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IN THE

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

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A TABLE OF STATUTES CONSTRUED IS GIVEN IN THE INDEX.

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# JUDGES

OF THE

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

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[1] Died May 12, 1905.

[2] Resigned July 26, 1905.

# CASES REPORTED.


Page

Acme Ry. Signal & Mfg. Co., Lafferty Mfg. Co. v. (C. C. A.) ..... 729
A. Denicke, The (C. C. A.)..... 645
A. E. Appleyard & Co., First Nat. Bank v. (C. C.) ..... 939
Ætna Life Ins. Co. v. Dunn (C. C. A.).... 629
Ah Sou, United States v. (C. C. A.)..... 775
A. J. Woodruff & Co. v. United States (C. C.) ..... 946
Alfred W. Booth, The (C. C. A.)..... 303
American Alkali Co. v. Kurtz (C. C. A.).. 392
American Caramel Co. v. Quaker City Chocolate & Confectionery Co. (C. C.).. 142
American Caramel Co. v. Thomas Mills & Bro. (C. C.)..... 142
American Sewage Disposal Co. v. Pawtucket (C. C. A.)..... 811
American Surety Co. of New York v. Campbell & Zell Co. (C. C. A.)..... 531
American Tobacco Co., Werckmeister v. (C. C.) ..... 162
American Transp. Co., Loring v. (C. C.)... 600
American Writing Mach. Co. v. Wagner Typewriter Co. (C. C.)..... 108
Amerman, Halpin v. (C. C. A.)..... 548
Ann Arbor R. Co. v. Powers (C. C.)..... 223
Appleyard & Co., First Nat. Bank v. (C. C.) ..... 939
Asbury Park, The (D. C.)..... 617
Asbury Park, The (D. C.)..... 925
Atlantic City R. Co., McKinney v. (C. C.)..1007
Atlantic Coast Electric R. Co., Guaranty Trust Co. of New York v. (C. C. A.)..... 517
Atlas Reduction Co. v. New Zealand Ins. Co. of New Zealand (C. C. A.)..... 497
Australian Knitting Co. v. Gormly (C. C.) 92
Axline v. Toledo, W. V. & O. R. Co. (C. C.) 169
Ayres v. Cone (C. C. A.)..... 778

Baillie v. Larson (C. C.)..... 177
Baker v. Crane Co. (C. C. A.)..... 60
Baker, James Heekin Co. v. (C. C. A.).... 63
Ballantine, United States v. (C. C. A.).... 312
Barnes v. Bee (C. C.)..... 476
Bassford v. Fitzgerald (C. C.)..... 958
Battle Island Paper Co., Panzl v. (C. C. A.) ..... 48
Baughman, In re (D. C.)..... 742
Bay, Pennsylvania Co. v. (C. C.)..... 203
Beatrice Cemetery Ass'n, Townsend v. (C. C. A.) ..... 381
Beattie, United Shirt & Collar Co. v. (C. C.) ..... 136
Bee, The (C. C. A.)..... 303
Bee, Barnes v. (C. C.)..... 476
Beede, In re (D. C.)..... 441
Bellingham, The (D. C.)..... 619
Big Six Development Co. v. Mitchell (C. C. A.)..... 279

Page

Board of Home Missions of Methodist Protestant Church, City of Seattle v. (C. C. A.) ..... 307
Board of Regents of Kansas State Agricultural College, Ward v. (C. C. A.)..... 372
Booth, The Alfred W. (C. C. A.)..... 303
Boston, Doten v. (C. C. A.)..... 406
Bower v. Holzworth (C. C. A.)..... 28
Bradley v. Eccles (C. C.)..... 911
Bradley v. Eccles (C. C.)..... 916
Brammer Mfg. Co., International Mfg. Co. v. (C. C. A.)..... 396
Brauer v. Macbeth (C. C. A.)..... 977
Brilliant, The (D. C.)..... 743
Brodrick Copygraph Co. of New Jersey v. Charles Eneu Johnson & Co. (C. C.).. 110
Buckley, Crane v. (C. C. A.)..... 22
Bulley, The (D. C.)..... 170
Bullock Electric Mfg. Co., General Electric Co. v. (C. C.)..... 412
Burnham, Williams & Co., Jones v. (C. C. A.) ..... 986

Caldwell, Ex parte (C. C.)..... 487
Camden Interstate R. Co., Williams v. (C. C.) ..... 571
Campbell & Zell Co., American Surety Co. of New York v. (C. C. A.)..... 531
Capewell v. Goldsmith (C. C.)..... 682
Car Float No. 19, The (D. C.)..... 435
Carroll, Southern R. Co. v. (C. C. A.)..... 638
Carter, In re (D. C.)..... 846
Cazier v. Mackie-Lovejoy Mfg. Co. (C. C. A.) ..... 654
Celtic Monarch, The (C. C. A.)..... 711
Central Coal & Coke Co., Penny v. (C. C. A.) ..... 769
Centre & C. St. R. Co., Weed v. (C. C.).... 474
Chandler, In re (C. C. A.)..... 637
Charles Eneu Johnson & Co., Brodrick Copygraph Co. of New Jersey v. (C. C.).. 110
Charles Eneu Johnson & Co., Cortelyou v. (C. C.)..... 110
Chicago, Farson v. (C. C.)..... 184
Chicago, Glucose Refining Co. v. (C. C.).. 209
Chicago, D. & C. Grand Trunk Junction R. Co. v. Powers (C. C.)..... 223
Chicago, M. & St. P. R. Co. v. Powers (C. C.) ..... 223
Chicago & N. W. R. Co. v. Powers (C. C.) 223
Cincinnati, S. & M. R. Co. v. Powers (C. C.) ..... 223
City of Birmingham, The (C. C. A.)..... 555
City of Seattle v. Board of Home Missions of Methodist Protestant Church (C. C. A.) ..... 307
Clark, United States v. (C. C. A)..... 294
Clymer v. Supreme Council, A. L. H. (C. C.) ..... 470

Page

Cone, Ayres v. (C. C. A.) ... 778
Consolidated Hoof Pad Co., Revere Rubber Co. v. (C. C.) ... 899
Cook v. Proskey (C. C. A.) ... 273
Copper Range R. Co. v. Powers (C. C.) ... 223
Copper River Min. Co. v. McClellan (C. C. A.) ... 333
Cortelyou v. Charles Eneu Johnson & Co. (C. C.) ... 110
Couch v. McCoy (C. C.) ... 696
Coup v. McConway & Torley Co. (C. C. A.) ... 411
Cramp, Philadelphia Const. Co. v. (C. C. A.) ... 999
Crane v. Buckley (C. C. A.) ... 22
Crane Co. v. Baker (C. C. A.) ... 60
Curran & Hussey, Smith & Benham v. (C. C.) ... 150
Curtain Supply Co. v. North Jersey St. R. Co. (C. C.) ... 734

Dairymen's Mfg. Co., Ironclad Mfg. Co. v. (C. C.) ... 123
Davis, Jones v. (C. C. A.) ... 62
Decatur, Parks Co. v. (C. C. A.) ... 550
De Forest Wireless Telegraph Co., Marconi Wireless Telegraph Co. of America v. (C. C.) ... 657
Deitsch, Shepherd v. (C. C.) ... 83
Delker Co. v. Hess Spring & Axle Co. (C. C. A.) ... 647
Denicke, The A. (C. C. A.) ... 645
Detroit, G. H. & M. R. Co. v. Powers (C. C.) ... 264
Detroit & M. R. Co. v. Powers (C. C.) ... 223
Diamond Drill & Machine Co. v. Kelley Bros. & Spielman (C. C.) ... 833
Diamond State Steel Co., Maderia, Hill & Co. v. (D. C.) ... 582
Diamond State Steel Co., Woolford v. (D. C.) ... 582
Dode, The (D. C.) ... 619
Doll v. Equitable Life Assur. Soc. of the United States (C. C. A.) ... 705
Donaldson v. J. W. Perry Co. (C. C. A.) ... 643
Donaldson v. Severn River Glass Sand Co. (D. C.) ... 691
Donaldson, Severn River Glass Sand Co. v. (D. C.) ... 694
Donchian v. Kingston (C. C.) ... 890
Doten v. Boston (C. C. A.) ... 406
Downey v. Lozier Motor Co. (D. C.) ... 173
Drey v. Watson (C. C. A.) ... 792
Duluth, S. S. & A. R. Co. v. Powers (C. C.) 257
Dunn, Ætna Life Ins. Co. v. (C. C. A.) ... 629

Eastern Dredging Co., In re (D. C.) ... 942
East Riverside Irr. Dist., Wright v. (C. C. A.) ... 313
Eccles, Bradley v. (C. C.) ... 911
Eccles, Bradley v. (C. C.) ... 916
Edison Electric Co. v. Westinghouse, Church, Kerr & Co. (C. C.) ... 460
Ehrlich v. Willenski (C. C.) ... 425
Eidmann, Vanderbilt v. (C. C. A.) ... 1006
Eisner & Mendelson Co., Saxlehner v. (C. C. A.) ... 22
Electric Boot & Shoe Finishing Co. v. Little (C. C. A.) ... 732
Elson v. Waterford (C. C.) ... 1004

Page

Encyclopædia Britannica Co. v. Werner Co. (C. C.) ... 461
Equitable Life Assur. Soc. of United States, Doll v. (C. C. A.) ... 705
Erie R. Co., Farrell v. (C. C. A.) ... 28
Escanaba & L. S. R. Co. v. Powers (C. C.) ... 223

Fabricant v. Philadelphia Rapid Transit Co. (C. C.) ... 976
Farrell v. Erie R. Co. (C. C. A.) ... 28
Farson v. Chicago (C. C.) ... 184
Fidelity Trust Co., Moore v. (C. C. A.) 1, 1008
59,650 Cigars, United States v. (D. C.) ... 166
First Nat. Bank v. A. E. Appleyard & Co. (C. C.) ... 939
Fitzgerald, Bassford v. (C. C.) ... 958
Florence & C. C. R. Co. v. Whipps (C. C. A.) ... 13
Flyer, The (D. C.) ... 619
Francis H. Leggett & Co. v. United States (C. C.) ... 970
Franklin & Co. v. Illinois Moulding Co. (C. C. A.) ... 58
Franzen, Mississippi Glass Co. v. (C. C.) ... 924
Fred Miller Brewing Co., Loew Supply & Mfg. Co. v. (C. C. A.) ... 886
Fuld & Co. v. United States (C. C.) ... 973

Gaffney v. International Mercantile Marine Co. (C. C.) ... 1007
General Electric Co. v. Bullock Electric Mfg. Co. (C. C.) ... 412
Gennessee, The (C. C. A.) ... 549
George Delker Co. v. Hess Spring & Axle Co. (C. C. A.) ... 647
George Lawley & Son Corp. v. Park (C. C. A.) ... 31
Gertrude, The (D. C.) ... 418
Gloyd, Southern Pac. Co. v. (C. C. A.) ... 388
Glucose Refining Co. v. Chicago (C. C.) ... 209
Gogebic & M. R. R. Co. v. Powers (C. C.) 223
Goldsmith, Capewell v. (C. C.) ... 682
Gormly, Australian Knitting Co. v. (C. C.) 92
Gorwood, In re (D. C.) ... 844
Grady, In re (D. C.) ... 935
Grand Forks Mercantile Co., Gray v. (C. C. A.) ... 344
Grand Rapids & I. R. Co. v. Powers (C. C.) ... 223
Grand Republic, The (D. C.) ... 615
Grand Trunk Western R. Co. v. Powers (C. C.) ... 223
Grand Trunk Western R. Co., Minahan v. (C. C. A.) ... 37
Gray v. Grand Forks Mercantile Co. (C. C. A.) ... 344
Great Northern R. Co., Roberts v. (C. C. A.) ... 711
Green Engineering Co., McKenzie Furnace Co. v. (C. C. A.) ... 830
Guaranty Trust Co. of New York v. Atlantic Coast Electric R. Co. (C. C. A.) 517

Haas-Baruch & Co. v. Portuondo (D. C.) ... 949
Halpin v. Amerman (C. C. A.) ... 548
Harriman Land Co., McEwen v. (C. C. A.) 797
Hartford & N. Y. Transp. Co. v. United States (C. C.) ... 618

| | Page |
|---|---|
| Harway Dyewood & Extract Mfg. Co., Hemolin Co. v. (C. C. A.) | 54 |
| Hayward v. Key (C. C. A.) | 34 |
| Heekin Co. v. Baker (C. C. A.) | 63 |
| Hegeman & Co., Virginia Hot Springs Co. v. (C. C.) | 855 |
| Hemolin Co. v. Harway Dyewood & Extract Mfg. Co. (C. C. A.) | 54 |
| Hendrick, In re (D. C.) | 473 |
| Hennesy, McGuigan v. (C. C.) | 1007 |
| Hess, In re (D. C.) | 951 |
| Hess Spring & Axle Co., George Delker Co. v. (C. C. A.) | 647 |
| Heyfron, United States v. (C. C.) | 964 |
| Heyfron, United States v. (C. C.) | 968 |
| H. F. Brammer Mfg. Co., International Mfg. Co. v. (C. C. A.) | 396 |
| Hilliard v. Lyman (C. C.) | 469 |
| Hirsch, Villamil v. (C. C.) | 690 |
| Hirschkovitz v. Pennsylvania R. Co. (C. C.) | 438 |
| Holzworth, Bower v. (C. C. A.) | 28 |
| Hooks Smelting Co., In re (D. C.) | 954 |
| Horstman Co., Oehrle v. (C. C. A.) | 561 |
| Hughes v. Pflanz (C. C. A.) | 980 |
| Humes v. Little Rock (C. C.) | 929 |
| Hurwood Mfg. Co. v. Wood (C. C.) | 835 |
| Illinois Cent. R. Co. v. Mississippi Railroad Commission (C. C. A.) | 327 |
| Illinois Moulding Co., S. Franklin & Co. v. (C. C. A.) | 58 |
| International Mfg. Co. v. H. F. Brammer Mfg. Co. (C. C. A.) | 396 |
| International Mercantile Marine Co., Gaffney v. (C. C.) | 1007 |
| Ironclad Mfg. Co. v. Dairymen's Mfg. Co. (C. C.) | 123 |
| Ironclad Mfg. Co. v. Orange County Milk Ass'n (C. C.) | 123 |
| James Heekin Co. v. Baker (C. C. A.) | 63 |
| Jenkins, Mahoney v. (C. C. A.) | 404 |
| Jersey Island Packing Co., In re (C. C. A.) | 625 |
| Johnson v. Lehigh Valley Traction Co. (C. C.) | 601 |
| Johnson, Swift & Co. v. (C. C. A.) | 867 |
| Johnson & Co., Brodrick Copygraph Co. of New Jersey v. (C. C.) | 110 |
| Johnson & Co., Cortelyou v. (C. C.) | 110 |
| Jones v. Burnham, Williams & Co. (C. C. A.) | 986 |
| Jones v. Davis (C. C. A.) | 62 |
| Joyce, United States v. (D. C.) | 455 |
| Joyce, United States v. (D. C.) | 457 |
| J. W. Perry Co., Donaldson v. (C. C. A.) | 643 |
| Kahn v. Starrells (C. C.) | 67 |
| Kelley Bros. & Spielman, Diamond Drill & Machine Co. v. (C. C.) | 833 |
| Kempton, Northern Pac. R. Co. v. (C. C. A.) | 992 |
| Key, Hayward v. (C. C. A.) | 34 |
| Kingston, Donchian v. (C. C.) | 890 |
| Kinney v. Mitchell (C. C.) | 270 |
| Kline Chair Co. v. Theo. A. Kochs & Son (C. C.) | 90 |
| Knickerbocker, The (D. C.) | 148 |
| Kochs & Son, Kline Chair Co. v. (C. C.) | 90 |
| Kroma, La (D. C.) | 936 |
| Kurtz, American Alkali Co. v. (C. C. A.) | 392 |
| Lafferty Mfg. Co. v. Acme Ry. Signal & Mfg. Co. (C. C. A.) | 729 |
| Lake Shore & M. S. R. Co. v. Powers (C. C.) | 257 |
| Lake Superior & I. R. Co. v. Powers (C. C.) | 223 |
| La Kroma (D. C.) | 936 |
| Lambert Snyder Vibrator Co. v. Marvel Vibrator Co. (C. C.) | 82 |
| Larson, Baillie v. (C. C.) | 177 |
| Lawley & Son Corp. v. Park (C. C. A.) | 31 |
| Lederer Co., Robinson v. (C. C.) | 140 |
| Leggett & Co. v. United States (C. C.) | 970 |
| Lehigh Valley Traction Co., Johnson v. (C. C.) | 601 |
| Levinson v. United States (C. C.) | 973 |
| Lewkowitz v. United States (C. C.) | 973 |
| L'Hommedieu, In re (D. C.) | 606 |
| Little, Electric Boot & Shoe Finishing Co. v. (C. C. A.) | 732 |
| Little Rock, Humes v. (C. C.) | 929 |
| Loew Supply & Mfg. Co. v. Fred Miller Brewing Co. (C. C. A.) | 886 |
| Logan, Southern Ry. Co. v. (C. C. A.) | 725 |
| Loring v. American Transp. Co. (C. C.) | 600 |
| Lozier Motor Co., Downey v. (D. C.) | 173 |
| Lukens, In re (D. C.) | 188 |
| Lyman, Hilliard v. (C. C.) | 469 |
| Lynch v. United States (C. C. A.) | 535 |
| Lyng, Miocene Ditch Co. v. (C. C. A.) | 544 |
| Macbeth, Brauer v. (C. C. A.) | 977 |
| McClellan, Copper River Min. Co. v. (C. C. A.) | 333 |
| McConway & Torley Co., Coup v. (C. C. A.) | 411 |
| McCoy, Couch v. (C. C.) | 696 |
| MacDonald, In re (D. C.) | 463 |
| McEwen v. Harriman Land Co. (C. C. A.) | 797 |
| McGraw, Rosenthal v. (C. C. A.) | 721 |
| McGuigan v. Hennesy (C. C.) | 1007 |
| McKenzie Furnace Co. v. Green Engineering Co. (C. C. A.) | 830 |
| Mackie-Lovejoy Mfg. Co., Cazier v. (C. C. A.) | 654 |
| McKinney v. Atlantic City R. Co. (C. C.) | 1007 |
| Mack Mfg. Co. v. Van Duerson (C. C.) | 953 |
| McLean-Bowman Co., In re (D. C.) | 181 |
| McLoud, Walker v. (C. C. A.) | 394 |
| McNicholas, Montgomery v. (D. C.) | 956 |
| Maderia, Hill & Co. v. Diamond State Steel Co. (D. C.) | 582 |
| Mahoney v. Jenkins (C. C. A.) | 404 |
| Manistee & N. E. R. Co. v. Powers (C. C.) | 223 |
| Marconi Wireless Telegraph Co. of America v. De Forest Wireless Telegraph Co. (C. C.) | 657 |
| Marmo, In re (D. C.) | 201 |
| Marquette & S. E. R. Co. v. Powers (C. C.) | 223 |
| Mars, The (D. C.) | 941 |
| Marvel Vibrator Co., Lambert Snyder Vibrator Co. v. (C. C.) | 82 |
| Mary J. Walker, The (D. C.) | 1005 |
| Masters v. Seeley (C. C. A.) | 719 |
| Meyer v. United States (C. C.) | 974 |
| Meyer-Sniffen Co., Moore v. (C. C. A.) | 402 |
| Michigan Air Line R. Co. v. Powers (C. C.) | 223 |
| Michigan Cent. R. Co. v. Powers (C. C.) | 223 |

| | Page |
|---|---|
| Michigan Railroad Tax Cases (C. C.) | 223 |
| Miller Brewing Co., Loew Supply & Mfg. Co. v. (C. C. A.) | 886 |
| Miller & England v. Walker Patent Pivoted Bin Co. (C. C.) | 919 |
| Mills & Bro., American Caramel Co. v. (C. C.) | 142 |
| Minahan v. Grand Trunk Western R. Co. (C. C. A.) | 37 |
| Mineral Range R. Co. v. Powers (C. C.) | 223 |
| Minneapolis, St. P. & S. S. M. R. Co. v. Powers (C. C.) | 223 |
| Miocene Ditch Co. v. Lyng (C. C. A.) | 544 |
| Mississippi Glass Co. v. Franzen (C. C.) | 924 |
| Mississippi Railroad Commission, Illinois Cent. R. Co. v. (C. C. A.) | 327 |
| Mitchell, Big Six Development Co. v. (C. C. A.) | 279 |
| Mitchell, Kinney v. (C. C.) | 270 |
| Monarch Electric & Wire Co. v. National Conduit & Cable Co. (C. C. A.) | 18 |
| Montgomery v. McNicholas (D. C.) | 956 |
| Moore v. Fidelity Trust Co. (C. C. A.) | 1, 1008 |
| Moore v. Meyer-Sniffen Co. (C. C. A.) | 402 |
| Morrin v. Robert White Engineering Works (C. C.) | 68 |
| Municipal Telegraph & Stock Co. v. Ward (C. C. A.) | 1006 |
| Munising R. Co. v. Powers (C. C.) | 223 |
| Murray v. Orr & Lockett Hardware Co. (C. C. A.) | 564 |
| Mygatt v. Zalinski (C. C.) | 88 |
| Napier v. Westerhoff (C. C.) | 420 |
| National Biscuit Co. v. Nolan (C. C. A.) | 6 |
| National Conduit & Cable Co., Monarch Electric & Wire Co. v. (C. C. A.) | 18 |
| National Hotel & Café Co., In re (D. C.) | 947 |
| Neck, The (D. C.) | 144 |
| Nestor, Northern Commercial Co. v. (C. C. A.) | 383 |
| New Century Box Co., Regina Co. v. (C. C.) | 903 |
| New York, S. & W. R. Co. v. Roney (C. C. A.) | 47 |
| New Zealand Ins. Co. of New Zealand, Atlas Reduction Co. v. (C. C. A.) | 497 |
| Nolan, National Biscuit Co. v. (C. C. A.) | 6 |
| Norfolk & W. R. Co., United States v. (C. C.) | 849 |
| Northern Commercial Co. v. Nestor (C. C. A.) | 383 |
| Northern Pac. R. Co. v. Kempton (C. C. A.) | 992 |
| North Jersey St. R. Co., Curtain Supply Co. v. (C. C.) | 734 |
| Ocean S. S. Co. of Savannah v. P. Sandford Ross (C. C. A.) | 555 |
| Oehrle v. William H. Horstman Co. (C. C. A.) | 561 |
| Orange County Milk Ass'n, Ironclad Mfg. Co. v. (C. C.) | 123 |
| Orr & Lockett Hardware Co., Murray v. (C. C. A.) | 564 |
| Panzl v. Battle Island Paper Co. (C. C. A.) | 48 |
| Park, In re (C. C.) | 421 |
| Park, George Lawley & Son Corp. v. (C. C. A.) | 31 |
| Parks Co. v. Decatur (C. C. A.) | 550 |
| Pauline, The (D. C.) | 271 |
| Pawtucket, American Sewage Disposal Co. v. (C. C. A.) | 811 |
| Pennsylvania Co. v. Bay (C. C.) | 203 |
| Pennsylvania R. Co., Hirschkovitz v. (C. C.) | 438 |
| Penny v. Central Coal & Coke Co. (C. C. A.) | 769 |
| Peonage Charge, In re (C. C.) | 686 |
| Pere Marquette R. Co. v. Powers (C. C.) | 223 |
| Perkinson, Voightmann v. (C. C. A.) | 56 |
| Perley & Hays, In re (D. C.) | 927 |
| Perry v. Rubber Tire Wheel Co. (C. C.) | 836 |
| Perry Co., Donaldson v. (C. C. A.) | 643 |
| Pettibone, Mulliken & Co. v. Verona Tool Works (C. C.) | 909 |
| Pflanz, Hughes v. (C. C. A.) | 980 |
| Philadelphia Const. Co. v. Cramp (C. C. A.) | 999 |
| Philadelphia Rapid Transit Co., Fabricant v. (C. C.) | 976 |
| Pitch Pine Lumber Co., Rosasco v. (C. C. A.) | 25 |
| Pontiac, O. & N. R. Co. v. Powers (C. C.) | 223 |
| Porterfield, In re (D. C.) | 192 |
| Portuondo, Haas-Baruch & Co. v. (D. C.) | 949 |
| Powers, Ann Arbor R. Co. v. (C. C.) | 223 |
| Powers, Chicago, D. & C. Grand Trunk Junction R. Co. v. (C. C.) | 223 |
| Powers, Chicago, M. & St. P. R. Co. v. (C. C.) | 223 |
| Powers, Chicago & N. W. R. Co. v. (C. C.) | 223 |
| Powers, Cincinnati, S. & M. R. Co. v. (C. C.) | 223 |
| Powers, Copper Range R. Co. v. (C. C.) | 223 |
| Powers, Detroit, G. H. & M. R. Co. v. (C. C.) | 264 |
| Powers, Detroit & M. R. Co. v. (C. C.) | 223 |
| Powers, Duluth, S. S. & A. R. Co. v. (C. C.) | 257 |
| Powers, Escanaba & L. S. R. Co. v. (C. C.) | 223 |
| Powers, Gogebic & M. R. R. Co. v. (C. C.) | 223 |
| Powers, Grand Rapids & I. R. Co. v. (C. C.) | 223 |
| Powers, Grand Trunk Western R. Co. v. (C. C.) | 223 |
| Powers, Lake Shore & M. S. R. Co. v. (C. C.) | 257 |
| Powers, Lake Superior & I. R. Co. v. (C. C.) | 223 |
| Powers, Manistee & N. E. R. Co. v. (C. C.) | 223 |
| Powers, Marquette & S. E. R. Co. v. (C. C.) | 223 |
| Powers, Michigan Air Line R. Co. v. (C. C.) | 223 |
| Powers, Michigan Cent. R. Co. v. (C. C.) | 223 |
| Powers, Mineral Range R. Co. v. (C. C.) | 223 |
| Powers, Minneapolis, St. P. & S. S. M. R. Co. v. (C. C.) | 223 |
| Powers, Munising R. Co. v. (C. C.) | 223 |
| Powers, Pere Marquette R. Co. v. (C. C.) | 223 |
| Powers, Pontiac, O. & N. R. Co. v. (C. C.) | 223 |
| Powers, St. Clair Tunnel Co. v. (C. C.) | 262 |
| Powers, Sault Ste. Marie Bridge Co. v. (C. C.) | 262 |
| Powers, Toledo, S. & M. R. Co. v. (C. C.) | 223 |
| Powers, Wisconsin & M. R. Co. v. (C. C.) | 223 |
| Proskey, Cook v. (C. C. A.) | 273 |
| Provident Life & Trust Co., Thomas v. (C. C. A.) | 348 |

Page

Provident Life & Trust Co., Wickham v. (C. C. A.) ..... 348
P. Sandford Ross, Ocean S. S. Co. of Savannah v. (C. C. A.) ..... 555

Quaker City Chocolate & Confectionery Co., American Caramel Co. v. (C. C.) .... 142

Regina Co. v. New Century Music Box Co. (C. C.) ..... 903
Revere Rubber Co. v. Consolidated Hoof Pad Co. (C. C.) ..... 899
Ridge Ave. Bank, Sundheim v. (D. C.) .... 951
Roberts v. Great Northern R. Co. (C. C. A.) 711
Robert White Engineering Works, Morrin v. (C. C.) ..... 68
Robinson v. S. & B. Lederer Co. (C. C.) ... 140
Rogers, Ex parte (D. C.) ..... 961
Roma, The (D. C.) ..... 218
Romine, In re (D. C.) ..... 837
Roney, New York, S. & W. R. Co. v. (C. C. A.) ..... 47
Rosasco v. Pitch Pine Lumber Co. (C. C. A.) ..... 25
Rosenthal v. McGraw (C. C. A.) ..... 721
Royal, The (D. C.) ..... 416
Rubber Tire Wheel Co., Perry v. (C. C.) 836

St. Clair Tunnel Co. v. Powers (C. C.) .... 262
Sandford Ross, Ocean S. S. Co. of Savannah v. (C. C. A.) ..... 555
Sault Ste. Marie Bridge Co. v. Powers (C. C.) ..... 262
Saxlehner v. Eisner & Mendelson Co. (C. C. A.) ..... 22
Scherr, In re (D. C.) ..... 695
Scow No. 34, The (D. C.) ..... 942
Sea Lion, The (C. C. A.) ..... 711
Seeley, Masters v. (C. C. A.) ..... 719
Severn River Glass Sand Co. v. Donaldson (D. C.) ..... 694
Severn River Glass Sand Co., Donaldson v. (D. C.) ..... 691
Sevigne Bread Wrapper Co., Union Waxed & Parchment Paper Co. v. (C. C.) ..... 415
S. Franklin & Co. v. Illinois Moulding Co. (C. C. A.) ..... 58
Shanker, In re (D. C.) ..... 862
Sharp v. United States (C. C. A.) ..... 878
Shepherd v. Deitsch (C. C.) ..... 83
Smith & Benham v. Curran & Hussey (C. C.) ..... 150
Snyder Vibrator Co. v. Marvel Vibrator Co. (C. C.) ..... 82
Southern Pac. Co. v. Gloyd (C. C. A.) .... 388
Southern R Co. v. Carroll (C. C. A.) ..... 638
Southern R. Co., Tift v. (C. C.) ..... 753
Southern Ry. Co. v. Logan (C. C. A.) ..... 725
S. S. Wyckoff, The (D. C.) ..... 418
Stanley Instrument Co., Westinghouse Electric & Mfg. Co. v. (C. C. A.) ..... 823
Starrells, Kahn v. (C. C.) ..... 67
Sundheim v. Ridge Ave. Bank (D. C.) .... 951
Supreme Council, A. L. H., Clymer v. (C. C.) ..... 470
Swift & Co. v. Johnson (C. C. A.) ..... 867
S. & B. Lederer Co., Robinson v. (C. C.) .. 140

Taber v. Trustees of State Hospital for Insane of Southeastern Dist. of Pennsylvania (C. C. A.) ..... 865

Page

Theo. A. Kochs & Son, Kline Chair Co. v. (C. C.) ..... 90
Thomas v. Provident Life & Trust Co. (C. C. A.) ..... 348
Thomas Mills & Bro., American Caramel Co. v. (C. C.) ..... 142
Thomas Wilson & Co. v. United States (C. C.) ..... 1007
Tift v. Southern R. Co. (C. C.) ..... 753
Toledo, S. & M. R. Co. v. Powers (C. C.) .. 223
Toledo, W. V. & O. R. Co., Axline v. (C. C.) ..... 169
Townsend v. Beatrice Cemetery Ass'n (C. C. A.) ..... 381
Transfer No. 10, The (D. C.) ..... 221
Treat v. Wooden (C. C.) ..... 934
Trustees of State Hospital for Insane of Southeastern Dist. of Pennsylvania, Taber v. (C. C. A.) ..... 865
Twilight, The (D. C.) ..... 1005

Union Waxed & Parchment Paper Co. v. Sevigne Bread Wrapper Co. (C. C.) .... 415
United Shirt & Collar Co. v. Beattie (C. C.) 136
United States v. Ah Sou (C. C. A.) ..... 775
United States v. Ballantine (C. C. A.) .... 312
United States v. Clark (C. C. A.) ..... 294
United States v. 59,650 Cigars (D. C.) ..... 166
United States v. Heyfron (C. C.) ..... 964
United States v. Heyfron (C. C.) ..... 968
United States v. Joyce (D. C.) ..... 455
United States v. Joyce (D. C.) ..... 457
United States v. Norfolk & W. R. Co. (C. C.) ..... 849
United States, A. J. Woodruff & Co. v. (C. C.) ..... 946
United States, Francis H. Leggett & Co. v. (C. C.) ..... 970
United States, Fuld & Co. v. (C. C.) ..... 973
United States, Hartford & N. Y. Transp. Co. v. (C. C.) ..... 618
United States, Levinson v. (C. C.) ..... 973
United States, Lewkowitz v. (C. C.) ..... 973
United States, Lynch v. (C. C. A.) ..... 535
United States, Meyer v. (C. C.) ..... 974
United States, Sharp v. (C. C. A.) ..... 878
United States, Thomas Wilson & Co. v. (C. C.) ..... 1007

Vanderbilt v. Eidmann (C. C. A.) ..... 1006
Van Duerson, Mack Mfg. Co. v. (C. C.) ... 953
Verona Tool Works, Pettibone, Mulliken & Co. v. (C. C.) ..... 909
Villamil v. Hirsch (C. C.) ..... 690
Virgil, Virgil Practice Clavier Co. v. (C. C.) 897
Virgil Practice Clavier Co. v. Virgil (C. C.) 897
Virginia Hot Springs Co. v. Hegeman & Co. (C. C.) ..... 855
Voightmann v. Perkinson (C. C. A.) ..... 56

Wagner Typewriter Co. v. Wyckoff, Seamans & Benedict (C. C.) ..... 108
Wagner Typewriter Co., American Writing Mach. Co. v. (C. C.) ..... 108
Walker, The Mary J. (D. C.) ..... 1005
Walker v. McLoud (C. C. A.) ..... 394
Walker Patent Pivoted Bin Co., Miller & England v. (C. C.) ..... 919
Ward v. Board of Regents of Kansas State Agricultural College (C. C. A.) ..... 372

| | Page |
|---|---|
| Ward, Municipal Telegraph & Stock Co. v. (C. C. A.) | 1006 |
| Waterford, Elson v. (C. C.) | 1004 |
| Watson, Drey v. (C. C. A.) | 792 |
| Watts, Wilder v. (D. C.) | 426 |
| Weed v. Centre & C. St. R. Co. (C. C.) | 474 |
| Weimer v. Zevely (C. C. A.) | 1006 |
| Werckmeister v. American Tobacco Co. (C. C.) | 162 |
| Werner Co., Encyclopædia Britannica Co. v. (C. C.) | 461 |
| Westerhoff, Napier v. (C. C.) | 420 |
| Westinghouse, Church, Kerr & Co., Edison Electric Co. v. (C. C.) | 460 |
| Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co. (C. C. A.) | 823 |
| Whipps, Florence & C. C. R. Co. v. (C. C. A.) | 13 |
| White Engineering Works, Morrin v. (C. C.) | 68 |
| Wickham v. Provident Life & Trust Co. (C. C. A.) | 348 |
| Wiesen Bros., In re (D. C.) | 164 |
| Wilder v. Watts (D. C.) | 426 |
| Willenski, Ehrlich v. (C. C.) | 425 |
| William H. Horstman Co., Oehrle v. (C. C. A.) | 561 |
| Williams v. Camden Interstate R. Co. (C. C.) | 571 |
| Wilson & Co. v. United States (C. C.) | 1007 |
| Wisconsin & M. R. Co. v. Powers (C. C.) | 223 |
| Wood, Hurwood Mfg. Co. v. (C. C.) | 835 |
| Wooden, Treat v. (C. C.) | 934 |
| Woodruff & Co. v. United States (C. C.) | 946 |
| Woolford v. Diamond State Steel Co. (D. C.) | 582 |
| Wright v. East Riverside Irr. Dist. (C. C. A.) | 313 |
| Wyckoff, The S. S. (D. C.) | 418 |
| Wyckoff, Seamans & Benedict, Wagner Typewriter Co. v. (C. C.) | 108 |
| Young America, The (D. C.) | 271 |
| Zalinski, Mygatt v. (C. C.) | 88 |
| Zevely, Weimer v. (C. C. A.) | 1006 |

# CASES CITED.


Page

Aaron Meyers, In re, 1 Am. Bankr. Rep. 1 949
Abbott v. Railroad Co., 145 Mass. 450, 15 N. E. 91 ..... 546
Abrahams v. Swann, 18 W. Va. 274, 41 Am. Rep. 692 ..... 844
Acme Flexible Clasp Co. v. Mfg. Co., 41 C. C. A. 338, 101 Fed. 269 ..... 88
Adam v. Folger, 56 C. C. A. 540, 120 Fed. 260 ..... 656
Adams v. Iron Co. (C. C.) 6 Fed. 179 .... 206
Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 801 ..... 205, 206
Adams v. Weeks, 174 Mass. 45, 54 N. E. 350 ..... 533
Adams Exp. Co. v. Ohio, 165 U. S. 194–228, 17 Sup. Ct. 305, 41 L. Ed. 683 .... 233
Adkins v. Sloane, 8 C. C. A. 656, 60 Fed. 344; 10 C. C. A. 69, 61 Fed. 791 ..... 383
Adonis, The, 5 Rob. Adm. 256 ..... 172
Ætna Life Ins. Co. v. Com'rs, 54 C. C. A. 468, 117 Fed. 82 ..... 99, 106
Ætna Life Ins. Co. v. France, 91 U. S. 510, 512, 23 L. Ed. 401 ..... 499
Aiken v. Printworks, 2 Cliff. 435, Fed. Cas. No. 113 ..... 73, 78
Ainley v. Balden, 14 U. C. Q. B. 535 .... 289
Alabama G. S. R. Co. v. Carroll, 28 C. C. A. 207, 84 Fed. 772, 780, 781 ..... 9
Alexander v. Hodges, 41 Mich. 691, 694, 3 N. W. 187, 188 ..... 289
Alexandra, The (D. C.) 104 Fed. 907 .... 461
Alleghany Oil Co. v. Oil Co., 21 Hun, 26, 32 ..... 287
Alleghany Oil Co. v. Snyder, 45 C. C. A. 604, 106 Fed. 764 ..... 283
Allen v. Bank, 120 U. S. 32, 7 Sup. Ct. 462, 30 L. Ed. 573 ..... 369
Allen v. Ruddell, 51 S. C. 366, 29 S. E. 198 ..... 370
Alnwick, The (D. C.) 132 Fed. 121 ..... 146
Altenberg v. Grant, 28 C. C. A. 244, 83 Fed. 980 ..... 346
America, The, 92 U. S. 432, 23 L. Ed. 724 560
American Bell Tel. Co. v. Telephone Co. (C. C.) 27 Fed. 663, 665 ..... 98
American Loan & Trust Co. v. Clark, 27 C. C. A. 522, 83 Fed. 230 ..... 345
American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102 ..... 233
American Sulphite Pulp Co. v. Pulp Co., 25 C. C. A. 500, 80 Fed. 395 ..... 52
American Surety Co. v. Pauly, 170 U. S. 133, 144, 18 Sup. Ct. 552, 42 L. Ed. 977 512
Anderson v. Fitzgerald, 4 H. L. Cas. 510 .. 513
Anderson v. Watts, 138 U. S. 701, 11 Sup. Ct. 449, 34 L. Ed. 1078 ..... 205

Page

Andrew v. Hovey, 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 160; 124 U. S. 694, 8 Sup. Ct. 676, 31 L. Ed. 557 ..... 914
Andrews, In re (D. C.) 135 Fed. 599 .... 953
Anthony v. Jasper County, 101 U. S. 693, 25 L. Ed. 1005 ..... 319
Antigo Screen Door Co., In re, 59 C. C. A. 248, 123 Fed. 249 ..... 455
Argo S. S. Co. v. Seago, 42 C. C. A. 128, 101 Fed. 999 ..... 938
Arrowsmith v. Hamoning, 118 U. S. 194, 6 Sup. Ct. 1023, 30 L. Ed. 243 ..... 211
Asay v. Hoover, 5 Pa. 21, 45 Am. Dec. 713 ..... 190
Ash v. Guie, 97 Pa. 493, 39 Am. Rep. 818 425
Atchison, etc., Co. v. Brown, 26 Kan. 443, 460 ..... 874
Atchison, T. & S. F. R. Co. v. Weber, 33 Kan. 543, 551, 6 Pac. 877, 52 Am. Rep. 543 ..... 877
Atlanta v. Light Co., 71 Ga. 106 ..... 212
Atlantic Trust Co. v. Dana, 62 C. C. A. 657, 670, 128 Fed. 209, 222 ..... 345
Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438 ..... 832
Atlas, The, 42 Fed. 793 ..... 272
Attorney General v. Joy, 55 Mich. 94, 20 N. W. 806 ..... 267, 268
Attwood v. Small, 6 Clark & Fin. 232 .... 158
Ault v. Dustin, 100 Tenn. 366, 45 S. W. 981 ..... 652
Aurora City v. West, 7 Wall. 99, 19 L. Ed. 42 ..... 781
Avery v. East Saginaw, 44 Mich. 587, 7 N. W. 177 ..... 260

Bailey v. Oviatt, 46 Vt. 627 ..... 852
Baker v. Holt, 56 Wis. 100, 14 N. W. 8 .. 702
Balch v. Haas, 20 C. C. A. 151, 73 Fed. 974 ..... 17
Ball v. Harris, 4 M. & Cr. 264 ..... 348
Ball v. Rutland (C. C.) 93 Fed. 516 .... 768
Ball & Socket Fastener Co. v. Fastener Co., 7 C. C. A. 498, 504, 58 Fed. 818, 824 895
Banan, The (D. C.) 116 Fed. 900 ..... 560
Bank v. Calhoun, 102 U. S. 256, 26 L. Ed. 101 ..... 197
Bank v. Moore, 2 Bond, 170, Fed. Cas. No. 10,041 ..... 782
Bank v. Shaw, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319 ..... 951
Bank v. Sherman, 101 U. S. 407, 25 L. Ed. 866 ..... 195
Bank of State of Alabama v. Dalton, 9 How. 522, 528, 13 L. Ed. 242 ..... 786
Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923 ..... 217

Page

Barnard v. Gibson, 7 How. 650, 12 C. C. A. 857 ..... 103
Barnes v. Straus, 9 Blatchf. 553, Fed. Cas. No. 1,022 ..... 78
Barney v. New York, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737 .....186, 211
Barnum v. Railroad Co., 30 Minn. 661, 16 N. W. 364 ..... 870
Barrett v. Power Co. (C. C.) 111 Fed. 45 .. 206
Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729 ..... 205
Bassett v. Nosworthy, 2 Leading Cases in Equity, p. 1 ..... 299
Bate Refrigerating Co. v. Gillette (C. C.) 28 Fed. 673 ..... 462
Bate Refrigerator Co. v. Sulzberger, 157 U. S. 1, 36, 15 Sup. Ct. 508, 516, 39 L. Ed. 601 ..... 826
Bates v. Insurance Co., 10 Wall. 33, 19 L. Ed. 882 .....505, 510, 511
Bath Co. v. Amy, 13 Wall. 247, 20 L. Ed. 539 ..... 851
Batie v. Allison, 77 Iowa, 313, 42 N. W. 306 ..... 702
Battler, The (D. C.) 58 Fed. 704 ..... 945
Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830 ..... 213
Bayley v. Taber, 5 Mass. 286, 4 Am. Dec. 57 ..... 321
Beach v. Grocery Co., 53 C. C. A. 463, 116 Fed. 143 ..... 629
Bear Lake Irr. Co. v. Garland, 164 U. S. 1, 15, 17 Sup. Ct. 7, 41 L. Ed. 327 ..... 526
Beatty v. Kurtz, 2 Pet. 566, 7 L. Ed. 521 774
Beaver Coal Co., In re, 51 C. C. A. 519, 113 Fed. 889 ..... 628
Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892 .. 233
Bement v. Harrow Co., 186 U. S. 70, 90, 91, 22 Sup. Ct. 747, 755, 46 L. Ed. 1058 114, 115
Bennett v. Black, 1 Stew. (Ala.) 495 ..... 277
Berkshire, The, 21 C. C. A. 169, 74 Fed. 906 ..... 305
Beuttell v. Magone, 157 U. S. 154, 157, 15 Sup. Ct. 566, 39 L. Ed. 654 .....42, 474
Bierbower's App., 107 Pa. 14 ..... 426
Bierly's Estate, In re, *81 Pa. 419 ..... 5
Billings v. Illinois, 188 U. S. 97, 23 Sup. Ct. 272, 47 L. Ed. 400 ..... 233
Bingham, In re (D. C.) 94 Fed. 796 ..... 788
Bird v. Halsy (C. C.) 87 Fed. 677 ..... 461
Bischoffscheim v. Baltzer (C. C.) 10 Fed. 1 461, 462
Bishop v. Railroad Co. (C. C.) 117 Fed. 771 .....573, 574, 575
Bissell Carpet Sweeper Co. v. Sweeper Co., 19 C. C. A. 25, 34, 35, 40, 72 Fed. 545, 554, 555, 560 .....100, 101, 103
Blair v. Cumming County, 111 U. S. 363, 368, 4 Sup. Ct. 449, 452, 28 L. Ed. 457 .. 326
Blanton v. Taylor, Gilmer, 209 ..... 199
Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521 .....837, 839, 841
Bleecker v. Smith, 13 Wend. 531 ..... 289
Bloomer v. Waldron, 3 Hill, 361 ..... 369
Board v. Platt, 25 C. C. A. 87, 92, 79 Fed. 567, 572 ..... 790
Board of Com'rs v. Vandriss, 53 C. C. A. 192, 115 Fed. 866 ..... 326

Page

Board of Education v. Board, 133 Mich. 116, 94 N. W. 668 ..... 237
Board of Education v. Stotlar, 95 Ill. App. 250 ..... 377
Board of Education of City of Ottawa v. Cook, 45 Pac. 119 ..... 380
Board of Regents v. Mudge, 21 Kan. 223, 224, 228, 229 .....374, 375, 379
Bolinger v. Railroad Co., 36 Minn. 418, 31 N. W. 856, 1 Am. St. Rep. 680 ....869, 876
Bondurant v. Crawford, 22 Iowa, 40 ..... 158
Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206 ..... 311
Boone v. Chiles, 10 Pet. 177, 209, 9 L. Ed. 388 ..... 299
Booth, In re (D. C.) 96 Fed. 943 ..... 627
Bordentown, The (D. C.) 40 Fed. 682 .... 945
Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. 342, 30 L. Ed. 532 .....1009
Borst v. Simpson, 90 Ala. 373, 7 South. 814 ..... 703
Boston Electric St. R. Co. v. Car-Box Co., 38 C. C. A. 661, 98 Fed. 121 ..... 824
Boston, etc., Min. Co. v. Montana, etc., Co., 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626 ..... 286
Boston & A. R. Co. v. O'Reilly, 158 U. S. 334, 336, 15 Sup. Ct. 830, 39 L. Ed. 1006 877
Boulton v. Moore (C. C.) 14 Fed. 922 .... 694
Bowdish v. Page, 153 N. Y. 104, 47 N. E. 44 ..... 448
Bowman v. Read, 2 Wall. 591, 603, 17 L. Ed. 812 ..... 533
Bowsher v. Watkins, 1 Russ. & Mylne, 277 ..1008
Boyce v. Grundy, 3 Pet. 210, 216, 7 L. Ed. 655 .....211, 286
Boyer v. Robinson, 26 Wash. 121, 66 Pac. 119 ..... 371
Braddock Glass Co. v. Macbeth, 12 C. C. A. 70, 64 Fed. 118–121 ..... 415
Bradley v. Ewart, 18 W. Va. 598 ..... 483
Bradley v. Packet Co., 13 Pet. 89, 10 L. Ed. 72 ..... 521
Bradley Timber Co. v. White, 58 C. C. A. 55, 121 Fed. 779 ..... 42
Brewing Co. v. Superior, 93 N. W. 1120 .. 211
Brewster v. Shuler (C. C.) 37 Fed. 785 ... 914
Bridge Proprietors v. Koboken Co., 1 Wall. 116, 17 L. Ed. 571 ..... 263
Britton's Appeal, 45 Pa. 177 ..... 188
Brodrick Copygraph Co. of New Jersey v. Roper (C. C.) 124 Fed. 1019 .....115, 121
Brown v. Brown, 33 N. J. Eq. 650 ..... 700
Brown v. McConnell, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495 ..... 338
Brown v. McDonald, 67 C. C. A. 59, 133 Fed. 897 ..... 394
Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200 ..... 686
Brown v. Torrence, 88 Pa. 186 ..... 290
Brown v. Vandergrift, 80 Pa. 142 ..... 288
Browne, In re (D. C.) 104 Fed. 762 ..... 628
Brunnemer v. Cook & Bernheimer Co., 180 N. Y. 188, 189, 190, 191, 73 N. E. 19 ... 444, 445, 448
Brunswick Savings Inst. v. Insurance Co., 68 Me. 313, 28 Am. Rep. 56 ..... 506
Brush v. Condit, 132 U. S. 39, 10 Sup. Ct. 1, 33 L. Ed. 251 ..... 915

Page

Brush Electric Co. v. Electric Co., 22 C. C. A. 543, 76 Fed. 761.....100, 102
Brush Electric Co.'s Appeal, 114 Pa. 574, 7 Atl. 794 ..... 426
Bruss-Ritter Co., In re (D. C.) 90 Fed. 651 198
Buck v. Eureka, 97 Cal. 135, 31 Pac. 845 553
Buckley v. Crane, 59 C. C. A. 109, 123 Fed. 29 ..... 22
Bullock Electric & Mfg. Co. v. Mfg. Co., 63 C. C. A. 607, 129 Fed. 105..... 123
Burdick v. Jackson (N. Y.) 7 Hun, 489... 196
Burgner v. Humphrey, 41 Ohio St. 340... 290
Burr v. Duryee, 1 Wall. 531, 573, 17 L. Ed. 650 ..... 908
Busby, In re, 10 Am. Bankr. Rep. 650, 124 Fed. 469 ..... 432
Buster v. Wright (C. C. A.) 135 Fed. 947.. 396, 1007
Butchers' Union Co. v. Crescent City Co., 111 U. S. 757, 4 Sup. Ct. 652, 28 L. Ed. 585 ..... 932
Butchers' & Drovers' Stock Yards Co. v. Railroad Co., 14 C. C. A. 290, 67 Fed. 35 205
Button Fastener Case, 25 C. C. A. 267, 269, 77 Fed. 288, 290, 292, 293, 35 L. R. A. 728 .....115, 116, 119
Byers v. McAuley, 149 U. S. 608, 615, 618, 13 Sup. Ct. 906, 37 L. Ed. 867..3, 5, 197, 1009

Caldwell v. School Dist. No. 7 (C. C.) 55 Fed. 372 ..... 374
Calhoun G. M. Co. v. G. M. Co., 182 U. S. 499, 509, 21 Sup. Ct. 885, 890, 45 L. Ed. 1200 ..... 178
California Electric Works v. Henzel (C. C.) 48 Fed. 377..... 414
Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294 .....782, 788
Canton Ins. Office v. Woodside, 33 C. C. A. 63, 90 Fed. 301..... 513
Carberry v. Insurance Co., 86 Wis. 323, 56 N. W. 920..... 506
Carib Prince, The, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181..... 645
Carley, In re (D. C.) 106 Fed. 862..... 844
Carlin v. Chappel, 101 Pa. 348, 47 Am. Rep. 722 ..... 290
Carlson v. Railway (Or.) 28 Pac. 497..... 15
Carnegie Steel Co. v. Brislin, 59 C. C. A. 651, 124 Fed. 215..... 910
Carpenter v. Insurance Co., 16 Pet. 495, 512, 10 L. Ed. 1044.....499, 501, 510
Carr v. Duval, 14 Pet. 79, 10 L. Ed. 362.. 704
Castleman v. Mayer, 168 N. Y. 354, 61 N. E. 282 ..... 445
Cawood Patent, 94 U. S. 695, 24 L. Ed. 238, 110 U. S. 301, 28 L. Ed. 154..... 408
Celluloid Mfg. Co. v. Mfg. Co. (C. C.) 34 Fed. 324 ..... 415
Celluloid Mfg. Co. v. Tower (C. C.) 26 Fed. 451 ..... 730
Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96..... 877
Central Ohio Co. v. Mahoney, 52 C. C. A. 364, 114 Fed. 732..... 170
Central R. R. v. Macon (C. C.) 110 Fed. 871 ..... 768
Central Trust Co. v. Kneeland, 138 U. S. 414, 11 Sup. Ct. 357, 34 L. Ed. 1014..521, 526
Central Trust Co. v. Railroad Co. (C. C.) 58 Fed. 500.....804, 808

Page

Chaffee v. Belting Co., 22 How. 217, 16 L. Ed. 240 ..... 73
Chaffee v. U. S., 18 Wall. 516, 21 L. Ed. 908 ..... 725
Chamberlain v. Taylor, 105 N. Y. 185, 11 N. E. 625..... 613
Chamberlain v. Walter (C. C.) 60 Fed. 788-793 ..... 243
Chandos v. Insurance Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321..... 506
Chapman, In re, 156 U. S. 211, 15 Sup. Ct. 331, 39 L. Ed. 401..... 489
Charlotte, etc., R. Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051... 233
Chatfield v. O'Dwyer, 42 C. C. A. 30, 32, 101 Fed. 797, 799.....345, 785
Chauncey v. Dyke Bros., 55 C. C. A. 579, 119 Fed. 1..... 627
Chesapeake Shoe Co. v. Seldner, 58 C. C. A. 261, 122 Fed. 593..... 192
Chicago, B. & Q. R. Co. v. Gardiner, 51 Neb. 70, 70 N. W. 508..... 998
Chicago, etc., Ry. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970..759, 768
Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 173, 20 Sup. Ct. 336, 44 L. Ed. 417 ..... 768
Chicago, St. P., M. & O. R. Co. v. Belliwith, 28 C. C. A. 358, 83 Fed. 437..... 875
Chicago & A. R. Co. v. Lamkin, 97 Mo. 496, 10 S. W. 200..... 236
Chicago & N. W. R. Co. v. De Clow, 61 C. C. A. 34, 124 Fed. 142..... 877
Chicago & N. W. R. Co. v. Osborne, 3 C. C. A. 347, 52 Fed. 914..... 764
Chicago & St. P. Ry. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970.. 760
China, The, 7 Wall. 53, 68, 19 L. Ed. 67, 73 ..... 172
Choctaw, O., etc. R. Co. v. Holloway, 191 U. S. 338, 24 Sup. Ct. 102, 48 L. Ed. 207 10
Christie v. Coke Co. (D. C.) 95 Fed. 837.. 694
Christmas v. Russell, 14 Wall. 84, 20 L. Ed. 762 ..... 430
Cicero Lumber Co. v. Cicero, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155 ..... 211
Cincinnati v. Miller, 11 Ohio Dec. 788... 213
Cincinnati, H. & S. R. Co. v. Thiebaud, 52 C. C. A. 538, 114 Fed. 918.....573, 574
City of Chicago v. Banker, 112 Ill. App. 94 ..... 187
City of Chicago v. Collins, 175 Ill. 445, 455, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. Rep. 224.....187, 211
City of Emporia v. Gilchrist, 37 Kan. 532, 15 Pac. 532..... 378
City of Kenosha v. Lamson, 9 Wall. 477, 19 L. Ed. 725.....322, 326
City of Norwich, The, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134.....1006
Claflin v. Fletcher (C. C.) 7 Fed. 851..... 98
Clara, The, 102 U. S. 200, 26 L. Ed. 145.. 559
Clark v. Barnwell, 53 U. S. 272, 13 L. Ed. 985 ..... 938
Clark v. Henne & Meyer, 127 Fed. 288, 62 C. C. A. 172..... 589
Clark v. Nash, 25 Sup. Ct. 676, 49 L. Ed. 1085 .....179, 180
Clark v. Railroad Co. (Wash.) 69 Pac. 639, 59 L. R. A. 508..... 873

Page

Clark v. Titusville, 184 U. S. 329, 22 Sup. Ct. 382, 46 L. Ed. 569 ..... 233
Clark Co. v. Ferguson (C. C.) 17 Fed. 79.. 914
Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555 ..... 743
Cleaver v. Insurance Co., 71 Mich. 414, 39 N. W. 571, 15 Am. St. Rep. 275 ..... 500
Cleve v. Mazzoni (Ky.) 45 S. W. 88 ..... 284
Cleveland City R. v. Cleveland (C. C.) 94 Fed. 409 ..... 768
Cleveland, etc., Ry. v. Illinois, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868 ..... 332
Coal Co. v. Limb, 47 Kan. 469, 471, 28 Pac. 181 ..... 877
Cobb, In re (D. C.) 96 Fed. 821 ..... 195
Coler v. Cleburne, 131 U. S. 162, 9 Sup. Ct. 720, 33 L. Ed. 146 ..... 323
Collins, In re, 12 Blatchf. 552, Fed. Cas. No. 3,007 ..... 453
Colorado Coal & Iron Co. v. Lamb, 6 Colo. App. 255, 266, 40 Pac. 251 ..... 15
Colson v. Thompson, 2 Wheat. 336, 4 L. Ed. 253 ..... 701
Colton v. Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137 ..... 158
Columbia Finance & Trust Co. v. Railroad Co., 9 C. C. A. 264, 60 Fed. 794 ..... 521
Columbus Southern R. Co. v. Wright, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. Ed. 238 240
Columbus S. & H. R. R. Co. Appeals, 48 C. C. A. 275, 304, 109 Fed. 177 ....530, 808
Commercial Co. v. Fairbank Co., 135 U. S. 176, 188, 194, 10 Sup. Ct. 718, 722, 724, 34 L. Ed. 88 .....826, 827, 828, 829
Commission v. Railroad Co., 118 Fed. 626 760
Commissioners v. Clark, 94 U. S. 278, 24 L. Ed. 59 ..... 875
Common Council v. Smith, 99 Mich. 507, 58 N. W. 481 ..... 261
Coney Island, The (D. C.) 115 Fed. 751... 418
Conger v. Duryee, 24 Hun, 617 ..... 289
Connecticut Mut. Life Ins. Co. v. Trust Co., 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708 ..... 710
Conner v. Renneker, 25 S. C. 514 ..... 703
Connolly v. Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679 ..... 207
Consolidated Coal Co. v. Schaefer, 135 Ill. 210, 25 N. E. 788 ..... 290
Consolidated Fastener Co. v. Fastener Co. (C. C.) 79 Fed. 795 ..... 85
Consolidated Fastener Co. v. Littauer, 28 C. C. A. 133, 84 Fed. 164 ..... 85
Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92, 24 L. Ed. 68 ..... 914
Consolidated Roller Mill Co. v. Walker, 138 U. S. 124, 11 Sup. Ct. 292, 34 L. Ed. 920 ..... 686
Cook v. Hart, 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934 ..... 489
Cook v. Railroad Co., 43 Mich. 349, 5 N. W. 390 ..... 270
Cooper v. Booth, 3 Esp. 144 ..... 277
Cooper v. Reynolds, 10 Wall. 316, 19 L. Ed. 931 ..... 554
Cornell Steamboat Co. v. U. S. (D. C.) 130 Fed. 480 ..... 618
Corn Planter Patent, 23 Wall. 181, 211, 23 L. Ed. 161 ..... 922
Cornwall, In re, 9 Blatchf. 114, Fed. Cas. No. 3,250 ..... 782

Page

Cortelyou v. Lowe, 49 C. C. A. 671, 111 Fed. 1005 .....115, 116, 121
Cortes Co. v. Tannhauser (C. C.) 18 Fed. 667 ..... 461
Cosmos Exploration Co. v. Oil Co., 50 C. C. A. 79, 112 Fed. 4, 61 L. R. A. 230 .... 286
Cotton Tie Co. v. Simmons, 106 U. S. 89, 1 Sup. Ct. 52, 27 L. Ed. 79 .....76, 117
Coughran v. Bigelow, 164 U. S. 301, 17 Sup. Ct. 117, 41 L. Ed. 442 ..... 875
Coulter v. Railroad Co., 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615...231, 240, 247
Coupe v. Weatherhead (C. C.) 16 Fed. 673, 675 ..... 909
Courthope v. Mapplesden, 10 Ves. 290 .... 283
Covington, In re, 6 Am. Bankr. Rep. 373, 374, 110 Fed. 143 .....839, 840
Craemer v. Washington, 168 U. S. 124, 127, 128, 18 Sup. Ct. 2, 42 L. Ed. 407.. 201, 203
Craft v. Webster, 4 Rawle, 242 ..... 190
Crescent Brewing Co. v. Gottfried, 128 U. S. 158, 166, 9 Sup. Ct. 83, 85, 32 L. Ed. 390 ..... 75
Cummings v. Bank, 101 U. S. 153–160, 161, 25 L. Ed. 903 .....242, 933
Cunningham v. Brown, 39 W. Va. 588, 20 S. E. 615 ..... 484
Cutter v. Richardson, 125 Mass. 72 ..... 533

Dalton v. Barnard, 150 Mass. 473, 23 N. E. 218 ..... 533
Dalzell v. Mfg. Co., 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749 ..... 700
Dalzell v. Watch Co., 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749 ..... 704
Dane v. Daniel, 23 Wash. 379, 63 Pac. 268 369
Daugherty v. Telegraph Co. (C. C.) 61 Fed. 138 ..... 940
Davey v. Ruffell, 162 Pa. 443, 29 Atl. 894 188
David Bradley Mfg. Co. v. Mfg. Co., 6 C. C. A. 661, 665, 57 Fed. 980, 985..98, 103
Davis v. Fredericks (C. C.) 19 Fed. 99, 21 Blatchf. 556 ..... 87
Davis v. Mercantile Co., 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563 ..... 345
Davis v. Stevens, 104 Fed. 235–242 ..... 929
Davis Electrical Works v. Light Co., 8 C. C. A. 615, 60 Fed. 276 ..... 72
Dean v. Anderson, 34 N. J. Eq. 496 ..... 196
Dederick v. Siegmund, 2 C. C. A. 169, 171, 51 Fed. 233, 235 ..... 678
Deery v. Cray, 5 Wall. 795, 807, 808, 18 L. Ed. 653 ..... 9
Deery v. Hamilton, 41 Iowa, 16 ..... 349
Deitz v. Lymer, 10 C. C. A. 71, 61 Fed. 792 ..... 339
Dejonge v. Hunt (Mich.) 61 N. W. 341 .... 703
Delafield v. Shipman, 103 N. Y. 463, 464, 9 N. E. 184 ..... 611
Delaware Ins. Co. v. Greer, 120 Fed. 916, 918, 919, 57 C. C. A. 188, 190, 191, 193, 61 L. R. A. 137 .....507, 511
Delaware Railroad Tax Case, 18 Wall. 206–231, 21 L. Ed. 888 ..... 234
Dennehy v. McNulta, 30 C. C. A. 422, 86 Fed. 827, 41 L. R. A. 609 ..... 208
Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439 .....574, 576, 577, 578, 579
Dennis v. Ryan, 65 N. Y. 385, 22 Am. Rep. 635 ..... 277

Page

Detroit v. Osborne, 135 U. S. 492, 499, 10 Sup. Ct. 1012, 34 L. Ed. 260 ..... 379
Detroit Co. v. Lunkenheimer (C. C.) 30 Fed. 190 ..... 914
Detroit, G. R. & W. R. v. Railroad Com'r, 119 Mich. 132, 77 N. W. 631 ..... 243
Diamond State Iron Co. v. Todd (Del. Ch.) 14 Atl. 27 ..... 701
Dickenson v. Dodds, L. R. 2 Ch. Div. 463 699
Dickinson v. Bank, 16 Wall. 250, 21 L. Ed. 278 ..... 383
Dimick v. Shaw, 36 C. C. A. 347, 94 Fed. 266 ..... 287
Dimmick v. Tompkins, 194 U. S. 546, 24 Sup. Ct. 781, 48 L. Ed. 1110 ..... 203
Dodson v. Fletcher, 24 C. C. A. 69, 78 Fed. 214 ..... 345
Donaldson v. Sand Co., 138 Fed. 691 .... 694
Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457 ..... 444
Doran v. Cohen, 147 Mass. 342, 17 N. E. 647 ..... 533
Dormitzer v. Society, 23 Wash. 132, 62 Pac. 862 ..... 370
Dougherty v. Steel Co., 88 Wis. 343, 350, 60 N. W. 274 ..... 727
Dougherty v. U. S., 47 C. C. A. 195, 108 Fed. 56 ..... 459
Douglas v. Herms, 53 Minn. 209, 54 N. W. 1112 ..... 289
Dowagiac Mfg. Co. v. Plow Co., 55 C. C. A. 86, 89, 91, 118 Fed. 136 .....65, 66
Dows v. Elmwood (C. C.) 34 Fed. 114 .... 325
Dows v. Johnson, 110 U. S. 223, 3 Sup. Ct. 640, 28 L. Ed. 128 ..... 347
Dressel v. Lumber Co., 9 Am. Bankr. Rep. 541, 119 Fed. 531 ..... 839
Drexell v. True, 20 C. C. A. 265, 74 Fed. 12 ..... 339
Drinkall v. Spielgel, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486 ..... 984
Driscoll v. Holt, 170 Mass. 262, 49 N. E. 309 ..... 533
Ducker, In re, 134 Fed. 43, 46, 47 ..... 455
Durham Paper Co. v. Knitting Mills (D. C.) 121 Fed. 179 ..... 589
Durrant Case (C. C.) 84 Fed. 317, 318, 322 202
D. & A. Co. v. Delaware, etc., 2 C. C. A. 1, 50 Fed. 677 ..... 115

Eagle Mfg. Co. v. Mfg. Co. (C. C.) 50 Fed. 193, 195; 6 C. C. A. 661, 57 Fed. 980, 990 98
Earl Cupper v. Baker, 17 Ves. 128 ..... 283
East v. Worthington, 88 Ala. 537, 7 South. 189 ..... 158
East Tennessee Land Co. v. Leeson, 178 Mass. 206, 208, 59 N. E. 639; 183 Mass. 37, 66 N. E. 427; 185 Mass. 4, 69 N. E. 351 .....533, 800
East Tennessee, V. & G. R. Co. v. Commerce Commission, 39 C. C. A. 425, 99 Fed. 64 ..... 760
East Tennessee, V. & G. R. Co. v. Railroad Co. (C. C.) 49 Fed. 608, 15 L. R. A. 109 ..... 197
Edgarton v. Mfg. Co. (C. C.) 9 Fed. 450.. 914
Edison Electric Co. v. Westinghouse, Kerr & Co. (C. C.) 138 Fed. 460 ..... 462
Edison Electric Light Co. v. Electrical Works, 58 Fed. 878 ..... 73

Page

Edison Electric Light Co. v. Heat Co., 43 C. C. A. 485, 489, 101 Fed. 831 ..... 122
Egbert v. Lippmann, 104 U. S. 333, 26 L. Ed. 755 .....914, 915
Eleanor T. Sumner, In re, 4 Am. Bankr. Rep. 124, 101 Fed. 224 ..... 846
Eliason v. Henshaw, 4 Wheat. 225, 4 L. Ed. 556 ..... 703
Elliott v. Toeppner, 187 U. S. 327, 334, 23 Sup. Ct. 133, 47 L. Ed. 200 ..... 28
Embury v. Sheldon, 68 N. Y. 235....609, 611
Emerson Electric Mfg. Co. v. Electric Co. (C. C.) 116 Fed. 974 ..... 88
Empire, etc., Co. v. Bunker Hill, etc., Co., 58 C. C. A. 311, 121 Fed. 973 ..... 286
Empire S. N. Co. v. Button Co., 21 C. C. A. 152, 74 Fed. 864 ..... 106
Endner v. Greco (D. C.) 3 Fed. 411, 413.. 943
England v. Gebhardt, 112 U. S. 502, 5 Sup. Ct. 287, 28 L. Ed. 811 ..... 383
Erhardt v. Boaro, 113 U. S. 537, 539, 5 Sup. Ct. 565, 566, 28 L. Ed. 1116..283, 288
Erickson v. Iron Co., 50 Mich. 604, 16 N. W. 161 ..... 290
Erie R. Co. v. Navigation Co. (D. C.) 121 Fed. 440 .....219, 220
Ermentrout v. Insurance Co., 60 Minn. 418, 62 N. W. 543 ..... 506
Esmay v. Gorton, 18 Ill. 483 ..... 703
Eudora, The, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002 ..... 146

Fallbrook Irr. Dist. v. Bradley, 164 U. S. 174, 17 Sup. Ct. 56, 41 L. Ed. 369 ..... 238
Fallon, In re, Fed. Cas. No. 4,628....781, 791
Falls of Keltie, The (D. C.) 114 Fed. 357.. 148
Farewell v. Easton, 63 Mo. 446 ..... 284
Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761 ..... 331
Farley v. Kittson, 120 U. S. 317, 7 Sup. Ct. 534, 30 L. Ed. 684 ..... 414
Farmers, etc., Bank v. Whinfield, 24 Wend. 420 ..... 10
Farmington v. Pillsbury, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114 ..... 205
Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931 ..... 158
Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246 ..... 157
Farrell v. Farrell, 3 Houst. 633 ..... 873
Farrelly v. Cole, 60 Kan. 356, 372, 56 Pac. 492, 44 L. R. A. 464 ..... 378
Farrington v. Board, 4 Fish. Pat. Cas. 216, Fed. Cas. No. 4,687 .....77, 78
Farwell v. Easton, 63 Mo. 446 ..... 289
Fayerweather v. Ritch, 195 U. S. 276–306, 307, 25 Sup. Ct. 58, 64, 49 L. Ed. ——.. 106, 248
Feely v. Bryan (W. Va.) 47 S. E. 307.... 198
Ferry v. Laible, 31 N. J. Eq. 566 ..... 368
Fertilizer Co. v. Elder, 42 C. C. A. 130, 101 Fed. 1001 ..... 938
Fertilizing Co. v. Hyde Park Co., 97 U. S. 659, 24 L. Ed. 1036 ..... 217
Fidelity Co. v. Railroad Co., 33 W. Va. 762, 11 S. E. 58 ..... 196
Field v. Chicago, 44 Ill. App. 410....214, 215
Finn v. Frink, 84 Me. 261, 24 Atl. 851, 30 Am. St. Rep. 348 ..... 277

Page

First Nat. Bank v. Trust Co., 26 C. C. A. 1, 80 Fed. 569 ..... 804
Fitzpatrick v. Rutter, 160 Ill. 282, 43 N. E. 392 ..... 426
Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847 ..... 196
Flagg v. Palmyra, 33 Mo. 440 ..... 326
Fletcher v. Fuller, 120 U. S. 534–545, 7 Sup. Ct. 673, 30 L. Ed. 759 ..... 772
Flint v. Transportation Co., 34 Conn. 554, Fed. Cas. No. 4,873 ..... 386
Florida, Cent., etc., R. Co. v. Reynolds, 183 U. S. 471–480, 22 Sup. Ct. 176, 180, 46 L. Ed. 283 ..... 233, 239
Florsheim v. Schilling, 137 U. S. 64, 11 Sup. Ct. 20, 34 L. Ed. 574 ..... 730
Flynn v. Insurance Co., 115 Mass. 449 .... 535
Fogg v. Insurance Co., 10 Cush. 337 ..... 513
Fonda, Ex parte, 117 U. S. 516, 6 Sup. Ct. 848, 29 L. Ed. 994 ..... 489
Foot v. Railroad Co., 81 Minn. 493, 84 N. W. 342, 52 L. R. A. 354, 83 Am. St. Rep. 395 ..... 870
Forbes v. Insurance Co., 9 Cush. 470 .... 500, 502, 503, 510
Ford v. Bancroft, 39 C. C. A. 91, 95, 98 Fed. 309, 312 ..... 131
Ford v. Rawlins, 1 Sim. & Stu. 328 ..... 612
Foreman v. Burleigh, 48 C. C. A. 376, 109 Fed. 313 ..... 345, 785
Fork Ridge Baptist Cemetery Ass'n v. Redd, 33 W. Va. 262, 10 S. E. 405, 406 .. 545
Fourth St. Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855 ..... 432
Fowler v. Stebbins, 136 Fed. 365 ..... 785
Fox v. Ass'n, 96 Wis. 390, 71 N. W. 363 .. 635
Franklin Fire Ins. Co. v. Martin, 40 N. J. Law, 568, 29 Am. Rep. 271 ..... 513
Franklin Sav. Inst. v. Insurance Co., 119 Mass. 240 ..... 514
Frazier v. Trust Co., 40 C. C. A. 76, 99 Fed. 707 ..... 197
Freeman v. Howe, 24 How. 450, 16 L. Ed. 749 ..... 197
French v. Hay, 22 Wall. 253, 22 L. Ed. 857 ..... 212
Froehly v. Insurance Co., 32 Mo. App. 302 514
Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010 ..... 283
Fulda, The (D. C.) 31 Fed. 351 ..... 219
Fuller v. Day, 103 Mass. 481 ..... 600
Fuller v. Gilmore (C. C.) 121 Fed. 129 .... 82

Gaisman v. Gallert (C. C.) 105 Fed. 955 .. 87
Gamewell Fire Alarm Tel. Co., In re, 20 C. C. A. 111, 73 Fed. 908, 913, 914 .. 824, 825
Gandy v. Belting Co., 143 U. S. 587, 12 Sup. Ct. 598, 36 L. Ed. 272 ..... 902
Garcewich, In re, 53 C. C. A. 510, 115 Fed. 87 ..... 192
Gardner v. Herz, 118 U. S. 180, 6 Sup. Ct. 1027, 30 L. Ed. 158 ..... 730
Gardner v. Railroad Co., 150 U. S. 361, 14 Sup. Ct. 140, 37 L. Ed. 1107 ..... 46
Garnett, Ex parte, 141 U. S. 1, 12, 11 Sup. Ct. 840, 35 L. Ed. 631 ..... 943
Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371 ..... 61
Gas Co. v. Gas Co., 186 Pa. 443, 40 Atl. 1000, 65 Am. St. Rep. 865 ..... 426

Page

Gates v. School Dist., 53 Ark. 468, 14 S. W. 656, 10 L. R. A. 186 ..... 374, 375
Gayler v. Wilder, 10 How. 477, 13 L. Ed. 504 ..... 84, 117
Geer v. Board, 38 C. C. A. 250, 256, 97 Fed. 435, 440, 38 C. C. A. 250 ..... 790
General Electric Co. v. Mfg. Co., 63 C. C. A. 448, 128 Fed. 738, 739 ..... 413
General Smith, The, 4 Wheat. 438, 4 L. Ed. 609 ..... 176
George Frost Co. v. Cohn (C. C.) 112 Fed. 1009 ..... 88
Georgia R. Co. v. Atlanta (Ga.) 45 S. E. 256 ..... 212
Geotler v. State, 45 Ark. 454 ..... 931
Gerding v. Land Co., 185 Mass. 380, 70 N. E. 206 ..... 809
Gerke Brewing Co. v. St. Clair, 46 W. Va. 93, 33 S. E. 122 ..... 483
German Bank v. U. S., 148 U. S. 573, 13 Sup. Ct. 702, 37 L. Ed. 564 ..... 371
Germanic, The, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. —— ..... 645
German Savings & Loan Soc. v. Tull (C. C. A.) 136 Fed. 1 ..... 370
Getman v. New York, 66 Hun, 236, 21 N. Y. Supp. 116 ..... 553
Gibson v. Brown (D. C.) 44 Fed. 98 ..... 694
Gilbert v. Baxter, 71 Iowa, 327, 32 N. W. 364 ..... 702
Gilbert v. Railroad Co., 63 C. C. A. 27, 128 Fed. 533 ..... 390
Gillan v. Board, 88 Wis. 7, 58 N. W. 1042, 24 L. R. A. 336 ..... 377, 378
Gilmer v. Higley, 110 U. S. 47–50, 3 Sup. Ct. 471, 28 L. Ed. 62 ..... 9
Giozza v. Tiernan, 148 U. S. 657–662, 13 Sup. Ct. 721, 37 L. Ed. 599 ..... 233
Girard Fire & Marine Ins. Co. v. Hebard, 95 Pa. 45 ..... 500
Glascock v. Brandon, 35 W. Va. 84, 12 S. E. 1102 ..... 199, 200
Globe Refining Co. v. Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171 .... 647
Glover v. State, 109 Ind. 391, 10 N. E. 282 880
Gluck v. Elkan, 36 Minn. 80, 30 N. W. 446 289
Gmaehle v. Rosenberg, 178 N. Y. 147, 70 N. E. 411 ..... 35
Goebel v. Wolf, 113 N. Y. 405, 412, 413, 21 N. E. 388, 10 Am. St. Rep. 464 ..... 611, 612
Goldsmith v. Lewine, 70 Ark. 516, 69 S. W. 308 ..... 848
Goldstein v. New Orleans (C. C.) 38 Fed. 626 ..... 554
Goodrich v. Chicago, 5 Wall. 573, 18 L. Ed. 511 ..... 781
Goodridge v. Mills Co., 160 Mass. 234, 35 N. E. 484 ..... 12
Goodyear Shoe Machinery Co. v. Jackson, 50 C. C. A. 159, 112 Fed. 146–148, 55 L. R. A. 692 ..... 79, 118, 119
Gorman v. Russell, 14 Cal. 531 ..... 426
Gottfried v. Brewing Co. (C. C.) 8 Fed. 322 ..... 73, 75, 77
Gottfried v. Schoenhofen, 10 Fed. Cas. 841 76
Gould v. Railroad Co., 91 U. S. 526, 23 L. Ed. 416 ..... 781
Grace v. Insurance Co., 109 U. S. 278, 282, 3 Sup. Ct. 207, 27 L. Ed. 932 ..... 511
Graham v. Norton, 15 Wall. 427, 21 L. Ed. 177 ..... 851

Page

Graham v. Penn Co., 139 Pa. 149, 21 Atl. 151, 12 L. R. A. 293 ..... 9
Grand Island & W. C. R. Co. v. Sweeney, 43 C. C. A. 255, 103 Fed. 342 ..... 345
Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485..46, 581, 643
Grant v. Raymond, 6 Pet. 218, 241, 8 L. Ed. 376, 384 ..... 114
Graubner v. Jacksonville, 50 Ill. 87 ..... 212
Graybill v. Brugh (Va.) 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894 ..... 704
Green v. Bogue, 158 U. S. 503, 15 Sup. Ct. 975, 985, 39 L. Ed. 1061 ..... 97
Green v. Creighton, 23 How. 90, 106, 16 L. Ed. 419 ..... 1009
Greenawalt v. Este, 40 Kan. 418, 19 Pac. 803 ..... 702
Greene v. Buckley, 135 Fed. 531 ..... 895
Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792 ..... 345
Grether v. Wright, 23 C. C. A. 498, 75 Fed. 742 ..... 206
Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718 ..... 160
Griswell v. Insurance Co., 70 Mo. 654 ... 514
Griswold v. Bay City, 24 Mich. 262 ..... 261
Gulf, etc., R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666 ..... 233
Gulf, etc., Ry. v. Jackson, 12 C. C. A. 507, 65 Fed. 48, 51 ..... 15, 17
Gunderson v. Elevator Co., 47 Minn. 161, 164, 49 N. W. 694 ..... 870, 876
Gundling v. Chicago, 176 Ill. 349, 52 N. E. 44, 48 L. R. A. 230 ..... 213

Haddock v. Railroad Co., 4 Interst. Com. Com'n R. 296 ..... 854
Hagan v. Insurance Co., 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229 ..... 508
Hagan v. Lucas, 10 Pet. 401, 9 L. Ed. 470 197
Hagar v. Reclamation Dist., 111 U. S. 701, 709, 710, 4 Sup. Ct. 663, 668, 28 L. Ed. 569 ..... 237
Hall v. Center, 40 Cal. 65 ..... 700
Hall v. Thompson, 1 Smedes & M. 443 .... 158
Hamilton G. L. & C. Co. v. Hamilton City, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963 ..... 187
Hammond v. Winchester, 82 Ala. 470, 2 South. 892 ..... 283
Hanson v. Stephens (Ga.) 42 S. E. 1028.. 195
Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 193, 30 L. Ed. 369 ..... 84
Harmison v. Lewiston, 153 Ill. 313, 38 N. E. 628, 46 Am. St. Rep. 893 ..... 213
Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698 ..... 214, 215
Harmon v. Struthers (C. C.) 48 Fed. 260.. 100
Hartell v. Tilghman, 99 U. S. 547, 25 L. Ed. 357 ..... 117
Hartog v. Memory, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725 ..... 205
Harvey v. Alexander, 1 Rand. 219, 10 Am. Dec. 519 ..... 199
Harvey v. Railroad Co., 124 Mass. 421, 26 Am. Rep. 673 ..... 647
Hatfield v. King (C. C.) 131 Fed. 791; 184 U. S. 162, 22 Sup. Ct. 477, 46 L. Ed. 481 ..... 416
Hattie Thomas, The (D. C.) 59 Fed. 297.. 272

Page

Hauke v. Cooper, 48 C. C. A. 144, 108 Fed. 922 ..... 97
Hawks v. Swett, 4 Hun, 146 ..... 117
Hawley, In re, 8 Am. Bankr. Rep. 632, 116 Fed. 428 ..... 841
Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157 ..... 298
Hawralty v. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613 ..... 703
Hayward v. Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725 ..... 800
Haywood v. Cope, 25 Beav. 140 ..... 158
Head v. University, 19 Wall. 526, 530, 22 L. Ed. 160 ..... 377, 379
Heaton Peninsular Button Fastener Co. v. Specialty Co., (C. C.) 65 Fed. 619; 25 C. C. A. 267, 77 Fed. 288, 35 L. R. A. 728 ..... 66, 114, 115, 116, 120
Heebner, In re, 13 Am. Bankr. Rep. 256, 132 Fed. 1003 ..... 696
Heekin v. Baker (C. C.) 127 Fed. 828 .... 64
Helen Mar, The, 2 Lowell, 40, 53, Fed. Cas. No. 10,543 ..... 945
Henricus v. Englert, 137 N. Y. 488, 33 N. E. 550 ..... 535
Hennen, In re, 13 Pet. 230, 10 L. Ed. 138 378
Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500 ..... 700, 704
Henry v. Insurance Co. (C. C.) 35 Fed. 15 844
Henry Ulfelder Clothing Co., In re (D. C.) 98 Fed. 409–411, 413, 414 ..... 786, 787
Hewit v. Machine Works, 194 U. S. 296, 302, 303, 24 Sup. Ct. 690, 692, 48 L. Ed. 986 ..... 454
H. G. Andrae Co., In re (D. C.) 117 Fed. 561 ..... 455
Hilton v. Dickinson, 108 U. S. 165, 2 Sup. Ct. 424, 27 L. Ed. 688 ..... 347
Hinckley v. Steel Co., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967 ..... 652, 654
Hinkley v. Arkansas City, 16 C. C. A. 395, 69 Fed. 768 ..... 383
H. M. Whitney, The, 30 C. C. A. 343, 86 Fed. 697 ..... 305
Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546 ..... 216
Hoberg v. State, 3 Minn. 262 (Gil. 181).. 10
Hockett v. Alston, 49 C. C. A. 180, 110 Fed. 910 ..... 396
Hoe v. Knap (C. C.) 17 Fed. 204 ..... 114
Hoffman v. Insurance Co., 32 N. Y. 405, 413, 88 Am. Dec. 337 ..... 512
Holland v. Prior, 1 Myl. & Keen, 237, 244 ..... 1008
Holt v. Mfg. Co., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374 ..... 185
Home Ins. Co. v. New York, 134 U. S. 594–600, 10 Sup. Ct. 593, 595, 33 L. Ed. 1025 ..... 233, 236
Hooper v. Castetter, 45 Neb. 67, 76, 63 N. W. 135 ..... 396
Hoops v. Ipava, 55 Ill. App. 94 ..... 214
Hope, In re, 10 N. Y. Supp. 28 ..... 984
Hornage v. Imboden (W. Va.) 49 S. E. 1036 ..... 481
Horner v. U. S., 143 U. S. 570, 576, 577, 12 Sup. Ct. 522, 524, 36 L. Ed. 266 .... 231
Hose Co. v. Rubber Co. (C. C.) 40 Fed. 168 ..... 656

Page

Howard v. Mfg. Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147 ..... 160
Hoyt v. Jaques, 129 Mass. 286 ..... 370
Hukill v. Railroad Co. (C. C.) 72 Fed. 745, 752–753 ..... 170
Humiston v. Stainthorp, 2 Wall. 106, 17 L. Ed. 905 ..... 103
Humphries v. Brogden, 12 Ad. & El. (N. S.) 739 ..... 290
Hunt v. Insurance Co., 196 U. S. 47, 25 Sup. Ct. 179, 49 L. Ed. —— ..... 500
Hunt v. Rousmaniere, 1 Pet. 1, 16, 7 L. Ed. 27 ..... 368
Huntington v. New York (C. C.) 118 Fed. 683 ..... 185
Huse, In re, 25 C. C. A. 1, 79 Fed. 305 ... 489
Huse v. Den (Cal.) 24 Pac. 790, 20 Am. St. Rep. 232 ..... 371
Hutchins v. Railroad Co., 44 Minn. 5, 9, 46 N. W. 79 ..... 870, 876
Hutchinson v. Insurance Co., 21 Mo. 97, 64 Am. Dec. 218 ..... 500
Hutter v. Bottle Stopper Co., 62 C. C. A. 652, 128 Fed. 283 ..... 656

Illinois Trust & Sav. Bank v. Arkansas City, 22 C. C. A. 171, 179, 76 Fed. 271, 279, 34 L. R. A. 518 ..... 379
Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 462, 463, 14 Sup. Ct. 379, 38 L. Ed. 231 ..... 499
Improvement Co. v. Munson, 14 Wall. 442, 448, 20 L. Ed. 867 ..... 45, 875
Iron City Toolworks v. Welisch, 63 C. C. A. 245, 128 Fed. 693 ..... 160
Iron Co. v. Reymert, 45 N. Y. 703 ... 283, 287
Iron Mountain R. R. v. Memphis, 37 C. C. A. 410, 96 Fed. 122 ..... 768
Iron & Supply Co. v. Rolling Mill Co., 11 Am. Bankr. Rep. 200, 125 Fed. 974 .... 429
Iroquois, The, 55 C. C. A. 497, 118 Fed. 1003; 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955 ..... 387
Irwin v. Kilburn, 104 Ind. 113, 3 N. E. 650 533
Itasca, The (D. C.) 117 Fed. 885 ..... 560
Ives v. Hamilton, 92 U. S. 426, 22 L. Ed. 494 ..... 398
Ivonton v. Perlie, 15 Shaw & Dunlap, 775 215

Jacobs, In re, 98 N. Y. 106, 50 Am. Rep. 636 ..... 933
Jacobs v. George, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127 ..... 346
James v. Gray, 65 C. C. A. 385, 131 Fed. 401 ..... 196
Jayne's Ex'x v. Platt, 47 Ohio St. 262, 269, 24 N. E. 262, 21 Am. St. Rep. 810 ..... 533
Jeffersonville R. Co. v. Hendricks, 41 Ind. 49 ..... 577
Jeffries v. Insurance Co., 22 Wall. 47, 54, 22 L. Ed. 833 ..... 499
Jennings v. Broughton, 5 De G. M. & Gord, 126 ..... 158
Jerome v. Ross, 7 Johns. Ch. 315, 11 Am. Dec. 484 ..... 283
John A. Thorp, In re (D. C.) 12 Am. Bankr. Rep. 195, 130 Fed. 371 ..... 189
John G. Stevens, The, 170 U. S. 113, 120, 18 Sup. Ct. 544, 547, 42 L. Ed. 969 .... 173
John H. Starin, The, 58 C. C. A. 600, 122 Fed. 236 ..... 559

Page

Johnson v. Accident Co., 115 Mich. 86, 72 N. W. 1115, 40 L. R. A. 440, 49 Am. St. Rep. 549 ..... 634
Johnson Co. v. Wharton, 152 U. S. 252, 14 Sup. Ct. 608, 38 L. Ed. 429 ..... 106
Johnston v. Huff, Andrews & Moyler Co., 66 C. C. A. 534, 133 Fed. 704 ..... 429, 430
Joint Traffic Ass'n Case, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259 ..... 761
Jones v. Railway, 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478 ..... 46
Jones v. State, 2 Blackf. (Ind.) 475 ..... 884
Jones v. Statesville, 97 N. C. 86, 2 S. E. 346 ..... 553
Jones v. Wagner, 66 Pa. 429, 5 Am. Rep. 385 ..... 290
Jones Co. v. Cotton Mach. Mfg. Co., 1 C. C. A. 668, 50 Fed. 785 ..... 103
Jordon, In re (D. C.) 49 Fed. 238 .... 489, 490
Jugiro Case, 44 Fed. 754 ..... 202

Kahn v. Starrells (C. C.) 131 Fed. 464; 135 Fed. 532 ..... 67
Kane v. Candy Co. (C. C.) 44 Fed. 287 ... 415
Kansas City Elevated Co. v. Railroad Co. (C. C.) 17 Fed. 200 ..... 288
Kansas Pac. R. Co. v. Cutter, 16 Kan. 568 ..... 576, 577
Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073 ..... 444, 448, 449
Keet, In re, 128 Fed. 651, 11 Am. Bankr. Rep. 117 ..... 743
Keitler v. State, 4 G. Greene, 291 ..... 884
Kellar v. Craig, 61 C. C. A. 366, 126 Fed. 630 ..... 285
Keller v. Ashford, 133 U. S. 610, 622, 10 Sup. Ct. 494, 33 L. Ed. 667 ..... 535
Kelley v. Machine Co., 123 Fed. 882; 129 Fed. 756; 136 Fed. 855 ..... 833
Kellogg, In re (D. C.) 7 Am. Bankr. Rep. 270, 112 Fed. 52; 56 C. C. A. 383, 118 Fed. 1017; 57 C. C. A. 547, 121 Fed. 333 ..... 189, 191, 454, 455, 627
Kellogg v. Insurance Co., 94 Wis. 558, 69 N. W. 362 ..... 375
Kellogg v. Kimball, 142 Mass. 124, 128, 7 N. E. 728 ..... 533
Kelly v. Jackson, 6 Pet. 631, 8 L. Ed. 523 759
Kelly v. Georgia (D. C.) 68 Fed. 652 ..... 488
Kenilworth, The (D. C.) 137 Fed. 1003 ... 942
Kensington, The, 183 U. S. 263, 269, 22 Sup. Ct. 102, 46 L. Ed. 190 ..... 999
Kentucky Life & Acc. Ins. Co. v. Hamilton, 11 C. C. A. 42, 63 Fed. 93 ..... 383
Kentucky Railroad Tax Cases, 115 U. S. 321, 336, 337, 6 Sup. Ct. 57, 63, 29 L. Ed. 414 ..... 233, 238, 239
Kentucky River Nav. Co. v. Com., 75 Ky. 8 287
Kerrison, Assignee, v. Stewart, 93 U. S. 155, 23 L. Ed. 843 ..... 345
Kestor, The (D. C.) 110 Fed. 432 ..... 146
Ketchum v. St. Louis, 101 U. S. 306, 307, 25 L. Ed. 999 ..... 196, 432
Keystone Bridge Co. v. Iron Co., 95 U. S. 278, 24 L. Ed. 344 ..... 62, 63
Keystone Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103 ..... 61
Kidd v. Alabama, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669 ..... 233
Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005 ..... 426

Page

Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377 ..... 496
Kilburn v. Holmes, 121 Fed. 750, 58 C. C. A. 116 ..... 84
Kimball Bros. v. Deere, Wells & Co., 108 Iowa, 676, 77 N. W. 1041 ..... 652
King Ax Co. v. Hubbard, 38 C. C. A. 423, 97 Fed. 795 ..... 656
Kingman & Co. v. Mfg. Co., 34 C. C. A. 489, 92 Fed. 486 ..... 654
Kinloch Tel. Co. v. Electric Co., 51 C. C. A. 369, 113 Fed. 659 ..... 902
Kinney v. Mitchell, 136 Fed. 773 ..... 271
Kissinger-Ison Co. v. Belting Co., 59 C. C. A. 221, 123 Fed. 91, 92 ..... 825
Knapp v. Morss, 150 U. S. 221, 225, 14 Sup. Ct. 81, 37 L. Ed. 1059 ..... 896
Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150 ..... 390
Kokomo Fence Mach. Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689 .. 832
Krementz v. Cottle, 148 U. S. 558, 13 Sup. Ct. 720. 37 L. Ed. 558 ..... 919
Kurtz v. Eggert, 9 Wkly. Notes Cas. 126 .. 426

Lacustrine Fertilizer Co. v. Fertilizer Co., 82 N. Y. 486 ..... 283
Lake View v. Letz, 44 Ill. 81 ..... 212
Lanahan v. Porter, 148 Mass. 596, 20 N. E. 460 ..... 533
Lancaster v. Evors, 4 Beav. 158 ..... 1008
Langellier v. Schaefer (Minn.) 31 N. W. 690 ..... 702
Lansburgh v. District of Columbia, 11 App. Cas. 512 ..... 931
Lapham's Case, 156 Mass. 480, 31 N. E. 638 ..... 880
Last Chance Min. Co. v. Mining Co., 157 U. S. 683, 692, 15 Sup. Ct. 733, 39 L. Ed. 859 ..... 105, 790
Latah County v. Peterson, 3 Idaho, 398, 29 Pac. 1089, 16 L. R. A. 81 ..... 180
Laugel v. Bushnell, 197 Ill. 26, 63 N. E. 1068, 58 L. R. A. 266 ..... 213
Lau Ow Bew v. U. S., 144 U. S. 59, 12 Sup. Ct. 517, 36 L. Ed. 340 ..... 985
Lawrence v. Nelson, 143 U. S. 215, 223, 12 Sup. Ct. 440, 443, 36 L. Ed. 130 ..... 1009
Lazier Gas Engine Co. v. Du Bois, 65 C. C. A. 172, 130 Fed. 834 ..... 160
Lea v. West Co. (D. C.) 91 Fed. 237 ..... 198
Leake v. Robinson, 2 Mer. 363 ..... 612
Leary v. Railroad Co., 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733 ..... 727
Lehigh Co. v. Kleckner, 5 Watts & S. 181 553
Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 643, 37 C. C. A. 210 ..... 589
Leland v. Newton, 102 Mass. 350 ..... 4
Lennig's Estate, 52 Pa. 135 ..... 190
Lennon Case, 150 U. S. 399, 14 Sup. Ct. 126, 37 L. Ed. 1120 ..... 201
Lewensohn, In re, 57 C. C. A. 600, 121 Fed. 538 ..... 346
Lichtenfels v. Phillips (D. C.) 53 Fed. 153 694
Liederkranz Soc. v. Germania Turn Verein, 163 Pa. 265, 29 Atl. 918, 43 Am. St. Rep. 798 ..... 426
Lilienthal's Tobacco v. U. S., 97 U. S. 268, 24 L. Ed. 901 ..... 759
Limekiller v. Railroad Co., 33 Kan. 83, 5 Pac. 401, 52 Am. Rep. 523 ..... 577

Page

Lindstrom v. Navigation Co. (C. C.) 117 Fed. 170 ..... 440
Lipset, In re, 9 Am. Bankr. Rep. 32, 119 Fed. 379 ..... 839
Litchfield v. Goodnow, 123 U. S. 549, 550, 8 Sup. Ct. 210, 31 L. Ed. 199 ..... 97, 105
Litz v. Goosling (Ky.) 19 S. W. 527, 21 L. R. A. 127 ..... 700
Liverpool, etc., Ins. Co. v. Kearney, 94 Fed. 314, 36 C. C. A. 265; 180 U. S. 132, 136, 138, 21 Sup. Ct. 326, 45 L. Ed. 460 .. 511, 512
Live Stock Ass'n v. Crescent City Co., 1 Abbott, C. C. 398 ..... 932
Lockman v. Lang, 65 C. C. A. 621, 132 Fed. 1 ..... 346
Loebenthal v. Raleigh, 36 N. J. Eq. 169 .. 348
Loesch v. Surety Co., 176 Mo. 655, 75 S. W. 621 ..... 636
Loew Filter Co. v. Filter Co., 47 C. C. A. 94, 107 Fed. 949 ..... 66, 123
Logan Nat'l Gas Co. v. Oil Co., 61 C. C. A. 359, 126 Fed. 623 ..... 283
Lohman v. State, 81 Ind. 15 ..... 931
Lombard v. La Dow, 60 C. C. A. 667, 126 Fed. 119 ..... 370
London Assur. v. Companhia, etc., 167 U. S. 149, 159, 17 Sup. Ct. 785, 42 L. Ed. 113 ..... 511
Long v. State, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268 ..... 933
Long v. Warren, 68 N. Y. 426 ..... 158
Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177 ..... 686
Loon Hing v. Crowley, 113 U. S. 708, 5 Sup. Ct. 730, 28 L. Ed. 1145 ..... 216, 217
Losey v. Stanley, 147 N. Y. 560, 568, 42 N. E. 8 ..... 609, 610, 611
Louisiana v. La Garde (C. C.) 60 Fed. 186 212
Louisville, etc., v. McChord (C. C.) 103 Fed. 220 ..... 768
Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 76 Fed. 296 ..... 197
Louisville Trust Co. v. Stone, 46 C. C. A. 299, 107 Fed. 305 ..... 230
Louisville & N. R. Co. v. Behlmer, 175 U. S. 675, 20 Sup. Ct. 219, 44 L. Ed. 309 ..... 760
Louisville & N. R. Co. v. Coulter (C. C.) 131 Fed. 282 ..... 247
Lourie Implement Co. v. Lenhart, 64 C. C. A. 456, 130 Fed. 122 ..... 908
Lovejoy v. Murray, 3 Wall. 1, 18, 19, 18 L. Ed. 129 ..... 97, 98
Lowenstein v. Mfg. Co. (D. C.) 130 Fed. 1007 ..... 589
Lowry v. Harris, 12 Minn. 255 (Gil. 166) .. 9
Ludington v. Renick, 7 W. Va. 273 ..... 158

McCarron v. Railroad Co. (D. C.) 134 Fed. 762 ..... 942
McCarthy v. Railroad Co., 148 Mass. 550, 20 N. E. 182, 2 L. R. A. 608 ..... 873
McClain v. Assurance Soc., 49 C. C. A. 31, 110 Fed. 80 ..... 709
McClurg v. Kingsland, 1 How. 202, 11 L. Ed. 102 ..... 914
McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932 ..... 426
McConway & Torley Co. v. Coup (C. C.) 127 Fed. 351 ..... 411

Page

McCormick, In re, 3 Am. Bankr. Rep. 340, 97 Fed. 566 ..... 841
McCormick v. Talcott, 20 How. 402, 405, 15 L. Ed. 930 ..... 678
McCoy v. Washington County, 3 Wall. Jr. 381, Fed. Cas. No. 8,731 ..... 326
McCulloch v. Maryland, 4 Wheat. 427, 4 L. Ed. 579 ..... 234
McDonald v. Daskam, 53 C. C. A. 554, 116 Fed. 276 ..... 433
McDowell v. Smith, 21 Wkly. Notes Cas. 558 ..... 426
McGarr v. Worsted Mills, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122, 96 Am. St. Rep. 749 ..... 873
McGarrahan v. Mining Co., 96 U. S. 316, 24 L. Ed. 630 ..... 321
McGhee v. Sampselle, 47 W. Va. 352, 34 S. E. 815 ..... 481
McGourkey v. Railroad Co., 146 U. S. 545, 13 Sup. Ct. 172, 36 L. Ed. 1079 ..... 103
McGuire v. Kouns, 7 T. B. Mon. 386, 18 Am. Dec. 187 ..... 543
McHenry v. Alford, 168 U. S. 651, 665, 673, 18 Sup. Ct. 242, 42 L. Ed. 614 .... 240
Machine Co. v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935 ..... 908
McIntyre v. Velte, 153 Pa. 350, 25 Atl. 739 ..... 190
McIver v. Ragan, 2 Wheat. 25, 29, 4 L. Ed. 175 ..... 786
Mack v. Levy (C. C.) 60 Fed. 752 ..... 104
McKenzie, In re, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. Ed. 657 ..... 338
McLaughlin v. Ihmsen, 85 Pa. 364 ..... 188
McMaster v. Dredge (D. C.) 95 Fed. 832 943
McMaster v. Insurance Co., 183 U. S. 25, 40, 22 Sup. Ct. 10, 46 L. Ed. 64 ..... 512
McNeely v. Driscoll, 2 Blackf. 259 ..... 277
McSherry Mfg. Co. v. Mfg. Co., 41 C. C. A. 627, 101 Fed. 716 ..... 135
Madden v. Lancaster County, 12 C. C. A. 566, 570, 573, 65 Fed. 188, 192, 195 ... 379, 786
Magone v. Origet, 17 C. C. A. 363, 70 Fed. 778 ..... 42
Magone v. Wiederer, 159 U. S. 555, 16 Sup. Ct. 122, 40 L. Ed. 258 ..... 976
Magoun v. Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037 ..... 233
Mahaffey v. Ferguson, 156 Pa. 156, 27 Atl. 21 ..... 158
Maine v. Railroad Co., 142 U. S. 217-229, 12 Sup. Ct. 121, 122, 35 L. Ed. 994 .... 236
Maling, The (D. C.) 110 Fed. 227, 236 .... 560
Mamie, The (D. C.) 5 Fed. 813 ..... 945
Mandeville v. Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678 ....445, 448
Manhattan Cloak & Suit Co. v. Dodge (Ind.) 21 N. E. 344, 6 L. R. A. 370 .... 723
Manhattan Iron Works v. French, 12 Abb. N. C. 446 ..... 212
Manhattan Life Ins. Co. v. Wright, 61 C. C. A. 138, 126 Fed. 82 ..... 285
Manhattan Oil Co. v. Lubricating Co., 51 C. C. A. 553, 113 Fed. 923 ..... 279
Manice v. Manice, 43 N. Y. 305 ..... 609
Manning v. Glue Co., 108 U. S. 462, 2 Sup. Ct. 860, 27 L. Ed. 793 .....914, 915

Page

Marden v. Mfg. Co., 15 C. C. A. 26, 67 Fed. 809 .....100, 101, 103
Marion County v. Clark, 94 U. S. 278, 24 L. Ed. 59 ..... 324
Mars, The, 6 Rob. Adm. 87 ..... 172
Marshall Field & Co. v. Dry Goods Co., 57 C. C. A. 326, 120 Fed. 815 ..... 345
Martin, Ex parte, 27 Ark. 467 ..... 931
Martin v. Railroad Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311 ..... 940
Marvin v. Iron Co., 55 N. Y. 538, 14 Am. Rep. 322 ..... 290
Mason v. Shawneetown, 77 Ill. 537 ..... 212
Matheson v. Campbell (C. C.) 69 Fed. 597, 603; 24 C. C. A. 384, 78 Fed. 910, 916 ..... 53
Maynard v. Taylor, 53 Me. 511 ..... 703
Mayor, etc., of Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239 ..... 211
Maysville S. R. & T. Co. v. Marvin, 8 C. C. A. 21, 59 Fed. 91 ..... 576
Maxwell Land Grant Case, 121 U. S. 381, 7 Sup. Ct. 1015, 30 L. Ed. 949 ..... 302
Medley's Case, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835 ..... 962
Mehaffey's Appeal, 4 Penny. (Pa.) 502 .... 288
Mellon's Appeal, 32 Pa. 121 ..... 188
Mercantile Nat. Bank v. Hubbard (C. C.) 98 Fed. 465-469 ..... 261
Mercer County v. Cowles, 7 Wall. 118, 19 L. Ed. 87 ..... 554
Merchants' & M. Bank v. Pennsylvania, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236 233
Merryman v. State, 5 Har. & J. (Md.) 423 951
Mertens, In re, 12 Am. Bankr. R. 709, 131 Fed. 515 ..... 195
Merwin v. Magone, 17 C. C. A. 361, 70 Fed. 776 ..... 42
Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, 9 Am. Bankr. Rep. 36 .....195, 628, 743, 949
Metropolitan Land Co. v. Manning, 98 Mo. App. 248, 71 S. W. 696 ..... 284
Mexia v. Oliver, 148 U. S. 664-673, 13 Sup. Ct. 754, 37 L. Ed. 602 ..... 9
Meyer, In re, 39 C. C. A. 368, 98 Fed. 977 928
Meyer Bros. Drug Co. v. Drug Co. (C. C. A.) 136 Fed. 396 ..... 455
Michigan Railroad Tax Cases, 138 Fed. 223 .....258, 262, 266
Miller, In re, 5 Am. Bankr. Rep. 184, 105 Fed. 57 ..... 841
Miller v. Board, 46 W. Va. 192, 32 S. E. 1007, 76 Am. St. Rep. 811 ..... 852
Miller v. Covert, 1 Wend. 487 ..... 781
Miller v. Mfg. Co., 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121 ..... 398
Miller v. State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109 ..... 984
Miller v. Tobacco Co. (C. C.) 7 Fed. 91, 93 ..... 98
Miller's Estate, In re, 136 Pa. 349, 20 Atl. 565 .....1010
Milligan, The (D. C.) 12 Fed. 338 ..... 560
Mills v. Banks, 3 P. W. 1 ..... 348
Milwaukee Carving Co. v. Collender Co., 61 C. C. A. 175, 126 Fed. 171 ..... 889
Milwaukee, etc., Co. v. Milwaukee (C. C.) 87 Fed. 577 ..... 768
Miner, In re (D. C.) 104 Fed. 520 ..... 589

Page

Minneapolis v. Lundin, 7 C. C. A. 344, 58 Fed. 525 ..... 15
Minnesota Lumber Co. v. Coal Co., 160 Ill. 85, 43 N. W. 774, 31 L. R. A. 529.. 653
Minturn v. Insurance Co., 76 Mass. 501.. 514
Mississippi, etc., S. S. Co. v. Swift, 29 Atl. 1063, 41 Am. St. Rep. 545, 86 Me. 248 ..... 704
Mississippi River Logging Co. v. Schneider, 20 C. C. A. 390, 74 Fed. 201..... 12
Missouri, etc., v. Telephone Co. (C. C.) 23 Fed. 539 ..... 115
Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 358, 19 Sup. Ct. 179, 43 L. Ed. 474..... 999
Mollan v. Griffith, 3 Paige, 403..... 371
Monaghan v. Cox, 155 Mass. 487, 30 N. E. 467, 31 Am. St. Rep. 555..... 277
Monroe v. Gerspach, 33 La. Ann. 1011.. 213, 214
Moody v. Fiske, 2 Mason, 112, 119, Fed. Cas. No. 9,745 ..... 53
Moore v. Calkins, 95 Cal. 435, 30 Pac 583, 29 Am. St. Rep. 128 ..... 626
Moore v. Trust Co., 115 N. Y. 65, 21 N. E. 681 .....369, 370
Moores v. Bank, 104 U. S. 625-630, 26 L. Ed. 870 ..... 9
Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981..... 197
Morgan Envelope Co. v. Paper Co., 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500 .....77, 116, 123
Morley Mach. Co. v. Lancaster, 129 U. S. 263, 273, 275, 9 Sup. Ct. 299, 302, 32 L. Ed. 715 .....135, 678
Morrill v. Smith County (Tex. Civ. App.) 33 S. W. 899 ..... 324
Morrin v. Illuminating Co. (C. C.) 90 Fed. 285 ..... 69
Morrin v. Lawlor, 40 C. C. A. 204, 99 Fed. 977 ..... 69
Morris v. Gilmer, 129 U. S. 326, 9 Sup. Ct. 298, 32 L. Ed. 690..... 205
Morris v. Hitchcock, 194 U. S. 384, 24 Sup. Ct. 712, 48 L. Ed. 1030.....396, 1007
Morris v. McMillin, 112 U. S. 244, 5 Sup. Ct. 2185, 28 L. Ed. 702..... 832
Morton, Bliss & Co. v. Comptroller General, 4 S. C. 477..... 235
Moses v. U. S., 16 App. D. C. 428..... 215
Mossberg v. Nutter, 60 C. C. A. 98, 124 Fed. 966 ..... 825
Mosser v. Moore (W. Va.) 49 S. E. 537.. 482, 486
Moulor v. Insurance Co., 111 U. S. 335, 341, 4 Sup. Ct. 466, 28 L. Ed. 447..511, 707
Moulton v. Coburn (C. C. A.) 131 Fed. 201 589
Mt. Adams, etc., R. Co. v. Lowery, 20 C. C. A. 596, 74 Fed. 643..... 47
Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229 ..... 455
Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.....165, 195
Muir v. Insurance Co., 203 Pa. 338, 53 Atl. 158 ..... 940
Mulligan v. Hollingsworth (C. C.) 99 Fed. 220, 221 ..... 289
Munn v. Burch, 25 Ill. 35 ..... 214
Munroe v. Armstrong, 96 Pa. 307..... 288

Page

Nash v. Tousley, 28 Minn. 5, 8 N. W. 875 869
Nashville, etc., R. Co. v. Taylor (C. C.) 86 Fed. 168 ..... 230
Natelle De Gottardi, In re, 7 Am. Bankr. Rep. 723, 114 Fed. 328 ..... 839
National Acc. Soc. v. Taylor, 42 Ill. App. 97 ..... 636
National Bank v. Insurance Co., 95 U. S. 673, 24 L. Ed. 563..... 511
National, etc., Ass'n v. Shryock, 20 C. C. A. 3, 11, 73 Fed. 774..... 9
National Hollow Brake Beam Co. v. Brake Beam Co., 45 C. C. A. 544, 557, 562, 106 Fed. 693 .....65, 66, 398
National Surety Co. v. Long, 60 C. C. A. 623, 627, 125 Fed. 887..... 499
Neagle, In re (C. C.) 39 Fed. 833, 5 L. R. A. 78; 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55 ..... 489
Negley v. Stewart, 10 Serg. & R. 207.... 396
Neilson v. Railroad Co., 58 Wis. 516, 17 N. W. 310 ..... 9
New Jersey Steamboat Co. v. Brackett, 121 U. S. 637, 649, 7 Sup. Ct. 1039, 30 L. Ed. 1049 ..... 996
New Jersey Traction Co. v. Brabban, 57 N. J. Law, 691, 32 Atl. 217..... 9
Newland v. Champion, 1 Ves. Sen. 105, 106 .....1008
New Orleans v. Benjamin, 153 U. S. 411-424, 14 Sup. Ct. 905, 38 L. Ed. 764..186, 187
New River Mineral Co. v. Seeley, 56 C. C. A. 505, 120 Fed. 193..... 719
New York v. Eno, 155 U. S. 89, 15 Sup. Ct. 30, 39 L. Ed. 80..... 489
New York Economical Printing Co., In re, 49 C. C. A. 133, 110 Fed. 514..... 450
New York Electric Equipment Co. v. Blair, 25 C. C. A. 216, 79 Fed. 896..... 9
New York Filter Mfg. Co. v. Bldg. Co. (C. C.) 93 Fed. 827 ..... 415
New York Ins. Co. v. Thomas, 3 Johns. Cas. 1 ..... 513
New York State v. Barker, 179 U. S. 279, 21 Sup. Ct. 124, 45 L. Ed. 194..... 233
Nicholls v. Webb, 8 Wheat. 326, 5 L. Ed. 628 ..... 725
Nichols v. Williams, 22 N. J. Eq. 63..... 700
Nickerson v. Nickerson, 127 U. S. 668, 8 Sup. Ct. 1355, 32 L. Ed. 314..... 704
Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101..... 873
Nofire v. U. S., 164 U. S. 657, 17 Sup. Ct. 212, 41 L. Ed. 588..... 967
Nord-Deutscher Lloyd v. Insurance Co., 49 C. C. A. 11..... 743
North Chicago City R. Co. v. Lake View, 105 Ill. 212, 44 Am. Rep. 788.....213, 214
Northern Assur. Co. v. Ass'n, 183 U. S. 308, 361, 364, 22 Sup. Ct. 133, 46 L. Ed. 213 .....499, 500, 501, 502, 510, 513
Northern Cent. R. Co. v. Maryland, 187 U. S. 258, 23 Sup. Ct. 62, 47 L. Ed. 167.... 267
Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958.. 574
Northern Pac. R. Co. v. Blake, 11 C. C. A. 93, 63 Fed. 45..... 390
Northern Pac. R. Co. v. Dixon, 194 U. S. 338, 343, 24 Sup. Ct. 683, 684, 48 L. Ed. 1006 ..... 17

Page

Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679..... 762
North Yakima v. Superior Court, 4 Wash. 655, 30 Pac. 1053..... 553
Norwich & N. Y. Transp. Co. v. Flint, 13 Wall. 3, 20 L. Ed. 556..... 386
Nugent v. Powell, 4 Wyo. 173, 194, 33 Pac. 23, 20 L. R. A. 199, 62 Am. St. Rep. 17.. 873
N. W. Iron Co. v. Meade, 21 Wis. 475, 94 Am. Dec. 557..... 702
N. Y., N. H. & H. R. Co. v. Walsh, 38 N. E. 378, 42 Am. St. Rep. 734..... 546

Odd Fellows' Bank's Appeal, 123 Pa. 356, 16 Atl. 606..... 4
Oil City v. McAboy, 74 Pa. 249..... 553
Oliver v. Chemical Works, 109 U. S. 75, 3 Sup. Ct. 61, 27 L. Ed. 862.....84, 117
Olmstead v. Partridge, 82 Mass. 383..... 277
Ontario, The, 2 Lowell, 40, 53, Fed. Cas. No. 10,543..... 945
Oolagah Coal Co. v. McCaleb, 15 C. C. A. 270, 68 Fed. 87.....283, 287
Oregon, The, 5 C. C. A. 229, 55 Fed. 666.. 647
O'Reilly v. Morse, 15 How. 62, 14 L. Ed. 601..... 675
Orton v. Smith, 18 How. 263, 15 L. Ed. 393..... 283
Osceola, The, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760..... 942
Oshkosh v. Schwartz (Wis.) 13 N. W. 552.. 212

Pacific R. Commission, In re (C. C.) 32 Fed. 250..... 844
Pacific Steam Whaling Co. v. Ass'n, 40 C. C. A. 494, 100 Fed. 462..... 73
Pack v. Greenbush, 62 Mich. 122, 28 N. W. 746..... 553
Packing Co. v. Magowan, 27 Fed. 362; 141 U. S. 332, 12 Sup. Ct. 71, 35 L. Ed. 781.. 902
Pain v. Sample, 158 Pa. 428, 27 Atl. 1107.. 426
Palatine Ins. Co. v. Ewing, 34 C. C. A. 236, 92 Fed. 111, 114..... 512
Palmyra, The, 12 Wheat. 1, 14, 6 L. Ed. 531..... 172
Parker, In re, 1 Am. Bankr. Rep. 615, 618 863
Parkhurst v. Trumbull, 130 Mich. 408, 90 N. W. 25..... 370
Parmenter Mfg. Co. v. Stoever, 38 C. C. A. 200, 97 Fed. 330..... 949
Parrott v. Bridgeport, 44 Conn. 180, 26 Am. Rep. 439..... 852
Passaic, The (D. C.) 76 Fed. 460..... 560
Patillo v. Commission Co., 65 C. C. A. 508, 131 Fed. 680..... 875
Patterson v. Brown, 32 N. Y. 81..... 371
Patton v. Railroad Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361..... 875
Pauline, The, 136 Fed. 815..... 271
Paulsen v. Portland, 149 U. S. 39, 40, 13 Sup. Ct. 750, 37 L. Ed. 637..... 238
Payne v. Hook, 7 Wall. 425, 440, 19 L. Ed. 260.....1009
Peck v. Heurich, 167 U. S. 624, 629, 17 Sup. Ct. 927, 24 L. Ed. 302..... 9
Peck v. Tie Co., 53 C. C. A. 551, 116 Fed. 273..... 283
Peirce v. Van Dusen, 24 C. C. A. 280, 78 Fed. 693, 706..... 996
Pekin Plow Co., In re, 50 C. C. A. 257, 112 Fed. 308..... 455

Page

Pendill v. Mining Co., 64 Mich. 172, 31 N. W. 100..... 287
Penfield v. C. & A. Potts Co., 61 C. C. A. 371, 126 Fed. 475..... 98
Penn Mut. Life Ins. Co. v. Austin, 168 U. S. 685–695, 18 Sup. Ct. 223, 227, 42 L. Ed. 626..... 231
Pennoyer v. McConnaughy, 140 U. S. 1–10, 11 Sup. Ct. 699, 35 L. Ed. 363..... 229
Pennsylvania Co. v. Fishack, 59 C. C. A. 269, 123 Fed. 465..... 18
Pennsylvania Co. v. Roy, 102 U. S. 451–460, 26 L. Ed. 141.....9, 872
Pennsylvania R. Co. v. L. E. S. Truck Co., 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222..... 686
People v. Dulaney, 96 Ill. 504..... 852
People v. Gillson, 109 N. Y. 389, 117 N. E. 343, 4 Am. St. Rep. 465..... 933
People v. Lead Works, 82 Mich. 472, 46 N. W. 735, 9 L. R. A. 722..... 213
People v. Lewis, 86 Mich. 276, 49 N. W. 140..... 213
People v. Marx, 99 N. Y. 386, 2 N. E. 29, 52 Am. Rep. 34..... 933
People ex rel. v. Hays, 5 Cal. 66..... 396
Phelps v. Jackson, 31 Ark. 272, 278..... 396
Phelps v. Lewiston, 15 Blatchf. 131, Fed. Cas. No. 11,076..... 327
Philadelphia Baptist Ass'n v. Hart, 4 Wheat. 27, 4 L. Ed. 499..... 774
Phillips v. New Buffalo, 64 Mich. 683, 31 N. W. 581..... 261
Phœnix Caster Co. v. Spiegel, 133 U. S. 360, 368, 10 Sup. Ct. 409, 33 L. Ed. 663.. 896
Phœnix Ins. Co. v. Kerr, 64 C. C. A. 251, 129 Fed. 723, 66 L. R. A. 569..... 42
Phœnix Life Ins. Co. v. Raddin, 120 U. S. 183, 189, 7 Sup. Ct. 500, 30 L. Ed. 644.. 499
Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128..... 195
Pittsburg, etc., R. R. Co. v. Iron Works, 31 W. Va. 71, 8 S. E. 453, 2 L. R. A. 680.. 546
Pittsburgh, C., C. & St. L. R. Co. v. Backus, 154 U. S. 421, 422, 423, 424, 425, 426, 427, 14 Sup. Ct. 1114, 1116, 38 L. Ed. 1031.....239, 259
Pittsburgh Reduction Co. v. Aluminum Co. (C. C.) 64 Fed. 125..... 51
Planters, etc., Co. v. Elder, 42 C. C. A. 130, 101 Fed. 1001..... 694
Pleasants v. Fant, 22 Wall. 120, 22 L. Ed. 780..... 46
Plumb v. Goodnow's Adm'r, 123 U. S. 560, 561, 8 Sup. Ct. 216, 31 L. Ed. 268..... 105
Poconoket Case (D. C.) 67 Fed. 265..... 468
Popp v. Railroad Co. (C. C.) 96 Fed. 465.. 578
Porter v. Coal Co., 84 Wis. 418, 423, 54 N. W. 1019..... 15
Port of Mobile v. Railroad Co., 84 Ala. 115, 4 South. 106, 5 Am. St. Rep. 342..... 212
Potts v. Creager, 155 U. S. 597, 608, 15 Sup. Ct. 194, 39 L. Ed. 275..... 686
Potts v. Whitehead, 23 N. J. Eq. 512..... 701
Powell v. Patison, 100 Cal. 234, 34 Pac. 676..... 626
Powell v. Pennsylvania, 127 U. S. 692, 8 Sup. Ct. 1257, 32 L. Ed. 253..... 932
Poyer v. Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494..... 211

Page

Presbyterian Corp. v. Wallace, 3 Rawle, 109 ..... 190
Preteca v. Land Co., 1 C. C. A. 607, 50 Fed. 674 ..... 286
Price's Estate, In re, 81 Pa. 263..... 4
Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104..... 837
Prout v. Starr, 188 U. S. 537–542, 543, 23 Sup. Ct. 398, 47 L. Ed. 584.....230, 331
Providence Bank v. Billings, 4 Pet. 561, 7 L. Ed. 939..... 234

Queen v. Darlington School, 6 Q. B. 682.. 377
Quested v. Railroad Co., 127 Mass. 204... 170
Quint v. Board, 64 Miss. 483, 4 South. 548 212

Railroad Co. v. Bank, 102 U. S. 21, 26 L. Ed. 61 ..... 97
Railroad Co. v. Bridge Co., 131 U. S. 371–389, 9 Sup. Ct. 770, 33 L. Ed. 157..... 263
Railroad Co. v. Holloway, 52 C. C. A. 260, 114 Fed. 458 ..... 9
Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542..... 642
Railroad Co. v. Hurd, 47 C. C. A. 615, 108 Fed. 116, 56 L. R. A. 193..... 574
Railroad Co. v. McClurg, 8 C. C. A. 322, 325, 59 Fed. 860..... 9
Railroad Co. v. O'Brien, 119 U. S. 99–103, 7 Sup. Ct. 172, 30 L. Ed. 299..... 9
Railroad Co. v. O'Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006.... 9
Railroad Co. v. Reeves, 10 Wall. 176, 189, 19 L. Ed. 909..... 997
Railroad Co. v. Sayles, 97 U. S. 554, 556, 24 L. Ed. 1053 ..... 678
Railroad Co. v. Soutter, 13 Wall. 517, 20 L. Ed. 543 ..... 371
Railroad Equipment Co. v. Railroad Co., 34 C. C. A. 519, 92 Fed. 541..... 346
Randall v. Railroad Co., 109 U. S. 478, 482, 3 Sup. Ct. 322, 325, 27 L. Ed. 1003.. 47, 728, 875
Randolph, Ex parte, Fed. Cas. No. 11,558.. 488
Randolph v. Halden, 44 Iowa, 327..... 290
Raymond v. Raymond, 28 C. C. A. 38, 83 Fed. 721 ..... 967
Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014.....331, 759
Red Jacket Mfg. Co. v. Davis, 27 C. C. A. 204, 82 Fed. 432..... 66
Reece Button Hole Mach. Co. v. Machine Co., 10 C. C. A. 194, 61 Fed. 958...135, 896
Reed v. Insurance Co., 95 U. S. 23, 24 L. Ed. 348 ..... 521
Reed v. Stockmeyer, 20 C. C. A. 388, 74 Fed. 194 ..... 727
Reggel, Ex parte, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250..... 984
Reubelt v. Noblesville, 106 Ind. 480, 7 N. E. 206 ..... 374
Reynolds v. Wilson, 15 Ill. 394, 60 Am. Dec. 753 ..... 396
Rhonda, The, 8 App. Cas. 552..... 306
Richmond v. Atwood, 2 C. C. A. 596, 52 Fed. 10, 17 L. R. A. 615.....100, 103
Richmond & D. R. Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728..... 876
Richmond & D. R. v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642..... 46

Page

Ricker v. Powell, 100 U. S. 104, 107, 108, 25 L. Ed. 527..... 826
Rickert v. Madeira, 1 Rawle, 328....189, 190
Rieger v. U. S., 47 C. C. A. 61, 107 Fed. 922, 47 C. C. A. 61..... 880
Riley v. Railroad Co., 66 C. C. A. 598, 133 Fed. 904 ..... 47
Rintoul v. Railroad Co. (C. C.) 17 Fed. 905, 907 ..... 997
Ripley v. Glass Co. (C. C.) 49 Fed. 927.... 89
Robb v. Voss, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52..... 808
Robbins v. Chicago, 4 Wall. 657, 672, 673. 18 L. Ed. 427.....97, 98
Robel v. Railroad Co., 35 Minn. 84, 89, 27 N. W. 305.....869, 875
Roberts v. Heim, 27 Ala. 678..... 781
Roberts v. Ogle, 30 Ill. 459, 83 Am. Dec. 201 ..... 213
Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544..... 984
Robertson v. Coal Co., 172 Pa. 566, 33 Atl. 706 ..... 289
Robert W. Parsons, The, 191 U. S. 17–30, 24 Sup. Ct. 8, 48 L. Ed. 73..... 943
Robins v. Bellas, 2 Watts, 359..... 396
Robinson v. Howard, 5 Cal. 428..... 781
Robinson v. U. S., 13 Wall. 363, 20 L. Ed. 653 ..... 994
Robinson v. Weller, 81 Ga. 704, 8 S. E. 447 ..... 702
Rochford, In re, 59 C. C. A. 388, 124 Fed. 182 .....195, 627
Rock Island County v. Bank, 31 Ill. 544.. 553
Roemer v. Neumann (C. C.) 26 Fed. 332... 100
Roemer v. Peddie, 132 U. S. 313, 10 Sup. Ct. 98, 33 L. Ed. 382..... 896
Roff v. Burney, 168 U. S. 218, 18 Sup. Ct. 60, 42 L. Ed. 442..... 967
Romanow, In re (D. C.) 92 Fed. 510..... 589
Root v. Third Ave. Co., 146 U. S. 210, 13 Sup. Ct. 100, 36 L. Ed. 946..... 915
Rosenfeld v. Einstein, 46 N. J. Law, 479.. 852
Rossend Castle, The (D. C.) 30 Fed. 462.. 647
Rowena Clarke v. Banking Co. (C. C.) 50 Fed. 338, 15 L. R. A. 683..... 762
Royal Ins. Co. v. Martin, 19 U. S. 149, 162, 24 Sup. Ct. 247, 48 L. Ed. 385..... 512
Royall, Ex parte, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868..... 489
Russia Cement Co. v. Le Page Co., 174 Mass. 349, 362, 55 N. E. 70..... 533
Rutherford L. & I. Co. v. Sanntrock, 60 N. J. Eq. 471, 46 Atl. 648..... 370

Sacks v. Kupferle (C. C.) 127 Fed. 569... 98
St. Louis v. Brewing Co., 141 Mo. 375, 42 S. W. 954, 39 L. R. A. 551, 64 Am. St. Rep. 516 ..... 212
St. Louis Car Coupler Co. v. Shickle, Harrison & Howard Co. (C. C.) 70 Fed. 783 76
St. Louis Cordage Co. v. Miller, 61 C. C. A. 477, 490, 495, 126 Fed. 495, 508, 513, 63 L. R. A. 551..... 12
St. Louis, etc., Ry. v. Insurance Co., 139 U. S. 223, 236, 11 Sup. Ct. 554, 35 L. Ed. 154 ..... 997
St. Louis, I. M. & S. R. Co. v. Greenthal, 23 C. C. A. 100, 77 Fed. 150, 152..... 996
St. Louis, I. M. & S. R. Co. v. Needham, 3 C. C. A. 129, 52 Fed. 371..... 869

Page

St. Louis & S. F. R. Co. v. Farr, 6 C. C. A. 211, 216, 56 Fed. 994, 1000 ..... 872
St. Paul v. Gilfallin, 36 Minn. 298, 31 N. W. 49 ..... 213
Saltonstall v. Birtwell, 150 U. S. 417, 14 Sup. Ct. 169, 37 L. Ed. 1128 ..... 383
S. A. McCaulley, The (D. C.) 99 Fed. 302 945
Sanbo v. Coal Co. (C. C.) 130 Fed. 52..575, 579
Sanders v. Louisville, etc., Co., 49 C. C. A. 565, 111 Fed. 708 ..... 869
Sanders v. Palmer, 5 C. C. A. 77, 55 Fed. 217 ..... 276
Sappenfield v. Railroad Co., 91 Cal. 48, 27 Pac. 590 ..... 9
Sapphire, The, 11 Wall. 164, 170, 20 L. Ed. 127 ..... 559
Savannah, etc., Co. v. Smith (Ga.) 21 S. E. 157 ..... 873
Sawyer v. Brossart, 67 Iowa, 678, 25 N. W. 876, 56 Am. Rep. 371 ..... 702
Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105 ..... 158
Sawyer Spindle Co. v. Carpenter (C. C.) 133 Fed. 238, 240 ..... 828
Saxe v. Hammond, Holmes, 456, Fed. Cas. No. 12,411 ..... 78
Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60 .... 24
Sayles v. Best, 140 N. Y. 368, 35 N. E. 636 ..... 611
Scania Ins. Co. v. Johnson, 22 Colo. 476, 45 Pac. 431 ..... 506, 511
Scheffler v. Railroad Co., 32 Minn. 125, 19 N. W. 656; 32 Minn. 518, 21 N. W. 711 869, 875
Schettler v. Smith, 41 N. Y. 334 ..... 612
Schick v. U. S., 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99 ..... 456
Schneider v. Pountney (C. C.) 21 Fed. 399 78
Schofield v. Railroad Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224 ..... 641, 642
Schuyler County v. Mercer County, 4 Gilman, 20 ..... 553
Schwartz v. Oil Co., 153 Pa. 283, 288, 25 Atl. 1018, 1019 ..... 724
Schwarz v. Judd, 28 Minn. 371, 10 N. W. 208 ..... 870
Scott v. Dock Co., 3 Hurlstone & Cottman, 596 ..... 996
Scott v. Donald, 165 U. S. 58-68, 17 Sup. Ct. 265, 41 L. Ed. 632 ..... 228
Scott v. U. S., 12 Wall. 443, 444, 20 L. Ed. 438 ..... 513
Scully v. Rose, 61 Md. 408 ..... 283
Sea King, The, 52 C. C. A. 349, 114 Fed. 535 ..... 306
Sears, In re, 54 C. C. A. 532, 117 Fed. 294 435
Sewall v. Jones, 91 U. S. 171, 183, 23 L. Ed. 275 ..... 909
Seymour v. McCormick, 16 How. 480, 14 L. Ed. 1024 ..... 60
Shaber v. Railroad Co., 28 Minn. 103, 107, 9 N. W. 575 ..... 869
Shappiro v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419 ..... 158
Sharon v. Terry (C. C.) 36 Fed. 337, 1 L. R. A. 572 ..... 212
Sheldon v. Insurance Co., 22 Conn. 235, 58 Am. Dec. 420 ..... 513
Sheldon v. Wickham, 161 N. Y. 500, 55 N. E. 1045 ..... 445, 446

Page

Shickle, Harrison & Howard Iron Co. v. Car Coupler Co., 23 C. C. A. 433, 77 Fed. 739 ..... 76
Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660 ..... 197
Shipman v. Rollins, 98 N. Y. 311 ..... 612
Shirley, In re, 7 Am. Bankr. Rep. 299, 112 Fed. 301, 50 C. C. A. 252 ..... 455
Shriver, In re, 10 Am. Bankr. Rep. 746, 125 Fed. 511 ..... 840
Sieber v. Railroad Co., 76 Minn. 269, 275, 79 N. W. 95 ..... 870, 876
Siemens v. Sellers, 123 U. S. 276, 283, 8 Sup. Ct. 117, 119, 31 L. Ed. 153 ..... 827
Simonson v. Sinsheimer, 37 C. C. A. 337, 95 Fed. 948, 954 ..... 589
Simpson v. Edmiston, 23 W. Va. 675 ..... 483
Simpson v. Story, 145 Mass. 497, 14 N. E. 641, 1 Am. St. Rep. 480 ..... 945
Singer Mfg. Co. v. Cramer, 192 U. S. 265, 285, 24 Sup. Ct. 291, 48 L. Ed. 437 ..... 896
Singer Mfg. Co. v. Foundry Co. (C. C.) 34 Fed. 393 ..... 73
Sisson v. Railroad Co., 14 Mich. 489, 90 Am. Dec. 252 ..... 996
Skelley, In re, 2 Biss. 260, Fed. Cas. No. 12,921 ..... 782
Slater v. Railroad Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900 ..... 574, 575
Slaughter v. Gerson, 13 Wall. 379, 20 L. Ed. 627 ..... 157
Sloan v. U. S. (C. C.) 118 Fed. 283 ..... 966
Smilie v. Walton, 41 Vt. 174 ..... 951
Smith, In re (D. C.) 92 Fed. 135 ..... 198
Smith v. Edwards, 88 N. Y. 92 ..... 612
Smith v. Insurance Co., 60 Vt. 682, 691, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144 ..... 500
Smith v. Iron Works, 165 U. S. 523, 524, 17 Sup. Ct. 407, 410, 41 L. Ed. 810..102, 103
Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566 ..... 685
Smith v. U. S., 151 U. S. 50, 14 Sup. Ct. 234, 38 L. Ed. 67 ..... 968
Smiths v. Shoemaker, 17 Wall. 630, 639, 21 L. Ed. 717 ..... 9
Smith & Davis Co. v. Mellon, 7 C. C. A. 439, 58 Fed. 705 ..... 915
Smith & Griggs Co. v. Sprague, 123 U. S. 249, 8 Sup. Ct. 122, 31 L. Ed. 141 ..... 915
Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819 ..... 230, 764, 768
Snell, In re (D. C.) 125 Fed. 154 ..... 628
Snyder v. Hopkins, 31 Kan. 557, 559, 3 Pac. 367 ..... 283
Snyder v. Martin, 17 W. Va. 276, 41 Am. Rep. 670 ..... 196
Southard v. Benner, 72 N. Y. 424 ..... 444
Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678 ... 157
Southern I. & M. Bridge Co. v. Stone, 174 Mo. 1, 30, 73 S. W. 453, 63 L. R. A. 301 547
Southern Loan & Trust Co. v. Benbow (D. C.) 96 Fed. 514 ..... 197
Southern Pacific v. Hetzer (C. C. A.) 135 Fed. 272 ..... 392
Southern Pac. Co. v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485 ..... 875
Southern R. Co. v. Corporation Commission (D. C.) 104 Fed. 700 ..... 844

Page

South St. Paul v. Lamprecht Bros. Co., 31 C. C. A. 585, 88 Fed. 449 ..... 326
Southwestern R. Co. v. Paulk, 24 Ga. 356 576
Sparks v. Husted, 5 Pa. Dist. R. 189 .... 426
Spencer v. Merchant, 125 U. S. 345–354, 8 Sup. Ct. 921, 926, 31 L. Ed. 763 ..... 238
Spindle v. Shreve, 111 U. S. 542, 4 Sup. Ct. 522, 28 L. Ed. 512 ..... 627
Spitzer, In re (C. C. A.) 130 Fed. 879 ... 934
Spring v. Insurance Co., 8 Wheat. 268, 5 L. Ed. 614 ..... 432
Springhead Spinning Co. v. Riley, L. R. 6 Eq. 558 ..... 212
Standard Caster & Wheel Co. v. Caster Socket Co., 51 C. C. A. 109, 116, 113 Fed. 162 ..... 66
Standard Life & Accident Ins. Co. v. Taylor, 12 Tex. Civ. App. 387, 34 S. W. 781 635
Stanford v. Lackland, 2 Dill. 6, Fed. Cas. No. 12,312 ..... 627
Stanton v. Hart, 27 Mich. 539 ..... 277
Starr v. Moulton, 97 Ill. 525 ..... 348
State v. Bridge Co., 20 Kan. 404 ..... 852
State v. Court, 39 Mo. 375 ..... 852
State v. Davis, 22 Minn. 423 ..... 884
State v. Hawkins, 44 Ohio St. 98, 5 N. E. 228 ..... 378
State v. Heidenhain, 42 La. Ann. 483, 7 South. 621 ..... 213
State v. Low, 46 W. Va. 451, 33 S. E. 271 483
State v. McEldowney (W. Va.) 47 S. E. 650 ..... 481, 486
State v. Miles, 89 Me. 142, 36 Atl. 70 .... 880
State v. Moore, 46 Neb. 590, 65 N. W. 193, 50 Am. St. Rep. 626 ..... 324
State v. Railroad Co., 37 La. Ann. 589; 43 N. J. Law, 505; 45 N. J. Law, 186 .. 852
State v. Telephone Co. (C. C.) 23 Fed. 539; 47 Fed. 633; 2 C. C. A. 1, 50 Fed. 677 .. 116
State v. Tower (Mo. Sup.) 84 S. W. 12 .... 215
State v. Turnpike Co., 16 Ohio St. 308 ... 852
State ex rel. v. Probate Court, 51 Minn. 241, 53 N. W. 463 ..... 870
State ex rel. etc. v. Telephone Co. (C. C.) 47 Fed. 633 ..... 115
State Railroad Tax Cases, 92 U. S. 575–612, 23 L. Ed. 663 ..... 239
Stephens v. Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678 ..... 444
Stephens v. Perrine, 143 N. Y. 476–480, 39 N. E. 11 ..... 444, 445, 449
Stephenson v. Railroad Co., 114 U. S. 149, 5 Sup. Ct. 777, 29 L. Ed. 58 ..... 685
Stevenson v. Lesley, 70 N. Y. 512, 517 .. 609, 610, 611
Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816 ..... 453
Stewart v. Railroad Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537 ..... 572, 574, 575, 579
Stewart v. Sonneborn, 98 U. S. 187, 25 L. Ed. 116 ..... 276
Stewart v. White (Ala.) 30 South. 526, 55 L. R. A. 213 ..... 774
Stiff v. McLaughlin, 19 Mont. 300, 48 Pac. 232 ..... 967
Stone v. U. S. Cas. Co., 34 N. J. Law, 371 634
Storti, In re (C. C.) 109 Fed. 807 ..... 963
Storti v. Massachusetts, 183 U. S. 138, 141, 22 Sup. Ct. 72, 73, 46 L. Ed. 120 .. 203, 963

Page

Storti Case, 109 Fed. 809 ..... 202
Strait v. Harrow Co. (C. C.) 51 Fed. 819 208
Straus v. Young, 36 Md. 246 ..... 277
Strong v. Randall, 90 App. Div. 192, 85 N. Y. Supp. 1089; 177 N. Y. 400, 69 N. E. 721 ..... 837
Strout v. Foster, 1 How. 89, 11 L. Ed. 58 .. 560
Suffolk Co. v. Hayden, 3 Wall. 315, 320, 18 L. Ed. 76 ..... 409
Sun Hung Case (C. C.) 24 Fed. 723 ..... 202
Supervisors v. Stanley, 105 U. S. 305, 26 L. Ed. 1044 ..... 244
Supply Co. v. Bullard, 17 Blatchf. 160, Fed. Cas. No. 294 ..... 117
Supreme Council, etc., v. Lippincott, 67 C. C. A. 650, 134 Fed. 824 ..... 471
Supreme Council, etc., v. McAlarney, 67 C. C. A. 546, 135 Fed. 72 ..... 472
Sutherland v. Parkins, 75 Ill. 338 ..... 703
Sutton v. McConnell, 46 Wis. 269, 50 N. W. 414 ..... 277
Swain v. Holyoke Co., 48 C. C. A. 265, 109 Fed. 154; 49 C. C. A. 419, 111 Fed. 408 ..... 914, 915
Swarts v. Siegel, 54 C. C. A. 399, 401, 117 Fed. 13, 15 ..... 788
Swearingen v. Insurance Co., 52 S. C. 315, 29 S. E. 722 ..... 431
Swift v. Brownell, 1 Holmes, 467, Fed. Cas. No. 13,695 ..... 945
Swope v. Andery, 5 Ind. 313 ..... 396
Sykora v. Machine Co., 59 Minn. 130, 60 N. W. 1008 ..... 870
Syracuse Tp. v. Rollins, 44 C. C. A. 277, 104 Fed. 958 ..... 324

Tapley v. Goodsell, 122 Mass. 176, 182 .. 533
Tappan v. School Dist., 44 Mich. 500, 7 N. W. 73 ..... 375
Taylor v. Bacon, 8 Sim. 100 ..... 612
Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028 ..... 197
Taylor v. Galloway, 1 Ohio, 232, 13 Am. Dec. 605 ..... 370
Taylor v. Moore, 2 Rand. 563 ..... 199
Teaser, The (D. C.) 118 Fed. 81 ..... 222
Telephone Cases, 126 U. S. 1, 535, 8 Sup. Ct. 778, 782, 31 L. Ed. 863 ..... 673
Terry v. Abraham, 93 U. S. 38, 23 L. Ed. 794 ..... 345
Texas R. Co. v. Kuteman, 4 C. C. A. 503, 54 Fed. 547 ..... 212
Texas & P. R. Co. v. Reiss, 183 U. S. 621, 626, 22 Sup. Ct. 253, 46 L. Ed. 358 .... 512
Thaule v. Krekeler, 81 N. Y. 432 ..... 277
Thayer v. Montgomery County, 3 Dill. 389, Fed. Cas. No. 13,870 ..... 327
Theller v. Hershey (C. C.) 89 Fed. 575 .... 97
Third Ave. R. Co. v. Mayer, 54 N. Y. 161 211
Thomas, The Hattie (D. C.) 59 Fed. 297 .. 272
Thomas v. Adelman (D. C.) 136 Fed. 973 .. 953
Thomas v. Hot Springs, 34 Ark. 558, 36 Am. Rep. 24 ..... 933
Thompson v. Allen Co., 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472 ..... 426
Thompson v. Brown, 4 Johns. Ch. 619 .... 1009, 1010
Thompson v. Chicago, etc., Co. (C. C.) 104 Fed. 845 ..... 873

Page

Thompson v. Insurance Co., 136 U. S. 287, 297, 10 Sup. Ct. 1019, 34 L. Ed. 408.... 511
Thompson v. Taylor (N. J. Sup.) 46 Atl. 567 ..... 999
Thompson v. Van Vechten, 27 N. Y. 568.. 444
Thompson Co. v. Lorain Co., 54 C. C. A. 281, 117 Fed. 249..... 915
Thomson-Houston Electric Co. v. Brass Co., 26 C. C. A. 107, 117, 80 Fed. 712... 66
Thomson-Houston Electric Co. v. Specialty Co. (C. C.) 72 Fed. 1016, 1017, 22 C. C. A. 1, 5, 75 Fed. 1005, 1009.....71, 72, 119
Thorp, In re (D. C.) 12 Am. Bankr. Rep. 195, 130 Fed. 371..... 191
Throckmorton v. Holt, 180 U. S. 552, 567, 21 Sup. Ct. 474, 45 L. Ed. 663..... 872
Tienken, Matter of, 131 N. Y. 391, 401, 402, 403, 404, 406, 407, 408, 409, 30 N. E. 109, 112.....609, 610, 611, 612
Tift v. Railroad Co., 123 Fed. 789–796... 757
Tindall v. Wesley, 167 U. S. 204–220, 17 Sup. Ct. 770, 42 L. Ed. 137..... 230
Titus v. Railroad Co. (Pa.) 20 Atl. 517, 20 Am. St. Rep. 944..... 391
Toledo, Delphos, etc., R. R. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905 ..... 526
Tom Tong, Ex parte, 108 U. S. 556, 2 Sup. Ct. 871, 27 L. Ed. 826..... 488
Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658..... 902
Town Council of Lexington v. Bank (Miss.) 22 South. 291..... 324
Town of Solon v. Williamsburgh, 35 Hun, 1 325
Townsend Nat. Bank v. Jones, 151 Mass. 454, 24 N. E. 593..... 533
Township of Rock Creek v. Strong, 96 U. S. 271, 24 L. Ed. 815..... 325
Transfer No. 14, The, 62 C. C. A. 223, 127 Fed. 305 ..... 222
Travelers' Ins. Co. v. Connecticut. 185 U. S. 364, 22 Sup. Ct. 673, 46 L. Ed. 949.. 233
Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 666, 8 Sup. Ct. 1360, 32 L. Ed. 308 511
Travellers' Ins. Co. v. Randolph, 24 C. C. A. 305, 78 Fed. 754..... 47
Travis v. Milne, 9 Hare, 141.....1008
Tremaine v. Mortimer, 128 N. Y. 1, 27 N. E. 1060 ..... 448
Triplett v. Bank, 24 Fed. Cas. 202..... 844
Troop, The (D. C.) 117 Fed. 557; 60 C. C. A. 362, 125 Fed. 672; 63 C. C. A. 584, 128 Fed. 856.....146, 387
Troy, The (D. C.) 121 Fed. 901..... 942
Troy Iron & Nail Factory v. Corning, 14 How. 193, 14 L. Ed. 383..... 84
Tryon v. Munson, 77 Pa. 250.....188, 190
Tua v. Carriere, 117 U. S. 201, 6 Sup. Ct. 565, 29 L. Ed. 855..... 198
Tubular Rivet & Stud Co. v. O'Brien, (C. C.) 93 Fed. 200.....115, 116, 120
Tuck v. Downing, 76 Ill. 71..... 158
Tuck v. Waldron, 31 Ark. 465..... 931
Tune, In re (D. C.) 115 Fed. 906..... 197
Turner v. Dinnegar, 20 Hun (N. Y.) 467.. 277
Turpin v. Lemon, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70..... 233
Tuttle v. Railroad Co., 122 U. S. 189, 194, 195, 7 Sup. Ct. 1166, 1168, 30 L. Ed. 1114 .....390, 728

Page

Tyler, Ex parte, 149 U. S. 164–190, 13 Sup. Ct. 785, 37 L. Ed. 689.....197, 229
Tyler v. Boston, 7 Wall. 327, 19 L. Ed. 93 53
Tyler v. Hand, 7 How. 573, 12 L. Ed. 824 533
Tyler v. Savage, 143 U. S. 95, 12 Sup. Ct. 340, 36 L. Ed. 82..... 426

Ulfelder Clothing Co., In re (D. C.) 98 Fed. 409 ..... 781
Union Bank v. Jolly, 18 How. 503, 15 L. Ed. 472 .....1009
Union Locomotive Exp. Co. v. Railroad Co., 37 N. J. Law, 23..... 999
Union Pac. R. Co. v. Elevator Co. (C. C.) 17 Fed. 200..... 283
Union Pac. R. Co. v. Railroad Co., 64 C. C. A. 348, 354, 355, 128 Fed. 230, 236, 237 ..... 380
Union Paper Bag Mach. Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935..... 400
Union Trust Co., In re, 59 C. C. A. 461, 122 Fed. 937..... 627
Union Trust Co. v. Railroad Co., 117 U. S. 435–470, 6 Sup. Ct. 809, 29 L. Ed. 963 808
United Nickel Co. v. Worthington (C. C.) 13 Fed. 392 ..... 656
U. S. v. Arredondo, 6 Pet. 729, 8 L. Ed. 547 ..... 378
U. S. v. Ass'n, 166 U. S. 341, 17 Sup. Ct. 540, 41 L. Ed. 1007; 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259.....761, 762
U. S. v. Bishop, 60 C. C. A. 123, 125 Fed. 181 ..... 42
U. S. v. Chaves, 159 U. S. 452–463, 464, 16 Sup. Ct. 57, 62, 40 L. Ed. 215..... 772
U. S. v. Clyatt, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. —..... 687
U. S. v. Fifty Boxes (D. C.) 92 Fed. 602 462
U. S. v. Gentry, 55 C. C. A. 658, 663, 119 Fed. 70 ..... 9
U. S. v. Higgins (C. C.) 103 Fed. 348..... 967
U. S. v. Hogg, 50 C. C. A. 608, 112 Fed. 912 ..... 985
U. S. v. Johnston, 124 U. S. 236, 253, 8 Sup. Ct. 446, 31 L. Ed. 389..... 543
U. S. v. Lumber Co., 131 Fed. 668..... 299
U. S. v. Morgan, 39 C. C. A. 653, 99 Fed. 570 ..... 618
U. S. v. Parrott, 1 McAll. 447, Fed. Cas. No. 15,999 ..... 462
U. S. v. The Little Charles, 1 Brock. 347, 354, Fed. Cas. No. 15,612..... 172
U. S. v. The Makel Adhel, 2 How. 210, 232–234, 11 L. Ed. 239, 248, 249..... 171
U. S. Co. v. Edison Co. (C. C.) 51 Fed. 24 914
U. S. ex rel. Interstate Commerce Com'rs v. Railroad Co., 25 Sup. Ct. 538, 49 L. Ed. —..... 851
U. S. ex rel. Kingwood Coal Co. v. Railroad Co. (C. C.) 125 Fed. 252..... 853
U. S. & Foreign Salamander Felting Co. v. Felting Co. (C. C.) 4 Fed. 816..... 98
Unruh's Estate, In re, 13 Phila. 337..... 4
Utley v. Donaldson, 94 U. S. 46, 24 L. Ed. 54 ..... 513
Utt, In re, 45 C. C. A. 32, 105 Fed. 754.. 345

Vaccaro v. Bank, 43 C. C. A. 279, 103 Fed. 436 ..... 929

Page

Vance v. Vance, 108 U. S. 514, 521, 2 Sup. Ct. 854, 27 L. Ed. 808..... 786
Vandercook Case (D. C.) 24 Fed. 472..... 272
Van Dyke's Appeal, 60 Pa. 481..... 3
Van Eyken v. Railroad Co. (D. C.) 117 Fed. 712 ..... 945
Vastbinder, In re, 13 Am. Bankr. Rep. 148, 132 Fed. 718.....742, 743
Ventress v. Smith, 10 Pet. 161, 9 L. Ed. 382 ..... 369
Village of Des Plaines v. Poyer, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524.. 214
Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667 ..... 211
Virtue v. Ioka Tribe, 5 Pa. Dist. R. 634... 426
Vrow Judith, 1 Rob. Adm. 150..... 172

Walcott v. People, 17 Mich. 68-76..... 236
Waldron v. Waldron, 156 U. S. 361, 383, 15 Sup. Ct. 383, 39 L. Ed. 453..... 872
Walker v. Brown, 165 U. S. 664, 17 Sup. Ct. 453, 41 L. Ed. 865..... 432
Walker v. Jack, 31 C. C. A. 462, 88 Fed. 576 ..... 206
Walker v. Jameson, 140 Ind. 598, 37 N. E. 402, 39 N. E. 869, 28 L. R. A. 679, 683, 49 Am. St. Rep. 222..... 213
Walker Patent Pivoted Bin Co. v. Brown & Krause, 110 Fed. 649..... 920
Walker Patented Pivoted Bin Co. v. Miller & England (C. C.) 132 Fed. 823..... 920
Wallace v. Holmes, 9 Blatchf. 65, Fed. Cas. No. 17,100.....66, 72, 78
Walla Walla v. Water Co., 172 U. S. 12, 19 Sup. Ct. 77, 43 L. Ed. 341..... 212
Wallwyn v. Lee, 9 Ves. 30-34..... 299
Walsh v. Insurance Co., 73 N. Y. 5..... 500, 503, 510
Walsh v. People, 65 Ill. 64, 16 Am. Rep. 569 ..... 880
Walston v. Nevin, 128 U. S. 582, 9 Sup. Ct. 192, 32 L. Ed. 544..... 238
Ward v. Cockran, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195..... 41
Wardell v. Williams, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814..... 704
Warner v. Durant, 76 N. Y. 136..... 612
Washburn v. Wire Co., 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154..... 919
Washington, etc., R. R. Co. v. McDade, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 34 L. Ed. 235 .....12, 46
Washington Gaslight Co. v. Lansden, 172 U. S. 534, 555, 19 Sup. Ct. 296, 43 L. Ed. 543 ..... 872
Watch Co. v. Robbins, 3 C. C. A. 103, 52 Fed. 337 ..... 100
Waterman v. McKenzie, 138 U. S. 255, 11 Sup. Ct. 334, 34 L. Ed. 923..... 84
Watson v. Merrill, 136 Fed. 359..... 790
Watson v. Railroad Co., 57 Wis. 332, 15 N. W. 468..... 9
Watson v. Sutherland, 5 Wall. 74, 18 L. Ed. 580 ..... 286
Watts, In re, 190 U. S. 1, 27, 23 Sup. Ct. 718, 724, 47 L. Ed. 933.....195, 197, 198
Watts v. Kellar, 5 C. C. A. 394, 56 Fed. 1 700
Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.....699, 701
Webber v. Railroad Co., 38 C. C. A. 79, 82, 97 Fed. 140, 143..... 786

Page

Weinger, Bergman & Co., In re (D. C.) 126 Fed. 875 ..... 627
Weisgerber v. Clowney (C. C.) 131 Fed. 477, 480 .....90, 91
Wertheim v. Railroad (C. C.) 15 Fed. 716.. 837
West v. U. S. (C. C.) 119 Fed. 495..... 973
Western Division of Western N. C. R. Co. v. Drew, 3 Woods, 691, Fed. Cas. No. 17,434 ..... 462
Western Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294.... 398
Western Electric Co. v. Telephone Co. (C. C.) 85 Fed. 649..... 135
Western Union Tel. Co. v. McGill, 6 C. C. A. 521, 57 Fed. 699, 21 L. R. A. 818.... 869
Westinghouse v. Brake Co., 170 U. S. 561, 562, 18 Sup. Ct. 707, 718, 42 L. Ed. 1136 131
Westinghouse v. Gas Co. (C. C.) 43 Fed. 582 ..... 922
Westinghouse Electric Mfg. Co. v. Granite Co., 49 C. C. A. 151, 162, 110 Fed. 753, 764 ..... 677
Westinghouse Electric & Mfg. Co. v. Instrument Co., 133 Fed. 167..... 824
West Memphis Packet Co. v. White, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427 386
Wetstein v. Franciscus (C. C. A.) 133 Fed. 900 ..... 953
Weyauwega v. Ayling, 99 U. S. 112, 25 L. Ed. 470 ..... 327
Wheatley v. Tutt, 4 Kan. 195..... 396
Wheeler v. Insurance Co., 101 U. S. 442, 24 L. Ed. 1055..... 431
Whitcomb v. Emerson (D. C.) 50 Fed. 128 945
White v. Rankin, 144 U. S. 628, 12 Sup. Ct. 768, 36 L. Ed. 569..... 117
White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183..... 934
White v. Walbridge (C. C.) 46 Fed. 526... 415
Whitham v. Sayres, 9 W. Va. 671..... 483
Whiting v. Ins. Co., 15 Md. 297..... 951
Whitlock, Matter of, 51 Hun, 354, 3 N. Y. Supp. 855 ..... 837
Whitney, The H. M., 30 C. C. A. 343, 86 Fed. 697 ..... 305
Whitney v. Olsen, 47 C. C. A. 331, 108 Fed. 292 ..... 387
Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406..... 489
Wilde's Sons, In re, 11 Am. Bankr. Rep. 714, 131 Fed. 142..... 839
Wilkin Mfg. Co. v. Lumber Co. (Mich.) 53 N. W. 1045..... 701
Wilkins v. U. S., 37 C. C. A. 588, 96 Fed. 837 ..... 459
Williamette Valley, The, 13 C. C. A. 635, 66 Fed. 565..... 197
Williams v. Nottawa, 104 U. S. 209, 26 L. Ed. 719..... 205
Williamson v. Insurance Co., 86 Wis. 393, 57 N. W. 46, 39 Am. St. Rep. 906..... 506
Wm. & Mary College v. Powell, 12 Grat. 372 ..... 199
Wilmington, The (D. C.) 48 Fed. 566, 567 943
Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147..... 430
Wilson v. Rousseau, 4 How. (U. S.) 646, 674, 11 L. Ed. 1141, 1153..... 114
Wilson v. Shoenberger's Ex'rs, 31 Pa. 295 190
Wilson v. Simpson, 9 How. 109, 13 L. Ed. 66.....73, 77, 78, 79

| | Page |
|---|---|
| Wilson Bros. v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147 | 428 |
| Winans v. Denmead, 15 How. 330, 14 L. Ed. 717 | 87 |
| Winchester Repeating Arms Co. v. Cartridge Co. (C. C.) 54 Fed. 711 | 415 |
| Windham Provident Inst. v. Sprague, 43 Vt. 502 | 470 |
| Winehill v. Insurance Co., 27 La. Ann. 63 | 500 |
| Winning v. Eakin, 44 W. Va. 19, 28 S. E. 757 | 480 |
| Winslow v. State (Ala.) 9 South. 728 | 873 |
| Wisconsin Compressed Air House Cleaning Co. v. Cleaning Co., 60 C. C. A. 529, 125 Fed. 761 | 889 |
| Wodell v. Coggeshall, 2 Metc. (Mass.) 89, 35 Am. Dec. 391 | 873 |
| Woodard v. Railroad Co., 10 Ohio St. 121 | 577 |
| Woodworth v. Stone, 3 Story, 749, Fed. Cas. No. 18,021 | 414 |
| Worcester Bank v. Insurance Co., 11 Cush. 25, 265, 59 Am. Dec. 145 | 500, 502, 510 |
| Worley v. Tobacco Co., 104 U. S. 340, 26 L. Ed. 821 | 914 |
| Wright's Health Underwear Co. (C. C.) 115 Fed. 527, 119 Fed. 921, 56 C. C. A. 451 | 107 |
| Wunderlich v. Insurance Co., 104 Wis. 395, 402, 80 N. W. 471 | 506 |
| W. U. T. Co. v. Railroad Commission, 74 Miss. 80, 92, 21 South. 15 | 332 |
| Wyatt v. White, 5 H. & N. 371 | 277 |
| Yandes v. Wright, 66 Ind. 319, 32 Am. Rep. 109 | 290 |
| Yesler v. Seattle, 1 Wash. 308, 25 Pac. 1014 | 324 |
| Zinc Co. v. Franklinite Co., 13 N. J. Eq. 322, 341 | 290 |


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# CASES

## ARGUED AND DETERMINED

IN THE

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

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### MOORE v. FIDELITY TRUST CO. et al.*

(Circuit Court of Appeals, Third Circuit. June 1, 1905.)

No. 35.

FEDERAL COURTS—ACTION AGAINST EXECUTORS—ACCOUNTING—JURISDICTION.

Where the surviving partner of a firm was one of the executors of the estate of his deceased partner, the settlement of which was pending in the probate court of the state, which had full jurisdiction in equity to compel an accounting between the executors and by the surviving partner of his deceased partner's interest in the firm, a bill by a distributee under the will to compel an accounting by such surviving partner and a payment of the amount found due to the executors for distribution was a suit looking to the mere administration of the estate, and was not, therefore, maintainable in the federal courts.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 796, 1410; vol. 22, Cent. Dig. Executors and Administrators, § 2004.]

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

For opinion below, see 134 Fed. 489.

John M. Gardner and V. G. Robinson, for appellant.

H. Gordon McCouch, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The bill of complaint, which the court below dismissed for lack of jurisdiction, was brought by Albert H. Moore, a citizen of New York, who is a son of Andrew M. Moore, deceased, and a distributee under his will, against the three executors named therein, citizens of Pennsylvania, to whom letters testamentary had been duly granted. One of these executors, Joseph F. Sinnott, was in partnership with Andrew M. Moore down to the time of his death, in the wholesale liquor business. The bill alleged that among the partnership assets of this firm of Moore & Sinnott were certain trade-marks, also the firm name of Moore & Sinnott, also the good will of said business, also the right of said Moore & Sinnott to sell liquors under the firm name and style of

*For dissenting opinion, see 138 Fed. 1008.

"Moore & Sinnott, Successors to John Gibson's Son & Co." It further alleged that these assets were of very great value, and had "never been appraised nor inventoried by the said Sinnott or the other defendants herein, and in no manner or way accounted for by the said Sinnott at any time, and that the affairs of said partnership have not been wound up nor accounting had with said Sinnott, surviving partner, and the executors and trustees of the estate of Andrew M. Moore." It further alleged "that the said defendant, Joseph F. Sinnott, has, since the death of said Moore, and is still, conducting and prosecuting the said business * * * under the name of 'Moore & Sinnott, Successors to John Gibson's Son & Co.,' and otherwise as 'Moore & Sinnott,' with the said trade-mark labels upon the bottles containing said liquors, and selling large quantities of said liquors with the designation of 'Gibson Whiskey,' and is now and has ever since the death of said deceased partner realized great profits in said business, * * * and has in no manner accounted for the same, or any part thereof, to the other executors and trustees, defendants herein." The last two and only remaining paragraphs of the bill, and its prayer for relief, are as follows:

"(8) Your orator further shows that the said Pennewill and Fidelity Trust Company, executors and trustees aforesaid, have neglected and failed to compel or require an accounting by the said surviving partner, Joseph F. Sinnott, of and concerning said rights, and the right and interest of the said estate in and to said trade-mark, good will, and firm name assets, although your orator has requested and demanded heretofore of them so to do.

"(9) That under and by virtue of the act of assembly of the commonwealth of Pennsylvania, May 11, 1901 (P. L. 174), the said Fidelity Trust Company and Walton Pennewill are empowered as executors to institute an action at law, bill in equity, or other appropriate legal or equitable proceeding on behalf of the said estate against said Sinnott to settle and determine the said questions and compel an accounting between said surviving members of said firm and the estate of said deceased partner, and, as your orator is informed and believes, the failure and neglect of the said Fidelity Trust Company and Walton Pennewill to take action and compel such accounting and to determine the value of said assets by appropriate proceedings for such purpose, in law or equity, and reducing to their possession the said assets, or the value thereof, belonging to said estate, for distribution to and among, or investment of the same for the benefit of, the beneficiaries and legatees mentioned in the said will of said deceased partner, inures greatly to their detriment and injury, and causes said beneficiaries and legatees, as well as said estate, a great injustice, to remedy which, and to compel the enforcement of the rights and secure the enjoyment of said estate, as well as the beneficiaries, including your orator, in and to said assets belonging to the estate of said deceased Andrew M. Moore, your orator brings this, his bill in equity.

"Wherefore, your orator prays judgment directing an accounting by and between the defendants Fidelity Trust Company and Walton Pennewill, as executors of the estate of Andrew M. Moore, deceased, and the defendant Joseph F. Sinnott, of and concerning the partnership affairs between said surviving partner and said estate, as and of the time of and from the death of said deceased to the date of said accounting, and, as incidental thereto, to determine what, if any, assets, property, or rights, including said firm name and the right to do business under said firm name as 'Successors to John Gibson's Son & Co.,' good will of said business, trade-marks owned and used by said firm, and other assets belonging to said firm of Moore & Sinnott, that have not been now and are undisposed of and that remain in common as the property of said firm, and that, in order thereto, a sale thereof and of the business of said firm be directed by a decree of this court, and the proceeds

arising therefrom be credited to the account of said firm for application and distribution according to the respective interests of said estate and the said Sinnott therein, and to the end that, on the coming in of the report of such sale, an accounting and settlement of the affairs of said firm may be had under the order of this court, and also that the purchaser at the sale, directed as aforesaid, acquire the exclusive right and use to the said firm name of Moore & Sinnott, as well as 'Moore & Sinnott, Successors to John Gibson's Son & Co.,' and the good will of the business of said firm and trade-marks aforesaid, and that the plaintiff have such other and further relief as may be just, with the costs and disbursements of this action."

In view of the prayer for "such other and further relief as may be just," we have considered, not only whether the court below had jurisdiction to award the special relief asked for, but also whether the case stated in the bill would justify any relief which a Circuit Court of the United States could properly grant. Story's Eq. Pl. §§ 41, 42. It appears, however, from the structure of the bill throughout, that the purpose for which it was framed is that which is thus stated at the close of its ninth paragraph: "To compel the enforcement of the rights and secure the enjoyment of said estate, as well as the beneficiaries, including your orator, in and to said assets belonging to the estate of said deceased Andrew M. Moore;" and, consequently, the position of the appellant necessarily is that the Circuit Court should have retained his bill, either for the recovery of certain assets on behalf of the estate of Andrew M. Moore, or for the purpose, at least, of compelling the co-executors of Sinnott to enforce its alleged rights in and to those assets. In our opinion, this position is untenable. It has been authoritatively decided that a federal court "has no original jurisdiction in respect to the administration of a deceased person," and cannot take any action or make any decree "looking to the mere administration of the estate." Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. Therefore, if a decree looking to the recovery of the assets in question, or ordering the Fidelity Company and Pennewill to institute proceedings for their recovery, would be a decree in respect to the administration of Andrew M. Moore's estate, it is clear that no relief agreeable to the frame of the bill could have been granted by the court below.

By the law of Pennsylvania, its orphans' courts are vested with exclusive jurisdiction in the administration of the estates of decedents, and that one of those courts had actually acquired jurisdiction of Andrew M. Moore's estate prior to the commencement of the present suit, the bill itself distinctly shows. "The jurisdiction of that court has attached to the assets; they are in gremio legis." Byers v. McAuley, supra; Van Dyke's Appeal, 60 Pa. 481. But it is said that:

"It is not sought by this action to administer the estate of the deceased; on the contrary, its primary object is to reach out for, and reduce to the possession of the representatives of the estate, for the purposes of administration by them in the proper forum, assets which, without the intervention of the equitable powers of this court, or those courts of the state possessing equitable power (under the Pennsylvania act of 1840), would not be acquired."

This statement, which we have taken from the brief of the appellant, assumes that a suit by a distributee to reduce to the pos-

session of the executors assets of a decedent's estate is not a suit "in respect to the administration of a deceased person," and that the particular assets here involved are recoverable only in a federal court, or in a court of Pennsylvania (other than the orphans' court) possessing equitable power. This assumption is erroneous throughout. It is the duty of executors, without suit by a distributee, to take possession of the assets of the estate committed to their charge. They are required to account for them in the orphans' court. For any refusal or omission to do so, they are there amenable, and it is peculiarly within the province of that court to see to it that nothing which they should take or demand shall be abandoned or relinquished. In other words, the administration of a decedent's estate includes the collection and recovery of its assets, and, in our opinion, there is nothing in the nature of the particular assets to which this bill relates, or in the facts which it states, to except the present case from the operation of this general rule. The appellant's hypothesis that the orphans' court cannot compel a settlement of the partnership account of Moore & Sinnott is a mistaken one. That court is a court of equity. It has jurisdiction of the assets belonging to the estate of Andrew M. Moore, and all parties in interest, including Sinnott, the surviving partner of the firm of Moore & Sinnott, are before it. The case is within its grasp, and "its power is only limited by the necessities of the case, and by its duty to administer equity in accordance with established rules. In such case it needs no other court to finish its work." Odd Fellows' Bank's Appeal, 123 Pa. 356, 16 Atl. 606. We have been referred to reported cases in which the Supreme Court of Pennsylvania has held that, where participation in the distribution of an estate is sought by one who claims that a balance is due him as surviving partner of the decedent, the orphans' court has no jurisdiction to settle the partnership account for the purpose of determining the validity or amount of his claim. But where, as in this case, it is charged that one of several executors, who is directly responsible to that tribunal, has failed to account for assets of the estate which are in his possession or control, the orphans' court has full power to effect a disclosure of such assets, and to this end may, where need be, settle a partnership account between the delinquent executor and his testator. Price's Estate, 81 Pa. 263; Unruh's Estate, 13 Phila. 337. In the last mentioned of these cases the court adopted the reasoning of the opinion in Leland v. Newton, 102 Mass. 350, in which it is said:

"Where one of two partners dies, * * * if the survivor himself becomes the personal representative of the deceased, he becomes bound, as executor or administrator, to render an account of his proceedings to the judge of probate. That account necessarily involves the settlement of the partnership affairs. There is no need of any other legal process, because all persons interested in the estate have an opportunity to be heard in respect to the settlement."

The Pennsylvania statute of June 16, 1836, § 19 (P. L. 792), provides that the jurisdiction of the orphans' court shall embrace "all cases * * * wherein executors may be possessed of or are in any way accountable for any real or personal estate of a decedent,"

and we need not assume to determine whether, if the liability to account which is here asserted exists, it extends to and includes all the executors, or attaches only to Sinnott. That question (if it arises) will be for decision by the orphans' court, whose authority to require an accounting, either by all or by any one of the executors, seems to be unquestionable (Bierly's Estate, *81 Pa. 419); but a federal court could not, without making a decree "looking to the mere administration of the estate," require any accounting at all.

The appellant says, in the brief he has filed in this court, that he "is not seeking * * * to compel the executors to sue," and it appears from the opinion of the court below that he did not there ask that it should retain his bill for the purpose of ordering any suit to be brought. But, waiving the point that a position not taken in the court of first instance cannot be insisted upon on appeal, we have considered the broad question whether, upon the case made by the bill, the Circuit Court had power to impose any direction whatever upon these executors, or upon any of them. It is obvious that no direction other than a decree that the coexecutors of Sinnott should compel him to account would have been pertinent or could have been efficacious, and this, as we have seen, the orphans' court may itself require him to do. The direction and control of executors and administrators in the performance of their duties is an essential attribute of its jurisdiction. Rhone on Orphans' Court Practice, vol. 3, §§ 144, 345. They are officers of that court (Byers v. McAuley, 149 U. S. 615, 13 Sup. Ct. 906, 37 L. Ed. 867), and should not be compelled to obey orders from two courts in respect to the administration of the same estate (Id., page 613 of 149 U. S., page 907 of 13 Sup. Ct. [37 L. Ed. 867]). This jurisdiction for direction and control was not taken from the orphans' court by the Pennsylvania act of 1901 (P. L. 174). That statute neither curtailed the powers of the orphans' court, nor enlarged those of any other court. It merely made it lawful for the "remaining executors" (as well as "assignees," etc.) to bring suit, on behalf of the estate, against any one or more of their number who might be indebted to it. This provision is permissive, not mandatory. The procedure it authorizes is not exclusive; and if, in the judgment of the orphans' court, it should be resorted to in this instance, it is for that court, in the exercise of its power of control, to direct the Fidelity Company and Pennewill to pursue it.

Our conclusion is that the appellant's bill did not, in any view which can be taken of it, present a case cognizable by the Circuit Court, and therefore the decree of that court, by which it was dismissed, is affirmed.

## NATIONAL BISCUIT CO. v. NOLAN.

(Circuit Court of Appeals, Eighth Circuit. May 11, 1905.)

No. 2,065.

1. EXPERT TESTIMONY.
The issue on trial being whether the defendant was guilty of actionable negligence in not providing the plaintiff a reasonably safe place in which to work about machinery, it was not competent for the machinist, whose duty was to look after the machinery and see that it was in good running order, without more, to testify that in his opinion the machinery should have been safeguarded, as it usurped the province of the jury to determine such question of fact from all the evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2318.]

2. SAME.
The opinions of so-called experts are not received if all the facts can be ascertained and made intelligible to the jury, or if it is such as men in general are capable of comprehending and determining.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2308, 2310.]

3. PERSONAL INJURIES—DAMAGES—EVIDENCE.
On trial to a jury, the plaintiff was permitted to testify that she depended upon herself for support. *Held* to be error, as such a rule would create a shifting scale for measuring compensation for personal injuries, making it depend upon the pecuniary condition of the sufferer.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 498.]

4. APPEAL—PREJUDICIAL ERROR—PRESUMPTIONS.
Where improper evidence is received which might have had a tendency to unduly influence the minds of the jury, the presumption is that it was prejudicial, and the verdict should be set aside.

5. INJURY TO SERVANT—MASTER TO FURNISH A REASONABLY SAFE PLACE TO WORK.
This rule is always conditioned that the employer is only bound to ordinary and reasonable care, as applied to the circumstances under which the liability arises, to furnish a reasonably safe place and machinery, and so as not to impose upon the employer the burden of being held as an absolute insurer of the employé, or so as not to excuse the employé from the exercise of reasonable care to avoid an obvious danger, or to not needlessly expose himself to a danger which due care on his part would avoid.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 172, 173, 178, 179.]

6. SAME—WARNING SERVANT OF DANGER.
Where the place assigned the employé, of full age, good intelligence, and experience, is not necessarily dangerous, and no injury would occur but for the employé unnecessarily exposing himself outside of the line prescribed for his work, the master cannot be held to have reasonably anticipated such abnormal movement.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 312, 313.]

7. SAME—CONTRIBUTORY NEGLIGENCE.
Where the employé, a girl of age and intelligence, who had worked for six weeks at a table where the machinery was guarded by being boarded up, and is transferred to work at another table near by, where the machinery is not so boarded up, and this fact is obvious to her, and after working there several hours she thrust her arms through endless chains, held apart by iron bars 4½ feet apart, moving at the rate of one every six seconds, to replace a piece of paper which had fallen from a shelf, whereby her arms were broken by coming in contact with such moving

bars, she cannot recover damage from the employer on the ground that she did not see the moving bars prior to the accident, and that the employer had not warned her of their existence.

(Syllabus by the Court.)

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

This is an action to recover damages for personal injuries, in which the jury returned a verdict in favor of the defendant in error, the plaintiff below, for the sum of $3,500. On motion for new trial, the court conditioned the overruling thereof on the remission of $1,000 of the amount, which was accepted by the defendant in error. To reverse the judgment entered thereon, the defendant below prosecutes this writ of error.

The plaintiff in error, a corporation, on the 25th day of August, 1902, was engaged in operating a bakery in the city of Minneapolis, Minn. Its specialty was the manufacture of what is known as "cookies." The building in which the work was conducted consisted of six stories. The cookies were prepared on the sixth floor, and carried to the second floor in pans by means of what is called a "conveyor," operated by steam. These pans were conducted to a level with the tables on the second floor, and by rollers carried along the table to the further end, where the pans were received by a man who lifted and turned them edgewise on a carrier moving about 2½ feet above the table, nearly back to the other end of the same, where such pans, after being emptied, were returned again to the sixth floor. This conveying was done by two endless chains, about three feet apart, moving perpendicularly from the sixth floor down to and around a shaft or revolving rod, situated, approximately to the center line of said receiving tables on the second floor near one end and parallel with the table. Said pans rested on dogs or brackets attached to the conveyor. There were several tables on said second floor, about 20 feet long and 4 feet wide, and 2 feet 10 inches from the floor. There was a trough, circular shaped at the bottom, extending along the center line of the table, into which the broken cookies were thrown as they were picked off the pans by the girls stationed at the tables doing the work. The pans of cookies as they descended the elevator came to the west end of the table, and thence were slowly carried east over the surface of the table by rollers to the east end. Eight girls, four on each side of the table, picked the cookies from the pans and put them into a little trough, about 3½ inches deep, running along on each side of the outer edge of the table, and afterwards packed them in boxes placed on stands near by. After the cookies had thus been removed the pans would be at the east end of the table, where they were taken by another workman and put in another conveyor, which carried them back edgewise along such central line nearly to the west end of the table, where two endless chains came down from the sixth floor, passed around said shaft or roller, 16 inches above the line surface of the table, and about 26½ inches from the edge of the table on either side. The endless chains which passed perpendicularly from the sixth floor around said shaft or roller were held apart by what is known as "spreaders," which were made of strips of iron 1¼ inches wide and one-eighth of an inch thick. There were intervals between the spreaders of 4½ feet, and the chains and spreaders ran around said shaft at the rate of about 42 feet per minute; that is, about 10 of the spreaders passed a given point each minute. At all the tables, except table No. 1, hereinafter mentioned, there was a wooden framework through which the spreaders and chains passed, situated 9⅛ inches above the sprocket shaft. The chains and spreaders passed downwards on the north side of the rod or shaft, and passed around it and up on the south side, being carried by means of sprockets on the shaft. There was on the table a little shelf called "cartoon shelf," running parallel with the top of the table, about 16 inches above the same, nearer the south side than the north side of the table, the north edge of which shelf was 32 inches from the north edge of the table, and about 7 inches wide. The defendant in error worked at table No. 2, about 7½ feet from table No. 1. She had been so engaged for about six weeks prior to the accident in question. About 6

o'clock p. m. on August 25, 1902, she moved from table No. 2 to table No. 1, to take the place of one of the girls who dropped out. Under the direction of the lady in charge of this immediate work, she took a position on the south side of the table, and about half an hour before the accident, on her own volition, she moved around to the north side of the table to work. While so engaged, a piece of wrapping paper used in said packing fell from said shelf on the opposite side from where she stood onto one of the pans, which she picked up, and reached her arms through the open space between said endless moving chains to replace it on the shelf. In so doing, her arms were caught by one of the cross-bars between said chains, called a "spreader," and were broken by being carried up against a wooden crosspiece. At the time of the accident the place where she stood was well lighted.

Other facts will appear in the course of the following opinion.

Koon, Whelan & Bennett, Ralph Whelan, and William H. Bennett, for plaintiff in error.

Henry W. Benton and Joseph W. Molyneaux, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

Two preliminary questions are presented by the assignment of errors, which are not unimportant to be settled. One Rothenberger was being examined as a witness by counsel for defendant in error. After merely testifying that he was a general mechanic, employed by the plaintiff in error as its master mechanic to look after the machinery and keep it in running order, counsel for defendant in error asked the following question: "Well, you say you are a machinist; in your opinion, was it machinery that needed to be guarded?" To this question counsel for plaintiff in error objected, on the ground that it was immaterial and called for the conclusion of the witness. The court overruled the objection, and the witness answered, "Yes, sir." This, in our opinion, was error. One of the crucial questions on trial before the jury was whether or not reasonable care on the part of the employer required that the part of the machinery where the endless chains and spreaders passed the place where the defendant in error was at work should have been protected by safeguards to prevent the accident in question. Necessarily, this was a question of fact to be developed before the jury from all the attendant circumstances, which would address themselves to the common sense and understanding of 12 men of average intelligence. As such, it was clearly susceptible of proof of the conditions comprehensible to the common understanding of the triers of the fact. It was not shown that the witness had any special experience founded on observation as to the necessity of guarding such place. He only knew, so far as the evidence developed, the mechanical structure of the machinery, and whether it was in good running order. He was not asked as to whether such machinery was dangerous in its operation, and it was no more proper to ask this witness for an expression of his opinion as to whether the place should have been guarded than it would have been to ask him

whether or not in his opinion it was dangerous for the girl to thrust her arms into the place whereby they would be brought into contact with the rapid movement of the spreaders. For him to answer the bald question as to whether the machinery needed to be guarded was to usurp the province of the jury, based on all the facts and circumstances, as respected the situation of the defendant in error at the time and place. The opinion of so-called experts is not received "if all the facts can be ascertained and made intelligible to the jury, or if it is such as men in general are capable of comprehending and understanding." 7 Amer. & Eng. Enc. of Law, 493; Neilson v. Chicago, etc., Ry. Co., 58 Wis. 516, 17 N. W. 310; Watson v. Milwaukee Ry. Co., 57 Wis. 332, 15 N. W. 468; New Jersey T. Co. v. Brabban, 57 N. J. Law, 691, 32 Atl. 217; 2 Labatt, Master & Servant, § 830; New York Elec. Equip. Co. v. Blair, 79 Fed. 896, 25 C. C. A. 216; Graham v. Penn Co., 139 Pa. 149, 21 Atl. 151, 12 L. R. A. 293; Sappenfield v. Main Street, etc., Ry. Co., 91 Cal. 48, 27 Pac. 590.

The defendant in error was permitted, over the objection of plaintiff in error, to testify that she was dependent upon herself for support. This was also error. Whether she was rich or poor, with or without an adequate income outside of her manual labor, in no manner affected her right to recover compensatory damages resulting directly from her injuries. Such compensation would include her physical and accompanying mental suffering, if any, loss of time, the value thereof based on her earning capacity at the time of receiving the injury, and any prospective loss based upon the probable continuation or permanency of such disability. Ala. G. S. R. R. Co. v. Carroll, 84 Fed. 772, 780, 781, 28 C. C. A. 207; Pennsylvania Co. v. Roy, 102 U. S. 451–460, 26 L. Ed. 141. Any other rule would create a shifting scale for measuring compensation for such injury, making it dependent upon the pecuniary condition of the sufferer.

Error presumptively works a prejudice to the party against whom it was committed, and this presumption is only overcome when it appears beyond a doubt that the error challenged did not prejudice and could not have prejudiced the complaining party. Deery v. Cray, 5 Wall. 795, 807, 808, 18 L. Ed. 653; Smiths v. Shoemaker, 17 Wall. 630, 639, 21 L. Ed. 717; Moores v. Bank, 104 U. S. 625–630, 26 L. Ed. 870; Gilmer v. Higley, 110 U. S. 47–50, 3 Sup. Ct. 471, 28 L. Ed. 62; Railroad Co. v. O'Brien, 119 U. S. 99–103, 7 Sup. Ct. 172, 30 L. Ed. 299; Mexia v. Oliver, 148 U. S. 664–673, 13 Sup. Ct. 754, 37 L. Ed. 602; Railroad Co. v. O'Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; Peck v. Heurich, 167 U. S. 624, 629, 17 Sup. Ct. 927, 24 L. Ed. 302; Railroad Co. v. McClurg, 59 Fed. 860, 8 C. C. A. 322, 325; National, etc., Association v. Shryock, 73 Fed. 774, 20 C. C. A. 3, 11; Railroad Co. v. Holloway, 114 Fed. 458, 52 C. C. A. 260; United States v. Gentry, 119 Fed. 70, 55 C. C. A. 658, 663. So, although there may have been competent evidence sufficient to sustain the verdict, yet if improper evidence was received which might have influenced the jury, or the chances are even that it may have had a tendency to injuriously affect the minds of the jury, the verdict should be set aside. Lowry v. Harris, 12 Minn. 255 (Gil.

166); Hoberg v. State, 3 Minn. 262 (Gil. 181); Farmers, etc., Bank v. Whinfield, 24 Wend. 420.

The learned trial judge was evidently impressed with the fact that the jury displayed ill judgment or temper in exaggerating the amount of the damages, as he compelled a remittitur of part of the award. It is impossible, however, to say whether or not it fully neutralized the sympathy naturally aroused in the mind of the jury by the vice of this evidence. Where the beneficiary of such evidence insists upon its admission against the protest of the adversary party, every presumption of the fullest tendency of its hurtful effect should be indulged.

A more important question remains to be answered, which is, should the trial court have granted the request made by the plaintiff in error for direction to the jury to return a verdict for the defendant below on the whole evidence? This case presents an apt illustration of the frequent abuse of the wholesome rule of law that imposes upon the master the obligation only to exercise ordinary and reasonable care to furnish a safe place in which the employé is assigned to work, so as not to expose him to unnecessary hazards. Choctaw, O., etc., R. R. Co. v. Holloway, 191 U. S. 338, 24 Sup. Ct. 102, 48 L. Ed. 207. This rule is always hedged about with reasonable conditions, such as will not impose upon the employer the burden of making him the absolute insurer of the safety of the employé, nor excuse the employé from the exercise of reasonable care on his part to avoid such dangers as are obvious to his eyes, or not to unnecessarily expose him to a danger which the exercise of reasonable care on his part would avoid. Negligence is always a relative question. It is that degree of care and circumspection which a reasonably prudent person may be expected to exercise under like circumstances.

This case is presented throughout by counsel for defendant in error as if she was then a mere novice and a girl of tender years. But the evidence shows that she was neither a minor nor a dolt. On the contrary, she was a woman over 18 years of age, and, under the laws of the state of Minnesota, she was "considered of full age for all purposes." Section 2, c. 59, p. 613, vol. 1, Gen. St. Minn. 1878. She was a manumitted person. And, as evidence of her intelligence, she had, prior to working for the plaintiff in error, learned and practiced the art of stenography. In the spring of 1902 she had worked in another like factory operated by machinery, but in which the baked material was delivered by hand at the tables where packed. She had worked for six weeks prior to this accident at the table next to the one where she was injured. It is true that at table No. 2, where she had so worked, the return elevator by which the empty pans were raised to the sixth floor was inclosed, for about three or four feet above the sprocket shaft, with boards screwed onto the framework, and then for a space in the center of about seven feet uninclosed, and above the uninclosed space again inclosed on the side, but not in the center, so that the boards would have prevented putting her hands into the place between the spreaders, or perhaps, seeing between them, in her immediate front. But

for about three weeks table No. 1 had been in operation without such guard. That she knew this fact when she went to table No. 1 to work must be conceded. She worked all the time in full view of said machinery conveying the pans to said table No. 1, only 7½ feet from her, and saw other girls at work there. The appliances carrying the pans were open to her view, and she could not have looked that way without observing that it was unguarded. Characteristically of such cases, she saw everything about the machinery carrying the pans except the spreaders. She could tell where the elevator was. At the table where she stood at the south side, she admits that the elevator "was right beside my [your] face," so that as she faced her table she "looked into the elevator that carried the pans up." She could not help hearing the sprockets and chains going around, and she admits that had she looked she could have seen the chains and sprockets. The photographs in evidence demonstrate to an absolute certainty that it was a physical impossibility for her to have failed to see the spreaders if she looked at all before her, for they were in plain view. There were intervals of 4½ feet between the spreaders, and the chains ran around the shaft at the rate of about 42 feet per minute, so that about 10 of the spreaders passed a given point every minute, or one in every 6 seconds. If she did not see this, it was because she shut her eyes to the view. Is it possible that the law, based upon common sense and in recognition of the instinct of self-preservation, will allow that she should unbidden, of her own volition, thrust her arms between the moving chains, without thought of her own safety, and without a search of the eye to observe the spreaders only 4½ feet apart, passing every 6 seconds? Where she stood at the post of duty assigned her, she was clear outside of the revolving chains and spreaders. She was exposed to no danger therefrom. It was no part of her assigned work to expose her hands and arms so as to come in contact with such spreaders. Why, therefore, invoke the doctrine of the duty of the master to advise her of a possible danger to which her allotted work did not expose her? The employer could not reasonably have anticipated that such a paper would chance to drop from its shelf, and much less anticipate the reckless, foolhardy act of this girl, thoughtlessly thrusting her arms through the chains, with the passing spreaders—an act which she could have omitted without dereliction of duty, and which could have been picked up by one of the girls on the opposite side of the table with absolute safety. Is it any palliation of her thoughtlessness that at the table where she had hitherto worked the chains were boarded up as above stated? She knew that table No. 1 had been recently installed; she saw that the endless chains and meshwork there were not protected as at table No. 2. This very fact was calculated to excite her curiosity and inquiry, and put her on her guard. Why should the lady overseer, in assigning the defendant in error to table No. 1, be held to have been guilty of negligence in not warning her that the revolving chains were not boarded up, when that fact was just as well known and apparent to the girl as to herself? Why should she be held to have been guilty of negligence in not pointing out to the

defendant in error the presence of the spreaders and chains, when that fact was open and obvious to her eyes? Especially so when her work lay outside of this machinery, and when it was not possible to have received the injury without this intelligent, self-poised girl heedlessly and unnecessarily putting her arms in a place of danger. The other girls worked at this table for three weeks without any accident, and there was nothing in the situation to excite any reasonable apprehension on the part of the lady overseer that this girl would do such a thoughtless act as to thrust her arms through such a meshwork of machinery to recover a piece of paper. It is a misconception of the law to apply to such a situation liability on the part of the master on the ground of a failure to provide a safe place for the servant to perform her work. As said by this court in St. Louis Cordage Co. v. Miller, 126 Fed. 495, 513, 61 C. C. A. 477, 495, 63 L. R. A. 551, "One cannot be heard to say that he does not know or appreciate a danger whose knowledge and appreciation are so unavoidable to a person of ordinary intelligence and prudence in a like situation." The liability of the employer in such cases is conditioned that "if the employé himself has been wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery, through the negligence of the employer." Washington, etc., R. R. Co. v. McDade, 135 U. S. 570, 10 Sup. Ct. 1044, 34 L. Ed. 235.

The law does not impose upon the master the extreme obligation to warn the servant "of every possible manner in which injury may occur. He must examine his surroundings, and take notice of obvious dangers and the operation of familiar laws." Nor can he demand that he shall be warned against risks that are as obvious to him as to the master. Miss. River Logging Co. v. Schneider, 74 Fed. 201, 20 C. C. A. 390; Dresser, Emp. Liab. § 99; Goodridge v. Washington Mills Co., 160 Mass. 234, 35 N. E. 484. As said by Judge Sanborn in St. Louis Cordage Co. v. Miller, 126 Fed. 508, 61 C. C. A. 490, 63 L. R. A. 551:

"A preliminary question for the judge always arises at the close of the evidence before a case can be submitted to the jury. That question is, not whether or not there is any evidence, but whether or not there is any substantial evidence upon which a jury can properly render a verdict in favor of the party who produces it."

In view of the indisputable facts in this case, it was not one to be turned over without comment by the court to the jury, to indulge the impulse of sympathy rather than give heed to the voice of the law.

The judgment of the Circuit Court must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

## FLORENCE & C. C. R. CO. v. WHIPPS et al.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1905.)

No. 2,062.

1. MASTER AND SERVANT—RAILROADS—INJURIES TO SERVANTS—SAFE PLACE TO WORK.

Where plaintiff's intestate, a railroad employé, was ordered to assist at night in the removal of débris caused by a landslide from the side of a mountain into a cut, obstructing traffic, and was killed by a large rock, which fell down the mountain side into the cut, the railroad company was not liable for failure to provide plaintiff with a safe place to work.

2. SAME—INSPECTION—ASSUMED RISK.

The servants of the railroad company being bound without orders to enter on the work of clearing the tracks without waiting for inspection, plaintiff's decedent was not entitled to rely on the railroad company having made an inspection of the place, but assumed the risk of injury from the dangers incident thereto.

[Ed. Note.—Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

3. SAME—FELLOW SERVANTS.

Where plaintiff's intestate, his foreman, and defendant's roadmaster were all engaged in the common employment of removing débris, caused by a landslide over the track of defendant's railroad in a cut, such roadmaster and foreman were decedent's fellow servants, for whose negligence in inspecting the mountain side for other loose rock which was liable to fall defendant was not liable.

[Ed. Note.—Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippen v. Kimball, 31 C. C. A. 286.]

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

The railroad of plaintiff in error runs between the towns of Florence and Cripple Creek, Colo., a distance of about 40 miles, through a rough, mountainous country, having tunnels and frequent cuts on the mountain sides. Rains and stormy weather, liable to loosen earth and rocks on the sides of such cuts, had continued for several days up to about the middle of the afternoon of April 11, 1901, when a landslide of loosened rock came down from the mountain side into a "thorough cut" on section 5 of said railroad, about two miles north of Adelaide Station. The mountain side of this cut down which the slide of rock came was more than 30 feet in height, and nearly perpendicular; and the cut on the opposite side of the track was 10 feet high, or more. The rock which so came down filled the cut for about 30 feet in length, and to the depth of 6 to 8 feet, completely obstructing the passage of trains. John McGrath, the foreman of said section, with such men as he had, began soon after the work of clearing away this fallen rock; and other foremen from nearby sections came with their men to aid him. The conductor of a south bound freight train, which about 4 p. m. was stopped by the obstruction, walked on to Adelaide and telegraphed the occurrence to some managing officer; and about 5 p. m. Miles McGrath, the roadmaster and superintendent of bridges, then at Florence, upon the order of the trainmaster, prepared a work train of flat cars pushed by an engine, and, gathering the laborers of the railroad company along the line, including a gang of bridge workmen, one of whom was Charles H. Whipps, arrived at the obstruction about 8 p. m., pushed the flat cars up to the rock lying in the cut, and set the men to work. Some of them at the south end of the obstruction, and among them the said Whipps, were put to loading the fallen stone upon the flat cars for removal, and others set to work at the north end of the pile of rocks; and said Miles McGrath then assumed the direction of the work. Up to that time John McGrath, the foreman of that sec-

tion, had been in charge; and while it was still daylight a brakeman from said freight train called the attention of John McGrath to a crevice at the side of a rock on the mountain side of the cut, and expressed his opinion that it was dangerous; though the brakeman had no experience in such formations. What, if any, inspection of this rock wall on the mountain side of the cut was made by said John McGrath, who was an experienced section foreman on that railroad, where such rock cuts were numerous, does not appear. The conductor of said freight train had met Miles McGrath at Adelaide, and expressed his opinion that there was danger of falling rock at the cut. When Miles McGrath, with his men, reached the obstruction, it was very dark. The only lights available were lanterns, and such light as reached the north end of the work from the headlight of the freight engine, which light, because of a curve in the railroad, did not reach the south side of the work, and from a small bonfire, which was bright for only a few minutes. After Miles McGrath reached the obstruction, because of the darkness, no inspection of the rock in the mountain side of the cut to determine whether any of it was liable to fall could be made with the lights which were available; and several of the foremen went together to Miles McGrath, and one of them in presence of the others asked Miles McGrath if the place had been examined and was all right, whereupon John McGrath, who was also present, said in their hearing to Miles McGrath, "Yes, I examined it before dark, and it is all right." Upon hearing that statement the foremen all went to work with their men, and the work continued until about 9 p. m., when a large rock fell down from the mountain side of the cut at the south side of the work, killing said Charles H. Whipps and some others, and injuring still others of the workmen. The plaintiffs (defendants in error) are the father and mother of said Charles H. Whipps, and brought this action under the Colorado statute to recover the damages, not exceeding $5,000, which they allege they have sustained by the death of their said son, which they aver was caused by negligence attributable to the defendant in not ascertaining by proper inspection the dangerous condition of the cliff of rock on the mountain side of the cut, and not propping or supporting the wall so as to prevent rock from falling therefrom, not advising said Whipps of the dangerous character of the cut, and not providing sufficient lights to enable said Whipps to observe the unsafe conditions, and in failing to provide him a safe place in which to work. Verdict and judgment was for the plaintiffs.

Karl C. Schuyler (Henry M. Blackmer, on the brief), for plaintiff in error.

Joseph H. Maupin and Arthur H. McLain (George H. Wilkes, on the brief), for defendants in error.

Before SANBORN and HOOK, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

It is a general rule of law governing the relation of master and servant that it is the duty of the master to use ordinary care to furnish and maintain a reasonably safe place for the servant in which to perform his work. This rule as to "safe place" only applies to such place as the master constructs, prepares, or selects for such purpose. It has a very limited application to the erection of new buildings or structures, though it may apply to stagings and the like, supplied by the master; and does not render the master responsible for dangers which necessarily inhere in the work and are only to be guarded against by the care the servants themselves shall exercise in its performance. Such risks, including the risk of neg-

ligence on the part of fellow servants, are assumed by all who enter into the employment. In many cases of preparatory work to fit a place for its intended use, like the excavation along a mountain side of a cut for a railroad track, the work so prosecuted will make the place which was safe before dangerous to the servants, as their work progresses, from the liability of stone or earth to slide down the sides of the cuts so made by the same servants, who must be held to have assumed all such risks. So in the pulling down of structures, and in the removal of débris after some catastrophe or accident which has made the place unsafe and unfit for the use to which it has been devoted, and where the very object of the work is to clear away the wreckage and restore the place to a condition of safety and usefulness. If by such catastrophe a railroad used for the transportation of passengers, freight, and mails is obstructed, the removal of the obstruction is a necessity admitting of no delay, whether the exigency arises in the daytime or at night; and servants employed, who undertake and engage in such work, necessarily assume the incidental risks. Gulf, etc., Ry. v. Jackson, 65 Fed. 48, 12 C. C. A. 507; Minneapolis v. Lundin, 58 Fed. 525, 7 C. C. A. 344; Porter v. Silver Creek, etc., Coal Co., 84 Wis. 418, 423, 54 N. W. 1019; Colo. Coal & Iron Co. v. Lamb, 6 Colo. App. 255, 266, 40 Pac. 251; Carlson v. Railway (Or.) 28 Pac. 497. The fact that the exigency causes the work to be done in the darkness of night and with insufficient lights does not lessen the assumption of the risks of the servants. Gulf, etc., Ry. v. Jackson, 65 Fed. 48, 51, 12 C. C. A. 507. But the court (adopting one of plaintiffs' requests) instructed the jury as follows:

"I charge you that it became and was the duty of said defendant company and its roadmaster, supervisor, and agent, before ordering and directing said Whipps to work at the aforesaid place, to have examined and inspected, or caused to be examined or inspected, the place wherein said deceased was required to work; and if you find that the said defendant, disregarding its duty toward the said deceased, negligently or carelessly failed to inspect the said premises, or negligently or carelessly failed to sufficiently and safely prop or support the said embankment or wall or cliff of rock, so as to prevent the same from caving or falling, or in any other manner negligently or carelessly failed to provide a safe place for the said Whipps to work, or negligently or carelessly failed to see that the loose rock and earth overhead was secure from falling in and upon the said Whipps at the said point, and that the place where he was ordered and directed to work was an unsafe and dangerous place to work, and that by reason of the defendant's violation of its duties and its several duties the said deceased lost his life, the case may be for the plaintiff, in connection with the other evidence in the case."

This charge was duly excepted to, and is assigned as error. The exception must be sustained. The first rock slide occurred late in the afternoon, and wholly obstructed traffic on the railroad, making it the duty of the servants of the railroad near that place, without awaiting orders, to clear the tracks of the fallen rock as rapidly as was possible. There was no time to summon engineers to inspect the face of the cliff. Such slides were not infrequent on this railroad, and there was no evidence that such a precaution as propping or supporting the embankment, wall, or cliff of rock was practicable, or was ever taken or thought of by any one under such circum-

stances on that or any other railroad. It was a sudden disaster, causing a condition of the tracks which had to be repaired with speed. The defendant was not responsible for the catastrophe and wreckage which caused whatever danger there was in the situation; and under such circumstances the doctrine of "safe place" had no application. The place was not in a condition made or chosen by the defendant, but in such condition as the disaster had left it. It was the plain duty of the servants in such an exigency, without awaiting orders, to engage in and hurry the work of clearing the obstruction from the track, and incidentally to look after and guard their own safety while so engaged; and the servants at hand, under John McGrath, their foreman and fellow servant, engaged in that work at once, and other servants, with their foreman, as they learned of the disaster, joined them. John McGrath was a man of experience on that railroad, where such slides had occurred before, and with the others could, while the daylight remained, see the face of the cliff, and form a judgment as to whether it appeared to be dangerous or reasonably safe for himself and his fellow workmen. That his attention was given to this subject appears, but the extent of his inspection or examination does not appear. His attention was called by a brakeman, who had no knowledge or experience about such matters, to a crevice or fissure at the side of a rock in the cliff. But it appeared that such crevices or fissures were common in all such cliffs, of which there were very many along that railroad, and this one does not seem to have impressed him as dangerous; and he appears to have relied on his own judgment and experience in preference to the suggestion of a mere trainman. Miles McGrath, the roadmaster, was sent there by another subordinate official, with an engine and flat cars and such workmen as he could pick up on the way, to clear the rock from the track; arriving there after it had become very dark. The foreman of these men which he brought there came to him when about to begin work, and one of them (Mr. Owens) asked him if the place was all right, whereupon John McGrath, who was present, answered, "Yes, I examined it before dark, and it is all right," and then the foremen went to work with their men.

It does not appear by direct testimony what information was given to Whipps, as to the exigency requiring this work to be done at night, or as to the character of the disaster, before he arrived at the obstruction and engaged in the work. It does appear that Miles McGrath arrived at Russell, where the bridge gang was, of whom Whipps was one, about 6 o'clock, with his engine and flat cars; and waited while they got their suppers, after directing that they go with him to this work; and that they got their shovels and went on those cars 10 miles or more to the work. If it is not a certain presumption that all the men were informed of the cause of their being called to distant work at such a time, it is clear that their foreman was so informed, and that on arriving at the obstruction, the situation was obvious, and also the necessity for clearing the track and causing that work, then only begun, to be hurried through, although in the night; and this could leave no other inference than

that the disaster had just happened, and that the work of removing the broken rock was being prosecuted by the workmen, caring for their own safety. The absence of sufficient light to enable them to carefully examine the cliff naturally occurred from the coming on of night and the hasty want of preparation, and was patent equally to all the men engaged. Gulf, etc., v. Jackson, 65 Fed. 48, 51, 12 C. C. A. 507.

As before stated, in the case of a sudden disaster like this rock slide, stopping all trains on a railroad, it was the duty of the servants without orders to enter on the work of clearing the tracks, and of the railroad company, without waiting for inspection, to direct its servants to hasten to the place and engage in that work, expecting the servants to use their own senses and judgment in avoiding dangers. The circumstances gave the servants no right to assume that a safe place was prepared and furnished, or any inspection had, other than such examination as had been or might be made by fellow servants in prosecuting the work. It appears that John McGrath had assumed to make such examination as he deemed proper. If he was negligent in this, although he was a foreman, he was engaged in a common employment with the others, and was a fellow servant. Balch v. Haas, 73 Fed. 974, 978, 20 C. C. A. 151. So, also, was Miles McGrath, the roadmaster. He had no entire control of any separate department, but was engaged, like the other servants and the foremen, in the common employment of keeping the road in repair, and was subject to the orders of the superintendent and trainmaster. Northern Pacific Ry. Co. v. Dixon, 194 U. S. 338, 343, 24 Sup. Ct. 683, 684, 48 L. Ed. 1006. In this case the court says:

"We have no hesitation in holding, both on principle and authority, that the employer is not liable for an injury to one employé occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work. It is enough to bring the case within the general rule of exemption if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes; or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end."

Here all these servants, including the foremen and the roadmaster, were, when the disaster happened, engaged in the common work and enterprise of keeping the railway in proper condition for the passage of trains. The disaster caused an instant sudden emergency in the very work in which they were engaged. An emergency admitting of no delay—not even for daylight—certainly not for the summoning of the managing officers of the railway or of its engineers. The work to be done was simply the rough work of clearing the tracks of the fallen rocks, which the servants, under their foremen and roadmaster, were entirely competent to perform. The circumstances and conditions must have made it plain to all that no inspection or precaution respecting the cliff was or could have been had except by such of the servants as were there while it was daylight. Under these circumstances the servants who came later as well as those who were there in daylight assumed the risk of the

employment they engaged in; and if John McGrath or Miles McGrath were negligent in representing the place to be safe, that was negligence of fellow servants. Northern Pacific Co. v. Dixon, above cited; Pennsylvania Co. v. Fishack, 123 Fed. 465, 59 C. C. A. 269.

It is unnecessary to consider in detail the several assignments of error. The instructions to the jury throughout conformed to the theory presented by the instruction above quoted.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

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## MONARCH ELECTRIC & WIRE CO. v. NATIONAL CONDUIT & CABLE CO.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

No. 1,091.

CONTRACTS—ACTION FOR BREACH—QUESTIONS FOR JURY.

Defendant was a New York corporation engaged in manufacturing copper wire, maintaining an office in Chicago in charge of an agent. Plaintiff was an extensive manufacturer of electrical supplies, using large quantities of copper wire, having its office in Chicago. Its president, who had previously dealt with defendant through its Chicago office, called up the agent by telephone, and asked the price on 100,000 pounds of copper wire, and on being told asked the agent to enter plaintiff's order, saying he would send it in writing, to which the agent answered, "All right." The order was sent and received without objection, but subsequently, copper having in the meantime advanced in price, defendant refused to fill it, and plaintiff sued in assumpsit for breach of contract, introducing evidence showing the custom in the business and the previous course of dealing between the parties. *Held* that, whether the telephone conversation, supplemented by the written order, constituted a contract, in view of such custom and course of dealing, and also whether the agent of defendant was authorized to make the contract on its behalf, were questions for the jury, and that the direction of a verdict for defendant at the close of plaintiff's evidence was error.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 141–143.]

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

Action of assumpsit for breach of contract in the failure of defendant in error to deliver to plaintiff in error, two hundred thousand pounds of copper wire. At the close of plaintiff's evidence in the Circuit Court, on motion made by defendant's counsel, the jury was instructed to return a verdict for the defendant; and upon this action of the court was assigned the error that constitutes the chief question in this case. The facts are stated in the opinion.

Albert N. Eastman, for plaintiff in error.

Gilbert E. Porter, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. The plaintiff in error is a manufacturer of electrical supplies, using large amounts of copper, and do-

ing a business that reaches from one hundred and fifty to two hundred million dollars a year.

The defendant in error is a New York corporation engaged in the manufacture and sale of copper wire. For a number of years the defendant has maintained a Chicago office, in the charge of one H. E. Cobb, through whom the contracts in question were made.

The evidence tended to show that on January 24th, 1902, one Samuel Mankowitz, president of the plaintiff, who had had previous dealings for copper wire with the defendant through Cobb, called Cobb on the telephone, asking him for a price on one hundred thousand pounds of wire; that Cobb named twelve cents a pound; that Mankowitz said "enter my order"; that Cobb said "all right"; that Mankowitz then said "I will mail you the order, either during the day, or I will send it over"; and that on the same day Mankowitz sent to Cobb a writing as follows:

"Chicago, Jan. 24th, 1902.

National Conduit & Cable Co.,
Mr. H. E. Cobb, Agent,
Chicago, Ill.

Dear Sir:—

As per conversation with you this day, you may enter our order for 100,000 lbs. bare copper wire at .12lb, base f. o. b. New York, to be taken as needed, sizes to follow specifications. We agree to pay 5% interest for remaining amount we do not take within 30 days.

Trusting that this will be satisfactory, we are
Yours very truly,

MONARCH ELEC. & WIRE CO.,
[Signed] H. SCHWAB,
*Secretary.*"

The evidence tended to show also, that on the morning of January 28th, Mankowitz called up Cobb, asking him again for a price on copper wire, to which Cobb replied that the price was the same as the last; that Cobb was then told to enter the plaintiff's order for one hundred thousand pounds, to which he replied "all right"; and that on the same day, the following paper was sent by the plaintiff to Cobb:

"Chicago, Jan. 28, 1902.

Mr. H. E. Cobb,
Agent, National Conduit & Cable Co.,
Chicago, Ill.

Dear Sir:—

As per conversation with you this morning, you will enter our order for 100,000 lbs., bare copper wire at .12 lb., f. o. b., factory, sizes to follow on specifications, to be taken within 30 days. We are
Yours very truly,

MONARCH ELECTRIC & WIRE CO.,
[Signed] H. SCHWAB,
*"Sec'y.*"

The evidence tended to show further, that on this latter date, January 28th, but after the conversation just related, Cobb called up the plaintiff on the telephone, saying that he had just received a wire from his house in New York, advising him that copper had advanced. Thereupon Mankowitz said "I am glad to hear it", to which Cobb replied, "well, you came in pretty lucky."

The day following, January 29th, Cobb wrote a note to the plain-

tiff, enclosing a letter received by him from the defendant in New York, which note, with the enclosure, are as follows:

"The National Conduit & Cable Company,
Chicago Office, 1501 Monadnock Building,
January 29, 1902.

Monarch Electric & Wire Co.,
135 S. Clinton St., City.

Gentlemen:—

Enclosed find letter from our New York office, referring to your order of January 24th for 100,000 lbs. bare copper wire. Please note contents and advise me at once whether you want us to accept your order under these terms.

Yours very truly,
[Signed] NATIONAL CONDUIT & CABLE CO.,
H. E. COBB."

(Enclosure)

"H. E. Cobb, Esq.,
Chicago, Ill.

Dear Sir:—

We have your favor of the 25th inst, enclosing your order No. 88 for the Monarch Electric Wire Co., Chicago, and in relation to this order, we beg to say that the only terms on which we would accept it would be cash on B/L, and that the total order must be taken before July 1st. We are doing nothing in connection with the order until we hear from you further.

Yours truly,
THE NATIONAL CONDUIT & CABLE CO.
[Signed] per G. G. O'CONNOR.

P. S. We return herewith letter of the Monarch Elec. Co."

To which plaintiff answered as follows:

"Chicago, Jan. 30, 1902.

Mr. H. E. Cobb,
C/o National Conduit & Cable Co.,
Chicago, Ill.

Dear Sir:—

We are in receipt of your letter of the 29th inst., where you enclose letter from your New York office. Referring to the contents, we wish to say that the conditions and terms your New York office name, are entirely satisfactory to us, we of course expect you to allow us the usual cash discount.

Yours very truly,
MONARCH ELECTRIC & WIRE CO.,
[Signed] S. MANKOWITZ,
*Pres.*"

This letter evidently was sent to New York; for on February 6th, Cobb received a letter written to him from the New York house on February 3rd, which read as follows:

"In relation to the inquiry of the Monarch Electric & Wire Co. as everything in relation to this matter has passed through your hands already, we want you to see these people and tell them for us that their order has not been accepted, is not accepted now, and will only be accepted at the market price of copper when it is accepted, and with the understanding that the terms shall be net cash on B/L and no discount."

This letter Cobb enclosed to the plaintiff.

What has now been stated constitutes the transaction on which the action is based. From time to time plaintiff made out specifications, according to his contract as claimed, which defendant refused to fill; whereupon the action was brought.

Assuming that Cobb had authority to make a contract, the question that first arises is, Did the telephone conversations constitute

a contract? It will be seen that the conversations covered, in express terms, a number of pounds of copper and the price per pound, and nothing more; while the written order, in addition, stipulated that the delivery should be "as needed," the amounts not taken within thirty days to draw interest at the rate of five per cent. From this it is argued that Cobb's assent to the verbal proposal did not carry assent to the proposal as enlarged in the written order.

But the conversations over the telephone have a background in the customs of the trade and previous dealings; and in view of such background must receive their interpretation. Plaintiff was not a merchant merely; he was a manufacturer also—a manufacturer whose need for copper wire as material, corresponded, in amount and time, with the specific contracts he had undertaken. This the defendant must have had in mind, and we must assume that, possibly, at least, the dealing was on that basis. Indeed such was the proof of customs of trade and the previous dealing between the parties. The evidence tending to establish these facts should have gone to the jury; for from such evidence, in connection with the other facts shown, the jury would have been warranted in finding that the telephone conversations constituted a complete understanding not varied by the confirmatory notes.

Nor can we assume that the conversations over the telephone were meant simply as an offer, the acceptance of which was not understood to be binding, until submitted to the New York office. There is no direct evidence to that effect; and whether such was, or was not, in the mind of the parties, is a question of fact also that should have gone to the jury.

The next inquiry is, Did Cobb have authority, or was he held out to plaintiffs as having authority, to enter into the contract? Here, again, the question for us to determine is, not what the evidence establishes, but whether, upon the evidence submitted, the court should have sent the case to the jury.

The direction was given, not at the close of all the evidence, but at the close of the plaintiffs' evidence. The case stood, therefore, as if the plaintiffs' evidence being closed, the defendant had gone to verdict with no further evidence. In such posture, it seems to us, that the previous dealings between the parties, the letter heads showing that the office occupied by Cobb was the Chicago office of the defendant, the fixing by Cobb of defendant's name to communications, and the other facts of that character submitted, were competent evidence to constitute, and in the absence of explanation by defendant, sufficed to constitute, a prima facie case to go to the jury. Indeed, these facts being shown, had the defendant rested his case without explanation, a verdict in favor of the plaintiff might easily have been sustained on the ground of the reasonable and natural inference that, in the absence of explanation, the facts would carry.

The instruction to the jury under all the circumstances, was, in our judgment, erroneous, and the judgment of the Circuit Court is reversed, with instructions to grant a new trial.

## CRANE v. BUCKLEY et al.

(Circuit Court of Appeals, Ninth Circuit. May 8, 1905.)

APPEAL—LIABILITY ON SUPERSEDEAS BOND—PROSECUTING APPEAL TO EFFECT.

Where the defendant in a suit to foreclose a contract for the purchase of real estate by an appeal secured a modification of the decree below, allowing him a substantial extension of time within which to make the deferred payments and protect his rights under the contract, his appeal was "prosecuted to effect," within the meaning of the condition of his supersedeas bond.

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

Cushing, Grant & Cushing, for plaintiff in error.

Theodore J. Roche, Matthew I. Sullivan, and J. F. Sullivan, for defendants in error.

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

HAWLEY, District Judge. The only point involved in this writ of error is, "Did the defendant Buckley prosecute his appeal to effect?" This question was answered in the affirmative by this court in Buckley v. Crane, 123 Fed. 29, 33, 59 C. C. A. 109. The rulings of the court below in the trial of the present case were in accord with the views heretofore expressed by this court.

The judgment of the Circuit Court is affirmed.

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## SAXLEHNER v. EISNER & MENDELSON CO.

(Circuit Court of Appeals, Second Circuit. April 19, 1905.)

No. 143.

1. TRADE-MARKS—FRAUDULENT USE—PROFITS—ESTOPPEL.

Where defendant had fraudulently appropriated complainant's trademarks and labels used on mineral waters, defendant was estopped to say that it would have been equally successful in selling this water had it used honest trade-marks and labels.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 93, 105, 112.]

2. SAME—ACCOUNTING.

Where defendants had fraudulently appropriated plaintiff's trademarks and labels and used the same in the sale of mineral water, plaintiff was not bound, on an accounting of profits, to show what part of defendant's goods it could have sold had it used honest marks and labels.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 104½, 112.]

3. SAME—EXPENSES.

Where defendant was engaged in selling other goods as well as Hunyadi water on which it fraudulently appropriated complainant's trademarks and labels, and on an accounting it appeared that the defendant's salesmen sold more goods of other character than they did of Huny-

adi water, the traveling expenses and salaries of such salesmen should be charged to general expenses, and not against the defendant's Hunyadi department exclusively.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 104½, 112.]

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

For opinion below, see 127 Fed. 1023.

On appeal by defendant from the final decree of the Circuit Court for the Southern District of New York, entered January 15, 1904, which confirmed the master's report, awarding $29,793.86 profits to the complainant, and directed the defendant to pay said amount, together with interest, costs, master's fees and disbursements, amounting in the aggregate to $31,874.36.

The report of the master contains the following conclusion:

"I am not convinced that the items under the head of 'traveling expenses,' 'salaries paid to salesmen' and 'Chicago expenses' are exclusively water department charges and as the proofs do not furnish any basis by which a definite proportion thereof as chargeable to this department can be computed, I have disallowed them as peculiarly 'Hunyadi' expenses and carried them to the general expense column whereby Hunyadi gets its proportionate credit.

"Making the foregoing disallowances and transfers and then employing defendant's method of computation I obtained the yearly results shown in the following tabulation:

| "Year." | Profits. |
|---|---|
| 1892 | $ 879 46 |
| 1893 | 9,026 22 |
| 1894 | 6,588 70 |
| 1895 | 3,238 02 |
| 1896 | 2,322 32 |
| 1897 | 2,180 64 |
| 1898 | 2,171 60 |
| 1899 | 2,618 83 |
| 1900 | 768 07 |
| | Total $29,793 86 |

"I accordingly find and report that the complainant is entitled to recover the sum of twenty-nine thousand seven hundred and ninety-three dollars and eighty-six cents ($29,793.86) as the net profit made by the defendant company during the period covered by the accounting by reason of the infringement complained of and adjudged."

This is the end of a long litigation between these parties. The preceding decisions will be found reported as follows: (C. C.) 88 Fed. 61; 63 U. S. App. 139, 91 Fed. 536, 33 C. C. A. 291; 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60; Id., 179 U. S. 43, 21 Sup. Ct. 16, 45 L. Ed. 77.

Charles G. Coe, for appellant.

Antonio Knauth, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge (after stating the facts). The two propositions principally relied upon by the defendant are:

First. That the recovery should be limited to the specific profits derived from the use of the red and blue label as distinguished from the use of the name "Hunyadi," the capsule and the size and shape of the bottle. As no testimony has been adduced showing the proportion of profits attributable to the label alone it is argued that nominal damages only can be recovered.

Second. That the master erred in charging the traveling expenses and salaries of salesmen employed by the defendant to the general expense account rather than to the Hunyadi department alone, which represented only about one-tenth of the defendant's business.

Neither of these contentions can be maintained. The label adopted by the defendant has been denounced by the courts as fraudulent and devised for the express purpose of enabling the defendant to trade on the good will established by the complainant. Had the defendant honestly intended to sell the bitter water imported by it on its merits it would not have dressed up its goods in such a way that even the intelligent and wary customer might be deceived. It might, for instance, have sold its water in ordinary bottles of the Apollinaris type, with a white oval label containing the words "Hunyadi Matyas" in black letters; but this it did not do and there is no evidence that the competing waters were ever sold in this country on their merits, viz.: in packages which clearly differentiated them from the complainant's water. The evident intent and purpose of the defendant was to poach on the reputation established by the Hunyadi Janos water. It started out to get a part of the complainant's profits and it succeeded, but we are familiar with no principle of law which will permit it to keep these profits. One who has fraudulently appropriated the trade-marks and labels of another will hardly be heard to say that he would have been equally successful had he used honest indicia and labels. It would be casting an intolerable burden upon the complainant in such cases if, after proving the fraud, the infringement and the profits, he were compelled to enter the realms of speculation and prove the precise proportion of the infringer's gains attributable to his infringement. The argument reduces itself to this: The defendant says: "If I had been honest I could have sold at least a part of these goods and as you have failed to show what that part is you are entitled to recover nothing." The answer is: "You were not honest." If authority be needed in support of the complainant's contention it will be found in the decision of the Supreme Court in this case. 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60.

During the period of the accounting the defendant sold 2,512,550 bottles of Hunyadi water. The testimony shows that this branch of the business was considered by the defendant's officers as both successful and lucrative. It is incredible that the shrewd business men in charge of the defendant company would continue a business for nine years which, according to the figures presented by them to the master, showed, with one exception, an annual loss and resulted in a total loss of $34,304. These figures were produced by adding to the cost of selling Hunyadi water items which should be added to the general expense of the business rather than to the water account alone. No separate account of the expenses of the water department was kept and the figures reported by the master were reached after marshaling the various items under the appropriate head. In a few instances items were charged to the water account, but the traveling expenses of salesmen were not among them. Naturally this should be so, for there can be no doubt that

these salesmen sold all the commodities dealt in by the defendant. One of them, in contradiction of the defendant's president, testified that he was paid by salary and not by commissions on the sale of Hunyadi water and that he sold about ten times as much Hoff's Malt Extract as Hunyadi water. Another salesman contradicts the defendant's president in other particulars. No one is called to corroborate him.

The subject of expenses presents simply a question of fact which was properly disposed of by the master. His report is most fair and conservative; as favorable to the defendant as it has any right to expect and we see no reason to disturb his findings. The great weight of testimony justifies the conclusion that the expenses of salesmen should be charged "to the general expense column whereby Hunyadi gets its proportionate credit."

The decree is affirmed.

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## ROSASCO et al. v. PITCH PINE LUMBER CO.

(Circuit Court of Appeals, Second Circuit. April 19, 1905.)

No. 167.

1. SHIPPING—CONSTRUCTION OF CHARTER PARTY—RIGHT OF CANCELLATION.
   A provision of a charter party requiring the vessel to sail in ballast for the port of loading within 48 hours after notice from the charterer designating such port, is not a condition precedent, a breach of which entitles the charterer to cancel the contract, where there is a subsequent provision for a canceling date if the vessel shall not have arrived at the port of loading, and she arrives within the time so fixed.

2. SAME.
   A vessel, then at Venice, was chartered "for a voyage from Ship Island or Pensacola, charterer's option, to Montevideo, * * * orders on signing B/L. Loading port to be named before vessel leaves Venice, but vessel to sail 48 hours after orders are given." *Held* that, in view of the situation of the parties when the charter was made, and of other provisions therein for dispatch, and fixing a canceling date if the vessel should not have arrived at port of loading, the clause requiring the vessel to "sail 48 hours after orders are given" applied to the orders given after the vessel was loaded, and not to the time she was required to sail from Venice after the naming of the port of loading.

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

On appeal from a final decree of the District Court for the Southern District of New York, entered May 13, 1904, in favor of the libelants for $2,561.80, damages for breach of a charter party. The facts are stated in the opinion below. 121 Fed. 437.

Charles C. Burlingham, for appellant.

J. Parker Kirlin, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The charter party contained the following stipulation: "Charterers have option of cancelling charter if vessel

not arrived at loading port by Nov. 15th, 1901." The designated loading port was Ship Island, Miss. The vessel arrived there from Venice and reported for cargo November 12, 1901, three days before the charterer could cancel the charter, pursuant to the provision just quoted. On November 15th the agent of the charterer, having learned that the vessel had not sailed from Venice within 48 hours after Ship Island was designated as the loading port, served notice on the master that the charterer declined to load the vessel "owing to the violation of your charter party." This action was taken under the following language of the charter, which provided that the Italian bark Guilia R. was chartered by the Pitch Pine Lumber Company "for a voyage from Ship Island or Pensacola, charterer's option, to Montevideo, Buenos Ayres or Bahia Blanca, A. R., orders on signing B/L. Loading port to be named before vessel leaves Venice, but vessel to sail 48 hours after orders are given." Construing this language as requiring the bark to sail from Venice within 48 hours after notice of loading port was given, the District Judge, nevertheless, decided that the stipulation was not a condition precedent, the breach of which warranted the cancellation of the charter. In view of the subsequent provision for canceling the charter if the bark reached Ship Island after November 15th the judge decided that the failure to sail from Venice within 48 hours was the breach of an independent covenant which entitled the charterer to any damages it might have sustained thereby but did not give it the right to refuse the bark. The District Judge undoubtedly felt that the action of the respondent in declining to load the bark after she had crossed the ocean in order to keep her agreement and had arrived well within the stipulated time, ought not to be upheld upon a strained or doubtful construction of the charter and we agree with him in thinking that if the 48-hour provision related to the departure from the port of Venice it must yield to the plain and unmistakable provision regarding the cancellation of the charter. If the negotiations of the parties on this subject had not culminated in an explicit agreement there might be difficulty in sustaining the libelants' position. It seems to us that there can be little doubt as to the soundness of the proposition that the respondent could, if it so desired, cancel the charter if the bark arrived at Ship Island after November 15, 1901, but could not do so if she arrived prior to that date.

It must be conceded that if the foregoing interpretation be adopted the question is not entirely free from doubt; if, however, the agreement be construed to mean that the bark was to sail from the loading port (Ship Island) within 48 hours after receiving orders to proceed to the port of discharge, all difficulty as to the law is eliminated from the case. It is now contended, and it is asserted that the contention is made for the first time in this court, that the clause in question should be interpreted as follows:

"A voyage from Ship Island or Pensacola, charterer's option, to Montevideo, Buenos Ayres or Bahia Blanca, A. R., orders on signing bill of lading, but vessel to sail 48 hours after orders are given. Loading port to be named before vessel leaves Venice."

Bearing in mind that in construing these contracts the court should be guided by the intention of the parties we are strongly inclined to the opinion that the foregoing is the proper and natural interpretation of language which it must be admitted is inartistic and somewhat ambiguous. Our reasons for this conclusion may be briefly stated as follows:

First: It is an inaccurate use of language to describe the mere designation of the loading port as "orders." If the parties had intended that the 48-hour provision should apply to the situation at Venice they would have stipulated that the bark should sail "48 hours after notice of loading port is given," or "48 hours after loading port is named." On the other hand, "orders" was a most apt and appropriate word to describe the action of the charterer in directing the master's course after his vessel was loaded with the charterer's property and especially so when the parties had used the word in a precisely similar sense in the paragraph immediately preceding. When they speak of the loading port they used the word "named"; when they speak of the port of discharge they use the word "orders."

Second: Though the agreement was made July 31, 1901, it was not until August 14th that Ship Island was designated as the loading port, indicating that the charterer was not anxious to load the vessel before November. The provision for naming the loading port was manifestly for the benefit of the vessel, otherwise she might have been compelled to touch at Pensacola only to be informed that her cargo was to be received at Ship Island. The charterer was amply secured by other provisions, found in the printed part of the charter, providing that the vessel should "proceed with all possible dispatch from Venice to loading port." The charterer needed no other protection than this, coupled with its right to cancel if the vessel failed to report November 15th.

Third: It was for the interests of both parties that the vessel should have quick dispatch after receiving her cargo. Delay here might result most disastrously to the charterer, but unless the 48-hour provision applied to the loading port the charterer had no redress. No other clause of the agreement gives it.

Fourth: The language so often quoted was written in the printed form in place of other language which had been erased. The printed portions so deleted provide for a safe port of discharge "48 hours allowed awaiting orders at Montevideo." In short, the charter as originally printed provided that after the loaded vessel arrived at Montevideo 48 hours should be allowed awaiting orders to proceed to a safe port of discharge. It seems fair to assume that the words "vessel to sail 48 hours after orders are given" were intended as a substitute for the words so erased. Read in the light of what seems to have been the intent of the parties we are of the opinion that the charter did not require the bark to sail from Venice within 48 hours after receiving notice that the charterer had selected Ship Island as her loading port.

The decree is affirmed with interest and costs.

## BOWER v. HOLZWORTH et al.

(Circuit Court of Appeals, Eighth Circuit. May 23, 1905.)

No. 2,199.

BANKRUPTCY—JURY TRIAL ON INVOLUNTARY PETITION—REVIEW.

Proceedings on a trial by jury of the issues joined on a petition in involuntary bankruptcy are not subject to review by appeal, but only on writ of error.

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

C. M. Brown (K. E. Willcockson, on the brief), for appellant.

C. H. Mackey and D. W. Hamilton, for appellees.

Before VAN DEVANTER and HOOK, Circuit Judges, and LOCHREN, District Judge.

PER CURIAM. Upon the involuntary petition of the appellees the appellant was adjudged a bankrupt, after the issues raised by the petition and answer respecting his insolvency and his commission of an act of bankruptcy had been determined against him by the verdict of a jury upon a trial had according to section 19 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]. It is sought to have the judgment reviewed by an appeal as in an equity case. The errors assigned relate to rulings made during the course of the trial before the jury. It is settled by the decision of the Supreme Court in Elliott v. Toeppner, 187 U. S. 327, 334, 23 Sup. Ct. 133, 47 L. Ed. 200, that the proceedings upon such a trial, had before a jury, are not subject to review on appeal, but only on writ of error. Upon the authority of that case this appeal must be, and is, dismissed.

## FARRELL v. ERIE R. CO.

(Circuit Court of Appeals, Second Circuit. April 6, 1905.)

No. 158.

1. RAILROADS—INJURY OF PERSON AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a boy 16 years old, approached on foot a crossing of double tracks of defendant's railroad over a street. After crossing the street the tracks curved sharply, and took a direction at right angles to their former course. Plaintiff's testimony showed that before going upon the crossing he looked in both directions along the track, which on the side of the curve he could see as far as a tunnel 1,300 feet away. There was no train in view from that direction, but one was approaching from the other on the further track, and he waited until it had passed, and then, looking along the other track and seeing no train, he started to cross, but was struck by a train coming from the opposite direction, and injured. There was thick smoke coming from the train which passed, and settling near the ground, and the train itself as it rounded the curve obstructed the view on the other track, except for perhaps 150 feet. There was also evidence that the train which struck plaintiff was moving at a speed of 15 miles an hour, in violation of a city ordinance, which

prohibited a speed greater than 6 miles. *Held*, that in view of such evidence, and the noise made by the train which had passed, the question of plaintiff's contributory negligence was one of fact for the jury.

2. SAME.

A person approaching a railroad crossing in a city is not bound to anticipate that an approaching train will proceed at an unlawful or an unusual rate of speed, and is not chargeable with negligence, as matter of law, in attempting to cross, if, in view of the distance at which the track seems to be clear, he would have time to cross before a train going at the usual and lawful speed would reach the crossing.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1074.]

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

Writ of error by the plaintiff in the court below to review a judgment entered upon a verdict directed by the court in an action brought to recover for injuries received at a highway crossing. The trial judge directed a verdict for the defendant upon the ground that the evidence established contributory negligence on the part of the plaintiff, and refused the request on behalf of the plaintiff to submit that issue to the jury. Error is assigned of that ruling.

J. B. Ker, for appellant.

Chas. MacVeagh, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The question whether the case was one which should have been submitted to the jury upon the issue of the contributory negligence of the plaintiff is the only one which has been argued at the bar.

The evidence upon the trial tended to show the following facts: Near the intersection of Monmouth street and Twelfth street, Jersey City, and a few feet westerly of the westerly line of Monmouth street, two parallel tracks of the defendant's railroad cross Twelfth street at right angles, and curve sharply to the westward, until they join the main lines of the defendant's road, when they run practically due west, and enter a tunnel distant about 1,300 feet from the crossing. Both Twelfth street and Monmouth street, as shown upon the map which was used upon the trial, are narrow streets, being about 30 feet wide. The plaintiff, a lad 16 years of age, was proceeding on foot, on the afternoon of a clear day, along the south side of Twelfth street, going west intending to cross the tracks. After he reached Monmouth street he looked to the left, and saw no train coming, though he could see the tracks unobstructed as far as the tunnel. Then he looked to the right, and saw a short freight train coming on the further track, which was going west towards the tunnel. He stopped and waited until it had passed and had got about 12 feet beyond the crossing. Then he looked again, saw the near track was clear to the westward as he thought for a distance of 100 feet, and started to cross; but as he got on the first track he was struck by a train coming from the westward. Thick smoke was coming from the locomotive of the train going towards the tunnel, and settling near the track; and the train itself while rounding the curve would preclude a person standing on Twelfth

street near the westerly line of Monmouth street from seeing a train coming from the westward on the nearer track more than 150 feet away. The evidence did not distinctly show how far the plaintiff was from the track when he finally looked to see if a train was approaching and started to cross. If he had reached the westerly line of Monmouth street, he would have been about 10 or 12 feet from the track. There was testimony that the train which struck the plaintiff was going at a speed of about 15 miles an hour.

Upon these facts we think the trial judge erred in taking the case from the jury. The testimony of the plaintiff indicates that he was a fairly intelligent lad, and if his narrative was true he approached the crossing without undue haste, and did not attempt to cross the tracks until he had looked, waited until one train had passed, looked again to see if he could cross safely, and discovering, as he supposed, that he could do so, went forward. It is not impossible that the smoke of the locomotive of the freight train obscured his view so that while the train was rounding the curve he could not have seen the approaching train more than 100 feet away. The noise of the freight train sufficiently explains his failure to hear the approach of the other train. If he was on the westerly line of Monmouth street when he made his final start to cross the track, he could have crossed, going leisurely, in about 5 seconds, and probably less. If the train that struck him had been moving at a speed of 6 miles an hour, it would have been about 11 seconds in covering the 100 feet. By one of the ordinances of the city it was unlawful for the defendant to propel its trains across any street within the city limits at a greater speed than 6 miles an hour. The engineer of the locomotive which struck the plaintiff testified that the customary speed of the defendant's trains at that place was at the rate of 5 or 6 miles an hour. If the train was in fact making a speed of 15 miles an hour, it would have traversed the 100 feet in about 4½ seconds.

The plaintiff was bound to use ordinary care, which was to be greater or less, according to the circumstances in which he was placed, and the dangers which a person of ordinary prudence would have reason to apprehend. He was not required to anticipate that an approaching train of the defendant would proceed at an unlawful rate of speed, or at an unusual rate of speed, or at a rate of speed dangerous in view of the relative location of the crossing and the curve. If, estimating the distance at which the track seemed to be clear, the time it would take a train to travel that distance proceeding at the usual speed, and the time it would require to cross the track in safety, a person of ordinary prudence would under the same circumstances have considered it safe to cross, the plaintiff was justified in attempting to do so. Unless the jury would not have been warranted in finding that ordinary care would forbid an agile lad to attempt to cross a railway track which he could pass in five seconds, when no train was in sight for a distance which a train proceeding at ordinary speed would cover in twice that time, the question of contributory negligence was not one of law, but one of fact.. Irrespective of any arithmetical calculations

based upon time and distance, if it was true that the plaintiff just before he stepped upon the track looked to see if any train was approaching, and did not see one, or if he did see the approaching train, and in that respect testified untruly, but nevertheless supposed that it was far enough away to permit him to cross the track without incurring any substantial risk, the question whether his attempt was one which an ordinarily prudent person would not have made was a question upon which fair-minded men might reasonably differ. Some weight is to be given to the presumption that those who are crossing a track in front of an approaching train, guided by the instinct of self-preservation, will not place themselves in imminent peril of life and limb by making the attempt without allowing a proper margin of safety. Reasonably prudent pedestrians not infrequently cross tracks near which they are standing in front of slowly approaching trains, and sometimes when the train is seen not to be more than 150 feet, or even 100 feet, away; and unless it can be said that to do so is negligent per se, it is for a jury to consider the various circumstances which give character to the particular act and assign it to its proper category. When different inferences fairly may be drawn from the facts, and different minds may be led reasonably to different conclusions upon the evidence, it is error to take the question of negligence from the consideration of the jury.

The evidence upon the trial presented an improbable, but not an impossible, case. It seems improbable, if the boy had looked as he said he did, that he could have failed to see the approaching train when at a distance of 150 feet; yet if, owing to the smoke, he could not see it until it was within 100 feet, and he looked and did not see it, the accident may have happened substantially as he testifies it did. Although he may have been near enough to the track to cross with apparent safety, nevertheless if it be true, as some of the testimony indicated, that the train was moving at the speed of 15 miles an hour, it is not wholly incredible that it could have overtaken him before he passed over.

The judgment is reversed.

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## GEORGE LAWLEY & SON CORP. v. PARK.

(Circuit Court of Appeals, First Circuit. May 25, 1905.)

No. 581.

1. CONTRACTS—ACTION FOR BREACH—QUESTIONS FOR JURY.

An issue as to whether certain bronze frames used by defendant in the construction of a yacht for plaintiff, and which proved to be brittle and unfit for the use to which they were put, were in compliance with the contract, which required all material to be "the best procurable of its kind in every respect," was properly submitted to the jury where there was evidence that the manufacturers had made and supplied to others a much better quality of bronze, although there was evidence tending to show that the bronze used was the best procurable at the time.

2. SAME—BREACH OF IMPLIED WARRANTY.

One who contracted, in the building of a yacht, to use material the best procurable of its kind, does not fulfill the implied warranty by using

reasonable efforts to procure the best, and it is no defense to an action to recover back the purchase price on the ground of its breach that he ordered the best materials, and used them in good faith in the belief that they were such.

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

H. Eugene Bolles (Charles H. Tyler and B. Deveraux Barker, on the brief), for plaintiff in error.

Robert S. Gorham (Ropes, Gray & Gorham, on the brief), for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. In 1903, the plaintiff in error, hereinafter called the defendant, contracted in writing to build a yacht for the defendant in error, hereinafter called the plaintiff. The materials were to be "the best procurable of their kind in every respect." Certain frames here in controversy were to be of extruded bronze 1⅛ inches by 1½ inches by 7/64 of an inch. About seven weeks after the yacht was launched and paid for, on her passage from New York to Newport, in ordinary weather, and with proper handling, nearly all these frames were broken, so that she was not safe to use. The bronze was found to be so brittle as to be unfit material for the frames of a yacht, having but 3 to 5 per cent. of ductility. The plaintiff sought to rescind the contract, and brought this action to recover back the purchase price. His principal contention at the trial before the jury was that the extruded bronze, of which these frames were made, was not "the best procurable of its kind in every respect," as required by the contract. The defendant asked the trial judge to order a verdict, contending that there was no evidence that the bronze was not the best procurable of its kind. The learned judge refused to take the case from the jury, which awarded the plaintiff the whole price he had paid. The defendant's exception to the learned judge's refusal to direct a verdict is now before us.

The question presented is this: Was there evidence to go to the jury that the bronze was not the best procurable of its kind in every respect? Extruded bronze is a material which, in 1903 and earlier, was made in this country exclusively by the Coe Brass Manufacturing Company. The plaintiff introduced evidence to show that rods and bars made by this company before 1903, being about 1¼ inches in diameter, showed a ductility of about 20 per cent.; that before 1903 the Herreshoffs had used bars about a quarter of an inch in thickness, having a ductility of at least 15 per cent.; and that the United States had used many tons of this bronze having a ductility of at least 15 per cent. Packard, an expert, testified that the frames in question were very brittle, and that a proper degree of ductility was necessary to constitute extruded bronze of the best quality. The defect in these frames was latent, and was known neither to the plaintiff nor to his architect until after the breakage. Having thus introduced evidence that the bronze of the frames was

unfit for use, and that much better bronze had been made by the Coe Company and supplied to others, the plaintiff made a prima facie case that the bronze was not the best procurable. To meet this case, the defendant made two defenses:

1. He introduced the evidence of Weaver, salesman and manager of the extruded bronze department of the Coe Company. Weaver testified that his company had at the time of the contract but one alloy used for the frames of yachts, and that without taking up the matter and experimenting further he could have given the defendant nothing better than the bronze furnished. He attempted to explain the admitted unfitness of these frames by stating his opinion that the bronze, when extruded into shapes as small as the frames in question, became more brittle by reason of its rapidly cooling surface, which was relatively larger as the frames were made the thinner. He also testified that a series of experiments was made by the Coe Company in 1903 and 1904, resulting in a new alloy, some samples of which, a little larger than the frames here in question, had a ductility of 20 per cent. The defendant thus sought to show that the bronze used in the yacht, though unfit for its purpose, was the best procurable of its kind. Weaver's evidence tended to establish this contention, and, if believed in all respects by the jury, might have established it conclusively. But Weaver was not qualified as an expert, and we cannot say that the jury was bound to accept his theory, or that a verdict founded upon the plaintiff's evidence was unwarranted. There was evidence that the bronze was not the best procurable, and to pass upon conflicting evidence is the duty of a jury.

2. The defendant called Lawley, its manager, who testified that he talked with Weaver before ordering the bronze frames, and that it was understood between them that the bronze was to be the best. It was agreed that all parties concerned acted in good faith, and honestly endeavored to produce a yacht which should be strong and satisfactory in every respect. The defendant contended that Lawley used all reasonable care to obtain from its only manufacturer in this country the best extruded bronze; and that, even if an inferior article was furnished the defendant, yet Lawley's precautions proved that the bronze was the best procurable, the best he could procure, even if it was not the best actually made. But we are of opinon that one who warrants to deliver the best procurable article of a certain kind does not fulfill his warranty by using reasonable care to obtain the article warranted. This suit is not brought in tort to recover for negligence in furnishing a dangerous article, but to enforce a warranty implied from the written contract. If the bronze sold to the defendant and by it employed in the yacht was, in fact, inferior to the bronze used by the Herreshoffs and the government, inferior to bronze made by the manufacturer before the contract, the defendant cannot successfully defend this action by showing that it ordered the best bronze, contracted for its delivery, and put it into the yacht in the honest belief that the manufacturer had furnished the article contracted for. For these reasons

we are of opinion that the learned judge was right in submitting the case to the jury, and the defendant's exception must be overruled.

We are also of opinion that the contract here in question was one capable of rescission, and that under the circumstances the plaintiff made a sufficient offer to return the yacht to the defendant. To refer to authorities and evidence on these two points we deem unnecessary.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers costs of appeal.

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## HAYWARD et al. v. KEY.

(Circuit Court of Appeals, Second Circuit. April 12, 1905.)

No. 183.

1. MASTER AND SERVANT—LIABILITY OF MASTER FOR FOREMAN'S NEGLIGENCE—NEW YORK STATUTE.

Under the New York employer's liability act of 1902, which establishes the rule for the federal courts sitting within the state in actions for personal injuries to employés, an employer is liable for the negligence of a foreman, whose principal duty is that of superintendence, to the same extent that he would be liable at common law for his own personal negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 371–373, 427–430.]

2. SAME—ACTION FOR DEATH OF SERVANT—QUESTIONS FOR JURY.

Plaintiff's intestate, who was employed by defendants, and working on a high scaffolding, was thrown therefrom and killed by the recoil of a pneumatic riveting tool which he was using. There was no recoil when the tool was in proper condition. At noon on the day of the injury deceased had told the foreman that the tool was out of repair, and on his return was told by the foreman that it had been repaired, and was in good condition. There was evidence that it worked properly until the time of the accident. Under the state statute defendants were liable for the negligence of the foreman. *Held*, that the questions whether or not deceased assumed the risk or was guilty of contributory negligence were properly submitted to the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1068–1132.]

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

Writ of error by the defendant in the court below to review a judgment rendered upon a verdict for the plaintiff.

Ford & Tuttle, for plaintiffs in error.

Joseph Steiner and Henry A. Petersen, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The action was brought to recover damages accruing to the next of kin in consequence of the death of the plaintiff's intestate, William C. Key, alleged to have been caused by the negligence of the defendants. Key was a mechanic in the employ of the defendants, and while engaged in the course of his duties met his death by being thrown from a high scaffold to the ground

by the recoil of a pneumatic riveter, called a "gun," which he was using in driving rivets. The pneumatic riveter is a powerful tool, making 500 or 600 strokes a minute. When in order, it works without any serious recoil, but when out of order is liable to recoil violently. Key had been using the tool throughout the forenoon, and found it "kicked" very hard. According to some of the testimony, when he stopped work at noon he stated that he was going to get another "gun," and went to the foreman of the defendants (Haskell), and told him that the tool was out of order, and was told by Haskell that he would have it repaired; and when Key returned from his dinner he inquired if the "gun" had been repaired, and was told by Haskell that it had been, and that it was "all right and in good condition." When he resumed work he used the same tool. According to some of the testimony it did not operate properly, but according to other testimony it did until Key applied it to the particular rivet which he was driving when the accident took place. While he was driving that rivet it recoiled with such force as to throw him off the scaffold.

At the close of the evidence the court was requested on behalf of the defendants to direct a verdict in their favor upon the general ground that the plaintiff had not established a cause of action, and upon the further ground that the defendants were not liable for any "negligence or alleged negligence that may have been shown." The request was denied, and the cause was submitted to the jury. No exceptions were taken to the instructions of the court to the jury, and no requests were made for further instructions. Some of the rulings of the trial judge in admitting evidence were excepted to by the defendants, and error was assigned of these rulings; but the assignments are without merit, and do not require detailed consideration. The main contention for the plaintiffs in error, as presented by the brief and argument of counsel, is that upon the evidence the court should have ruled that the deceased was guilty of contributory negligence, and that he assumed the risk of the injuries which he received. The case made upon the trial brought the action within the provisions of the New York "Employer's Liability Act" of 1902. This act, while preserving all the common-law liabilities of the master for injuries sustained by the servant through the negligence of the master, extends that liability by providing that the master shall be liable for the negligence "of any superintendent of the employer, or any person acting as such, or whose principal duty is that of superintendent." In Gmaehle v. Rosenberg, 178 N. Y. 147, 70 N. E. 411, the New York Court of Appeals, in construing this statute, said:

"It is clear that it has given an additional cause of action where it prescribes that the master shall be liable for the negligence of the superintendent or any person acting as such. At common law, while the master was liable for the fault of his alter ego to whom he intrusted the whole management of the work, with the power to employ and discharge servants, he was not liable for the negligence of foremen merely as such."

The language of the statute accords with this interpretation of the court, and it must now be accepted as the rule of decision in the

federal courts sitting in this state in actions like the present that the employer is to be deemed liable for the negligence of a foreman whose principal duty is that of superintendence to the same extent as he would be liable at common law for the negligent acts of an alter ego. The defendants were therefore liable for the negligence of the foreman, Haskell, to the same extent as they would have been for their own personal negligence.

It is entirely plain that if the deceased, finding the tool with which he had been provided by his employers out of order and in a condition dangerous to use, had brought the fact to the notice of one of the defendants, and had received from him a promise that it would be put in proper order, and before using it again had been told by him that it had been put in order in the meantime, he would have been justified in relying upon the faith of that assurance and in using the tool in the belief that it was in proper condition, until it appeared that such was not the fact. Under such circumstances the servant cannot be presumed to have assented to assume a risk of danger incident to the use of an unsafe tool, or to have been guilty of negligence in using it, unless it appears that he discerned the defect, or that the defect was so apparent that it ought to have been manifest to him before the accident took place. The evidence amply justified the trial judge in leaving the question of the negligence of the defendants to the jury.

The question of the contributory negligence of the deceased was not specifically raised by the request in behalf of the defendants for the direction of a verdict. It was, however, submitted to the jury by the trial judge in his instructions, and, as has been mentioned, his instructions were not in any respect challenged by exceptions or requests for further instructions. If the jury believed the witness Beck, they were justified in finding that no defect was manifest in the tool to the deceased until almost at the moment when the accident occurred. In view of the evidence it is quite unnecessary to consider the effect of the statutory provision in the employer's liability act, which declares that "the question whether the employé understood and assumed the risk of such injury, or was guilty of contributory negligence by his continuance in the same place and course of employment with knowledge of the risk of injury, shall be one of fact, subject to the usual powers of the court in a proper case to set aside a verdict rendered contrary to the evidence." We find no error in the record.

The judgment is affirmed, with costs.

## MINAHAN v. GRAND TRUNK WESTERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1905.)

No. 1,360.

1. FEDERAL COURTS—BILL OF EXCEPTIONS—SETTLEMENT—TIME.
A bill of exceptions in a case tried in a federal court may be settled at any time during the term, or thereafter until the end of the term during which judgment is rendered.
[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, §§ 49–51.]

2. SAME—EXTENSION OF TIME.
An order extending the time to settle a bill of exceptions, made during the pendency of the term at which the cause was tried, to a date later than the end of that term, of itself operated to prolong the control of the court over the cause, and justified the settlement of the bill at a later date.

3. TRIAL—PEREMPTORY INSTRUCTIONS—JOINT REQUESTS.
Where, in an action in which the facts were not conceded, plaintiff interrupted the court as it was passing on a motion to direct a verdict for the defendant, and asked leave to file certain requests to charge the jury, one of which was a request for a peremptory instruction for plaintiff, and the court permitted such requests to be filed, and assured counsel that he should have the benefit of them, such practice did not amount to a submission of the issues of fact to the court so that plaintiff was precluded from objecting to an adverse finding thereon.

4. CARRIERS—INJURIES TO PASSENGERS—PRESUMPTION OF NEGLIGENCE.
Injuries to a passenger by derailment of the car in which he was riding, while passing over a switch, created a presumption of negligence on the part of the carrier.
[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1288.]

5. TRIAL—DIRECTION OF VERDICT—CONFLICTING EVIDENCE.
A trial judge in a federal court is not entitled, on his own view of the evidence, to direct a verdict, where there is a positive conflict in the evidence on a material issue.
[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 342, 343.]

6. SAME—QUESTION FOR JURY.
In an action for injuries to a passenger by derailment of the car in which he was riding, as it passed over a defective switch, conflicting evidence as to the cause of the defect *held* to present a question for the jury.

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

Dickinson, Stevenson, Cullen, Warren & Butzel (Maybury, Lucking, Emmons & Helfman, of counsel), for plaintiff in error.

H. Geer, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The case brought up by this writ of error is an action instituted in the court below by the plaintiff in error to recover damages for personal injuries sustained by him in consequence, as he alleges, of the negligence of the defendant while he was a passenger on a car of defendant's passenger train, whereby the car was thrown from its track against an engine standing on

a side track at or near Millets Station, a few miles west of Lansing, Mich., on the night of April 5, 1902. The defendant pleaded the general issue, which, under the Michigan statute relating to pleadings in actions at law, is equivalent to a plea of not guilty. The issue was tried before a jury, and at the conclusion of the evidence adduced by the respective parties the court, at the request of the defendant, instructed the jury to return a verdict for the defendant. No question arises upon the pleadings. There are 53 rulings of the court assigned as errors. But as we are of opinion that the court erred in taking the case from the jury by its peremptory instruction, we shall pass all other questions, and, after attending to certain objections of the defendant in error, proceed to a statement of the reasons which lead to our conclusion upon the propriety of the general instruction given by the court. To do this, we must needs make a more particular statement of the case.

The plaintiff had taken a ticket at South Bend, Ind., for a passage over the defendant's road to Detroit. There were seven cars in front of the one on which the plaintiff was riding, and one, a sleeper, behind. The train left South Bend at 11:30 p. m., and at 3:30 in the morning was passing through Millets Station at a speed of 45 miles an hour. Some time before that a long freight train drawn by two engines, coming from the east, had passed off the main track, and was standing on a side track on the south side of the main track and parallel therewith, awaiting the passage of the passenger train, No. 6, on which the plaintiff was riding. There was a switch at the west end of the side track, and some distance west of the station house, leading into the main track, and the switch was adjusted so as to leave the main track clear for the passage through of the passenger train. This switch was of parallel rails, which at the movable end were thin, running to a point, and lying against the side of the rail when closed. The engine of the passenger train and seven cars passed over the switch safely. The forward truck of the plaintiff's car also kept the main track, but the switch apparently opened before the rear truck reached it, and the rear end of the car was carried off to the right, and the car thrown with great violence against the engine standing in the front end of the freight train. One of the passengers in the car was killed; several were seriously injured, among them the plaintiff, who was so grievously hurt that he is crippled for life. The cause of the accident was the dislocation of the switch bar at the joint where its two parts are united, whereby the part (which for convenience is called here part 2) carrying at their proper distance apart the front or movable ends of the switch rails was left unattached to the part (called part 1) coming from the switch stand, and the forward end of the switch was left floating, i. e., without any lateral fastening. Apparently, also, the concussion and jar of the passenger train had to do with the dislocation of the switch bars and the lateral movement of the fore end of the switch whereby it became opened. Until the afternoon of the day before the accident the switch stand had stood upon the south side of the tracks, but on that afternoon it was moved over to the north side of the tracks to make way for the

removal of the station house to the former site of the switch stand. And in transferring the switch stand to the north side it became necessary to detach part 2 of the switch bar from the switch rails and reverse its position, end for end, and again securing it to the rails of the switch. Part 2 was also detached from part 1 at the joint between them. Part 1 was carried over with the switch stand; the two long ties on the projection of which the stand rested were slid under the rails to the north, to form the projection for the stand there. The stand was relocated, parts 1 and 2 connected up, and the switch made to operate. This was finished at the close of the day's work. We have said that parts 1 and 2 were "connected up." But as the controversy is centered at this point, it is necessary to describe in detail the mode of this connection. This end of part 1 is flat and rounded at the extremity, near which a perpendicular hole is made in such wise that a loop is formed around the pin to be inserted in the hole, which loop is of a nearly even thickness around the sides and fore end of the bar. On the connecting end of part 2 a pin is secured perpendicularly, which enters the hole in the end of part 1. Then, in order to hold the end of part 1 down on the pin of part 2, a clip is riveted upon part 2 further back than the pin, is carried up the thickness of the end of part 1, and then carried parallel to part 2 part way over the rim or loop on the end of part 1. When the parts are formed in this manner, the only way of detaching them is by bending the free end of the clip upward and backward far enough to make space for lifting the loop off the pin. Some of the witnesses testified that this was the form of the parts of this switch bar. When these parts of the bar were first seen after the accident, the clip was thus turned up out of its normal place. Another form of making the parts of the bar is to carry out a projection, or tongue, on the end of part 1 beyond the pinhole. Then the clip on part 2 is made shorter at the free end so as to rest on the tongue only. In this form the parts may be readily disengaged by turning them at right angles to each other, thus carrying the tongue from under the clip. This is the form in which some other of the witnesses testify this switch bar was made. If this was so, there was no need of meddling with the clip, if the sectionman understood his business. But he says he was required to work expeditiously in order to get the switch in order for the passage of trains, and he had not much familiarity with switches. He had two men to help him, but they belonged to another branch of the service. He testified that after the accident he tried to bend the clip back to its place by hammering it with a fish plate, and, not succeeding completely with this, the superintendent of the tracks who had come to the place, hammered it back to place with an iron maul. The bar was then put in its proper place, and used two days after.

During the course of the trial the defendant produced before the court and jury the parts of a switch bar which some of its witnesses testified was the identical switch bar in question which had been taken out two days after the accident and preserved for testimony. Part 1 of this switch bar had a projection on the end where it con-

nected with part 2. Several witnesses for the plaintiff, who examined the bar on the morning after the accident to discover the cause of it, testified that it was not the same bar, and two professors of engineering and metallurgy from the University of Michigan testified that the clip bore no signs of having been hammered back to place, as it would have done if it had been the original bar. We cannot further prolong this statement of the evidence.

Two preliminary questions are raised by counsel for defendant which it is urged should first be settled before the merits are considered:

First. It is contended that from lapse of time after the trial the court had lost its authority to settle the bill of exceptions, and that it is therefore a mere nullity. The verdict was rendered June 30, 1903. The term then pending expired on the first Tuesday of November following. No judgment was rendered during that term. But on October 19, 1903, the court ordered that the time for settling a bill of exceptions should be extended until January 2, 1904. By successive orders the time was further extended until the time when the bill was settled, July 18, 1904, and thereupon the court entered judgment on the verdict for defendant. Meantime Mr. Meddaugh, the attorney of record for defendant, had, on December 20th, died, and the defendant had not appointed another. On April 20th counsel for plaintiff served a proposed bill of exceptions on Geer & Williams, who had managed and tried the cause as counsel for defendant. They made no objection to the service on account of Mr. Meddaugh's death, but took no action with reference to the settlement of the bill. On June 4th the plaintiff gave notice to the defendant to appoint a new attorney, as provided by a Michigan statute. This notice was ignored by defendant, and on the 8th of July the court made an order which, after reciting the notice and that no appearance had been entered for defendant, directed the defendant to show cause on the 11th of that month why the bill of exceptions which had been served on Geer & Williams should not be settled. On that day Geer & Williams and F. E. Rankin "appearing specially," as the record states, and, on an affidavit of Mr. Rankin stating the death of the attorney of record and that the extensions of time for settling a bill were made ex parte, moved that the order to show cause be dismissed. The motion was denied, and, on request of counsel for defendant, the time for settling the bill was extended one week, at the end of which time it was settled, as before stated. The contention for defendant is that the time wherein a bill of exceptions could be settled expired at the end of the term during which the cause was tried. But this is not a valid objection. By the lapse of the term without the rendition of a judgment, the cause remained open and in all things subject to the power of the court. Until the judgment was entered, the court had power to extend the time for settling a bill of exceptions, and, if the reasons for it were sufficient, it would be not only proper, but due to the party that it should be done. It is true that it has sometimes been said in judicial opinions that the bill must be settled during the term at which the cause was tried. But doubtless

this was so said because in the usual practice of the courts the judgment is entered before the lapse of the term, and the expression referred to was made in contemplation of the ordinary course, and so was an inexact statement of the rule as a universal one. In like manner a great number of decisions can be found wherein it is said that the power of the court over a judgment is at an end at the expiration of the term at which it was rendered. But this, while true as a general rule, has an exception, which is of frequent occurrence, when the cause remains open for some further action contemplated by the court. It is accordingly the established rule that a bill of exceptions may be settled at any time during the term at which the cause is tried, and thereafter, if judgment is deferred, until the end of the term during which it is rendered. And in Ward v. Cockran, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195, it was held that an order extending time for settling the bill made during the pendency of the term at which the cause was tried to a date later than the end of that term of itself had the effect to prolong the control of the court over the cause and justify the settlement of the bill at a later date. This view of the subject makes it unnecessary to consider what effect the death of the attorney of record in December, after the time had been extended beyond the trial term, would have upon the validity of notices given to defendant's counsel. For it is not contended that the notice given in June to appoint another attorney was invalid, or that the failure of the defendant to make such appointment was not sufficient to give ground for the action of the court in making the order on defendant to show cause, if the lapse of time had not deprived the court of power to make it.

The second question propounded by counsel is based upon the following facts: At the close of the production of evidence the counsel for the defendant preferred a request to the court that the jury be directed to return a verdict for that party. This request having been discussed by the counsel for the respective parties, the court was proceeding to give its opinion and instructions to the jury, and seemed to indicate, as plaintiff's counsel thought, a purpose to sustain the defendant's request for a positive direction in its favor. Thereupon the court permitted an interruption to allow the plaintiff's counsel to put on file certain requests to instruct the jury, and assured the counsel that he should have the benefit of them, and then, after giving its views at length, directed a verdict for defendant. The requests filed by plaintiff were eighteen in number, the first being as follows:

"(1) Under the pleadings and proofs, you are instructed that your verdict must be for the plaintiff, and the only question for you is as to the amount of damages."

The others related to particular matters of law and fact involved in the issue. The court did not comply with any of these requests. The plaintiff excepted to the ruling of the court upon defendant's motion for directing the verdict in its favor, and to the refusal of the court to give the instructions requested in his behalf. Coun-

sel for defendant now urge that the request of each of the parties for a peremptory instruction by the court had the effect of a joint withdrawal of the issues of fact from the jury and a submission of them to the court for its determination, and that, the court having decided them in favor of the defendant, both parties are concluded by the finding; citing Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654. In that case there was no disputed question of fact, and it only remained for the court to state to the jury what the facts were, and what the law applicable to those facts was. And what the court there held in effect was that the court might state the facts as agreed, and not submit them to the jury. The language of Mr. Justice White, taken apart from the case before the court, might justify the conclusion which the counsel draws from it. But it would seem that the decision cannot be regarded as furnishing a rule for cases where the evidence is conflicting, and where the party whose request is refused has coupled with his request other requests directed to particular aspects of the case, which repel the implication that the party had consented to a submission of the facts to the court. And in all the cases in which the case of Beuttell v. Magone has been cited in the appellate courts the conditions were the same; there was no disputed question of fact, and there were no special requests. Merwin v. Magone, 70 Fed. 776, 17 C. C. A. 361; Magone v. Origet, 70 Fed. 778, 17 C. C. A. 363; Bradley Timber Co. v. White, 121 Fed. 779, 58 C. C. A. 55; United States v. Bishop, 125 Fed. 181, 60 C. C. A. 123; Phœnix Ins. Co. v. Kerr, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569.

In Beuttell v. Magone it is expressly stated that such request made by the respective parties is not the equivalent of a submission of the case to the court without the intervention of a jury, within the intendment of Rev. St. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570]. The rule must therefore rest upon an implication of consent. Can any implication of consent be fairly drawn when, as here, the party couples his request for a peremptory instruction in his favor with further requests for instructions on the questions of law applicable to certain assumed facts which the jury may find? The presentation of requests for instructions in that form necessarily imports that the party expects that, if his first request is refused, the case will go to the jury, and that the court will give his other requests, or such of them as the court thinks are proper. For, if his request for a peremptory instruction is given, the others are futile. May not a party ask for a peremptory instruction in his favor without depriving himself, if the court thinks he is not entitled to it, of the right to have the jury pass upon the evidence and determine the issue? No valid reason is perceived why he should pay the penalty of losing a constitutional right by invoking the opinion of the court pro hac vice upon the preliminary question. It is, we believe, a common practice of the state and federal courts in Michigan and elsewhere in this circuit, when the party wishes to obtain the opinion of the court upon the question whether there is any evidence which could fairly be relied upon to defeat his claimed right, and, if the

opinion of the court should be that a question for the jury is presented, then to ask that appropriate instructions be given them to guide their deliberations, to present all his requests in a body, and the courts understand that to be the purpose, and conform to it. This was the course pursued here, and we do not think we should be justified in extending the rule stated in Beuttell v. Magone to a case thus differently circumstanced. In the case before us it is apparent that the judge did not suppose he was intrusted with the ultimate finding of the facts in the case. It appears that, before the plaintiff's requests were filed, the court had already indicated to the plaintiff's counsel that it was about to give a direction in favor of the defendant, and had already determined that the plaintiff was not entitled to recover. The court also stated that it would give to the plaintiff the benefit of his requests. But these could be of no benefit if the case was to be concluded by the judge's opinion on the facts. All this indicates that the court was co-operating with the plaintiff's counsel in his effort to save the questions presented by his requests.

Coming to the main question, the contention of the plaintiff was that, when the stand was moved in the afternoon, the sectionman, in order to detach parts 1 and 2 of the switch bar, pried up the end of the clip on part 2 so as to let the pin drop out of the hole in part 1; and that, when he had put the parts together again on the other side of the track, he neglected to bring the end of the clip back to its place. The defendant's contention was that the sectionman took the members of the bar apart and put them together again without disturbing the clip, and that the clip was afterwards raised by some unknown person out of malice against the railroad company, or that in some other unknown way the clip was raised without any fault of defendant. It is not claimed that the plaintiff was at fault, or disputed that, as matter of law, a presumption of negligence against the defendant was raised by proof of the accident, and the absence of fault on the part of the plaintiff. That such is the law is well settled. If the testimony of the defendant's sectionman and his helpers were not contradicted and were given full credit, it might, and probably should, be found that the defendant was exculpated. But their evidence was subject to some criticism, and not altogether consistent either in itself or with the uncontroverted facts; and, contradicted as it was by other unimpeached witnesses upon vital facts, the determination of such facts depended upon the credibility of the witnesses, and nothing is more clearly settled than that this is the province of the jury. The court below, in its opinion given before charging the jury, justifies the proposed instruction upon the ground that several unimpeached witnesses testified that when the switch was left that afternoon the clip was down in its proper position, and that this fact, thus proved, exonerated the defendant from any duty of further showing how the accident occurred. But the learned judge stated that it was conceded that the clip was sufficient for its purpose, and that there could be no accident attributable to the switch so long as the clip remained in its proper position. The undisputed facts remain

that the switch had, up to the time when it was changed, performed its duty and was then in proper condition, and that within a few hours thereafter it was found with the clip raised and the parts of the bar separated. The disaster coming so soon, naturally the attention of the inquirer is directed to the fact that the switch bar was opened the day before. If it was closed again, how did it get reopened? No one is charged with a malicious motive which would prompt to such a deed. Counsel for defendant exclaimed with much warmth against the imputation that the employés of the company had for the purposes of the suit substituted another switch bar for the genuine (a grossly scandalous proceeding, it is true, if the fact was so), and claimed that the presumption against such conduct was so strong that the evidence of the plaintiff's witnesses in that regard ought not to be credited. But the jury might well have thought that a still stronger presumption existed against the imputation that some other person or persons, with no apparent motive at all, might have done a deed which, if its purpose should be effected, would directly imperil the lives and safety of innocent persons. The circumstances of the case were such that the moral probabilities springing from established facts had a very potent influence in leading the mind to the truth. This species of evidence is often more convincing than the testimony of witnesses.

In his opinion the learned judge said:

"I state candidly that the undefaceable impression left upon my mind by this testimony is that the explanation offered by the railway company here in this case shows such a correct demonstration to my mind of immunity from liability that if the case were submitted to you for your decision upon the facts, and you should find contrary to the result which I will announce, I should deem it my duty, in the exercise of sound judicial discretion, to set that verdict aside. That being the duty forced upon me by the rules of law, I am not only authorized, but required to give to the facts proven judicially the same force and effect as if your verdict should be for the defendant."

If, indeed, the case for the plaintiff was so feeble that it would be the imperative duty of the court to set aside a verdict based upon it, we should have no doubt that the court might end the case by a peremptory instruction to find for the defendant. The court might, upon motion, in the exercise of "sound judicial discretion" upon its view that the clear preponderance of the evidence was with the defendant, set aside a verdict for the plaintiff and order a new trial. But the court cannot balance the evidence when it is conflicting, and then compel the jury to find a verdict according to the court's estimate of the relative weight of the evidence for the respective parties. Such a doctrine would efface the line of demarcation between the provinces of the court and jury.

Certain expressions used by the Justices in delivering the opinion of the Supreme Court are often laid hold of by counsel in cases in the federal courts as authority for some such doctrine as that of the court below. Indeed, in this court, and we have no doubt the same thing is true in the experience of all the federal appellate courts, come frequent repetitions of cases where opposite counsel contend for distinctly opposite doctrines in respect to the authority

of the trial judge to take the determination of questions of fact from the jury, and in support of their respective contentions an equally formidable list of decisions is cited; on the one hand, where language has been used almost, if not quite, as broad as that of the trial judge in the present instance; and, on the other hand, where that court has said that if there be any substantial testimony bearing upon an issue of fact to which the jury might, in the proper exercise of their rightful authority, give credit, the court is not justified in withdrawing the issue from the jury and deciding it upon its own estimate of the preponderance of the evidence. Undoubtly, it is distinctly settled that a mere scintilla, a spark, which arrests attention, and then from mere lack of vitality fades away, is not sufficient to warrant the submission of an issue of fact to a jury, when the scintilla is all that is developed by the party having the burden of proof. Such a showing has no substance, has not the quality of proof, and the judge may lawfully say so to the jury. And it must be admitted that the Supreme Court has gone a step farther than this, and assigned to the province of the court the right to direct the jury in those cases standing between those where there is a mere scintilla and those where there is substantial evidence, standing in a borderland, so to speak, where the evidence is so vague, indefinite, or inconsequential as not to furnish a reasonable foundation on which a verdict could rest. There are numerous cases in the Supreme Court where it is said that the judge may direct the verdict when the evidence is of such conclusive character that the court, "in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it." In the case supposed it would undoubtedly be the imperative duty of the court to set the verdict aside, and the refusal to do so would be a plain denial of justice. The judge is bound to see that each party is accorded legal justice, which could not be if one party were to obtain a judgment without proving his cause of action, or the defendant allowed to defeat a proven cause of action without establishing a defense. In other cases it is said the condition contemplated in which the judge may direct the verdict is when, "in his deliberate opinion, there is no excuse for a verdict save in favor of one party."

Greenleaf, in the first volume of his work on Evidence, § 49, with his customary precision thus states the fundamental rules of the trial of issues of fact:

"In trials of fact, without the aid of a jury, the question of the admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of objection, the evidence objected to must of necessity be read or heard by the judge, in order to determine its character and value. In such cases, the only question, in effect, is upon the sufficiency and weight of the evidence. But in trials by jury, it is the province of the presiding judge to determine all questions on the admissibility of evidence to the jury, as well as to instruct them in the rules of law by which it is be weighed. Whether there be any evidence or not, is a question for the judge; whether it is sufficient evidence is a question for the jury."

In strict harmony with this statement is the language of Mr. Justice Clifford in Improvement Company v. Munson, 14 Wall. 442,

448, 20 L. Ed. 867, one of the leading cases generally cited on this subject, as follows:

"Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule—that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

As is also the language of Mr. Justice Miller in Pleasants v. Fant, 22 Wall. 120, 22 L. Ed. 780, another case often cited, where, after citing Improvement Co. v. Munson and other cases, he states the rule with more precision by a distinct exclusion, thus:

"In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor; not whether on all the evidence the preponderating weight is in his favor—that is the business of the jury—but, conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside and grant a new trial"—and makes the matter clear.

We think the whole subject may be shortly summed up by starting with the incontestable datum that the Supreme Court has never intended to propound and perpetuate two inconsistent rules for the guidance of the trial judge. It has by distinct and definite rulings declared that, if there is any substantial evidence bearing upon the issue to which the jury might in the proper exercise of its function give credit, the court cannot rightfully direct the jury to find in opposition to such evidence. Among the many cases to this effect are: Jones v. East Tenn. Ry., 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478; Washington, etc., Railroad v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Richmond & Danville Railroad v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; Gardner v. Michigan Central R. Co., 150 U. S. 361, 14 Sup. Ct. 140, 37 L. Ed. 1107.

If this proposition is established, it follows that the more general language used by the court in other cases should be construed consistently with the definitely stated rule. If it be urged that the argument might be conversely stated, and that the last-mentioned cases might be taken as stating the rule and the former be construed consistently with the latter, the answer is that the former are explicit and definite, and cannot be reconciled with the rule which the latter are supposed to authorize. We are not aware of any case where the Supreme Court has by actual decision declared that the trial judge may, upon his own view, direct the verdict, where there is a positive conflict in the evidence upon an issue material to the controversy. And by "evidence" we mean something of substance and relevant consequence, and not vague, uncertain, or irrelevant matter not carrying the quality of "proof" or having fitness to induce conviction. Such a case was Riley v. Louisville & N. R. Co.

(C. C. A.) 133 Fed. 904, one of the cases on which the defendant relies. The testimony upon which the plaintiff relied in that case to prove the negligence of the railroad company in maintaining the switch in that form consisted of his own opinion and that of another employé that the ballasting under the switch should have been brought up to the ground level of the top of the ties. There was no conflict in the evidence as to what was the customary manner of building spring switches, which was to build them with a shallow excavation under them, and no question but that the particular switch was constructed in that form. If that was so, the testimony of those witnesses that in their opinion another form would be better did not bear upon the real issue, which was whether this switch was in the form in which such switches were customarily built. The evidence led to no consequence affecting the issue, and we held that the court below had properly directed the verdict for defendant. These facts which are stated in the opinion impose the proper construction upon the previous language of the opinion, in which it was said that, if the case was such as that, if a verdict were rendered for defendant, the court, in the exercise of sound judicial discretion, would have been bound to set it aside, the court did not err in directing the verdict. Another just such a case was Randall v. B. & O. R. Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003, cited as authority for the decision of Riley's Case. This subject has been discussed in former opinions of this court, especially in that delivered by Judge Lurton in Mt. Adams, etc., R. Co. v. Lowery, 74 Fed. 643, 20 C. C. A. 596; and the conclusions there reached were confirmed by the court in an opinion delivered by Mr. Justice Harlan in Travellers' Insurance Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305. Those conclusions were in substance those which we have here stated as in our judgment sound. But the frequency of the recurrence in this court of the question involved has induced us to again review the subject and restate our convictions in respect to the law governing it. If we misinterpret the rulings of the Supreme Court, we shall, of course, be glad to be set right upon the subject when opportunity shall occur.

The result is that the judgment must be reversed, with costs, and a new trial awarded.

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## NEW YORK, S. & W. R. CO. v. RONEY.

(Circuit Court of Appeals, Third Circuit. May 24, 1905.)

No. 18.

SHIPPING—INJURY OF SCHOONER BY FLOATING ICE—NEGLIGENT ANCHORING BY DOCK OWNER.

A decree affirmed holding a dock owner solely in fault and liable for removing libelant's schooner from the dock after loading, and anchoring her in the river, where there was floating ice by which she was injured.

Appeal from the District Court of the United States for the District of New Jersey.

For opinion below, see 132 Fed. 321.

Gilbert Collins, for appellant.
N. Dubois Miller, for appellee.
Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal from a decree in admiralty, by which it was adjudged that the libelant (appellee here) recover the damages by him sustained by reason of the matters alleged in the libel, and that the respondent (appellant here) be condemned therefor, with costs. The libel alleged that the libelant was the sole owner of the schooner Harry Landell, and that the respondent, after loading her with coal, and against the objections and under the protests of her mate, moved the said schooner "out into the stream, and placed her in the midst of the running and solid ice which was there, and liable to move there on the shifting of the wind or tide"; and that shortly after she had been so placed in the stream "the solid and floating ice caused serious injuries to the hull of said vessel, by reason of which she took in water, and subsequently filled and sank." The answer denied these allegations, and the learned judge correctly conceived that the questions presented for his determination were (1) whether, by a fair preponderance of the evidence, the libelant had shown negligence on the part of this appellant, or for which it was responsible, which was the proximate cause of the damage; and (2) whether, if such negligence had been shown, there had been negligence also on the part of the libelant himself, by reason whereof the damages sustained by him should be apportioned. Both these questions he resolved in favor of the appellee, and we think he was right in doing so. We have examined the case de novo, and upon independent consideration of the proofs have reached the conclusions at which he arrived. No useful purpose would be subserved, however, by again reviewing the testimony.

Suffice it to say that in our opinion none of the errors assigned has been established, and therefore the decree of the District Court is affirmed.

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## PANZL v. BATTLE ISLAND PAPER CO. et al.

(Circuit Court of Appeals, Second Circuit. April 19, 1905.)

1. PATENTS—INVENTION—COMPOSITION FOR LINING PULP DIGESTERS.
The Panzl patent, No. 644,367, for a composition of material for lining vessels used for storing or boiling corrosive liquids, intended for a lining for pulp digesters, which should be acid proof, in claim 3 describes a combination in new and specified proportions and in a new manner of well-known materials which produces a new and superior composition, and was not anticipated, and discloses invention. Claims 1 and 2 are void for lack of invention in view of the prior art, or because they fail to specify the proportions of the ingredients entering into the composition, and do not, therefore, acquaint those skilled in the art with the necessary information to enable them to practice the invention without experimenting. Claim 3 also *held* infringed.

2. SAME—CHEMICAL COMPOSITION—NECESSITY OF SPECIFYING PROPORTIONS.
A patent for a chemical composition must not only give the names of the ingredients used in making the composition, but also the proportion

of each, so that the invention may be practiced by those skilled in the art without further experimentation.

3. SAME—DEFINITION OF TERMS—"CHAMOTTE."
The term "chamotte," as used in the arts and in the Panzl patent, No. 644,367, as an ingredient used in making an acid-resisting composition for lining pulp digesters, denotes a species of specially pure calcined clay, which must be silicate of alumina, and is not the equivalent of crushed fire brick, used in prior preparations, which may or may not have the chemical composition and properties of chamotte.

4. SAME—SUIT FOR INFRINGEMENT—REHEARING.
An application to reopen the case after final hearing in a suit for infringement to permit the taking of additional testimony on an issue of fact is properly denied where the evidence could have been produced on the hearing by the exercise of due diligence.

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

For opinion below, see 132 Fed. 607.

This cause comes here upon appeal by defendant from an interlocutory decree of the United States Circuit Court for the Northern District of New York granting an injunction against infringement of patent No. 644,367, granted to Romedius Panzl February 27, 1900, for improvements in composition of material for lining of vessels used for storing or boiling of corrosive liquids. The opinion below is reported in 132 Fed. 607.

Howard P. Denison, for appellants.

Henry Schreiter, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The court below has exhaustively discussed the prior art and explained its bearing upon the patent in suit, and in stating its reasons for the conclusions reached has fairly presented the issues of validity and infringement and the arguments by which the contentions of the parties are supported. The controlling questions herein may be summarized as follows: (1) The definition of chamotte. (2) The disclosures of the prior art. (3) Infringement.

As to the meaning of the word "chamotte," the court says, inter alia, as follows:

"The testimony of the expert witnesses is conflicting. The technical signification and classification of chamotte as a particular ingredient for lining is left in doubt by the evidence, and reference has therefore been had to standard dictionaries, publications, and books of science for such information as in the judgment of the court was necessary to clarify the disputed point."

Then, quoting from various definitions, the court says:

"The testimony of complainant's expert witness supports this definition. He testifies that when speaking of chamotte he means calcined clay, which is essentially silicate of alumina and water. In its preparation the water or moisture is driven out by heating, so as to produce contraction and baking of the clay. He further adds that ordinary fire brick is not chamotte, and only becomes such after undergoing the process outlined. * * * According to the expert witnesses for defendants, chamotte is merely crushed fire brick—that is, clay without sand, heated to a high temperature—and hence is the identical material referred to as fire brick in the patents of Wenzl Kellner, No. 4,959, Norton, No. 480,934, and others contained in the record. If the consideration given to the word 'chamotte' in order to ascertain its exact meaning and import impelled the acceptance of the view of the defendants'

expert witnesses, the invalidity of the Panzl patent because of the prior art would seem plain, and the combination of the materials mentioned in the claims would lack invention. But it is apparent from the definitions above quoted that the term 'chamotte' technically is accorded a wider signification than that claimed by the defendants, and that it is not restricted to ordinary fire brick with which furnaces are lined, though in its classification burnt clay or fire brick is included."

The appellant contends that this conclusion is not justified, because complainant's expert testified as follows:

"X-Q. 49. Will you please state what you understand by the term 'chamotte,' as found in the claims in the patent in suit? A. I mean thereby calcined clay which is essentially silicate of alumina and water. In preparing the chamotte the process simply consists in driving out the water and producing such temperature that the clay contracts and bakes together. X-Q. 50. Then I am to understand that ordinary good quality of clay calcined or hydrated forms what is termed chamotte? A. After it has undergone the process roughly outlined."

Appellant claims that upon the strength of this definition by complainant's expert Endemann it directed its proofs to show that chamotte was merely fire brick, and was shown in the prior art in compositions identical with that covered by the patent in suit, and that the court was not justified in giving to the word "chamotte" an interpretation wider than that stated by complainant's expert and derived from dictionaries and other publications.

The admission of an expert witness is, of course, entitled to weight in the interpretation of technical terms employed in a patent. But the court is not necessarily concluded by such interpretation when other satisfactory evidence is available. Furthermore, an examination of the whole testimony of the expert Endemann serves to explain the foregoing particular statement relied on as an admission, and to show that he merely meant that chamotte was a calcined clay, which is essentially silicate of alumina and water, and that a calcined clay brick may or may not be chamotte, according to whether it has the porosity and chemical affinities essential to constitute the product known as "chamotte." His understanding of the word is shown by the following testimony:

"X-Q. 77. Would a composition for lining digesters, as contemplated by the patent in suit, consisting of silicate of soda, cement, water, fire brick, and sand, be embraced or contemplated, in your opinion, by either or any of the claims of the patent in suit? A. Fire brick is an exceedingly loose description, inasmuch as fire bricks vary considerably in composition. We have even fire bricks which do not contain any clay at all, like those which are made of magnesia."

So far as this witness is concerned, therefore, the term "fire bricks" covers a class of articles alike in use, but variant in composition, and is broad enough to include chamotte; but the word "chamotte" denotes a species of specially pure calcined clay, but which must be silicate of alumina, and which, by reason of its properties, is peculiarly adapted for the chemical and mechanical actions and results necessary in order to produce the acid-proof, unshrinkable composition of the patent in suit. In these circumstances, the court has examined the record and standard publications, and has found therein confirmation of the contention that chamotte

is a special substance well known in the art, and that ordinary fire brick does not possess the properties of chamotte. Inasmuch, therefore, as the term "fire brick," if used in the patent, would not have sufficiently identified this peculiar product to enable one skilled in the art to produce the patented product, but would have obliged him to experiment with the various materials known under said name, we think the patentee was justified in the use of said word; that it may even have been necessary to a full disclosure of his alleged invention; and that, in view of the evidence, the court correctly found that fire brick was not necessarily the equivalent of chamotte.

Appellant, after the decision of the case, moved to reopen it, in order to show that it used only fire brick, and did not use chamotte, within the meaning given to it by the court in its opinion. This motion was rightly denied. The new evidence sought to be introduced might have been brought before the court at the original hearing. Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co. (C. C.) 64 Fed. 125, and cases cited.

It is further contended that the patent is invalid, in view of the prior art. After a careful analysis of the prior patents, the court below reached the conclusion that none of them showed how to so combine the materials of the patent in suit as to produce monocalcium silicate, free from di- or tri-calcium silicate, and that, as this was essential in order to obtain an acid-proof composition, and complainant alone had thus succeeded where the others had failed, his patent was valid. The court says:

"The process of mixing hydraulic cement and silicate of soda for the purpose of making an adhesive and chemical resisting lining was very well known at the date of the patent in suit. The characteristic feature, however, of the Panzl combination rests in compounding the ingredients of the process in certain proportions so that the chemical reaction referred to will be obtained, and an acid-proof lining be produced. The conception of this combination resulted from experiment, comparisons with the prior art, and practical tests with various compositions in nature. Unless anticipated, it is entitled to protection. Little doubt arises that the process described in the patent was an advance or addition to those already known. Others were endeavoring to invent a process which would prevent the disintegration of boilers by corrosive fluids. All seem to have failed, except the patentee in suit."

Counsel for appellant chiefly relies on Swedish patent to Wenzl of November 13, 1888, for interior coatings for cellulose boilers, which, he says, "completely negatives any possible invention of either or any of the claims of the patent in suit." All that this patent discloses in regard to said coating is that:

"The protecting mass consists of a mixture of about one part, by weight, of cement, and two parts, by weight, of fire brick or brick dust and sand, or a mixture of the two, or all three of these materials. The mixture is stirred in a solution of about 36°. B. strong soda water glass in proportion of about two parts of the mixture to one part of water glass forming a base with which the interior of the boiler is coated."

The essential elements, chamotte and quartz or pulverized glass and slate, are not suggested; no specific mixture of ingredients is indicated as especially adapted to secure the result; the cement may be mixed with either or all or any two of the other materials, and

in the latter cases no proportions are given. That Wenzl failed to disclose the composition of the patent in suit is affirmatively shown by his assumption that fire brick and brick dust and sand are equivalents. The patentee herein has insisted upon the necessity of using a certain specific kind of fire brick, namely, chamotte, in combination with a specific kind of sand, namely, crushed quartz, or a certain described equivalent, and has insisted that the result can only be obtained by a combination of said specific materials. The conclusion of the court below as to the Wenzl patent is stated as follows:

"Although defendants claim that the compounded material of the Wenzl patent contains precisely the same ingredients as the claims in suit, nevertheless, from what has been said regarding the term 'chamotte,' it is manifest that such ingredient, as an essential element, is absent in the Wenzl process. Moreover, Wenzl does not clearly indicate the proportions of materials or definitely specify the particular materials to be compounded. * * * I am impressed by Dr. Endemann's analysis of the Wenzl patent. He testifies that by the process there described mono-calcium silicate is not produced, and the mixture of the ingredients does not cause the chemical reaction necessary to achieve the results attained by the Panzl process. The practical tests made by defendant's expert witnesses would seem to support the complainant's position. Hydraulic cement, chamotte, and quartz and sand appear to have been used in the proportions of the patent in suit. The evidence shows that some of the materials specified in the Panzl patent were used in making these tests, and that the fire brick mentioned in the Wenzl patent was treated as the equivalent to the chamotte, sand the equivalent to quartz, and the materials were compounded in the precise proportions of the patent in suit."

We concur in this conclusion.

The appellant lays much stress on the opinion of the Court of Appeals for the First Circuit in sustaining reissue patent No. 11,282, granted to George F. Russell in 1892, for a pulp digester. American Sulphite Pulp Co. v. Howland Falls Pulp Co., 80 Fed. 395, 25 C. C. A. 500. But this patent merely covers a cement lining, applied, when soft, to a pulp digester, and which, when it hardened, mechanically protected the shell of the digester by its cohesive, adhesive, and acid-resisting powers from the corroding influence of the solution. There is no suggestion either in the patent or in the opinion of the court that this patent is for any acid-proof chemical combination, and the claims merely cover "a continuous lining or coat of cement." This patent, therefore, has no bearing upon the issues herein.

The court below in its opinion did not distinguish or separately discuss the three claims in suit, but found they were all valid. In view of the prior art and the testimony of complainant's witness, we are unable to concur in this conclusion as to the first and second claims. Complainant's expert admits that all the substances mentioned in the patent have been already used in various combinations in this art for this purpose; that the essence of the patented invention is such a combination as will insure the production of mono-calcium silicate; that "the formation of the mono-calcium silicate is, so to say, the bull's eye and the main feature of the Panzl invention"; that its production is a question of proportions of the ingredients; and that a publication describing a mixture contain-

ing the ingredients named in the patent in suit, but "stating no proportions, is in matters of this kind practically useless." He further says, in attempting to differentiate Kellner patent No. 15,931, that if in the Kellner composition mono-calcium silicate could be produced, it might, in that respect, be compared with the substitute composition of the patent in suit, but that it cannot produce this "prominent feature" because of the weakness of the solution of silicate of soda. And while he asserts that this patent does not contain any chamotte, yet it does include among its ingredients both silicate of alumina, which becomes chamotte when baked, and burnt clay tiles.

The application of these admissions and arguments of complainant's expert to the patent in suit is fatal to its first and second claims. They are drawn to cover a combination of substances, old in the art, the patentability of which is asserted upon the theory that thereby a new result, mono-calcium silicate, is produced. No proportions are given, however, and it would require experiment to determine what proportions were necessary to secure this result.

Inasmuch as the discovery of a new substance by means of chemical combination is empirical, and results from experiment, the law requires that the description in a patent for such discovery should be specially clear and distinct. Tyler v. Boston, 7 Wall. 327, 19 L. Ed. 93. "When the specification of a new composition of matter gives only the names of the substances which are to be mixed together, without stating any relative proportion, undoubtedly it would be the duty of the court to declare the patent void; and the same rule would prevail when it was apparent that the proportions were stated ambiguously or vaguely, for in such cases it would be evident on the face of the specification that no one could use the invention without first ascertaining by experiment the exact proportion of the different ingredients required to produce the result intended to be obtained. The specification must be in such full, clear, and exact terms as to enable any one skilled in the art to which it appertains to compound and use the invention; that is to say, to compound and use it without any experiments of his own. Moody v. Fiske, 2 Mason, 112, 119 Fed. Cas. No. 9,745." Matheson v. Campbell (C. C.) 69 Fed. 597, 603. An inventor cannot "speculate on the equivalents of his claimed invention, and thereby oblige the public to resort to experiments in order to determine the scope of the claims of his patent." Matheson v. Campbell, 78 Fed. 910, 916, 24 C. C. A. 384. These claims must be held invalid, therefore, either because it does not appear that they disclose any invention, in view of the prior art, or because they fail to acquaint those skilled in the art with the necessary information to enable them to practice the invention without experiment. It is proved, however, that by compounding the ingredients in the proportions stated in the third claim a new and highly useful result is obtained, and that the discovery and disclosure of such mixture and its proportions entitle the patentee to the benefit thereof. The third claim is sustained. Infringement of this claim, under the interpretation given by the court to the word "chamotte," is suf-

ficiently shown by the admissions of defendant's witnesses and by analysis of specimens of its lining.

The decree of the court below is reversed as to claims 1 and 2, and affirmed as to claim 3, without costs in this court to either party.

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HEMOLIN CO. v. HARWAY DYEWOOD & EXTRACT MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. April 19, 1905.)

No. 168.

1. PATENTS—VALIDITY—SUFFICIENCY OF DISCLOSURE.
When a patent contains a sufficient disclosure of the claimed invention, it will not be invalidated either by the failure of the patentee to state the causes which produce the result, or by a mistaken statement thereof.

2. SAME—INFRINGEMENT—PROCESS OF MAKING LOGWOOD EXTRACT.
The Austen patent, No. 491,972, for improvements in the art of making coloring matter from logwood, covering a process and the resulting product, which is a nonhydroscopic powder, was not anticipated, and discloses invention. Also *held* infringed.

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

For opinion below, see 131 Fed. 483.

W. P. Preble, Jr., for appellants.

Harold Binney, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The opinion of the court below accurately states the contentions of defendants, and discusses them in detail—especially that founded upon the Avery patent, which, as the expert for defendants admits, "is absolutely the only piece of literature * * * where it is especially mentioned that the use of nitrite of soda in the presence of water will modify the presence of resinous and other attractive matters in the logwood." The court reached the conclusion that the Avery patent did not disclose the invention of the patent in suit, and that defendants had infringed. The decision is questioned by defendants on the following grounds:

1. There is no evidence that hemolin, complainant's product, is made by the patented process. The answer to this is found in the uncontradicted testimony of complainant's witness Hopewell that it is made "by the use of nitrites under Dr. Peter T. Austen's patent."

2. There is no evidence that it is nonhydroscopic. But this evidence was furnished by experiments made with hemolin, the powder of the prior art, and defendants' powder, under a bell jar having therein a glass containing water, as a result of which it was shown that, while the powder of the prior art absorbed moisture and liquified, hemolin and defendants' powder remained unchanged.

3. The only novelty claimed for the patented powder is that it is

nonhydroscopic, but the fact is not stated by the patentee. The language of the specification refutes this statement. Referring to the tendency of prior products to "melt or run together," the patentee states that his invention "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, * * * and which will allow of the same facility and accuracy in determining the proper proportions required."

4. "The Avery patent discloses the exact process of claims 1 and 2 of the patent in suit, except for whatever difference there may be between the use of nitrate of soda and of nitrite of soda." Even if this statement be assumed to be true for the sake of the argument, this difference is vital and sufficient. Defendants' expert was unable to state, as a result of his experiments, how much, if any, nitrite was formed by the reduction of nitrate as suggested in the Avery patent. But further objections to the Avery patent are (a) that it did not disclose or suggest a method of forming a powder, and therefore did not amount to a discovery of the development of a nonhydroscopic powder; (b) the Avery process of heat and pressure or use of acids would eliminate or decompose and destroy the nitrite, if any were found; (c) there is no suggestion of the beneficial result from the use of the nitrite in destroying or modifying the extracted matters, such result being the one specifically pointed out in the patent in suit.

5. Finally it is argued that nitrite of soda only oxidizes the extractive matters of the extract, that this property was well known, and therefore there was no invention. If this contention were shown to be correct, it would be fatal to the patent. But what was well known was that nitrite oxidized the coloring matter hæmatoxylin What was not known, and what Austen discovered, was that, if a complex logwood mixture was subjected by his process to the action of nitrite, a permanent nonhydroscopic powder could be produced. The theory of the process is that thereby the gummy matters were modified or destroyed. Defendants' answer to this contention is that there is no statement in the patent to this effect. But it is well settled that, when a patent contains a sufficient disclosure of the claimed invention, it will not be invalidated either by the failure of the patentee to state the causes which produce the operation, or by a mistaken statement as to the reasons therefor. The sufficiency of the disclosure and the novelty and utility of the result are the sufficient considerations for the grant. Here it appears that mere oxidation may be accomplished by various inexpensive materials, that nitrite is a comparatively costly product, and yet that by its use a new kind of powder is produced, which is so much better than those of the prior art that it is profitable to employ it. That complainant's process does in fact accomplish something more than mere oxidation was further indicated by experiments with defendants' samples before and after treatment with nitrite. Before treatment, like the powders of the prior art, they liquified on exposure to a humid atmosphere. After treatment they

became nonhydroscopic. As already shown, the powders of the prior art, which had been produced by oxidation of the extract, do not exhibit this nonhydroscopic quality.

We concur in the conclusion of the court below 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 prominent characteristic and effective feature of this product, which distinguishes it from those of the prior art, consists in the fact that it retains its permanent quality when exposed to atmospheric conditions, and for that reason possesses peculiar practical utility and commercial value.

The admissions of defendants' president quoted in the opinion of the court below, are conclusive upon the question of infringement.

The decree is affirmed, with costs.

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## VOIGHTMANN et al. v. PERKINSON et al.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

1. PATENTS—PATENTABLE INVENTION.

A conception alone, although first in time, is not patentable, but must be accompanied by mechanical embodiment, which, to make the invention patentable, must itself be unanticipated.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 72.]

2. SAME—FIREPROOF WINDOWS.

The Voightmann patent, No. 600,186, for a fireproof window, is void for lack of patentable invention; being for an aggregation of old elements, each of which performs its old function to produce the old result.

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

For opinion below, see 133 Fed. 934.

The bill is to restrain infringement of letters patent No. 600,186, issued March 8th, 1898, to Frank Voightmann, for a new and useful improvement in fire proof windows. The bill was dismissed by the Circuit Court for want of equity, and from the decree of dismissal the appeal is prosecuted.

Other patents cited on the hearing were as follows:

No. 188,375, March 13, 1877, J. Kelly.
No. 246,410, Aug. 30, 1881, T. J. Morgan.
No. 277,478, May 15, 1883, F. Grinnell.
No. 483,020, Sept. 20, 1892, F. Shuman.
No. 483,021, Sept. 20, 1892, F. Shuman.
No. 535,035, March 5, 1895, E. Walsh, Jr.
No. 535,512, Feb. 5, 1895, E. Walsh, Jr.
No. 563,394, July 7, 1896, H. T. Moody.
No. 753,665, March 1, 1904, H. E. Brown.

The further facts are stated in the opinion.

Charles K. Offield and Albert H. Graves, for appellants.

James H. Perkinson, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. The fire proof window described in appellants' patent is one made of wire glass, or other fire proof glass, set in a metal frame, which, in turn, is set into a metal casement, the window being so hinged above its center, that when let at rest, it falls automatically into its place in the casement. In this state, and without further accessories, the window, admittedly, existed in the prior art.

Voightmann's patent contemplates that the window should not always be kept closed, but on occasion should be kept open; and he accomplishes this by a cord or chain attached at one end to the upper end of the window, and at the other to a hook below the window; in which chain is inserted a fusible link so placed that in case of fire, while the window is open, the link would be exposed to the outside temperature; and, melting on exposure, would part, leaving the window to fall into its casement, thereby presenting, with the surrounding wall, a solid fire wall.

Admittedly a window so hinged that it is kept open by a cord or chain attached to its upper edge, and falling when the cord or chain is severed, is old. The fusible link also is old. A fusible link, so placed that it would melt under heat coming from a chamber outside its own chamber, is old. Such a link was employed to open and close elevator sky lights, and in other connections in the previous art.

It is possible that Voightmann was the first to conceive that windows thus constructed would be a valuable adjunct to fire proof buildings. If so, it is the previousness of his conception that constitutes the merit of his so-called invention; for the mechanical embodiment of that conception is old. But it does not follow that a conception is patentable merely because it is first in time. Concept, alone, is not patentable. Concept must be accompanied by mechanical embodiment; and, as the law now stands, the mechanical embodiment, to make the invention patentable, must itself be unanticipated.

Now in Voightmann's patent, every mechanical element described is found to have pre-existed; to have pre-existed in the form utilized by Voightmann; to have pre-existed performing the functions performed in Voightmann's device; and performing those functions to the same result. Voightmann possibly has pointed out to the world a wider use of the pre-existing art than was before known. But the discovery of an enlarged use is not, of itself, patentable invention.

The decree of the Circuit Court is affirmed

## S. FRANKLIN & CO. v. ILLINOIS MOULDING CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

No. 1,100.

1. PATENTS—REISSUE.

The presumption that new matter found in the specification of a reissue patent was omitted from the original through inadvertence or mistake, arising from the fact of the granting of the reissue, is prima facie only, and merely places the burden of proof upon a defendant contesting the validity of the reissue.

2. SAME—VALIDITY OF REISSUE—MACHINE FOR ORNAMENTING PICTURE FRAMES.

The Adams second reissue patent, No. 11,980 (original No. 642,059), for a machine for mounting ornamental composition directly upon circular picture frames, claims 11 to 18, are void as covering a construction not included in the original patent.

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

For opinion below, see 128 Fed. 48.

The bill is to restrain reissued letters patent, No. 11,980, issued April 8th, 1902, to Frank E. Adams, assignor to Samuel Franklin, for a machine for mounting ornamental composition directly upon circular picture frames. The original letters patent, on which the reissue was based, were No. 642,059 issued January 30th, 1900, to Francis E. Adams.

Other patents cited were the following:

No. 242,934, June 14, 1881, J. P. Jamison.
No. 292,552, Jan. 29, 1884, P. E. Francke.
No. 430,576, June 17, 1890, J. Groble.
No. 445,215, Jan. 27, 1891, W. Zoeller.
No. 590,200, Sept. 14, 1897, F. A. Brausil.
No. 591,520, Oct. 12, 1897, W. Zoeller.
British Patent No. 7,163, Apr. 25, 1891, H. Huppertz.

The bill was dismissed by the Circuit Court for want of equity, and from this decree the appeal is prosecuted. The further facts are stated in the opinion.

William B. Rummler, for appellants.

Charles G. Page, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. Prior to Adams' machine, as described in his original letters patent, ornamental work made out of paste pliable to impression, was applied by machinery to picture frames. None of these frames thus ornamented, however, were oval or circular. They were straight frames, and the ornamentation was put on by running the frames between bearings over a feed roller, and under an impression roller—the paste being put on the frame just in front of the rollers.

In his original letters patent, Adams sought to apply this kind of machine made ornamentation to oval, or circular frames. To do this he employed a feed roller, and impression roller, as formerly. But axially with these rollers he put in two bearings, one on the inner, and the other on the outer side of the frame, so that as he conceived the machine would operate, the frames would be guided by these two bearings over the table, and through the rollers at practically right angles to the rollers.

The original application having been rejected in the patent office on citation of the Groble and Huppertz patents, Adams inserted in the description of his invention, as an explanation, the following:

"A guide or stop only at one side edge, either at the inside, or at the outside of an irregular, or an even ordinary long oval picture frame, would not be sufficient to serve as a guide even in the hands of a skillful workman."

But in one of the claims of the application, as thus amended, he included as one of the elements of the combination "a stop adjacent to the wheel, and in line with the axis of the shaft." Thereupon the examiner pointed out that according to the language in the description already quoted, the element of the single stop claimed would be inoperative; and thereupon the claim was stricken out, the explanation in the description remaining; and nowhere, either in the claims, or the description of the patent as it was originally granted, does the suggestion of a single guide or bearing again show itself.

Now when we come to the reissue, we find that the clause already quoted from the original patent was repeated; but repeated with an addition that, as this case shows, entirely changed its meaning. The quotation, with the addition, is here repeated, the addition being in brackets:

"A guide or stop only at one edge, either at the inside, or the outside of an irregular frame, or even an ordinary long oval picture frame [in which the composition is mounted on a slanting surface] would not be sufficient to serve as a proper guide even in the hands of a skillful workman."

The effect of the reissue, it will thus be noted, was to eliminate the original clause wholly from the description of the invention, except as it applied to the mounting of the ornamental composition on frames having a slanting surface.

The motive for this modification of the original letters patent, by reissue, is made perfectly plain by the facts disclosed in the record before us. Following Adams' original letters patent, but before his reissue, the appellees discovered the desirability of picture frames, the outer edge, as well as the sides, of which should be ornamented; and to attain this end employed a machine that used but one guide on the inner edge; finding, that except in the mounting of ornamental composition on slanting frames, such a machine would work as well as if two guides were employed. Plainly, to our minds, appellants reissue was intended to antedate this machine of the appellees; and that could be done of course, only by a reissue that would carry the modification back to the date of the original letters patent.

But it is said in argument that whatever the evidence in that respect might disclose, the legal conclusion is closed in favor of appellants, because, as argued, it must be presumed that before the reissue was issued, there was before the patent office satisfactory evidence that, but for inadvertence or mistake, the original letters would have taken the form that the reissue now employs.

That some such presumption properly attaches itself to the reissued patent we may admit. At most, however, it is a prima facie

presumption only. It is not a presumption that debars the appellees from challenging the validity of the reissue by showing facts that would overcome the presumption. The reissue is before us just as it was before the patent office before it was allowed, except that while the burden of proof then was upon the appellants, the burden is now upon the appellees. But, as already indicated, appellees have, in our judgment, fairly met the burden, and made good their case against the reissue.

The decree of the Circuit Court is affirmed.

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## BAKER v. CRANE CO.

## CRANE CO. v. BAKER.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

PATENTS—ACCOUNTING FOR INFRINGEMENT—PATENTED IMPROVEMENTS.

On an accounting for damages or profits for infringement of a claim of a patent covering an improvement on an existing device, it is incumbent on complaint to show how much of the profit made by defendant on the entire article was due to the patented improvement, or, in case of damages, how much of complainant's loss was due to such improvement.

[Ed. Note.—Accounting by infringer of patent for profits, see note to Brickill v. Mayor, etc., of City of New York, 50 C. C. A. 8.]

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

Baker secured against Crane Company a decree for an injunction and an accounting, which was affirmed on appeal. Crane Co. v. Baker, 125 Fed. 1, 60 C. C. A. 138. Both parties are now appealing from the decree on accounting.

Clifford E. Dunn, for Clara E. Baker.

Paul Synnestredt and F. H. W. Clay, for Crane Co.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. The decree awards complainant $1,177.05, as being the profits defendant derived from the infringement. The utmost that can be claimed for the evidence and finding respecting defendant's profits is this: Defendant made 4,130 appliances, which embodied claim 1 of the patent, at a cost of 86½ cents each, and sold them at an average price of $1.15 each.

But the patent was for an improvement upon an existing device for the same purpose, which was made and sold by defendant. What profit was made on the old device? Was the old device utterly useless and unsalable at any profit after the invention was disclosed? How much of the 28½ cents, the difference between the cost and selling price of defendant's new appliance, was due to the improvement covered by claim 1? The record fails to show. This was necessary. Seymour v. McCormick, 16 How. 480, 14 L. Ed.

1024; Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371; Keystone Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103.

Complainant asserts that the court, in addition to or in lieu of defendant's profits, should have allowed damages to the extent of the gains complainant would have made on defendant's sales. The evidence and the finding show that complainant made the device embodying the patented improvements at a cost of $1.03, and sold it for $2.25. Complainant's profits on 4,130 appliances would be $5,038.60.

But even assuming, contrary to the master's finding, that complainant, but for the infringement of claim 1, would have made defendant's sales at the very much higher price, there is no basis on which to sustain complainant's contention. The damages for which defendant might be liable are damages for infringement of claim 1. What were the cost and the selling price of the appliance made and sold by complainant, before including the improvements shown in the patent? What additional profit did complainant make by reason of the improvements? How much of the additional profit was due to the improvement covered by claim 1, and how much to claim 2, which was not infringed? In short, what was the commercial value of claim 1 to complainant? Or to any one? There is no evidence.

Complainant insists that the court erred in limiting the accounting period. The record contains no warrant for more than nominal damages at any time. We cannot reopen the taking of evidence simply because the complainant has failed to make a case.

The decree is reversed, at complainant's costs, with the direction to enter a decree for $1.

JONES et al. v. DAVIS et al.

(Circuit Court of Appeals, Third Circuit. May 19, 1905.)

No. 28.

PATENTS—INFRINGEMENT—MINERS' LAMP HOLDER.

The Lattimore patent No. 415,720, for a lantern holder to be attached to miners' caps, claim 1, distinctly and clearly describes the device claimed, which includes a "forwardly projecting top piece" having an eye for the inner end of the lantern hook, and cannot be enlarged by construction. It is not infringed by a device in which the front piece stands out from the front of the cap, and the top piece, having the eye for the lantern hook, projects backwardly.

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

For opinion below, see 133 Fed. 550.

Melville Church, for appellants.

E. Hayward Fairbanks, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. Patent No. 415,720, dated November 26, 1889, was granted to Walter A. Lattimore for a lantern-holder. Its first claim which the court below held had been infringed by the appellants, is as follows:

"(1) A lantern-holder consisting of the metallic base-piece, the front-piece and the forwardly-projecting top-piece having an eye for the inner end of the lantern-hook and a slot or socket for the upper part or shank of the lantern-hook."

The meaning of this claim is plain. It does not require, and therefore it is not open to, interpretation. It is so explicit that the courts cannot alter or enlarge it. Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 278, 24 L. Ed. 344. It is for a lantern-holder for holding lanterns on miners' hats and caps, and it is for nothing else. It is not for a hat or cap and a lantern-holder; nor is it for any and every lantern-holder, however constructed. If it were, it would not, in view of the prior art, be possible to sustain it. It is solely and distinctly for the lantern-holder which it specifically describes as consisting of (1) the metallic base-piece, (2) the front-piece, (3) the forwardly-projecting top-piece having an eye for the inner end of the lantern-hook, and (4) a stop or socket for the upper part or shank of the lantern-hook. The device of the appellants (which is likewise patented) has the first, and perhaps the last, mentioned of these parts. It has also a front-piece, but this piece stands out from the front of the cap, and is not designed to be immediately attached to it, as, in the patent in suit, the corresponding piece is shown to be. This variance, if alone and separately considered, might be regarded as merely formal; but it cannot be so considered, for by excluding any direct connection of their front-piece with the cap, the appellants have been enabled to, and they do, have a backwardly-projecting top-piece, with an eye for the inner end of the

lantern-hook behind the front-piece, instead of the forwardly-projecting top-piece, having its eye in front of the front-piece, which is explicitly specified in the claim under consideration. This difference the terms of the claim make a distinguishing one. We are not at liberty to inquire whether a backwardly, as well as a forwardly, projecting top-piece might have been claimed. The fact is that it was not, and by that fact we are concluded. "When the terms of a claim in a patent are clear and distinct (as they always should be), the patentee, in a suit brought upon the patent, is bound by it." Keystone Bridge Co. v. Phœnix Iron Co., supra. Applying this rule, we are constrained to hold that the learned court below erred in finding that the appellants had infringed the patent in suit, and for that reason the decree is reversed.

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## JAMES HEEKIN CO. v. BAKER et al.

(Circuit Court of Appeals, Eighth Circuit. May 22, 1905.)

No. 2,050.

1. PATENTS—INVENTION AND INFRINGEMENT—COFFEEPOTS.
   The Lewis patent, No. 650,129, for a drip-coffeepot, embodies a combination which, although of old elements, is new, and discloses patentable invention, in that it accomplishes an old result in a more facile, economical, and efficient way; its chief merit being in its simplicity, its cheapness of construction, and ease of operation. While not for a pioneer invention, and therefore not entitled to a liberal interpretation of its claims, it is entitled to a reasonable range of equivalents; and infringement cannot be avoided by a mere colorable modification of some of its elements, not essentially varying its principles or mode of operation. As so construed, *held* infringed by the device of the Baker patents, Nos. 710,132 and 710,133.

2. SAME—INFRINGEMENT—COMBINATION.
   Infringement of a patent for a combination is not avoided by omitting one element of the combination, where such element is essential to the successful operation of the alleged infringing device, and it is intended that it or its equivalent shall be supplied by users.
   [Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 387.]

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

For opinion below, see 127 Fed. 828.

Walter F. Murray (George J. Murray, on the brief), for appellant.

John E. Stryker, for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and AMIDON, District Judge.

VAN DEVANTER, Circuit Judge. This is an appeal from a decree dismissing a bill for the infringement of letters patent No. 650,129, for certain new and useful improvements in drip-coffeepots, granted May 22, 1900, to Charles Lewis, assignor of the appellant.

The coffeemaker of the appellees, the manufacture and sale of which is claimed to infringe the letters patent of the appellant, is covered by letters patent Nos. 710,132 and 710,133, granted September 30, 1902, to Thomas K. Baker, assignor of the appellees. The defenses were want of patentable novelty, and noninfringement in the manufacture and sale of appellees' device. The latter defense was sustained in the Circuit Court. Heekin v. Baker (C. C.) 127 Fed. 828.

The appellant's invention consists (1) of a cooking or mixing vessel open at one end, and closed at the other, to receive the ground coffee and water; (2) a strainer, preferably of cloth, to be placed over the open end of the cooking vessel; (3) a pouring vessel to fit over the open end of the cooking vessel, and to hold the strainer in place; and (4) a valve in or near the closed end of the cooking vessel, capable of being closed when the vessel is seated on its closed end, and of being opened for the admission of air when it is inverted; the whole, when so assembled, being capable of being inverted so that the liquid coffee will quickly pass through the strainer from the cooking vessel into the pouring vessel, leaving the grounds in the former. One of the claims of the patent is:

"(3) In a drip-coffeepot, the combination of a vessel for holding ground coffee, open at one and closed at the other end; a nipple in the walls of said vessel, near the closed end; a check valve to close the mouth of said nipple when it is inverted, and to open automatically when it is reinverted; a removable strainer to fit over the open end of said vessel; and a pouring vessel to fit down over said strainer and vessel—substantially as shown and described."

The purpose of the invention, as stated in the application for the letters patent, is:

"My invention relates to improvements in drip-coffeepots. Its object is a pot in which to make French or drip-coffee so that the least amount of the aroma of the coffee is lost by exposure to the air during the process of making, in which the hot water may be kept in contact with the ground coffee just the length of time desired before commencing to drip, and which is so simple of construction that it is cheap to make and easy to clean."

The article manufactured and sold by the appellees consists of (1) a cooking or mixing vessel, open at one end and closed at the other, to receive the ground coffee and water, and having the open end tapering, so as to fit into the top of any ordinary coffeepot; (2) an ordinary lid or cover to be temporarily fitted over the open end of the cooking vessel, so as to exclude the air therefrom during the process of making: (3) a strainer, of cloth or other suitable material, to be placed into the opening in the cooking vessel, and to be firmly and tightly held in place by a skeleton holder; (4) a valve in the closed end of the cooking vessel, capable of being closed when the vessel is seated on its closed end, and of being opened for the admission of air when it is inverted; the whole, when assembled (save the lid or cover, which is to be removed), being capable of being inverted so that the liquid coffee will quickly pass through the strainer from the cooking vessel into the ordinary coffeepot used as a pouring vessel, leaving the grounds in the former.

In the application for the first of the appellees' letters patent, the purpose of the invention is stated as follows:

"My invention relates to improvements in coffeemakers. Its object is the production of a coffeemaker that may be used in conjunction with an ordinary coffeepot or receiver, and which will not clog when the liquid coffee is strained into such receiver. A further object is the production of a simple and cheap coffeemaker, in which the minimum amount of the aroma of the coffee is lost by admitting air during the process of infusion. * * * While the coffee is being infused the vessel stands upon its closed end, after which it is inverted, with the funnel in the top of the coffeepot to be used, and the beverage quickly strains into such pot. * * * The funnel-shaped end of the coffeemaker adapts it for use in connection with any ordinary coffeepot, without regard to the exact size of the opening in its top, and also permits the vessel to stand in the open coffeepot while the process of emptying continues without being held in position."

And as stated in the application for the second of their letters patent, the purpose of the improvement there claimed upon the invention named in the other application is this:

"The object of my invention is the production of a simple and efficient coffeemaker (adjustable to coffeepots of varying styles), in which the strainer may be easily and quickly attached, so as to produce a tight joint between the wall of the open end of the vessel and the strainer."

The first question is that of the patentable novelty of the appellant's coffeepot. None of its elements was new, and it did not produce a new result; but we think the record clearly discloses that the combination, although of old elements, was new, and that it accomplished an old result in a more facile, economical, and efficient way. This gave it patentable novelty. National Hollow Brake Beam Co. v. International Brake Beam Co., 45 C. C. A. 544, 557, 106 Fed. 693. The merits of the device consist in the simplicity and cheapness of its construction, the ease of its operation, its complete and quick separation of the beverage from the coffee grounds after permitting an intimate and uniform contact of the coffee and the water, and its retention of the aroma of the coffee during the process of infusion. But if the questions of novelty and merit were otherwise left in doubt by the evidence, they would have to be resolved in favor of the patent, because of the immediate and general use into which the device is shown to have gone when it was put upon the market. Dowagiac Manufacturing Co. v. Minnesota Moline Plow Co., 55 C. C. A. 86, 89, 118 Fed. 136.

The chief question relates to the claimed infringement by the appellees. As is shown by their letters patent, their device is intended, by its use in conjunction with an ordinary coffeepot, to accomplish the same result as the device of the appellant, and the evidence shows that when so used it does accomplish it. Identity of result is, however, not a sufficient test of infringement. There must also be substantial identity of the means and manner of its accomplishment. The appellant's invention being obviously not a pioneer, but only an improvement upon the prior art, its claims cannot be given a liberal interpretation; but there is yet a right to a reasonable range of equivalents, measured by the character and extent of the improvement, and infringement cannot be avoided by mere color-

able modifications of some of its elements, not essentially varying its principle or mode of operation. National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 45 C. C. A. 544, 562, 106 Fed. 693; Dowagiac Manufacturing Co. v. Minnesota Moline Plow Co., 55 C. C. A. 86, 91, 118 Fed. 136; Standard Caster & Wheel Co. v. Caster Socket Co., 51 C. C. A. 109, 116, 113 Fed. 162.

Careful consideration of the two devices convinces us that the one of the appellees', with the ordinary coffeepot in conjunction with which it is used, is an imitation or reproduction of the one of the appellant. There is in the former a mere colorable modification of some of the elements of the latter, without any modification of its principle or mode of operation. The differences consist in the substitution of the plainest mechanical equivalents. There is almost perfect identity of result, means, and manner of accomplishment. It is true that the appellees' device, as manufactured and sold by them, does not have a pouring vessel—one element of the appellant's device; but the evidence, including the letters patent of the appellees, shows that a pouring vessel is essential to the successful operation of their device, and that in its manufacture and sale they intend that the purchaser shall supply a pouring vessel, in the form of an ordinary coffeepot. That constitutes infringement, because he who makes and sells one or more elements of a patented combination, with the intention and for the purpose of bringing about its or their use in an infringing combination, is guilty of contributory infringement, and is equally liable with him who in fact organizes and uses the complete combination. Wallace v. Holmes, Fed. Cas. No. 17,100; Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 25 C. C. A. 267, 77 Fed. 288; Thomson-Houston Electric Co. v. Ohio Brass Co., 26 C. C. A. 107, 117, 80 Fed. 712; Red Jacket Manufacturing Co. v. Davis, 27 C. C. A. 204, 82 Fed. 432; Loew Filter Co. v. German American Filter Co., 47 C. C. A. 94, 107 Fed. 949.

The decree is reversed, and the cause is remanded to the Circuit Court, with directions to enter a decree in favor of the appellant for an infringement of the third claim of its patent, and for the usual injunction and accounting, and to take such further proceedings as may not be inconsistent with the views here expressed.

KAHN et al. v. STARRELLS.

(Circuit Court, E. D. Pennsylvania. May 16, 1905.)

No. 17.

PATENTS—VIOLATION OF INJUNCTION AGAINST INFRINGEMENT—CONTEMPT PROCEEDINGS.

A defendant *held* in contempt, on the evidence, for violation of a permanent injunction against infringement of a patent.

On Motion to Attach for Contempt.

Fraley & Paul, for complainants.

L. L. Smith and Joshua Pusey, for respondent.

J. B. McPHERSON, District Judge. In Kahn et al. v. Starrells, 135 Fed. 532, the Circuit Court of Appeals, reversing the decision reported in (C. C.) 131 Fed. 464, sustained the validity of the first and second claims of letters patent No. 669,011, which relate to the process of making flat caps, or tam-o'shanters. These claims, which are both for a process, are 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 a right angle 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, and finally setting the article in its flat, distended shape, substantially as described."

The seventh paragraph of the decree that was entered by the circuit court to carry out the order of the Court of Appeals directs—

"That a perpetual injunction issue out of and under the seal of this court, perpetually enjoining and restraining the said defendant, Morris Starrells, and his servants, agents, attorneys, employés, workmen, and confederates, and each and every one of them, from directly or indirectly making, constructing, or manufacturing flat knit caps by the method or process described in said letters patent of the United States, No. 669,011, and particularly recited in the first and second claims thereof, or in any wise counterfeiting or imitating the said invention, and particularly from employing the method of manufacture which the said defendant has hitherto employed in the manufacture of knit caps in infringement of said letters patent."

The complainants aver that the defendant has violated the injunction, which was served upon him on March 30, 1905, by continuing to use the patented process, and upon this point witnesses were heard in open court; affidavits having been received only so far as they were offered to contradict the oral testimony given by two of the witnesses. The specific act of violation charged against the defendant was the manufacture of a cap marked "Exhibit B," and concerning this cap the following stipulation was entered into by counsel and noted by the stenographer at the hearing:

"It is stipulated between counsel for the respective parties in the above case that upon the hearing of the order granted by Hon. J. B. McPherson on the 10th day of April, 1905, requiring the defendant to show cause why an attachment should not issue against him for contempt of an injunction of the court, the defendant, Morris Starrells, will admit that the cap marked in this cause 'Exhibit B,' or others in all respects identical therewith, was manufactured by the defendant at his factory at 218 Arch St., Philadelphia, subsequent to the service upon the defendant on March 30, 1905, of the injunction issued in this cause."

A great deal of defendant's evidence was offered in support of his contention that he is now making caps by a method which does not infringe the patent, because it does not involve distending the cap at any stage of the process. Whether this is true or not, I have not considered it material to decide, except so far as Exhibit B is concerned, for it is clear that, while the defendant may be making some caps by a process that does not infringe, he may also have made others, in which Exhibit B may be included, in defiance of the injunction. I have no intention of discussing the conflicting evidence concerning Exhibit B. It is sufficient to say that I have attentively considered it all, aided by the advantage of having heard the witnesses examined and cross-examined in my presence, and have weighed it to the best of my ability. The result is that I am satisfied that Exhibit B was made by the patented process, and I so find as a fact. The defendant has therefore disobeyed the injunction, but, as the complainants only ask for a nominal punishment, no other will be inflicted.

It is accordingly ordered that the defendant, Morris Starrells, pay the costs of this proceeding for contempt, including the stenographer's charges, on or before the 25th day of May, 1905.

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## MORRIN v. ROBERT WHITE ENGINEERING WORKS.

(Circuit Court, E. D. New York. May 10, 1905.)

1. PATENTS—INFRINGEMENT—RECONSTRUCTION OR REPAIR.

The rule as to the right of a purchaser of a patented combination to supply parts, of his own authority, from a generalization of the authorities, would seem to be that he may replace an element of the combination (1) when its consumption was the very purpose of the device; (2) when its use upon external objects must work its early destruction; (3) when it was intended to be destroyed and was destroyed after a single use, and became waste material; (4) when, in the arrangement of an element, not the chief element, it is so fashioned and placed as to be specially subjected to external forces that make it peculiarly liable to breakage and wear; (5) when it is not the chief part of the combination; (6) when it is an ordinary working part, like a cam in actuating machinery, although specially adapted for the proper operation of the device, and even though it is the most essential element in the combination. But an element may not be replaced when it is the vital element of the combination in fact, and in regard to patentability, especially when it is not intended to be of short life by the action of external forces thereon.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 399.]

2. SAME—RECONSTRUCTION OF VITAL ELEMENT OF COMBINATION.

Complainant was the owner of a patent for a steam generator, consisting of an upright cylinder or shell provided with tiers of generating

tubes, of peculiar shape, which constituted the vital and patentable element of the structure. Such tubes constituted about one-third in value of the completed structure, and were ordinarily subject to injury only from the action of the water, the same as the shell, though perhaps to a greater extent. Defendant, under contracts with purchasers of the patented generators, practically refitted the same with new tubes; some of the old ones having become useless. *Held*, that such refitting was not an authorized repairing of the patented structure, but a reconstruction, which constituted an infringement of the patent.

3. SAME—STEAM GENERATOR.

The Morrin patent, No. 463,307, for a steam generator, *held* infringed by defendant by a reconstruction of the tubes, which constitute the patentable element of the combination, in generators which had been sold under license from the patentee.

In Equity. Suit for infringement of patent.

Joseph F. Farmer (George E. Morse, Clifford E. Dunn, and Henry M. Turk, of counsel), for complainant.

Field & Chittenden (Thomas Ewing, Jr., of counsel), for defendant.

THOMAS, District Judge. The complainant is the owner of letters patent No. 463,307, issued to Thomas F. Morrin on November 17, 1891. The bill charges that the defendant has infringed claim 2, which is as follows:

"(2) A steam-generator having an upright generator-cylinder provided with tiers of generating-tubes, b, of loop-like form, said loop having a pear-shaped outline when seen in plan, and each loop having at one side a lobe formed by the short out-curve at bx, and the short in-curve at bxx, the planes of the loops in the tubes being set obliquely to the axis of the generator-cylinder, substantially as set forth."

This claim was sustained in the suit of Morrin v. Lawlor and Morrin v. Edison Electric Illuminating Co. (C. C.) 90 Fed. 285, on appeal 99 Fed. 977, 40 C. C. A. 204. The patentability of the structure, as shown in the claim, is found in the loop described in claim 2, and it was so held. The Clonbrock Steam Boiler Company, a former licensee of the complainant, installed at the establishment of the Terre Haute Electric Company between December, 1894, and July, 1895, two boilers constructed pursuant to the claim, and two of the same type of boilers at the establishment of the American Manufacturing Company—one in 1895 and one in 1898. On April 8, 1904, a receiver of the Clonbrock Company was appointed in bankruptcy, and thereupon one Jones, who had been the vice president of such company, canceled a contract which he had made on December 29, 1903, with the Terre Haute Company, whereby he was to supply for its boilers the following:

950, 3" Boiler Tubes for 500 H. P. Climax Boilers at 3.50 each.
1000 ½x1" Bolts at 1½c. each.
50 Casing Brick for lining Casing at 15c. each.

On March 3, 1904, Jones left the Clonbrock Company, and on March 16th procured the Terre Haute Company to give the contract for the work to the defendant. Pursuant to its contract the

defendant replaced in each boiler at Terre Haute 450 tubes, which was 25 less for each cylinder than the amount originally provided; the cylinder at some previous time having been so repaired as to prevent further replacement. The defendant calked part of the shell of one of the boilers, and put in new bricks in an outer casing where necessary, and furnished 1,000 bolts. The defendant actually sent to the Terre Haute Company 950 new tubes. The American Manufacturing Company negotiated with both the defendant and the receiver of the Clonbrock Company for work upon its boilers. On July 5, 1904, that company requested the receiver to estimate on the cost of furnishing from 900 to 1,000 tubes and other parts, and on July 17th the receiver agreed to do the work at $4.75 per tube, which included the cost of the tube and labor. On June 20, 1904, the defendant offered to supply 475 tubes for one of the American Manufacturing Company's boilers, and 588 tubes for the other, at the cost of $3.25 each, and an additional sum of $400 for labor on one boiler, and $600 for the other boiler, which offer was repeated on July 20, 1904, and thereafter was accepted by the American Manufacturing Company. In addition to the above work the defendant also renewed about 4 tiers out of 19 for the Wurster & Company boiler, when it was enjoined and stopped. The boiler was taken down, moved, and put up again. The defendant did the work for these three several companies according to the contract, although the receiver gave due notice that he contested the legality of its proposed action.

The first question is whether the practical replacement of all the tubes by the defendant was unlawful renewal or authorized repair? The defendant's brief states that, as to the Terre Haute boilers, the reason for replacing the tubes was "that there were already many stop tubes and tubes in bad condition, and it was difficult to pick out the good tubes, since they were only 3-inch tubes, and bent or bowed so that one could not see inside of them"; and, as to the American Manufacturing Company boilers, that "there were two boilers that were retubed by the defendant. This was done because many of the tubes were in bad condition, and it seemed cheaper to replace all than to undertake to pick out the bad tubes." The "generator cylinder," of the 500 horse power class, is about 28 feet in height, and about 3½ feet in diameter. The original cost of the cylinder alone was about the same as that of the tubes. There was an outer casing, not mentioned in claim 2, which, with its fire-brick lining and fire box, cost about the same as each of such elements. The price of the tubes used to retube the boilers was about one-third of the original first cost of the entire structure, including cylinder, tubes, and outer casing. The evidence of Ormond, who did the work on the Terre Haute boilers for the defendant, is to the effect that the life of such a boiler is "about fourteen years; that is, if the boilers are kept repaired with tubes if they need it."

"Q. When you left these boilers at the Terre Haute Company, did you, or did you not, consider them as good as new? A. I did not consider them as

good as new. Q. Could you give any estimate as to how long they would probably run? A. Well, about two years I would give them."

Wilson, complainant's witness, states:

"Twenty years should be the lifetime of any shell boiler under certain conditions. Q. And those conditions are conditions of proper attention? A. Well, in a building of this character, I shouldn't feel justified in running boilers over twenty years, whereas, in an isolated factory, or something of that kind, with good care, a boiler would last twenty-five or thirty years. The question of crystallization creeps in, and you can't determine."

The life of the cylinder and tubes is affected by the water used in them. The Terre Haute tubes were from the beginning peculiarly clogged, impaired, and destroyed by the use of water having a large amount of carbonates and deposits, which necessitated an unusually large replacement of tubes. The American Company's boilers were used under more favorable, and perhaps ordinarily favorable, conditions, and were not fully retubed until the defendant supplied tubes therefor, although tubes failed from time to time; and in such instances the holes in the boiler were closed by stop tubes, or new tubes furnished by the Clonbrock Company were inserted, amounting in all to 50 or 60. Only a very limited number of stop tubes could be used, or the efficiency of the boiler would be seriously limited. The evidence shows that the life of a whole set of tubes is somewhat shorter than that of the cylinder, and that some of the entire set of tubes fail from time to time before the entire set becomes unserviceable.

The question to be determined requires an examination of the decisions, for the difficulty is not in discovering the general rule, but, rather, its application. Hence what the courts have regarded as reconstruction, and what justifiable repair, aids decision, and the pertinent cases must be considered carefully.

In Thomson-Houston Electric Co. v. Kelsey Electric Ry. Specialty Co., 75 Fed. 1005, 22 C. C. A. 1, the Circuit Court of Appeals modified the order of the Circuit Court (72 Fed. 1016) enjoining the defendant from selling "trolley stands." A trolley stand is the means by which the trailing arm carried above a trolley car "is hinged and pivoted to the car, with a capacity for lateral and vertical movement, and is pressed upward by some suitable spring." It held that such stands might be sold only to persons licensed to use the patented combination, of which the trolley stand was an element. Judge Townsend, in the Circuit Court, said, "The trolley stand is probably the most substantial, if not the chief, element in the patented combination." Judge Shipman, in the opinion on appeal, in which Judge Lacombe concurred, said, "But the trolley stand is not the vital element of the invention," while Judge Wallace dissented upon the ground that the defendant was entitled to sell to any person the trolley stand, although it was one part of the patented combination. This decision is to the effect that an element held not to be the vital element of a combination can be sold only to persons entitled to use the combination. What would have been the holding had the trolley stand been the vital element?

Judge Townsend, while regarding the trolley stand as "probably the most substantial, if not the chief, element," said:

"The advertisements thereof contained no limitation to sales for repairs, or to persons having the right to use said invention, and it may fairly be inferred from the affidavits that sales have been made to persons not having such right. * * * Defendants further suggest that their trolley stand is capable of a lawful as well as an unlawful use, by way of reparation or restoration of a patented device, and that the presumption must be that this is the purpose for which it is to be used. As already shown, it does not appear, by advertisements or sales, that its use is to be confined to such purpose. Inasmuch as the defendants make and thus sell stands which are useful only for the purpose of performing functions involved in the operation of the patent, it raises a presumption that they intend their stands should be so used. A suit for infringement cannot be defeated by merely showing that such devices could be used for some other purposes. Walk. Pat. (3d Ed.) 331."

But in the suit at bar the sale was made to persons licensed to use the combination, and to no others. Therefore the decision of Judge Townsend does not relate to facts such as are here presented. But Judge Shipman states (75 Fed. 1009, 22 C. C. A. 5):

"While it is not intended that a trolley stand should be broken or should lose its useful capacity, either calamity may befall it; and the right to replace the injured part by a new stand, from any person who can supply the article, should be conceded by the owners of the patent."

But he immediately adds:

"It is not intended to permit the unauthorized substitution of the vital and distinctively new part of an invention in place of one worn out by use, as the substitution of a new filament in an Edison incandescent lamp, or the substitution of a new for an old burner in the Wallace Case, supra [9 Blatchf. 65, Fed. Cas. No. 17,100]; but the trolley stand is not the vital element of the invention, though a portion of it is an element of the combination."

But in the suit at bar the tubes are the vital element of the invention. The cylinder might feebly operate without the tubes, but would be useless for any valuable purpose. The specification states:

"The water circulates through the generating-tubes, b [the tubes marked "b" are thus below the water line], flowing upward, and is converted into steam in its passage through said tubes. The saturated steam is dried in its passage upward to the steam-dome, e, through the tiers of tubes, b', [b' are the tubes above the water line]."

And after describing the arrangement of the tubes continues:

"This arrangement of the tubes compels every portion of the ascending heated gases to come in contact with some portion of some one or more of the generating tubes."

In Davis Electrical Works v. Edison Electric Light Co., 60 Fed. 276, 8 C. C. A. 615, the claim was for "the combination of carbon filaments with a receiver made entirely of glass, and conductors passing through the glass, and from which receiver the air is exhausted, for the purposes set forth." The court held that "the carbon filament, in use in a vacuum, represents the entire advance from the state of the art." The receiver was punctured, the carbon filament destroyed by use was removed, and a new filament inserted, with its ends inserted in platinum sleeves, the hole closed

by fusion, and the air exhausted. The court held that the filament was essentially Edison's electric lamp, and that the "globe and the conductors * * * only the chimney, the stand, and the opening for inserting the oil or other fluid, found in the ordinary domestic lamp." The defendant was held to infringe. This decision seems to be to the effect that, when that element which alone gives the combination patentability is replaced, it is renewal, and not repair. Judge Colt, while considering this Edison lamp in the Circuit Court (58 Fed. 878), said:

"When you take an Edison lamp with its filament destroyed, and break open the all-glass chamber, you have only left the broken pieces—the remains—of the original lamp. Its identity as a structure is gone."

If this be the rule of "identity," the Morrin steam generator loses its identity when the tubes are removed, because it leaves a thing not only useless in fact, but also stripped of the element that makes it patentable.

A case wholly contrasting with either of the above is Pacific Steam Whaling Co. v. Alaska Packers' Association, 100 Fed. 462, 40 C. C. A. 494, where the owners of a machine for automatically filling cans removed all the parts except the legs, and on such old legs placed a new superstructure. This was obvious renewal.

In Singer Manufacturing Co. v. Springfield Foundry Co. (C. C.) 34 Fed. 393, the defendant company made some, but not all, the parts of the patented combination for improvements in sewing machines. Such parts were the feed-cam, forked connecting feed-bar, feed-lifting rock-shaft, feed rock-shaft, shuttle-driver, and shuttle-race, and they were made and sold for the purpose of replacing parts which had been broken or worn out in organized sewing machines sold by the plaintiff. It appeared that the parts would fit no other machine than that of the plaintiff without considerable alteration. Judge Colt refers to Wilson v. Simpson, 9 How. 109, 13 L. Ed. 66, which related to replaced cutter knives; Chaffee v. Belting Co., 22 How. 217, 16 L. Ed. 240, where the defendant "had used certain machinery, constructed in conformity with the specifications of the plaintiff's patent," and where the question was whether the defendant, as grantee or assignee, was licensed to use the thing patented, there being present no question of restoration or repair; to Gottfried v. Brewing Co. (C. C.) 8 Fed. 322, which will be later noticed; and Aiken v. Printworks, 2 Cliff. 435, Fed. Cas. No. 113, where the needles renewed by defendant were subject to a separate patent. Thereupon he said:

"As illustrated by these cases, the rule seems to be that where a patent covers, as an entirety, a machine composed of several separate and distinct parts, the purchaser of such machine from the patentee will not infringe by replacing such temporary parts as wear out, so long as the identity of the machine is retained; but, if the patent is for a distinct part or element of the machine, a purchaser will infringe by replacing such part or element. Tested by this rule, I think the defendants are guilty of infringement in the present case. The sewing machine of complainant is not patented as an entirety, but different parts of the machine are covered by different patents. Claims 1 and 2 of patent No. 229,629 cover an improved shuttle-driver, and the defendant makes and sells the same device to be used in a Singer machine.

The second claim of letters patent No. 274,359 is for a shuttle-race for an oscillating shuttle, provided with an elastic side or flange. The shuttle-race cannot be used in the Singer I M machine without the elastic flange. The defendant makes the shuttle-race for use in such machine. He therefore makes the major part of the patented combination, intending that it should be provided with an elastic flange, and used in complainant's machine. Claims 3 and 4 of patent No. 229,629 and claim 6 of patent 208,838 are combination claims. The main elements found in these patented combinations are made and sold by defendant for use in the Singer machine. Under the authority of Wilson v. Simpson and other cases, this cannot be done."

It is understood from the above that Judge Colt held that the shuttle-driver was subject to separate patent; that the shuttle-race, provided with an elastic side or flange, was subject to separate patent, and that the defendant made such shuttle-race usable only in the plaintiff's machine; and that the other parts sold by defendant were "main elements" in patented combinations—and thereupon ordered a decree for the complainant. From this decision it appears that the owner of the machine may not replace broken or worn-out parts that are subject to a patent, either separately, or, if they be main parts, although not the main parts in the combination, and that the parts worn or broken did not bear to the structure the relation of the knives to the planing machine in Wilson v. Simpson. There it was said that the right to replace the knives did not depend upon perishable material, but existed because the inventor's arrangement of the knives in the combination patented precluded continued use of the machine "without a succession of knives at short intervals." Then the court contrasts the other parts of the planing machine with the knives:

"The other constituent parts of this invention, though liable to be worn out, are not made with reference to any use of them which will require them to be replaced. These, without having a definite duration, are contemplated by the inventor to last so long as the materials of which they are formed can hold together in use in such a combination. No replacement of them at intermediate intervals is meant or is necessary. They may be repaired as the use may require. With such intentions they are put into the structure. So it is understood by the purchaser, and beyond the duration of them a purchaser of the machine has not a longer use of them. But if another constituent part of the combination is meant to be only temporary in the use of the whole, and to be frequently replaced, because it will not last as long as the other parts of the combination, its inventor cannot complain, if he sells the use of his machine, that the purchaser uses it in the way the inventor meant it to be used, and in the only way in which the machine can be used. Such a replacement of temporary parts does not alter the identity of the machine, but preserves it, though there may not be in it every part of its original material."

Here the court draws a distinction between parts exposed to wear in connection with extrinsic material subjected to the operaction of the machine, and consumed thereby after brief use, and parts that wear from coaction with other parts of the machine, or from the effect of the operation of the entire organism. But even as to the parts last mentioned, it is said that repair may be had, which leaves the question of what would be repair to be settled as each case arises.

In the suit at bar the tubes are so arranged as to be more directly affected by the heat than the adjoining cylinder. As a whole they

will probably wear out before the cylinder, and certain of them—probably those in proximity to the source of heat—will fail sooner than others. But it was not the design of the inventor that their life should be brief, or that they should fail during a time largely disproportioned to the life of the cylinder. The same influences causing deterioration act, even if they act unequally, on the cylinder and tubes; but it cannot be said, as in Wilson v. Simpson, that the arrangement of the tubes, and the functions imposed upon them, contemplated frequent consumption and replacement.

In Gottfried v. Conrad Seipp Brewing Co. (C. C.) 8 Fed. 322, the bill was dismissed for noninfringement; but Judge Blodgett held that the grates, pipes, and blowers were worn out, and their renewal by the defendant did not destroy the identity of the machine. The opinion states:

"If, for instance, this patent had been upon a peculiar grate, and there had been no patent upon the other parts of the machine, when the grate was worn out the defendant would have no right to put in another like it, because the grate was covered by the patent; but, if the grate is only a part of the entire combination, I think it has a right to replace the worn-out parts, and it cannot be said to be a different machine."

The first claim of the patent was held invalid in Crescent Brewing Co. v. Gottfried, 128 U. S. 158, 9 Sup. Ct. 83, 32 L. Ed. 390; but, upon the assumption of validity, some of the parts held by Judge Blodgett to have been renewed without infringement were mentioned in the claim. The invention related to the preparation of casks for receiving pitch or other melted substance, by subjecting the interior of such casks to blasts of highly heated air by means of an apparatus described in the letters. There were three claims:

"(1) The application of heated air under blast to the interior of casks by means substantially as described, and for the purposes set forth.

"(2) The use of a removable conductor, E, in combination with a furnace and blowing apparatus, arranged and operated substantially as described.

"(3) The tube-holding plate, i, in combination with the removable pipe, E, and blast furnace, A, substantially as and for the purposes described."

The opinion of the court (128 U. S. 166, 9 Sup. Ct. 85, 32 L. Ed. 390), describes the above structure as—

"An apparatus consisting of a fan-case arranged outside of a furnace, and furnished with a series of rotary wings or fans, which create a blast of air, and force such blast into a chamber and through a fire built upon a grate in the chamber, and thence through such chamber and out of it, and, by means of a pipe, into the cask which it is desired to heat; the heated products of combustion being thus forced into the cask, and then allowed to escape therefrom, so that the cask will be properly heated to admit of the ready flow of the melted pitch into the pores and cracks or joints in the wood in the interior of the cask when the cask is rolled about."

The grates that were renewed were not specific elements of the combination, but the removable conductor and the blowing apparatus were. The blowers that were replaced were probably the rotary wings or fans inside the fan-case, so that only a portion of the blowing apparatus was renewed. The conductor or pipe seemed to have patentable novelty only from the fact that it was removable, and it was said in the opinion of the Supreme Court, "It

is cast separate from the furnace, for convenience of renewal in case of the breakage of either it or the furnace." Indeed, the specification states that the pipe is removed when the cask has been subjected to treatment.

In Gottfried v. Schoenhofen, 10 Fed. Cas. 841, the infringement of the same patent was involved; and while it was held that the defendant was entitled to use the original structure, yet, as he had torn it down, removed the old parts, and put up another machine, consisting of parts of the original machine, he thereby so destroyed the parts of the original machine as to make him an infringer. It does not appear what parts were renewed.

In Cotton-Tie Company v. Simmons, 106 U. S. 89, 1 Sup. Ct. 52, 27 L. Ed. 79, the cotton-bale ties that were the subject of the patent consisted of a buckle and band, with the words, "Licensed to use once only," stamped in the metal of the buckle. At the cotton mill the band was cut, and the ties sold as scrap iron to H., who rolled out the pieces of the band, riveted their ends, cut them to proper lengths, and sold them with the old buckles for their original purpose. This was held to be a reconstruction of the tie. It will be observed that the right to use was, by the very license to use, subject to the necessity of destruction after one use, and that the device as such was actually destroyed. Hence when the ties came to the defendant they were, in fact and in law, incapable of restoration for the purpose of baling cotton.

Shickle, Harrison & Howard Iron Co. v. St. Louis Car Coupler Co., 77 Fed. 739, 23 C. C. A. 433, related to a patent for car couplers. The couplers consisted of:

"First, the drawheads or shanks; second, the coupling head or knuckle which is used to connect them; third, the pivot pin on which the knuckle turns; and, fourth, the locking pin."

Each claim of the patent was founded upon a combination of three or more of these elements, and no one of the elements was the subject of a separate claim. The defendant made and sold, to persons licensed to use the couplers, knuckles in substitution of those worn out or broken. Judge Thayer states in the opinion:

"The Circuit Court concluded that the manufacture and substitution of new knuckles for those which had been broken should be regarded as a reconstruction of the car coupler, rather than a repair. It was led to entertain this view, as it seems, because it regarded the knuckle as the chief element of the patented combination; also because the knuckle is unique in form and structure, and only susceptible of use in connection with the other elements of the complainant's device. St. Louis Car Coupler Co. v. Shickle, Harrison & Howard Co. (C. C.) 70 Fed. 783. It is undoubtedly true that the patentee did display considerable ingenuity in devising the peculiar shaped knuckle. It is also true that the knuckle is an important element of the coupling device in question, and that it is utterly useless except in combination with the drawheads forming the coupler. But we are not able to say for these reasons that the substitution of new knuckles for others that had been broken should be regarded as a reconstruction of the coupler. * * * Moreover, the drawheads of the coupling device, besides being more durable than the knuckle, are also an essential part of the patented combination. It is not wholly accurate to say that the knuckle is the chief element of the combination. The drawheads have an equally important function to perform. They are not like the drawheads in use in the ordinary

coupling device, but are of peculiar design; being so cast as to fit or complement the knuckle and render it operative. The drawheads are also much the larger part of the coupling device, and doubtless cost more than the knuckle. Neither can we say that the knuckle is the only part of the coupler which affords evidence of invention, for that is found in the conception of the coupler as a whole, and in the shape and arrangement of all its parts, including the drawheads."

In considering the relative durability of the parts it is said:

"Other considerations, we think, are entitled to greater weight. The knuckle or 'coupling-head,' as it is termed in the patent, is an irregular, hook-shaped piece of cast iron or steel, which is interposed between the drawheads or shanks of the car coupler, and is perforated with holes in which to insert the locking pin and pivot pin. Owing to its position between the drawheads, it frequently receives a severe blow or shock when, in the act of coupling, two cars come together, besides being subjected to a great strain when a train is started or is in motion. The proof shows that it is much more liable to be broken than other parts of the coupling device, and, from the peculiar shape of the knuckle, and its location between the drawheads, it seems obvious that the knuckle will be broken frequently, while the drawheads remain intact, and that the knuckle is therefore less durable than other parts of the coupler. * * * It can hardly be supposed that a railroad company would equip its cars with a patent coupling apparatus like the one in controversy, one part whereof is liable to be broken long before the drawheads are worn out, unless the purchase of the coupling apparatus was made on the implied understanding that the purchaser should have the right to replace that part of the apparatus, if it was accidentally broken, without being compelled to pay further tribute to the owner of the patent."

After referring to Wilson v. Simpson, 9 How. 109, 13 L. Ed. 66, Farrington v. Board, 4 Fish. Pat. Cas. 216, Fed. Cas. No. 4,687, and Gottfried v. Brewing Co. (C. C.) 8 Fed. 322, it is said:

"In our judgment, the principle which underlies these decisions is strictly applicable to the case at bar. The knuckle of the complainant's car coupler is shown to be less durable than the drawheads, but no more essential to the successful operation of the coupling apparatus."

It was held that, while the defendant could not sell the knuckles indiscriminately, it could sell them, for the purpose of repairing the patent coupling devices, to persons or corporations who had acquired the right to make use of them. This case holds that an essential element of a combination of peculiar design, although not the most essential element of the combination, and presumably less expensive than other equally essential parts, and purchased on an implied understanding that the purchaser should have a right to replace, may be replaced when worn out in use, and that such replacement is not reconstruction, but repair.

In Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500, it was held that letters patent for an apparatus for holding toilet paper were not infringed by selling such fixture or apparatus, bought of the patentee, with paper manufactured by the seller. As to two of the patents, the opinion states:

"Each patent contains five claims, and in all of them, except the fourth and fifth of the first patent and the fifth of the second, the paper roll is included as an element of the combination. No question is made but that the mechanism of these patents by which the paper is served out to the user involves a patentable novelty; but it is claimed, first, that the roll of paper

being perishable, and the machine being constructed for the purpose of delivering this paper to users in convenient lengths, such a roll is not a proper part of the combination; second, that, conceding it to be a part of the combination, there was no infringement. * * * The real question in this case is whether, conceding the combination of the oval roll with the fixture to be a valid combination, the sale of one element of such combination, with the intent that it shall be used with the other element, is an infringement. We are of opinion that it is not. There are doubtless many cases to the effect that the manufacture and sale of a single element of a combination, with intent that it shall be united to the other elements, and so complete the combination, is an infringement. Saxe v. Hammond, Holmes, 456, Fed. Cas. No. 12,411; Wallace v. Holmes, 9 Blatchf. 65, Fed. Cas. No. 17,100; Barnes v. Straus, 9 Blatchf. 553, Fed. Cas. No. 1,022; Schneider v. Pountney (C. C.) 21 Fed. 399. But we think these cases have no application to one where the element made by the alleged infringer is an article of manufacture perishable in its nature, which it is the object of the mechanism to deliver, and which must be renewed periodically whenever the device is put to use. Of course, if the product itself is the subject of a valid patent, it would be an infringement of that patent to purchase such product of another than the patentee; but, if the product be unpatentable, it is giving to the patentee of the machine the benefit of a patent upon the product, by requiring such product to be bought of him. To repeat an illustration already put: If a log were an element of a patentable mechanism for sawing such log, it would, upon the construction claimed by the plaintiff, require the purchaser of the sawing device to buy his logs of the patentee of the mechanism, or subject himself to a charge of infringement. This exhibits not only the impossibility of this construction of the patent, but the difficulty of treating the paper as an element of the combination at all. In this view the distinction between repair and reconstruction becomes of no value, since the renewal of the paper is, in a proper sense, neither the one nor the other."

The opinion states that the case is more nearly analogous to the planing machine case in Wilson v. Simpson, and distinguishes it from Aiken v. Manchester Printworks, where the needles were the subject of a separate patent, and adds:

"As we have already held that the paper roll in this case was not the subject of a valid patent, it follows that the defendants cannot be held as infringers for the manufacture and sale of such roll."

In Farrington v. Board of Water Commissioners of the City of Detroit, 4 Fish. Pat. Cas. 216, Fed. Cas. No. 4,687, is involved "a new and improved machine, intended chiefly for boring pump logs," and the invention consisted in, "first, the employment or use of a tubular or hollow auger or bit," constructed and arranged as shown; and, "also, in the combination of the tubular or hollow auger or bit with a screw or worm-rod, arranged and operating" as described. The opinion states that it is clear that the patent covers—

"(1) The lips of the auger or bit, in question. (2) The combination of the hollow auger or bit with the new lips attached, with the screw or worm for removing the chips as fast as made, as described. (3) The 'lips' and the 'combination' are the only things that were new, or claimed as new, and, of course, were the only things patented. The 'combination' included the 'lips,' and it is the combination, together with the ordinary machinery for giving its different parts the requisite motion, that constitutes the 'machine,' as a whole, which is mentioned in the first sentence of the specifications above quoted, which was covered by the patent, which was sold to the defendants, and which they had the right to use. In this combination the lips of the auger or bit constitute the effective element, but the inventor has so arranged them in the combination that the machine could not be continued in use without a complete renewal of them at short intervals. From the nature of

the case, these lips could be but temporary in their relation to the use of the whole machine, and it must have been so understood by the inventor in selling, and the purchaser in buying, the machine."

The evidence showed that the lips of the auger or bit would wear out in about 40 days, and, unless replaced by new ones, the machine could not be longer used, and that it was the replacing of such old, worn-out lips by new ones that constituted the alleged infringement. For convenience in taking off and putting on the lips of the auger or bit for the purpose of sharpening or repair, the auger or bit was so constructed that a small portion of the outer end of it, to which the lips were attached, could be screwed off and on at pleasure, and thereby the new lips attached in place of the old ones, although such device for taking off and putting on the new lips was no part of the invention. It was held that the case was analogous to Wilson v. Simpson, and that the fact that in that case the cutter knives were not a part of the invention did not distinguish it. It was stated, "The only question is, are they [the lips], from the nature of things, temporary in their relation to the use of the whole combination?" It was held that the defendant did not infringe.

The decision in Goodyear Shoe Machinery Co. v. Jackson, 112 Fed. 146, decided by the Circuit Court of Appeals, First Circuit, in 1901, is instructive not only in the careful discussion and presentation of principles, but in their application to the case then at bar. The opinion states:

"Each of the purchasers in the suit at bar bought from the Lincoln Sewing Machine Company, who then owned the patents in issue, machines called the 'Lincoln Machine'—an in-seam sewing machine designed to unite the sole and upper of a turned shoe, or the sole and welt of a welt shoe. There are always found in such a machine a needle, a looper, and a tension for forming the stitch, and their actuating mechanism; guiding devices for guiding the work, and their actuating mechanism; and feeding devices for feeding the work, and their actuating mechanism."

As to one of the patents involved, the charge of infringement was that the purchaser, "in repairing his machine, replaced in the feeding device the cam which, with its connections, gives the vertical movement to the needle."

The opinion states:

"It is manifest, however, that a broken or worn-out cam effected only a partial destruction of the patented combination, composed of three separate groups of mechanism, and that the replacement of the old cam with a new one was not a substantial rebuilding of the combination. If the patented invention had been for this particular form of cam, or had been simply for an improved feed, and the whole invention had resided substantially in the cam, the case would have presented a different aspect."

It was held that the replacement of the cam was not infringement.

A second patent was for "a new and useful welt guide mechanism for sewing machines." As to this the court said:

"Here, again, we have a combination patent embracing a number of essential elements. The purchaser of a Lincoln machine bought the whole of this combined mechanism, and was entitled to use it until its usefulness had

ceased by reason of decay or destruction. The charge of infringement of this claim is substantially limited to the replacement of the cam which moves the carrier to and from the curved needle. But this cam is only one of the material elements of the patented combination, and, further, it only moves the carrier back and forth in a straight line, and is not productive of the curved movement of the welt guide, which is the essential feature of this invention. As for the carrier of the welt guide, which it is also said the purchaser replaced, this, again, is only one of the elements of the combination. On the whole, we fail to find in these repairs anything like a substantial rebuilding of the patented combination."

The third patent was for a new and useful improvement "in means for providing slack thread" in the class of sewing machines under consideration. The patentees state their invention as follows:

"'What we claim as our invention is: In a chain stitch, hook-needle sewing machine, the combination of tension, looper, hook needle, a pull-off mechanism between the needle and the tension, and actuating mechanism timed to cause the pull-off mechanism to make its pulling stroke, after the hook needle has completed its loop-drawing stroke, and while the loop is held under strain by the hook of the needle, substantially as described.' There was sold to the purchaser of a Lincoln machine this patented combination, and he had the right to prolong its life and usefulness by any repairs which fell short of a reconstruction of substantially the whole combination. It cannot be said, therefore, that the replacement by the purchaser of the cam or the pull-off lever which moves the pull-off truck constituted an infringement of the patent, although it may be this cam was the characteristic and most essential element in the combination. The breaking or wearing out of this cam resulted in only a partial destruction of the patented combination, and its replacement by a new cam was plainly a restoration, and not a substantial reconstruction of the combination."

The above decisions show that a needle subject to a separate patent cannot be replaced by the purchaser; that a cutting part of a patented combination, consumed by use within a few months, may be restored; that a device that regulates the delivery for consumption of an article also combined in the claim is not infringed by the person who supplies such article; that, when the patented article consists of a band and buckle, a person cannot gather fragments of many such articles, each severed after use, and piece the parts, cut to usable lengths, restore the buckles, and sell the product for the original purpose, because the act is no different from taking a confused heap of old parts of a patented article, and, after patching and mending, reassembling the parts. Even the parts reassembled may not have been previously related. Thus far there is not serious difficulty.

But Judge Colt held that parts of a sewing machine, some subject to a separate claim and some in combination, could not be replaced by the purchaser; and later the learned judge, in the Circuit Court of Appeals, considered that a cam-actuating mechanism used in a sewing machine, even when the "characteristic and most essential" element in the combination, could be replaced by the purchaser. So the Circuit Court of Appeals in the Second Circuit held that a trolley stand—an element, but not the vital element, of the patent—could be replaced, but disclaims holding that a vital element could be replaced. It will be observed that no court has held that

the purchaser could replace the sole vital element of the combination. The knuckles in the car coupler were held to have been replaced lawfully, although an important, but not the most important, part of the combination; and even then the decision rested upon the ground of such greater exposure to breakage, as compared with the other parts, as justified implied authority to renew. But the filament in the Edison burner was held to be the vital element in the combination, not replaceable by the purchaser. Its very use, barring accident, made it the sole item of consumption in the patent; but, as it was the only justification for the patent, it stood as if it were the subject of a separate claim. When it perished the whole combination lost life and identity.

An attempted generalization of the cases is as follows: An element of a patented combination may be replaced by the purchaser, of his own authority, (1) when its consumption was the very purpose of the device; (2) when its use upon external objects must work its early destruction; (3) when it was intended to be destroyed and was destroyed after a single use, and became waste material; (4) when, in the arrangement of an element, not the chief element, it is so fashioned and placed as to be specially subjected to external forces that make it peculiarly liable to breakage and wear, like the knuckle in the car coupler; (5) when it is not the chief part of the combination, like the trolley stand; (6) when it is an ordinary working part, like the cam in actuating machinery, although specially adapted for the proper operation of the device, and the decision is broad enough to cover a cam which is the most essential element in a combination. But a part of a combination may not be replaced by the purchaser when it is the vital element of the combination, in fact, and in regard to patentability, especially when it is not intended to be of short life by the action of external forces thereon. The generalization is probably imperfect, but it is considered that the spirit of the law, as expressed in the decisions, is at least that a part that gives sole patentability to the combination may not be replaced by a purchaser without the patentee's consent. Cases may arise where, from inability or unreasonable refusal, the patentee fails to supply the vital part, and where, from the nature of the machine and its uses, it would be inferable that the patentee and his grantee contemplated that a broken or injured part should be supplied, to enable the machine, as a whole, to be used through the life of the whole. In such case a court of equity should permit the purchaser to have the use contemplated by the parties, and if the patentee failed, neglected, or unreasonably refused to provide the part become worthless, the court would not restrain the purchaser from supplying it. But in the suit at bar the patentee's licensee to manufacture had offered to supply the parts upon reasonable terms, and those parts are the very vital parts of the machine, and, in addition, are not parts of such brief duration, in the ordinary use of the machine relatively to the other parts, that it can be fairly held that the parties intended that such parts might be furnished by the grantee. Of

course, the question is not free from difficulty; otherwise this extended discussion would not have been necessary. The conclusion is reached that the defendant was not permitted to replace the tubes in the Terre Haute & American Company's boilers. But suppose that one tube fails in use! May the defendant supply it? If he may supply one, how many more may he supply before he reaches the point of infringement? For instance, in the present case, when the Wurster boiler was dismantled, the defendant supplied 4 out of 19 tiers. The evidence seems to indicate that it would have supplied more, had it not been enjoined. Was that infringement? It seems illogical to hold that the defendant may not supply the whole 19 tiers, but may provide 4 tiers; that is, that it may carry on the business of supplying tubes, provided it keeps within certain limits. The supply was not for an emergency. It is not as if a tube or a few tubes had broken, and in an exigency the purchaser applied to a local mechanic to supply them. What would be equitable in such an instance need not be determined, for here the defendant has entered the business for the general purpose of supplying tubes, few or many, and should be enjoined from such general business. Its whole attitude is that of a trespasser.

Hence the complainant should have a decree against the defendant, enjoining it from supplying tubes for use in the patented generating cylinder.

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## LAMBERT SNYDER VIBRATOR CO. v. MARVEL VIBRATOR CO.

(Circuit Court, S. D. New York. April 29, 1905.)

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
   The fact that a patent has not been adjudicated is not sufficient ground for refusing a preliminary injunction against its infringement, where that is clear, unless there is a substantial question as to its validity.

2. SAME.
   The Snyder patent, No. 773,234, for a vibratile apparatus, *held* valid and infringed as to claim 1, on a motion for preliminary injunction.

In Equity. Suit for infringement of letters patent No. 773,234, for a vibratile apparatus, granted to Lambert Snyder October 25, 1904. On motion for preliminary injunction.

Wm. R. Davis, for the motion.
Grafton L. McGill, opposed.

LACOMBE, Circuit Judge. The patent is of very recent date, and has not heretofore been adjudicated. That circumstance, however, is not sufficient ground for refusing preliminary injunction, unless there is some substantial question as to validity. Fuller v. Gilmore (C. C.) 121 Fed. 129. The evidence fails to disclose any anticipating patent, or anything in the prior art which would at all qualify the language of the first claim. The patents for toys which have been put in proof are devised to secure vibrations in a flexible movable arm, not in the rigid rod on which such arm moves. The Wolverton patent is not in the prior art. The defendant, who

uses the patented device, advertises and commends it, certainly cannot question its utility; and, even if he could, the evidence is unpersuasive to a conclusion that it does not subserve some useful purpose. Some of the devices complained of have points of difference from the device of the patent. Possibly the changes are improvements, but the combination of the first claim is found in all of them. It is not necessary to discuss the other claims.

Complainant may take injunction under the first claim.

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SHEPHERD v. DEITSCH et al.

(Circuit Court, S. D. New York. March 9, 1905.)

1. PATENTS—SUIT FOR INFRINGEMENT—PARTIES.
   A personal license granted by a patentee to manufacture and vend the patented article, which reserves the right to license one other, and also binds the patentee to prosecute infringers, does not operate as an assignment, and the licensee is not a necessary party complainant to a suit for infringement.

2. SAME—VALIDITY—SUFFICIENCY OF DESCRIPTION.
   Where a patentee has pointed out such features as he claims are his invention with sufficient clearness to enable them to be understood by those skilled in the art, the law affords him protection.
   [Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 135.]

3. SAME—INFRINGEMENT—BRUSH.
   The Shepherd patent, No. 601,405, for a brush having a reticulated back, the openings extending through between the rows of bristles, having the greatest diameter at the rear of the brush "and decreasing in diameter to the face thereof," the object being to facilitate the cleaning and drying of the brush, was not anticipated, and discloses an improvement of utility. While limited by the prior art, it is not to be so restricted as to require the openings to decrease in diameter continuously from the back to the face of the brush, but is entitled to a fair range of equivalents. The essential feature of the invention being to leave the larger amount of material on the side of the back in which the bristles are inserted, the beveling of the openings at the back, so that they are wider there than on the face, is within the patent, and such construction infringes.

4. SAME—ABANDONMENT OF APPLICATION.
   The failure of an applicant for a patent to further prosecute his application after it has been rejected by the examiner for anticipation does not operate as an abandonment of the invention, nor an acquiescence in the ruling, where it was caused by his lack of funds.

In Equity. On final hearing.

Briesen & Knauth and Arthur v. Briesen (Hans v. Briesen, of counsel), for complainant.

Joseph L. Levy, for defendants.

HAZEL, District Judge. This suit is brought by the patentee upon a bill which alleges infringement of United States letters patent No. 601,405, issued March 29, 1898, to Robert B. Shepherd, which relates to brushes wherein the back is reticulated, or perforated, the openings or slots extending through the back of the brush between the bristles substantially at right angles to the plane of the back, "so that the brush may be readily cleaned and maintained

in a clean condition." The defenses are anticipation, noninfringement, and nonjoinder of necessary party complainant.

The first point for decision is whether the Celluloid Company, an alleged exclusive licensee, is an indispensable party complainant. Upon the expiration of the original license to that company, which was for a term of three years, and which did not in terms transfer the right to its successors or assigns, a supplemental agreement was made between the patentee and the licensee, which in effect not only modified and qualified the earlier agreement, but also expressly reserved to the patentee the right to license one other person, firm, or corporation to make and sell tooth and nail brushes under the patent in suit. The supplemental agreement contains no provision which prohibits the complainant, within the reserve power, to license a firm or corporation of which he was a member or stockholder. Moreover, the original license and the license to the Martin & Bowne Company obliged the complainant to promptly prosecute infringers of the said patent. Neither of these instruments conveyed any title to the patent. Under these circumstances no exclusive monopoly was granted, but a mere personal license to manufacture and vend the patented article. Oliver v. Rumford Chemical Works, 109 U. S. 75, 3 Sup. Ct. 61, 27 L. Ed. 862; Gayler v. Wilder, 10 How. 477, 13 L. Ed. 504; Troy Iron and Nail Factory v. Corning, 14 How. 193, 14 L. Ed. 383; Waterman v. McKenzie, 138 U. S. 255, 11 Sup. Ct. 334, 34 L. Ed. 923; Kilburn v. Holmes, 121 Fed. 750, 58 C. C. A. 116; Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 193, 30 L. Ed. 369. It follows that the suit was not improperly brought in the name of the complainant.

The single claim of the patent is in the following words:

"A brush having a reticulated back, the openings in which extend between the bristles, said openings being of the greatest diameter at the rear of the brush and decreasing in diameter to the face thereof, whereby the most material is provided at the face or bristle-receiving side of the brush back."

The crucial question is whether a restricted interpretation must be given to the words "decreasing in diameter to the face thereof," found therein. At the outset it may be briefly stated that the scope of the claim depends upon the character of the invention and the prior state of the art. Admittedly, the field of invention is limited, and the patent is narrow. Brushes having reticulated or perforated backs, the openings extending through between the bristles to the face thereof, were not new at the date of the invention in suit, as may be seen from an inspection of the patents to Ashburner (No. 318,749, dated April 24, 1898), Osborn (No. 457,007, dated August 4, 1891), Maloney (No. 557,844, dated April 7, 1896), British patent to Bidwell & Young (No. 5,948, dated March 21, 1895), British patent to Pedder (No. 2,450, dated August 28, 1867), and British patent to Ashburner (No. 7,467, dated April 8, 1896). The specification of the patent in suit states:

"Heretofore in brushes of this character it has been customary to make each of the openings in the back in the form of a frustum of a cone, with the base of the frusto-conical openings next to the bristles, and the narrowest part of the openings at the rear, or to make the openings of the same extend

[extent] throughout, from the face to the back of the brush back. Great difficulty has been experienced with brushes made in this manner, inasmuch as the least material is provided where the bristles are mounted and where the most material and strength are required. Furthermore, by constructing a brush back with openings in the manner hereinbefore described, it has been found impracticable to mount the bristles near the edge of the brush, so that they will project outwardly from a longitudinal median line, as is illustrated in the drawings."

As will be seen, the primary object of the patentee was to provide means for cleaning the bristles and to strengthen the base of the brush back, to attain which the slots between the rows of bristles have the greatest diameter or width at the rear and the narrowest at the face or bristle-bearing side of the brush back. When the lateral walls or slots are tapered to the face of the brush back, as described, the structure manifestly is provided with pyramidal bases or triangular bars, which enable their adaptation and use for mounting the bristles. Not only are larger spaces furnished in which to mount the bristles, but the task of projecting them in an oblique direction at the edge of the brush is facilitated. By these means a strong and efficient open back brush is produced. Neither tooth brushes nor hair brushes, the class to which the article in controversy belongs, are specifically mentioned in the patent.

In the manufacture of tooth brushes the complainant has departed from the strict letter of his claim. Instead of gradually tapering the lateral walls of the slots to the face or bristle-bearing side of the brush back, the inclination is a short distance only towards, and not actually to, the face thereof. In explanation of this modification, it is shown in the record that, because of the thickness of the brush back and the narrowness of the bars, it is necessary to bevel the openings or slots at the rear of the brush, without, however, actually lessening the diameter of the openings to the bristle side. The deviation from the claim concededly does not alter the functions of the brush, and therefore its materiality is questionable. This modified form of brush back is also the structure adopted by defendants. The defendants contend that the elemental claim, in view of the state of the art and the specification and drawings of the patent, precludes the modification indicated. They insist that as the slots or openings of their tooth brush do not actually decrease in diameter to the bristle end, and because no more material is there provided than at other points between the front and the back, they do not infringe. Is defendant's structure an evasion of the patent in suit, or must the claim be limited to the specific construction shown? Counsel for defendants urges that the language of the claim, namely, "decrease in diameter to the face thereof" must be strictly interpreted to mean a continuous slant to the face of the brush back. This interpretation is thought to be too technical, and a more liberal construction of the words is justified by the character of the invention. Consolidated Fastener Co. v. Columbia Fastener Co. et al. (C. C.) 79 Fed. 795; Consolidated Fastener Co. v. Littauer et al., 84 Fed. 164, 28 C. C. A. 133.

None of the prior patents found in the record embody the construction specified in the claim of the patent in suit. The Maloney,

Osborn, Ashburner, and Pedder patents relate to tooth and hair brushes, and unquestionably are the defendants' best references. The Maloney brush has a slanted wire back, with longitudinal grooves or channels, which are narrowest in the middle of the thickness of the back and increase in diameter toward the face thereof. The least material is supplied at the bristle-mounting side of the brush, and hence it lacks the essential features of the Shepherd patent. The perforations in the Osborn brush are of the same width at both sides of the brush back, the lesser diameter being midway between the face and back. The Pedder British patent is similar to those of Maloney and Osborn, and need not specifically be considered. None of the citations, though examined in connection with the Seufert and Darras patents, Nos. 582,509 and 566,144, respectively, are thought to anticipate the patent in suit. The last-mentioned patents each disclose a pyramidal base for mounting the bristles, and while the greater amount of material is supplied to the bristle-receiving side of the brush back, neither of them are reticulated or perforated. Although belonging to the same art, they are for an entirely different purpose, namely, for cleaning machines, tin cans, etc., and they do not embody the principle of the patent in suit. The Arnold-Ashburner tooth brush discloses several extremely narrow recesses or fissures of equal width extending through the brush back parallel with the bristles. The same quantity of material is provided at the rear and face side of the brush back, and hence the substantial difference between this reference and the patent in suit is clear. If these last-mentioned brushes were shown by the evidence to successfully achieve the object of the Shepherd patent, the inventive skill of the patentee would be rather shadowy. An examination of the Arnold-Ashburner exhibits, and the proofs relating thereto, indicates a failure to accomplish the beneficial results intended. After the brush is used, the narrow grooveless slits retain the water through the action of capillary attraction, and obviously the bristles were thereby prevented from easily drying. The retained moisture, on account of the ingredients of dentifrice and tooth powder, tended to cause the brushes to become unsanitary and unwholesome. Wider uniform longitudinal openings, on the other hand, would have weakened the base of the brush and loosened the bristles. The slanting slots or openings of the brush of the patent in suit apparently act as a guide to the flow of the water to the bristles and provide a method for keeping them clean and expediting the process of drying.

The defects of the prior art are clearly indicated by the witness De Angelo. He testified substantially that, because of the ingredients used in connection with tooth brushes, they very soon became unsanitary, and the open back style of brush known at the time of the Shepherd patent was unable to meet the requirements. He further states that the peculiar construction of the Shepherd open back brush renders it aseptic and sanitary, because the openings are easily cleaned. Evidence was also given tending to show that tooth brushes of the Ashburner style were neither salable nor serviceable. The prior art does not show a structure possessing

the advantages of the patent in suit. Shepherd's invention was an improvement which successfully carried a principle into effect. By it he chiefly desired to strengthen the bristle-bearing part of the brush, and also to facilitate the flow of the water to the bristles through suitable openings in the back, in order to maintain them in a clean and dry condition after use. These results he seems to have accomplished, though others skilled in the art have failed, and therefore his patent, within a limited range, is thought to be entitled to protection.

Stress is laid upon the action of the Patent Office in twice rejecting the application. That the claim finally granted was narrow must be admitted. Such a restricted construction, however, as is contended for by defendants, applied to an extremely narrow art, in view of the beneficial results achieved, is not, as already indicated, thought to be warranted, although the question is not free from doubt. The principle of the patent should not be disregarded, where it fairly appears that a meritorious invention is described, and where the infringer has substantially adopted the method of carrying the principle into effect. The general rule is stated in Gaisman et al. v. Gallert (C. C.) 105 Fed. 955:

"When forced to choose between a construction which destroys and one that saves the patent, the court should not hesitate to adopt the latter." Winans v. Denmead, 15 How. 330, 14 L. Ed. 717.

An examination of the record in connection with the file wrapper fairly indicates that what the patentee claimed was means whereby the most material is provided at the bristle-receiving side of the brush. The words of the claim, "to the face thereof," according to the Century Dictionary, may also be understood as meaning "in the direction of," etc. The patentee has pointed out with sufficient clearness such features as he claims is his invention. The rule is that, if the skilled in the art are thereby enabled to discover the new features, the law affords protection to the inventor. In my opinion it makes no difference that the slant of the walls is not carried down to the face, even though the altered terms of the claim employs language to that effect.

My attention is not called to any brush having a reticulated back wherein the openings taper to the face, or toward the face, so as to provide the bristle side of the brush with the most material. This conception undoubtedly belongs to the patentee. He was the first to disclose beveled longitudinal openings in brush backs in connection with providing the most material at the bristle side thereof. The essential features of the patent are retained in complainant's modified tooth brushes. It is material that there is also as large a quantity of material in other portions of the base or bars as at the face of the brush. It is a familiar rule that patentable machinery, for example, in many instances requires changing of parts and forms to adapt the same to the principle of the invention. The Shepherd patent is not a primary patent, and is not entitled to a great liberality of construction; but, in view of the failures of the prior art and of the novelty and utility of the invention, a fair range of equivalents is thought to be permissible. Davis v. Fredericks

(C. C.) 19 Fed. 99, 21 Blatchf. 556; Emerson Electric Mfg. Co. v. Van Nort Bros. Electric Co. (C. C.) 116 Fed. 974; Acme Flexible Clasp Co. v. Cary Mfg. Co., 101 Fed. 269, 41 C. C. A. 338; George Frost Co. et al. v. Cohn et al. (C. C.) 112 Fed. 1009. The modified Shepherd brushes are within the scope of the claim, are of patentable novelty, and a new result has been accomplished by the patentee, which is not destroyed by the change in form. The variation in no way effects any change in the purpose, functions, or operations of the brushes.

The record shows that the principle of the Shepherd patent and the manner of carrying it into effect is revealed in defendant's tooth brushes, exhibited in evidence and filed prior to the hearing by order of the court. Defendants seek to escape the charge of infringement by insisting, as heretofore stated, upon an exact reading of the claim, and by denial of infringement in fact because of dissimilarity in defendants' structures. The slight beveling of the defendants' slots, three in number, is not carried down toward the face of the brush as sharply as that disclosed in the form adopted by the complainant. Nevertheless, defendants' exhibits have slots which are widest at the back and narrowest at the face of the brush, and the most material is provided where the bristles are inserted.

But it is insisted that Shepherd on February 1, 1902, filed an application for a brush with apertures between the rows of bristle tufts for convenience in cleaning, and that this feature was held by the Patent Office to be anticipated by the British patent to Pedder, No. 2,450 of 1867. Later the application became abandoned. In explanation of the alleged abandonment, the patentee testified that he was unable to pay for prosecuting such application. The proofs do not show that Shepherd intended to abandon the first application, and his lack of means to prosecute the same cannot be interpreted as an acquiescence in the action of the Patent Office. Robinson on Patents, § 578.

For the foregoing reasons, the defendants must be held to infringe the patent in controversy. The usual decree for an injunction and accounting, with costs, may be entered.

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## MYGATT v. ZALINSKI et al.

(Circuit Court, S. D. New York. May 17, 1905.)

PATENTS—DESIGNS—LAMP SHADES.

The Mygatt design patent, No. 32,685, for a design for a lamp shade or reflector, discloses novelty and invention, and is valid. Also *held* infringed.

Suit for the alleged infringement of a design patent for reflectors of artificial light No. 32,685, dated May 22, 1900, and granted to Otis A. Mygatt. The defendants' counsel in his points says: "The defendants deny the validity of the patent, and they deny infringement. No other question presented by the pleadings is of importance at this stage of the case."

Taylor, Anderson & Seymour (Howard Taylor and Francis H. Kinnicutt, of counsel), for complainant.

Simon L. Adler (James A. Hudson, of counsel), for defendants.

RAY, District Judge. The complainant claims "the design for a lamp shade or reflector, as herein shown and described." The specifications say, among other things:

"My design consists in a new and original shape or configuration of an article of manufacture known as a 'reflector' or 'shade' for an artificial light, and in a new and original ornament or form of ornamentation of such a manufacture. * * * As shown in the drawings, the shape or configuration of my design is in general that of a frustum of a cone, A, with a central opening, above which is a circular collar or tube, B, with an opening therein. The lower or inside face of the reflector or shade is smooth. The upper surface has prismatic ribs, as indicated at C, such ribs constituting surface ornamentation of the shade, and extending from near the outer edge toward the center. The material of which this shade is composed is translucent, such as glass, and the same may be tinted. The tint in the glass adds to the iridescent or spectral effect of a light shining through the translucent material on the prismatic ribs. The shade or reflector is intended to be suspended slightly above an artificial light or lamp, and the light rays rising from the light pass through the transparent material, and are reflected or refracted by the prismatic ribs on the upper surface thereof, producing an ornamental and useful distribution of the light rays which pass through and also of the rays which are reflected from the shade or reflector."

This lamp shade or reflector is both useful and highly ornamental. It is seen to great advantage, even in daylight, when placed in the position designated near an artificial light. That it is useful as well as ornamental does not affect its patentability as a design patent. In open court the complainant's reflectors made according to the patent were produced and placed in the position designated. It was clearly apparent to the court that the reflectors "fill the bill" —are all that is claimed. The evidence fully sustains the claims of the patent.

The defendants contend that there is no infringement for the reason that the complainant is confined to a shade of the exact angle shown in the drawings of the patent. This is not the law. Ripley v. Elson Glass Co. (C. C.) 49 Fed. 927. The defendants are making and selling substantially what the complainant is making and selling or is authorized by his patent to make and sell. True, in some, if not all, the angle is changed; the edge is curved or beaded, and in some there are other slight changes, but these changes are evidently made to be used in justifying the infringement if possible. The defendants' shades or reflectors are bald appropriations of the complainant's patent. Slight changes are made which add nothing to the ornamentation, but rather detract therefrom. These, however, enable the defendants to say our shade or reflector is different from yours; therefore we do not infringe. The defendants say, recognizing the merit of complainant's patent:

"Our contention here is that while it is doubtless true that Mygatt has produced an article of manufacture of transparent glass that is more efficient as a reflector than any transparent glass lamp shade previously in use, it is equally true that the increased efficiency of his production is not due to anything either in shade body or surface ornamentation, or to a combination

of the two, that could be properly made the subject-matter of a design patent at the time when his application was filed."

In Weisgerber v. Clowney (C. C.) 131 Fed. 480, it was said:

"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."

This is quite true but this court fails to discover any attempt here to patent a mechanical function. True, it is when the artificial light is turned on that the reflector shows to its great advantage; but the patent is not for a machine to make light look pretty, but for a design in the shade or reflector that will make it exceedingly handsome and ornamental when in use. Clearly the patent is not void for want of invention. It is not claimed that "the patent is generic as to form of configuration of the shade body—embracing all frustums of cones." All the world, so far as this patent is concerned, is at liberty to make lamp shades or reflectors in the shape of the frustum of a cone. But when to a reflector of that general shape or form is added the other elements of the complainant's patent, using the same material, we have infringement. Here the defendants fall into error. They say we may use the frustum of a cone shape; we may use a circular collar with an opening; we may use the smooth inside face; we may use the prismatic ribs; we may have them long or short, as we elect; therefore we may use them in the combination indicated by the complainant's patent. This cannot be so if any design patent is to be held valid. It is of course true that the complainant must stand here upon the novelty, utility, etc., of his patent as an ornament, etc.; that is, upon the design, not the utility, of the shade as such or as a reflector of light for illuminating purposes.

The court is of the opinion that the patent is valid and that defendants infringe. There will be a decree for an injunction and an accounting.

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KLINE CHAIR CO. v. THEO. A. KOCHS & SON et al.

(Circuit Court, S. D. New York. May 26, 1905.)

PATENTS—INFRINGEMENT—DESIGN FOR CHAIR.

The Kline design patent No. 26,623, for a design for a chair, *held* valid, but not infringed.

This is a suit in equity for the infringement of design patent No. 26,623, of February 9, 1897, "Design for a Chair." The defenses are noninfringement, anticipation, and want of invention in view of the prior art.

C. V. Edwards (Joseph C. Fraley, of counsel), for complainant.

H. A. Heyn (Bond, Adams, Pickard & Jackson, of counsel), for defendants.

RAY, District Judge. In open court the defendants admitted that this chair is the subject of a design patent, although it is made

and constructed for use solely and is not intended ever for ornamentation. The invention relates, says the patent, to the frame of the chair, and the principal feature of the design is the contour of the frame, consisting in a broad upper portion forming sides or arms for the seat, and having an abrupt or substantially vertical front edge and a sloping rear edge, terminating in a narrow substantially horizontal basal portion. The opening in the side of the chair frame immediately under the arm rest is partly closed by vertical bars. The basal portion is supplemented by an upwardly extending footrest. Nothing is said that this is a barber's chair or intended as such. The brief of the complainant, however, states that the design is employed in barbers' chairs. Both the complainant and the defendants are engaged in the manufacture of this class of chairs. It may be that the complainant's chair made in accordance with the patent, and known as the Kline chair, was patentable under the design patent law. The presumption is in favor of the validity of the patent, and the court will hold the patent valid.

Coming to the question of infringement, this court is of the opinion that the defendants' chair does not infringe. In many respects all barber and dentist chairs resemble each other. Both chairs were in court. The court now has pictures of both chairs before it. The designs of the two chairs are strikingly dissimilar. No person would mistake the one for the other. The large opening in the Kline chair, before spoken of, occupied in part by vertical bars, is of dissimilar shape in the alleged infringing chair, and, instead of being partially filled by vertical bars, is filled by two bars crossing each other diagonally. The footrests are strikingly dissimilar, as are the arm rests. At least a dozen chairs in the prior art are as similar in design and general appearance to the Kline chair as is the alleged infringing chair.

In Weisgerber v. Clowney (C. C.) 131 Fed. 477, it was held that 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. It was also held: "A design patent also, the same as any other, must be possessed of novelty."

Assuming that there is novelty shown in each chair, it is perfectly clear that the one does not infringe the other. The general appearance of the two is dissimilar when we look at the design of the two with a view to discern what is ornamental. As a barber chair or a dentist chair, they are quite similar in general form and construction. The alleged infringing chair does not copy or imitate the Kline chair. It is evident that there was no purpose to imitate or copy the Kline chair. There is no evidence of confusion or mistake among purchasers and users of chairs of this description. The most striking feature of the patented design is the three vertical bars. In the alleged infringement we have something entirely dissimilar.

This court cannot find infringement. The defendants are entitled to a decree dismissing the complaint, with costs.

## AUSTRALIAN KNITTING CO. v. GORMLY.

(Circuit Court, N. D. New York. May 23, 1905.)

1. PATENTS—SUIT FOR INFRINGEMENT—RES JUDICATA.
A decree of a Circuit Court sustaining the validity of a patent, and awarding a permanent injunction against infringement, and referring the case to a master for an accounting as to damages and profits, is interlocutory, merely, and not final, and is not conclusive of the validity of the patent in a subsequent suit between the same parties prior to the rendition of final decree in the cause, although, on appeal from such interlocutory decree, it has been affirmed by the Circuit Court of Appeals.

2. SAME—PERSONS BOUND BY DECREE.
A manufacturer of an alleged infringing article, who voluntarily assists a purchaser from him in defending a suit for infringement of the patent by the use of such article, but who is not a party to the record, and is not shown to have assumed control of the defense, is not directly interested in the case, and is not concluded as to the validity of the patent by a decree in favor of the complainant, so as to be estopped thereby from setting up new defenses in a subsequent suit against him for its infringement by making and vending the same article.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1190–1194.]

3. SAME—PRIOR USE—KNITTING MACHINES.
The Kinsey patent, No. 424,314, for a burr-wheel for knitting machines, is void for prior public use of the alleged invention by others.

Action in equity brought by the Australian Knitting Company against Robert W. Gormly, a manufacturer of knitting machinery, for alleged infringement of United States letters patent No. 424,314, granted March 25, 1890, to Peter S. Kinsey, assignor to the complainant, for burr-wheels for knitting machines. These burr-wheels are adapted for knitting machines adapted to produce figured or pattern knitting. In the specifications the patentee says:

"Burr-wheels of the kind referred to have been previously made which comprised blades set obliquely on the periphery of the burr-wheel hub, and so secured upon the hub that spaces are left between the blades. After the blades have been secured upon the hub, certain of them have had the spaces between them filled up by means of solder, lead, or similar soft metal run in in a molten state, where it becomes a fixture, and secures together the blades between which it is run. Burr-wheels thus constructed, when once the spaces between the blades have been filled in by the soft metal, cannot be used for any pattern other than that for which they were originally constructed, for which reason it has been necessary to construct separate burr-wheels for each separate pattern which was desired. By my improvement I obviate this difficulty, for I so construct certain of the burr-wheel blades that their positions may be changed in any desired manner to produce any given pattern, thus making it possible to produce a great number of patterns with the same burr-wheel. The invention consists in making certain of the blades of which a burr-wheel is composed with enlargements upon one side thereof, which enlargements form part of, or are integral with, the blades upon which they are formed, and which enlargements are of such thickness that when the blades are arranged upon the burr-wheel hub the enlargements will substantially fill the spaces between the blades upon which they are formed and the next adjacent blades upon one side. It is, of course, to be understood that the object of filling certain of the spaces between the burr-wheel blades is that, when the knitting machine cylinder containing the needles is revolving, such of the needles as come in contact with the closed

spaces of the burr-wheel will have their barbs pressed in, so that a stitch will be cast off. Such of the needles, on the contrary, as come opposite the open spaces between the burr-wheel blades will mesh into such spaces without pressing in the barbs, and from such needles the stitches will not be cast off."

The claim is as follows:

"The combination, with a hub having obliquely-extended slots upon its periphery and provided with a recess in its upper face, of blades made to enter said peripheral slots and said recess in the hub top, certain of said blades each having thickened portions or enlargements upon one of its sides, and a cap constructed to be passed down over the hub and upper ends of the blades and secured to the hub, substantially in the manner as and for the purposes set forth."

About April, 1900, the complainant here learned, as he claims, that the patent in question was being used without license by the manufacturers of knitted goods, and that the alleged infringing burrs came from Tompkins Bros., of Troy, N. Y. The defendant, Robert W. Gormly, was then employed by Tompkins Bros. The complainant caused notices to be sent these manufacturers, calling attention to the patent in suit. It is alleged that notice was given Tompkins Bros. and the present defendant. Gormly had referred the question of the validity of the patent in question to Mosher & Curtis, and that firm had given an opinion that the patent in suit here was invalid. Their communication said:

"Positively, the only thing that Kinsey did was to take one of Swits Conde's thickened blades and insert it in a Kavanaugh burr, which involved no invention, and was clearly unpatentable, and it may be said with absolute certainty that no court would ever sustain such a patent."

Mosher & Curtis also informed Mr. Preble by letter that the communication of the complainant to Mr. Gormly had been handed to them for reply. They said:

"We will look the matter up and report to you the result of our investigation as soon as we can conveniently do so."

May 26, 1900, Mosher & Curtis informed Mr. Preble that they had examined the patent now in suit, and had advised their client, Mr. Gormly, that the blades manufactured by him did not infringe the patent, in view of patents to Kavanaugh, No. 117,299, July 25, 1871, and Conde, No. 240,008, April 12, 1881. This letter also contained this statement:

"Mr. Gormly instructs us to inform you that if your clients believe that he is infringing upon any of their rights, he is able and willing to respond to any action they may bring against him for redress; and that he will use every lawful means to prevent interference with or intimidation of his customers."

June 9, 1900, Mosher & Curtis wrote Mr. Preble that they understood he had sent threatening letters to the users of Mr. Gormly's patented blade for burr-wheels subsequent to the letter of May 26th, and they say in reference to that letter. "in which we clearly pointed out that the Kinsey patent is void." They further say:

"For the purpose of removing every possible excuse for such methods of doing business we hereby notify you that we are authorized to and will appear for Mr. Gormly in any action you may desire to bring against him to test the validity of the Kinsey patent, without putting you to the expense or trouble of serving a subpœna, and we will do everything in our power to expedite matters so that you may be able to have the validity of the Kinsey patent adjudicated in the shortest time possible."

June 12, 1900, Mosher & Curtis wrote Mr. Preble, referring to his statement that he had no reason to doubt the validity of the Kinsey patent, and expected to bring suit, etc., and Mosher & Curtis say:

"Mr. Gormly has himself, made all the blades which have been manufactured under his patent, the blades being put on the market by Tompkins

Bros. Mr. Gormly is perfectly responsible and abundantly able to answer for any damages sustained by your client. As we wrote you before, we will appear for Mr. Gormly on receipt of copy of your complaint, waiving the formality of service by subpœna."

In the fall of 1900 the Australian Knitting Company, of which said Peter S. Kinsey was president, brought action for the infringement of the patent in question against Wright's Health Underwear Company, a corporation organized under the laws of the state of New Jersey. This action was put at issue by the defendant, and among the defenses it was set forth that the alleged invention covered by the Kinsey patent was in public use and on sale in this country by Kinsey and others for more than two years before the application for the patent, and that the said invention for more than two years prior to the application for the patent had been shown and described in various printed publications and patents—especially the Kavanaugh patent and the Swits Conde patent—and that such alleged improvements and inventions had been invented, known, and used by various parties named for more than two years prior to the application for a patent, and also set up the defense that the said letters patent sued upon were invalid for want of invention and for want of patentable novelty. The issues formed were tried before Hon. Hoyt H. Wheeler in the Southern District of New York, and his decision was filed February 19, 1902, in which he found:

"The defenses relied upon in the brief and argument are principally patent No. 240,008, dated April 12, 1881, and granted to Swits Conde, for a burr for knitting machines, which is said to show such a cam on some of the blades for that purpose; lack of adequate proof of infringement; and laches. The Conde patent is said to show some blades with such cams upon them by the drawings. There are drawings of blades which might, if set out by corresponding description, be understood to show such cams upon, and as a part of, them. But the description says. 'One of said burrs being of the ordinary construction and filling every needle with thread, while the other has a certain number of the interstices between its thread-lifting teeth or wings filled with a block which presses against and closes the beards of certain needles, and thus causes its thread to skip over the said needles, carrying the single thread applied thereto by the other aforesaid burr;' and the claims include 'the filling-block, c, arranged between the said two series of wings.' What are shown in the description and claim are interstices filled with blocks between, not a part of, the blades or wings. What the patent shows is what it sets forth as a whole; and what appears on a drawing, that might be what is described or something else, would well be taken to be what is described, especially as that was a thing well known. This invention cannot, therefore, be justly said to be described or shown in that patent. The date of use shown by the parol evidence is not sufficiently clear as having been before Kinsey's invention to overthrow a patent, and appears to have been properly omitted from the defendant's points."

An interlocutory decree was entered March 1, 1902, in pursuance of that decision. An appeal was taken from such interlocutory decree, and same was affirmed, the court saying:

"We are convinced that the proof fails to show prior use beyond reasonable doubt. The defense of laches has not been clearly established. It depends largely for its support upon inference and conjecture. The facts are capable of a construction consistent with due diligence on the part of the appellee. The stipulation entered into by counsel for appellant in connection with the other evidence in the case, clearly establishes infringement. The only question which we regard as at all serious arises upon the Conde patent, but after careful consideration, we are satisfied with the interpretation of the patent by the circuit judge. Figs. 4 and 5 of the drawings, considered alone, may fairly be said to show the enlargement or cam attached to the blade. But there is nothing in the description to support such an interpretation. In fact, the language there used would seem to indicate that the enlargements used were the well-known filling blocks of the prior art. The claim, too, is in accord with this interpretation, as it speaks of the blocks as separate and

distinct structures, namely, the 'filling-blocks, c, arranged between the said two series of wings.'"

Thereupon the defendant in that suit, Wright's Health Underwear Company, petitioned for an order recalling the mandate of the court for modification, or for an order granting leave to the Circuit Court to grant a rehearing and consider newly discovered evidence. The defendant set forth in affidavits the nature of the newly discovered evidence, and there were used on the motion the affidavits of George A. Mosher, Frank C. Curtis, David C. Philip, James A. Shufelt, and Thomas D. White. Thereupon the Circuit Court of Appeals denied the motion to recall the mandate and amend the instructions to the court below so as to permit that court to order a rehearing and consider newly discovered evidence, "because it has not been satisfactorily made to appear that the defendant could not have discovered the new evidence if reasonable diligence had been exercised." The mandate was then filed in the Circuit Court and the case went to an accounting before a master. No final decree has yet been granted. Soon thereafter this action was brought against Robert W. Gormly. The defendant in his answer sets up and relies upon the following alleged new defenses: (1) The model Conde burr 1881, by itself, is a prior public exhibition, and disclosure of the alleged invention; (2) prior use in the Conde Mill, in connection with the Conde burr 1881, on exhibition in the Patent Office; (3) prior publication in the Conde patent in connection with the Conde burr 1881, on exhibition in the Patent Office; (4) prior use in the Pioneer Mill; (5) inoperativeness in the construction shown and described in the patent in suit. The complainant insists that the defendant here, Robert W. Gormly, took such part in the defense of the suit against Wright's Health Underwear Company, and was so connected therewith, that he is bound by the interlocutory decree entered in that action, and is estopped from making these defenses in this suit. Attention will be called later to just what occurred, and more particularly to the nature of the evidence adduced, on the trial of this action that was not before the court in the suit against the Wright's Health Underwear Company.

W. P. Preble, Jr., for complainant.
Mosher & Curtis, for defendant.

RAY, District Judge (after stating the facts as above). If the interlocutory decree in the Australian Knitting Company v. Wright's Health Underwear Company is res adjudicata between the Australian Knitting Company and Robert W. Gormly in this action, it will be unnecessary to consider the evidence bearing on the question of the validity of complainant's patent. The same patent in question there is in controversy here, and the same general question was raised there as here, viz., are United States letters patent No. 424,314, granted March 25, 1890, to P. S. Kinsey, assignor to the complainant, invalid by reason of prior public exhibition and disclosure of the alleged invention? In that suit the defendant here was called as a witness, and said, in substance and effect, he was defending it. The cause of action was the assertion by the plaintiff that he is the owner of certain letters patent granted by the government of the United States (the letters in question here), giving him a monopoly or exclusive right, as against all the people of the United States, including that defendant and the defendant here, to make, use, and vend a certain improvement in burr-wheels for knitting machines; that the defendant in that suit had invaded and was continuing to invade that right, to the great damage of the plaintiff, in that it had "unlawfully and wrongfully made, used, and sold to others to be used, burr-wheels for knitting machines

made according to and embodying the invention," and was threatening to make and sell, etc., in large quantities, and supply the market. The complainant demanded an injunction restraining such acts and threatened acts, and an accounting as to damages suffered, and a judgment therefor. This is a cause of action going beyond a mere recovery for damages sustained by reason of the tort. The defendant there was not a manufacturer of the alleged infringing article, but merely a user thereof. Robert W. Gormly, the defendant here, was the maker, and he sold to Wright's Health Underwear Company, that defendant, for use. That defendant was in no sense the agent of Gormly, the maker. But when the plaintiff notified the defendant in that prior action that it was infringing the patent, Gormly at once notified it, as well as others, that complainant's patent was void and that he would defend all suits for alleged infringement thereof; and, when suit was brought, Gormly did defend, not by being made a party to the record, but by employing counsel, procuring witnesses, and doing other like acts. But it does not appear that he put himself in such a position that he could control or direct the defense or appeal in the event of a holding in favor of the validity of the patent.

The exact relation of Gormly to the defense of that action does not appear further than he testified in that action, and it is conceded in this action that Gormly undertook the defense of that action. It also appears that Mosher & Curtis represented the defendant, Wright's Health Underwear Company, in that action, and that said firm of attorneys represented Gormly in conducting the correspondence, etc., prior to the bringing of that suit. The cause of action in this suit against Gormly is for an alleged infringement or alleged infringements of the same patent relied on by the complainant in such prior suit, but the infringing acts are different, in this: that the infringement charged against Gormly in this action is the making and selling of the alleged infringing burr or device—the same device, as to form and construction, alleged to constitute an infringement in the suit against Wright's Health Underwear Company. The cause of action in the former suit was the infringement of the Kinsey patent by the using of the burrs in question, manufactured by Gormly. The cause of action in the present suit is the infringement of the same patent by the making and selling of such burrs—the alleged infringing devices. Gormly made the burrs used by the defendant in the former action, and the use of which constituted the cause of action against that defendant. Gormly was interested in the result of that action, for, if it was determined in that action that the burrs used by the defendant infringed the complainant's patent, an injunction would issue against that defendant, restraining the use of such burrs, and that defendant would no longer purchase either from Gormly or from others the burrs made by Gormly.

Greenleaf, in his Treatise on the Law of Evidence, vol. 1, § 523, says:

"Under the term 'parties,' in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment. This right

involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause."

This statement has been frequently cited and approved by the Supreme Court of the United States. Litchfield v. Goodnow, 123 U. S. 550, 8 Sup. Ct. 210, 31 L. Ed. 199; Lovejoy v. Murray, 3 Wall. 1, 19, 18 L. Ed. 129; Robbins v. Chicago City, 4 Wall. 657, 673, 18 L. Ed. 427; Green v. Bogue, 158 U. S. 503, 15 Sup. Ct. 975, 39 L. Ed. 1061.

In Green v. Bogue, supra, the court, at page 503 of 158 U. S., page 985 of 15 Sup. Ct. (39 L. Ed. 1061), said:

"Parties, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision if an appeal lies."

In Railroad Co. v. National Bank, 102 U. S., at page 21, 26 L. Ed. 61, Harlan, J., in giving the opinion of the court, holding that the railroad company was not bound by a certain judgment, said:

"Being, however, an entire stranger to the record, it had no opportunity or right in that proceeding to controvert the claim of the bank, to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment."

In Hauke v. Cooper, 108 Fed. 922, 48 C. C. A. 144, it was held:

"A decree in a suit involving the title to land, sustaining the validity of a defendant's title, is conclusive on one who, although not nominally a party, was directly interested in the subject-matter, and by agreement controlled the suit on behalf of the adverse party through counsel employed by him, and, if successful, would have shared in the benefits of the decree; and the defendant is entitled to plead such decree as an estoppel against the plaintiff in a subsequent action brought to recover the same land by one to whom such person conveyed his interest after the decree was entered, the question of fact as to the interest in and control of the prior suit by plaintiff's grantor being one for the jury."

In that case the court quoted with approval section 174 of Freeman on Judgments. Among other things it is there said:

"Whenever one has an interest in the prosecution or defense of an action, and he, in the advancement or protection of such interest, openly takes substantial control of such prosecution or defense, the judgment, when recovered therein, is conclusive for and against him to the same extent as if he were the nominal as well as the real party to the action."

In Theller v. Hershey (C. C.) 89 Fed. 575, it was held:

"A pleading setting up a former judgment between plaintiff and a third party as binding on defendant need not allege in terms that defendant had such control of the former action as to be bound by the judgment, but is sufficient if the facts pleaded warrant such conclusion by the court. One who, being interested in the subject-matter of an action for infringement of a patent, contributes towards the defense of such action, and agrees to pay a share of the expenses and costs, becomes privy thereto, and is bound by the judgment."

In the opinion in that case the judge said:

"Parties include not only those whose names appear upon the record, but all others who participate in the litigation by employing counsel, or by contributing towards the expenses thereof, or who in any manner have such control thereof as to be entitled to direct the course of proceedings therein. Thus it is said in 3 Rob. Pat. § 1176: 'Where several defendants, by agree-

ment, contest one of the actions in their joint behalf, all become thereby parties to the suit, and are equally concluded by the judgment.' The law is well settled that parties and privies include all who are directly interested in the subject-matter, and who had the right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. United States & Foreign Salamander Felting Co. v. Asbestos Felting Co. (C. C.) 4 Fed. 816; Miller v. Tobacco Co. (C. C.) 7 Fed. 91, 93; Claflin v. Fletcher (C. C.) Id. 851; American Bell Tel. Co. v. National Improved Tel. Co. (C. C.) 27 Fed. 663, 665; Eagle Mfg. Co. v. David Bradley Mfg. Co. (C. C.) 50 Fed. 193, 195; Id., 6 C. C. A. 661, 57 Fed. 980, 990, and authorities there cited; Lovejoy v. Murray, 3 Wall. 1, 18, 18 L. Ed. 129; Robbins v. Chicago City, 4 Wall. 657, 672, 18 L. Ed. 427; Walk. Pat. (2d Ed.) § 468."

In David Bradley Manufacturing Co. v. Eagle Manufacturing Co., 57 Fed. 980, 6 C. C. A. 661, it was held:

"Where a suit for infringement of a patent is brought against a firm that is a branch of the company that manufactures the infringing device, and such company conducts the defense, raising the question of validity of the patent, a decree for complainant is conclusive as to the validity of the patent as against the company conducting the defense, even in regard to alleged anticipations not referred to in the suit, since, under the issues, all anticipatory inventions might have been shown in defense. 50 Fed. 193, affirmed. Such decree is none the less conclusive because it was merely interlocutory at the bringing of the suit in which it is set up as a bar, and subsequently ripened into a final decree."

In the opinion, at page 985 of 57 Fed., page 665 of 6 C. C. A., the court said:

"The suit in the Circuit Court of the United States for the Southern District of Iowa was brought to restrain the infringement of the same claims of the same patent here in question. The defendant there was the agent of the present appellant in the sale of the infringing machines. The defense of the suit there was assumed and prosecuted by the appellant here. The appellant was in fact the real party to that litigation, and, so far as the decree there is res adjudicata, is as effectively concluded thereby as if it were the actual defendant to the record. Lovejoy v. Murray, 3 Wall. 1, 18, 19, 18 L. Ed. 129; Robbins v. Chicago, 4 Wall. 657, 672, 18 L. Ed. 427."

In Robbins v. Chicago City, 4 Wall. 657, 18 L. Ed. 427, it was held:

"Parties having notice of the pendency of a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if, instead of doing so, they willfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently turn round and evade the consequences which their own conduct and negligence have superinduced. The term 'parties,' as thus used, includes all who are directly interested in the subject-matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment."

In Sacks v. Kupferle (C. C.) 127 Fed. 569, it was held:

"Where a suit for infringement against a dealer in the alleged infringing article was defended by the manufacturer of such article at his own cost, and on appeal it was adjudged that complainant was not the original inventor, and that his patent was void, such adjudication is a bar to a subsequent suit directly against the manufacturer on the same patent."

In Penfield et al. v. C. & A. Potts & Co., 126 Fed. 475, 61 C. C. A. 371, it was held:

"Where the defendants in a number of separate suits for infringement of the same patent joined in defending each suit, contributing equally to the

expense, and stipulating with the plaintiff that all evidence taken should be used in all the cases, which fact was known to the plaintiff, all such defendants are concluded by the final decree first rendered in any one of the cases as to issues which are identical and are to be determined on the same evidence; and, estoppel by judgment or decree being mutual, the plaintiff is likewise concluded to the same extent in all the cases."

In Ætna Life Ins. Co. v. Board of Commissioners of Hamilton County, Kan., 117 Fed. 82, 54 C. C. A. 468, it was held:

"A former judgment, based upon a general finding for the defendant, which does not disclose which one of several defenses therein was sustained, constitutes an estoppel of the plaintiff therein from maintaining a second action between the same parties upon different causes of action, in which the same defenses are interposed and the same issues are presented that were made in the earlier action, unless he makes it appear by pleading or proof that some new and determining issue or matter is involved in the second action that was not or may not have been litigated or decided in the first.

"Where the same issues are made and the same defenses are interposed in both actions, and there is no pleading or proof that any new determining issue, matter, or right is involved in the second action, it is not material upon which defense or issue the former judgment was based, because an opposite judgment cannot be rendered without relitigating at least one defense and issue determined in the former action, and overruling the decision upon it there rendered.

"Where the record is such that there is or may be a material issue or matter that may not have been raised, litigated, and decided in the former action, the judgment therein does not constitute an estoppel, unless by pleading or proof the party asserting it establishes the fact that the issue, right, or matter in question was actually and necessarily litigated and determined in the former action.

"When the second suit is upon a different cause of action, but between the same parties, as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action; but it is not conclusive as to other matters which might have been, but were not, litigated or decided."

It is insisted by the defendant here that the decree rendered in the former suit by this complainant against Wright's Health Underwear Company is interlocutory, merely, and therefore not res adjudicata or an estoppel, even if the court finds that the defendant here assumed the defense of that action to such an extent that he had the right to control it, offer evidence, examine and cross-examine witnesses, and take an appeal. This court is of the opinion, in view of the fact that the defendant here does not deny that he assumed the defense of the prior action to such an extent that he controlled it, that it is established that Gormly did assume the defense of that action, and did have the right to control it and employ counsel therein, and examine and cross-examine witnesses, and take an appeal. This being so, we come to the question whether the decree granting an injunction and an accounting made by the Circuit Court, and appealed from and affirmed by the Circuit Court of Appeals, is interlocutory, merely, or final, on the question of the validity of the patent in question, and the question of infringement by the making and selling or using of the alleged infringing article; that is, is it a final decree in the sense that it is either an estoppel or strictly res adjudicata as to the defendant Gormly?

In Brush Electric Co. v. Western Electric Co., 76 Fed. 761, 22 C. C. A. 543, it was held by the Circuit Court of Appeals, Seventh Circuit, that:

"A decree awarding a perpetual injunction in a patent suit, but with an order of reference to a master to ascertain the damages suffered by the infringement, is an interlocutory, and not a final, decree, and therefore does not operate as an estoppel in a subsequent suit."

It will be noted that in that case there had been no appeal to the Circuit Court of Appeals.

In Harmon v. Struthers (C. C.) 48 Fed. 260, it was held:

"In a suit for infringement of letters patent there was a decree for plaintiffs, awarding an injunction, and for an account, and a reference to a master. The defendants quit using the device so held to infringe, substituting a different device, which was openly used by other persons, and as to which there had been no adjudication. Then, pending the reference before the master, the plaintiffs brought a new suit in the same court against the same defendants. The answer therein not only denied infringement, but alleged that one G., and not the patentee, was the original and first inventor of the patented device, which defense was not set up in the first suit. *Held*, that the decree was interlocutory, and did not, in the second suit, preclude inquiry into the validity of the patent."

In Roemer v. Neumann (C. C.) 26 Fed. 332, it was held:

"An interlocutory decree, entered pro confesso, finding the patent valid, awarding an injunction, and referring the case to a master to take an account of profits and damages, is not definitive. No appeal lies from it, and it is still in the control of the court.

"In a prior suit between the same parties, an interlocutory decree, pro confesso, awarding an injunction and a reference to a master, had been entered, and a release of profits and damages signed. In a subsequent suit between the same parties, exceptions setting up this decree as an estoppel were overruled, in the absence of an express authority on the question; and held that, where there is a doubt in such a case, it ought to be resolved against the party urging the estoppel."

In neither of these cases was an appeal taken from the interlocutory judgment of the Circuit Court to the Circuit Court of Appeals.

In Bissell Carpet Sweeper Co. v. Goshen Sweeper Co., 72 Fed. 545, 19 C. C. A. 25 (Sixth Circuit), the Circuit Court of Appeals held and decided:

"The decrees and mandates of the Circuit Courts of Appeals have precisely the same finality as the decrees and mandates of the Supreme Court. Whatever is before the court by virtue of the appeal, and is disposed of by it, is finally settled, and becomes the law of the case, so that the court below must carry it into execution according to the mandate, without power to modify, reverse, enlarge, or suspend it.

"Where, on appeal from interlocutory decree granting a perpetual injunction, the court necessarily examines and determines the entire merits of the cause, its power to decree is not limited to the matter of the injunction alone, but extends to the whole merits, and its decision is final and conclusive on every point actually decided. Consequently the court below has no power to modify in any respect a decree which is thus affirmed, but must give it full effect in the very terms of the decree of the appellate court. Richmond v. Atwood, 2 C. C. A. 596, 52 Fed. 10, 17 L. R. A. 615, and Marden v. Manufacturing Co., 15 C. C. A. 26, 67 Fed. 809, followed. Watch Co. v. Robbins, 3 C. C. A. 103, 52 Fed. 337, overruled."

In the opinion of the court at pages 554 and 555 of 72 Fed., pages 34 and 35 of 19 C. C. A., it is said:

"It is equally clear that, by allowing an appeal from an interlocutory decree, Congress intended to allow an appeal from a perpetual injunction ordered and allowed upon a final hearing of the merits, where the same decree refers the cause to a master for an accounting. This construction of the act has been, so far as we know, universally accepted by the Circuit Courts of the United States and by the Circuit Courts of Appeals. * * * When the appeal is from a decree determining the merits, awarding a perpetual injunction, and referring the cause to a master for the simple purpose of reporting damages for infringement, there can be no proper review or re-examination of so much of the decree as awards the injunction that does not include the basis upon which it was granted. Thus, though the 'injunction is the backbone of the jurisdiction,' as pithily observed by Judge Putnam in Marden v. Manufacturing Co., supra, yet the appeal necessarily brings up the full record, and places us in full possession of the entire case, so far, at least, as a remedy by injunction was the foundation of the jurisdiction below. It follows, therefore, that if the court finds it essential to pass upon the merits of the case in order to determine the propriety of the injunction, and in no way reserves to the lower court a right to review or re-examine the grounds upon which it had originally proceeded, the decision of this court becomes the law of the case. If that decision was an affirmance of the decree below, that decree becomes the decree of this court, and is no longer open to review, rehearing, or modification, for it has become the settled law of the case. A second appeal can only involve matters subsequent to the decree, for this court, after term passed, has no power to review, rehear, or re-examine its own decrees. This rule of practice and procedure is in accord with the usages and practice of appellate courts obtaining jurisdiction through appeals from decrees, interlocutory in character, which determine the rights of the party appealing."

And at page 560 of 72 Fed., page 40 of 19 C. C. A., the court further says:

"The conclusion we have reached is in the line of the relief intended by Congress to be afforded suitors whose rights are affected by temporary submission to an inconclusive decree. The right to appeal at that stage of the cause is optional. If one affected by the action of the court in allowing, dissolving, or continuing an injunction, see fit, he may await a final decree, and then appeal. But if he elects to appeal, with the result that another inconclusive decree is rendered, his last estate is no better than his first, for he must proceed with the cause, and submit until he can again appeal. The statutory purpose was to save the litigants from being obliged to submit to the injury incident to an inconclusive decree, and to all the expense of an accounting. But if, after an appeal, resulting in an inconclusive affirmance, he must still proceed with an accounting, which, after all, may prove unnecessary, the statute will have amounted to little. The doctrine of res adjudicata rests upon the maxim that there should be an end to litigation. No doctrine rests upon sounder principles of public policy, or is more entitled to a wide application. If, under an appeal from a decree awarding an injunction, this court obtains such a record as to enable it, with justice to the parties to the appeal, to hear and consider the merits of the cause, it would be most anomalous if we have not the power to decide. The judicial function of considering involves the function of determining. The decision of an appellate court is final, and no second appeal is maintainable, except as to matters reserved or proceedings subsequent to the first appeal."

It may be that in Bissell Sweeper Co. v. Goshen Co., 72 Fed. 545, 19 C. C. A. 25, 43 U. S. App. 47, it was not intended to hold that the affirmance by the Circuit Court of Appeals of an interlocutory decree holding a patent valid, and granting an injunction restraining infringements, and sending the matter to a master to take and state

the account, makes the judgment final as to the validity of the patent and as to all matters except profits and damages; but this court can give no other interpretation to the language of the court, and, in the absence of an intimation by another Circuit Court of Appeals to the contrary, would feel constrained to so hold. It expressly held that the Circuit Court of Appeals may affirm such a decree on the merits, and that when affirmed the holding becomes the law of the case, and that the Circuit Court can then only carry into effect the decision of the Circuit Court of Appeals. This being so, should the case come up on a second appeal from the final decree entered by the Circuit Court on the coming in and confirmation of the master's report, could the Circuit Court of Appeals reverse or modify its prior rulings in the same case affirming the interlocutory decree first entered and appealed from, and which also necessarily established the validity of the patent? This would be giving to the Circuit Court of Appeals in such a case the power to reverse its own decree on a given point, or all points, in the same case made at a prior term. The court said:

"Upon affirming such a decree [interlocutory decree of the Circuit Court], the Circuit Court of Appeals is not called upon to determine the effect of the affirmance, should the case be again appealed after the accounting of profits and damages has been stated and confirmed. A second appeal, moreover, can only involve matters subsequent to the decree of the Circuit Court of Appeals, for that court, after the term has passed, has no power to review, rehear, or re-examine its own decrees." And again: "The decision of an appellate court is final, and no second appeal is maintainable, except as to matters reserved or proceedings subsequent to the first appeal."

This decision seems to be approved in Smith v. Vulcan Iron Works, 165 U. S. 523, 17 Sup. Ct. 407, 41 L. Ed. 810, although the only question really decided there was that on such an appeal in a patent case the Circuit Court of Appeals may decide the case on the merits, and render or direct a final decree dismissing the bill. If it may do that, and reverse and dismiss, giving a final judgment against the complainant, why must not its affirmance of such a decree be regarded as final? If this be the law, then the affirmance of the judgment in this case under consideration by the Circuit Court of Appeals made the judgment of affirmance entered by direction of that court final, and we now have a final, and not an interlocutory, judgment, establishing and declaring the validity of the complainant's patent. If so, and if Gormly is to be held a party (in the broad sense) to that action and judgment, then there is the end of this case, for, when the strict doctrine of res adjudicata applies, the judgment is final and conclusive not only as to all questions actually decided, but as to all that might have been raised and litigated. Hence, if such be the case, the new defenses now urged, not pleaded in that prior action, cannot be urged here, as they might have been presented and passed upon then. But the Circuit Court of Appeals in the Seventh Circuit, October, 1896, did not so understand the decision in Bissell Carpet Sweeper Co. v. Goshen Sweeper Co., supra, for in Brush Electric Co. v. Western Electric Co., 76 Fed. 761, 22 C. C. A. 543—a patent case, where the

patent was upheld, and an injunction granted, and an appeal taken —the court said, as to the defense of a prior decree between the same parties regarding the same patent:

"The decree in the Toledo Case awarded a perpetual injunction, but with an order of reference to a master to ascertain the damages by reason of infringement; and for that purpose the suit, it is conceded, is still pending. It is therefore only an interlocutory decree, and not available as an estoppel in respect to any issue in these suits."

In support of this statement of the law it cited Bissell Carpet Sweeper Co. v. Goshen Sweeper Co., 72 Fed. 545, 19 C. C. A. 25, from which the above quotations have been taken, and also the following cases: Barnard v. Gibson, 7 How. 650, 12 C. C. A. 857; Humiston v. Stainthorp, 2 Wall. 106, 17 L. Ed. 905; McGourkey v. Railway Co., 146 U. S. 545, 13 Sup. Ct. 172, 36 L. Ed. 1079; David Bradley Mfg. Co. v. Eagle Mfg. Co., 6 C. C. A. 661, 57 Fed. 980, and 18 U. S. App. 349; Jones Co. v. Munger Improved Cotton Mach. Mfg. Co., 1 C. C. A. 668, 50 Fed. 785, and 2 U. S. App. 188; Richmond v. Atwood, 2 C. C. A. 596, 52 Fed. 10, 17 L. R. A. 615, and 5 U. S. App. 151; Marden v. Campbell Printing Press & Mfg. Co., 15 C. C. A. 26, 67 Fed. 809, and 33 U. S. App. 123; Bissell Carpet Sweeper Co. v. Goshen Sweeper Co., 19 C. C. A. 25, 72 Fed. 545.

It is not necessary to call attention particularly or in detail to the inconsistency between the Carpet Sweeper Case, above commented on, and Marden v. Campbell Printing Press & Mfg. Co., 67 Fed. 809, 15 C. C. A. 26, where it is held that the appeal from the interlocutory decree in such a case in no way affects the right to an appeal from the final decree after an accounting.

That the decree of a Circuit Court sustaining a patent, declaring infringement, and sending the matter to a master to take and state an account of profits and damages, is interlocutory, and not final, is declared by the Supreme Court in McGourkey v. Toledo & Ohio Railway, 146 U. S. 545, 13 Sup. Ct. 172, 36 L. Ed. 1079, where it is said:

"It is equally well settled that a decree * * * or in equity establishing the validity of a patent, and referring the case to a master to compute and report the damages, is interlocutory merely."

And also in Smith v. Vulcan Iron Works, 165 U. S. 524, 17 Sup. Ct. 410, 41 L. Ed. 810, where it is said:

"But under the judicial system of the United States, from the beginning until the passage of the act of 1891 establishing Circuit Courts of Appeals, appeals from the Circuit Courts of the United States, in equity or in admiralty, like writs of error at common law, would lie only after final judgment or decree; and an order or decree in a patent cause, whether upon preliminary application or upon final hearing, granting an injunction, and referring the cause to a master for an account of profits and damages, was interlocutory only, and not final, and therefore not reviewable on appeal before the final decree in the cause."

After a review of all the cases, this court is constrained to hold, and does hold, that the decree entered in Australian Knitting Company v. Wright's Health Underwear Co., on the affirmance of the decree of the Circuit Court by the Circuit Court of Appeals sustain-

ing complainant's patent, is interlocutory, merely, and not final, as no final judgment has been entered or rendered by the Circuit Court, and the matter of the accounting is still pending before the master. That judgment may not be res adjudicata and conclusive on the defendant here, Robert W. Gormly, for another reason: Gormly was not a party in fact to that litigation, nor was he directly interested. He was interested, but not "directly interested." Nor was he represented in that case by Wright's Health Underwear Company. That company was not his representative in any sense, nor did Gormly, the defendant here, claim under or through that company. In this suit Gormly does not claim under or through that company, or succeed to its title or right. Had that company succeeded in securing a judgment dismissing the action, such judgment might have proceeded on the ground that the device used by it did not infringe the patent in question, or it might have proceeded upon the ground that the complainant's patent was invalid for various reasons. The defendant there set up certain defenses, and pleaded certain matters as showing prior use and publication, anticipation, etc.; but it did not plead certain matters which, if established as true, would have determined that action in favor of the defendant. Those matters the defendant there sought to set up after the decision by the Circuit Court of Appeals affirming the judgment on its petition to that court asking a recall of the mandate for modification, or for an order granting leave to the Circuit Court to rehear and consider newly discovered evidence. That motion was denied for the reason, said the court, "it has not been satisfactorily made to appear that the defendant could not have discovered the new evidence if reasonable diligence had been exercised." It therefore appears that the Circuit Court of Appeals did not consider the defenses now set up on the merits when it affirmed the judgment, and that it declined to allow the Circuit Court to consider such defenses on the merits because of the laches of that defendant in not discovering the facts at an earlier date.

But if Wright's Health Underwear Company had secured a judgment in that action dismissing the complaint on the defenses urged in that action, would such judgment bar or estop the complainant in this action from prosecuting it against the defendant, Gormly, for making and vending the alleged infringing device? It is well settled that estoppels, to be binding or effective, must be mutual. Mack v. Levy (C. C.) 60 Fed. 752. In other words, could Gormly effectively plead such judgment as res adjudicata against the complainant? Could Gormly say (1) "The subject-matter is the same;" (2) "The parties the same;" (3) "The causes of action are the same, identical;" (4) "In that action you were bound to set up and litigate all your defenses;" and, (5) "In that action it was determined that your patent is invalid, or that the device in question does not infringe"? The judgment, if for defendant, might have proceeded upon either ground. The question thus presented would seem to be reduced to this: Is a person who is only indirectly interested in a litigation, and who is not made a party, and who is not

represented by a party to the record who represents his interest, but who comes forward and defends because it may ultimately benefit him so to do, so represented in the suit that he is, for purposes of res adjudicata, to be regarded as an actual party to the record, and to such an extent that in all actions by such complainant against him involving the same cause of complaint and all the defenses that might have been pleaded and urged by the actual defendant, but in fact were not, such matters are to be deemed to have been finally adjudicated and determined between the complainant and the person so defending?

In Litchfield v. Goodnow, 123 U. S. 549, 550, 8 Sup. Ct. 210, 31 L. Ed. 199, it was held:

"The defense of prior adjudication is disposed of by the fact that Mrs. Litchfield was not a party to the suit in which the adjudication relied on was had. At the time of the commencement of the suit she was the owner of her lands, and they were described in the bill, but neither she nor any one who represented her title was named as a defendant. She interested herself in securing a favorable decision of the questions involved as far as they were applicable to her own interests, and paid part of the expenses, but there was nothing to bind her by the decision. If it had been adverse to her interest, no decree could have been entered against her personally either for the lands or the taxes. Her lands were entirely separate and distinct from those of the actual parties. A decree in favor of or against them and their title was in no legal sense a decree in favor of or against her. She was indirectly interested in the result, but not directly. As the questions affecting her own title and her own liability for taxes were similar to those involved in the suit, the decision could be used as a judicial precedent in a proceeding against her, but not as a judgment binding on her and conclusive as to her rights. Her rights were similar to, but not identical with, those of the persons who were actually parties to the litigation."

It will be noted that the Supreme Court places the decision on the facts that, while Mrs. L. owned a part of the lands described in the bill, "Neither she nor any one who represented her title was named as a defendant," and "she was indirectly interested in the result, but not directly," and "no decree could have been entered against her." The court also quotes with approval Greenleaf's Evidence, vol. 1, § 523, "Under the term 'parties,' in this connection, the law includes all who are directly interested in the subject-matter," and had a right to make defense, or to control the proceedings and to appeal from the judgment.

The decision in Litchfield v. Goodnow is in no wise weakened or broken by Plumb v. Goodnow's Administrator, 123 U. S. 560, 561, 8 Sup. Ct. 216, 31 L. Ed. 268. There Plumb was the actual owner of the land in question, but the title stood in the name of one Wade, and the defense was made by Plumb, the real owner—the one "directly interested." Again, Wade represented Plumb's title, and was a party on the record.

In Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859, held:

"When the jurisdiction of a controversy by a court is unquestioned, and the cause proceeds to final judgment, and no review is sought for, the judgment is conclusive upon the parties to the suit as to the matters decided, but not as to matters which might have been decided, but were not."

In Ætna Life Ins. Co. v. Bd. of Com'rs, 117 Fed. 82, 54 C. C. A. 468, the third headnote reads:

"Where the record is such that there is or may be a material issue or matter that may not have been raised, litigated, and decided in the former action, the judgment therein does not constitute an estoppel, unless by pleading or proof the party asserting it establishes the fact that the issue, right, or matter in question was actually and necessarily litigated and determined in the former action."

See, also, Empire S. N. Co. v. S. L. B. Co., 74 Fed. 864, 21 C. C. A. 152.

The right of the defendant to be heard in this case on his new defenses would seem to be implied from Johnson Co. v. Wharton, 152 U. S. 252, 14 Sup. Ct. 608, 38 L. Ed. 429. The syllabus is as follows:

"A judgment recovered in a Circuit Court of the United States in favor of the plaintiff by the owner of a patent right in an action against a licensee to recover royalties on sales of the patented article, where the sole defense set up was that the articles manufactured and sold by the defendant were not covered by the patent, in which the amount recovered was not sufficient to permit a review by this court, is a bar to an action in the same Circuit Court by the same plaintiff against the same defendant to recover like royalties on other like sales, where the same defense is set up, and no other, and the amount involved is sufficient to authorize a review here."

In Fayerweather v. Ritch, 195 U. S., at page 299, 25 Sup. Ct., at page 64, 49 L. Ed. 193, the court said, speaking of estoppel by judgment:

"But in order to make this finality rightful it should appear that the question was distinctly put in issue; that the parties presented their evidence, or at least had an opportunity to present it; and that the question was decided."

It seems to this court reasonably clear that, while Gormly is bound by the former judgment as to all questions actually raised in that case by the answer, he is not bound thereby so as to preclude him from presenting his new defenses here; that the judgment is only interlocutory; and, second, Gormly was not directly, but only indirectly, interested, and his rights and interests were not represented in that action.

In pleading defenses, it was not sufficient to merely allege that the patent of Kinsey was void. It was necessary to set up anticipation, prior use, want of patentable invention, etc., if relied on. See 3 Robinson on Patents, § 958.

The final question is that of the invalidity of complainant's patent because of the alleged new matters set up in the answer.

Burr-wheels, in the ordinary circular knitting machine, caused to rotate by the meshing of their peripheries, having teeth, so called, with the needles, co-operate with the needles in various ways for different purposes. The matters in question here relate to such burr-wheels as have some of the spaces between the blades or wings thereof filled or blocked. The patent in suit is for what is known as a "cut-presser," and defendant's device is for a "backing" wheel. The evidence shows that the one cannot do the work of the other. When the blades are arranged upon the wheel, in order to knit different patterns, it is necessary to have some of the spaces be-

tween the blades partly or wholly filled. Formerly this was done by running in solder or lead or some other metal in a molten state. It is obvious that when this was done the metal run in became fixed, as did the blades, and that, when it was desired to knit a new pattern, it was necessary to use a new burr wheel. On the other hand, it is obvious that if the blades were removable or detachable from the wheel proper, and certain of the blades had a projection or cam on the side thereof, at the proper place, either made integral with the blade, or made separately and attached by means of a rivet, and of such size or shape that such projection or cam would fill the space between the blades when in place, in the same way the metal run in would do, that different patterns could be knit with the same burr-wheel, and without changing it, by merely changing the blades, or the location or number of blades, having such projections or lugs. There were two old, well-known wheels—the Kavanaugh and the Allardice. These were well-known equivalents. Comparing the Kinsey patent in suit with the Kavanaugh, it is obvious from the evidence that the Kinsey patent shows the blocks applied to the blades of a Kavanaugh wheel. It is evident that the blade with the closing block or cam, so called, either soldered or riveted thereto, is the equivalent of the blade with the block or cam cast or wrought integral therewith, so far as the questions here are concerned. It would not be patentable invention to make such block or cam as a part of the blade, in place of soldering or riveting it thereto. The Allardice and Kavanaugh wheels, each with the blocks riveted to the blades, are equivalents. In the case against Wright's Health Underwear Company (C. C.) 115 Fed. 527, and 119 Fed. 921, 56 C. C. A. 451, it is evident from the opinions that the prior patent to one Swits Conde, No. 240,008, dated April 12, 1881, failed to be held an anticipation of the Kinsey patent in question here because it did not plainly show the closing blocks attached to the blades. The patent itself was in evidence, but not the Conde model burr of 1881, on file in the Patent Office at Washington years before the Kinsey patent was applied for, showing the blocks or cams attached to, and forming a part of, the blades. Nor was the present defense made, that the device covered by the Kinsey patent was in public use in the Conde Mill at Oswego, N. Y., and at Amsterdam, N. Y., for years before that patent was applied for or granted. On the evidence, which is substantially uncontradicted and unquestioned, it is proved beyond a reasonable doubt, and in fact beyond any question, that the alleged invention of the Kinsey patent was on public exhibition and in prior use, in connection with the Conde burr on exhibition in the Patent Office at Washington, for years before the Kinsey patent was applied for or granted. The memory of witnesses alone is not relied on. They come supported by notes made at the time, which evidently do not falsify. The evidence shows that Kinsey, the patentee, was in and about the mill where this device, patented by him subsequently, was in use, long before he applied for his patent. He was acquainted with the Kavanaugh and Allardice wheels, and the application thereto of the device in question. He borrowed the invention of

others, so far as there was invention, which had been abandoned to the public. This court has no doubt that had these defenses, supported by the evidence now adduced, been before the court in the Wright's Health Underwear Company Case, the decision there would have been the other way. This court is not at all inclined to differ from the decision of the court in that case on the defenses made and the evidence produced. In this case the court finds no evidence of a concocted story or "put-up" defense.

The defendant is entitled to a decree dismissing the bill of complaint, with costs.

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## AMERICAN WRITING MACH. CO. v. WAGNER TYPEWRITER CO.

## WAGNER TYPEWRITER CO. v. WYCKOFF, SEAMANS & BENEDICT.

(Circuit Court, S. D. New York. March 10, 1905.)

1. PATENTS—INFRINGEMENT—STOP MECHANISM FOR TYPEWRITING MACHINES.
The Schulte patent, No. 450,592, for an adjustable mechanism for making column stops on a typewriting machine, claim 9, covers only the particular mechanism disclosed. As so construed, *held* not infringed.

2. SAME.
The Gathright patents, No. 436,619, claims 4 and 5, No. 452,268, claims 6 and 8, each covering mechanism for making column stops on a typewriting machine, construed, and *held* not infringed.

In Equity. Suits for infringement of letters patent No. 450,592, granted to John H. Schulte April 14, 1891, and letters patent Nos. 436,619 and 452,268, granted respectively September 22, 1890, and May 12, 1891, to Josiah B. Gathright, all relating to column stop mechanism for typewriting machines. On final hearing.

Henry D. Donnelly and Edmund Wetmore, for Wyckoff, Seamans & Benedict and American Writing Machine Company.

Arthur v. Briesen, for Wagner Typewriter Company.

WHEELER, District Judge. In the use of typewriters the writing of short lines and other tabulating work was done by stopping the carriage at the proper place for beginning it by hand. July 22, 1886, John H. Schulte made application for a patent for mechanism to stop the carriage at desired places by moving the feed dog out of the toothed feed racks into a third rack, having teeth at long intervals to engage the dog and stop the carriage at the desired place; and January 15, 1889, Josiah B. Gathright made application for a patent for such mechanism, consisting of a bar hung in the machine in line with the feed racks, carrying adjustable stops to engage with a bar on the carriage as the feed racks should be lifted away from the dog. A patent was granted on this application, numbered 436,619, and dated September 22, 1890, among the claims of which are:

"(4) The combination of stop-rod freely hung to the machine, a stop-lug thereon, and a supplemental spacing-key hung in the machine and adapted

to move the said stop-lug into the path of a portion of the feed-carriage, and connection between the stop-rod and rack-bar, substantially as shown and described.

"(5) In a typewriter, the combination of the usual letter-keys and one or more spacing-keys having mechanism in common for permitting the carriage to move a definite space at each stroke, and a supplemental spacing or skipping key fitted to permit the carriage to move any desired number of said spaces, according to adjustment, said key provided with independent mechanism for releasing the carriage from the detent, and mechanism for simultaneously interposing an adjustable stop, substantially as shown and described."

October 17, 1890, Gathright made another application for a patent for such mechanism by which the dog was lowered away from the feed racks, and a stop on the carriage was made to engage with adjustable stops on the nearly parallel push rod.

April 14, 1891, a patent was granted on Schulte's application, numbered 450,592, containing among other claims:

"(9) In a typewriting machine, the combination, with the carriage, of an adjustable column-stop, a dog to engage the same, and a finger-piece or key to actuate said dog, substantially as and for the purpose set forth."

And May 12, 1891, patent No. 452,268 was granted on Gathright's second application, which contained, among other claims:

"(6) The combination, in a typewriting machine having a carriage feed-rack, of a detent hung to engage the said rack, a rock-shaft journaled in bearings parallel with the feed-rack to be rocked in a direction transverse thereto, and having one arm communicating with the said detent to disengage it from the rack, and another arm or block to be rocked into the path of a fixture of the carriage, and a skipping-key connected with the rock-shaft, substantially as described."

"(8) The combination of a typewriting machine feed-rack, a rock-shaft nearly parallel with the rack wholly independent of the ordinary feed rock-shaft, a lug upon one and stop-blocks adjustably secured upon the other, a detent for the rack, the rock-shaft having one arm to disengage the rack and detent, and another arm connected with a skipping-key, substantially as described."

The first of these suits is brought against alleged infringement of this claim of the Schulte patent by the use of the tabulating mechanism of the Underwood machine, whereby the carriage is raised away from the feed mechanism, and stopped by the engagement of arms on the carriage with projections on the frame.

The second is brought against alleged infringements of these claims of the two Gathright patents, whereby the carriage is raised away from the feed mechanism, and projecting arms are moved into engagement with adjustable stops on a notched bar hung in the machine.

It seems quite obvious, without going more into details of the contrivances, that claim 9 of the Schulte patent cannot be held valid to cover such different mechanism as that of the Underwood machine unless the combination of any tabulating mechanism with the known parts of a typewriting machine would be so patentable as to cover all other forms; but such a combination with another machine was not new. The Schulte device operates in its particular way to accomplish the stopping of the carriage of the typewriting machine at certain places; the Underwood mechanism accomplishes a similar result in a different way. Under such cir-

cumstances, the inventions are not the same, and a patent for one would not cover both.

In the latter of these cases it is urged that, as the inventions and patents of Gathright are the first to place the tabulating mechanism away from the feed dog, his patents should cover all such devices that include that feature of which the defendant's structure is one. This one common feature does not, however, make all combinations containing it the same. The patents will not cover the plan of tabulating in that way, but only the inventor's contrivances for carrying it out, and the defendant's means are so different from that inventor's that the use of them does not appear to be any infringement of either of the claims of his patents here involved. According to these views, the bill in each case must be dismissed.

Bills dismissed.

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## CORTELYOU et al. v. CHARLES ENEU JOHNSON & CO.

## BRODRICK COPYGRAPH CO. OF NEW JERSEY v. SAME.

(Circuit Court, S. D. New York. May 30, 1905.)

1. PATENTS—CONDITIONAL SALE OF PATENTED MACHINE—VALIDITY OF RESTRICTION ON USE.

   It is competent for the owner of a patent for a rotary neostyle, used for stencil duplication, to sell such machines under a license restriction that they shall be used only with paper and ink made by the licensor, it being necessary to the successful operation of the machine that such supplies shall be of a special kind and quality, and any use of the machine with other supplies will constitute an infringement of the patent.

2. SAME—NOTICE OF CONDITION.

   In such case a written contract of license embodying such restrictions is not necessary, but purchasers and users are bound by a notice thereof placed conspicuously on the machine itself.

3. SAME—CONTRIBUTORY INFRINGEMENT.

   A defendant who, with knowledge that a patented machine is sold subject to a license restriction that it is to be used only with supplies made and sold by the licensor, induces such licensees to violate such restriction and infringe the patent by buying and using with the machine supplies made by himself, is chargeable with contributory infringement.

   [Ed. Note.—Contributory infringement of patents. see note to Edison Electric Light Co. v. Peninsular Light, Power & Heat Co., 43 C. C. A. 485.]

In Equity.

This is a suit in equity brought in the first instance by Mary V. Cortelyou and another, administrators, etc., and Neostyle Company against Charles Eneu Johnson & Co., for the alleged infringement of letters patent No. 584,787, granted June 22, 1897, to Lowe and Cortelyou, covering the machine known as the "rotary neostyle." The administrators aforesaid, at the time the action was brought, owned the legal title to the patent, and the Neostyle Company was licensed under that patent. The original bill was filed November 15, 1902. February 28, 1903, the rights of the administrators were acquired by the Brodrick Copygraph Company, and then was filed a bill in the nature of a supplemental bill bringing in that concern as a party in interest. An answer has been filed to both bills, and the two causes have proceeded as one, under a stipulation to that effect. The license contract of the Neostyle Company is in evidence. The defendant is not charged with a direct infringe-

ment of the patent in suit, either by the making, the using, or the selling of the patented machine. The defendant is charged with contributory infringement, in that it has, it is alleged, procured the complainants' vendees to directly infringe by the illegal use of the machine; that is, by the use of the machine outside of the right and the scope of the authority conferred upon them.

Samuel Owen Edmonds (Edmund Wetmore, of counsel), for complainants.

Francis T. Chambers and Jefferson Clark, for defendant.

RAY, District Judge (after stating the facts). The patented rotary neostyle is sold under a license restriction, which restriction precludes the use thereof except with supplies (stencil paper, ink, etc.) manufactured and sold by the Neostyle Company. The charge is that the defendant has been making duplicating ink and selling the same to the complainants' vendees or licensees, with the intent that such ink shall be used on these machines obtained of the complainants by such vendees or licensees in violation of the license restriction. It is charged that the defendant in fact procures such ink to be so used by such licensees.

The rotary neostyle was the first machine on the market adapted for rapid stencil duplication, and is the only duplicating machine of the rotary type ever marketed. Its use was commenced in 1899, and soon passed into the hands of the Neostyle Company. At that time the machines were sold without any restrictions as to their use. In a short time that plan of sale proved to be impracticable, because the excessive cost of selling left no profit. In fact, there was a loss. The machines were not being at all times successfully used, because of the inferior supplies offered and furnished by outsiders to the users of the machine. It was also discovered that several improvements on the machine were necessary to make it complete. If the machine was to prove a success, it was necessary that it be operated efficiently and economically, and, that this result might be attained, it was necessary that the machine should be used in the manner contemplated by the manufacturer. Its use in a different manner, as with stencil paper adapted for a hand duplicator or with ink adapted for a printing press, would speedily bring the machine into disrepute. In October, 1899, it was discovered that the plan of selling the machine outright and without a license limitation was disastrous; money was being lost by the manufacturers and sellers, and the machine was falling into disrepute because of their failure to secure high-class work. This failure was due, in some degree at least, to the supplies used. It was deemed unwise to increase the price of the machine. The plan was then formed of selling the machine under a license restriction. The machine was improved, and placed in the hands of users at the price of $50, the same before charged; but each machine, it is asserted, was sold under and with a license restriction forming a part of the contract of sale, and limiting the right of the purchaser to use the same. The purchaser, it is insisted, acquired the right to use the machine only in connection with the specially developed supplies of the Neostyle Company, its ink being one of these supplies. The

baseboard of the machine, a most conspicuous part of the mechanism, is black, and upon this, before the sale of the machine, was firmly affixed in a conspicuous place a white celluloid plate, on which was and is inscribed, in black letters, the following:

"License Agreement.

"This machine is sold by the Neostyle Co. and purchased by the user, with the express understanding that it is licensed to be used only with stencil paper and ink (both of which are patented), made by the

"Neostyle Company,
"New York City."

This license agreement was affixed to each and every machine sold subsequent to October 21, 1899. Each machine bore also the patent label, giving the date of the Lowe patent in suit. This tag read as follows:

"Rotary Neostyle, U. S. Pats., July 9, 1895; Jan. 28, '96; June 22, '97. Made by Neostyle Co., New York."

This plate, giving the patents, etc., was of metal about 2½ inches long and 1¼ inches wide, and the letters named were placed thereon in raised gilt.

The supplies for this machine are duplicating ink and stencil paper. The manager of the Neostyle Company says that the company expended large sums of money in bringing these supplies to the highest possible standard, and that they employed at great expense expert chemists, and expended months of labor and thought, to perfect an ink that would give satisfaction in any temperature and climate, and permit the user to secure the best possible results under all climatic conditions. The president of the company says that much time and labor and experience were thrown into experiments on the ink to be used on the machine, as well as in the reconstruction of the machine itself. He says that chemists and ink manufacturers were employed to secure an ink that would give the highest and best results. He says that the use of satisfactory ink on the machine means more than the production of perfect prints; that the ink must dry readily, and not act to destroy the stencil. He says that other inks were found to destroy the stencils. It must be conceded that the success of the machine would depend largely upon the quality of the work done, and that the quality of the work done would depend largely upon the quality of the supplies used. In short, it appears that the complainants, having lost large sums of money, and being in danger of having the machine brought into disrepute so that it would be worthless, expended large sums of money in improving the machine and other large sums of money in producing first-class supplies, and that then, to make the venture a success and insure a proper working of the machine and good results, they attached to each machine, before selling the same, the license agreement before quoted, and to which attention has been called. The evidence shows that good results came from this plan. The testimony shows that this plan of selling and using and operating has been beneficial both to the company and the purchaser and user of the machine. It has resulted

in profits to the company, and the highest result in quality of work has been attained. It is also shown that the ink used under this plan has saved from 30 to 40 per cent. of what would otherwise be the initial cost of the machine. The evidence is that the present selling price of the rotary neostyle machine is $50, but that its cost to the manufacturer is about $64. The evidence shows, therefore, that the manufacturer or complainants put into the hands of the purchaser or licensee, whichever we call him, a machine costing $64, at a cost to him of $50, but with the agreement attached, specified heretofore as the "license agreement," that the purchaser or licensee shall only use the machine with the supplies made and sold by the complainants. The evidence shows also that the user of the machines, operating them with the supplies made and furnished by the complainants, may receive or get back the price paid for it in about three weeks. The evidence shows that the cost of producing 1,000 typewritten copies of a writing, letter size, on the rotary neostyle, is about 33 cents. The cost of 1,000 copies of the same produced on a printing press is about $3. Other benefits derived might be named and specified, but it is unnecessary. There is a sufficient consideration to the buyer of the machine, or licensee, for the license agreement. The price charged by the company for duplicating ink is fair and reasonable. In selling the machines with this license agreement attached in the manner described, there is no fraud, deceit, or imposition. After some of these machines were sold with the license agreement attached, it was discovered by the complainants that some of them were not doing satisfactory work. On investigation it was found that some of the purchasers and users of these machines had violated the license agreement and were purchasing and using other ink, either of the defendant, or of parties who were selling the defendant's ink. The defendant's ink is inferior to that of the complainants for use upon the rotary neostyle. It is shown that the defendant itself is a party to this violation of the license agreement. The complainants contend that this license restriction and agreement is valid and binding upon the purchasers and users of the rotary neostyle, and that the use of inks made and sold by others is a violation of the license agreement and an infringement, and that all persons who make and sell, or who sell to the purchasers and users of the rotary neostyle, ink made by parties other than complainants, are contributory infringers. The defendant denies infringement, and denies the validity of the license agreement hereinbefore set out in full.

We start here with the proposition that the complainants have a valid patent, and, so far as this case is concerned, the exclusive right thereto, and to the invention covered thereby—to keep, lock up, hide, use, or sell. They may use it themselves and refuse the privilege to any one else. It is theirs, like the dollar of the one who has earned it, and they have the exclusive right to it; the right, as has the owner of the dollar, to throw it in the ocean or to bury it in the earth; the right to put at interest, or to let it lie idle and wholly unproductive. This right in the owner of a patent continues during the life of the patent. When it dies the invention becomes

public property. This is the policy of the law. Its wisdom has been demonstrated by a century of experience, which has seen the inventive faculties and genius of our people developed to a marvelous extent. We lead the world in invention. The purpose of the law is monopoly for a limited time for the protection and encouragement of the inventor, as well as of others of a mechanical and inventive turn.

In Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, it is said in the syllabus:

"The object of the patent laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very 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; and the fact that the conditions in the contracts keep up the monopoly does not render them illegal. The prohibition was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others, who were engaged in manufacturing and selling other machines under other patents; but it would be unreasonable to so construe the provision as to prevent the defendant from using any letters patent legally obtained by it and not infringing patents owned by others."

The same language is found in the opinion at page 91 of 186 U. S., page 755 of 22 Sup. Ct. (46 L. Ed. 1058). In that case the court cites with approval the language of Judge Nelson in Wilson v. Rousseau, 4 How. (U. S.) 646, 674, 11 L. Ed. 1141, 1153, viz.:

"The law has thus impressed upon it all the qualities and characteristics of property for the specified period, and has enabled him to hold and deal with it the same as in the case of any other description of property belonging to him, and on his death it passes, with his personal estate, to his legal representatives, and becomes part of the assets."

And also the language of Mr. Chief Justice Marshall in Grant v. Raymond, 6 Pet. 218, 241, 8 L. Ed. 376, 384, viz.:

"To promote the progress of useful arts is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries,' is among those expressly given to Congress."

The court, in Bement v. National Harrow Co., at page 90 of 186 U. S., page 755 of 22 Sup. Ct. (46 L. Ed. 1058), also says:

"In Heaton-Peninsular Company v. Eureka Specialty Company, 47 U. S. App. 146, 160 [77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728], it is stated regarding a patentee: 'If he see fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own. That the grant is made upon the reasonable expectation that he will either put his invention to practical use, or permit others to avail themselves of it upon reasonable terms, is doubtless true. This expectation is based alone upon the supposition that the patentee's interest will induce him to use, or let others use, his invention. The public has retained no other security to enforce such expectations. A suppression can endure but for the life of the patent, and the disclosure he has made will enable all to enjoy the fruit of his genius. His title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it. The dictum found in Hoe v. Knap [C. C.] 17 Fed. 204, is not supported by reason or authority.'"

The next proposition is that the owers of the patent may wholly control not only the making and selling of the machine, made under and in accordance with the patent, but the use of same by others, provided that the conditions or limitations or restrictions imposed are not in their very nature illegal under the provisions of some national law, or illegal and in violation of some law duly enacted by a state in the exercise of its police power; as to which last proposition, see Missouri, etc., v. Bell Telephone Co. (C. C.) 23 Fed. 539; State ex rel., etc., v. Del., etc., Co. (C. C.) 47 Fed. 633; and D. & A. Co. v. Delaware, etc., 50 Fed. 677, 2 C. C. A. 1, 3 U. S. App. 30. See, also, Button Fastener Case, 77 Fed. 292, 293, 25 C. C. A. 267, 35 L. R. A. 728. The main proposition just stated is settled and determined in Bement v. National Harrow Co., supra, as fully appears from the language quoted. It follows that the owner of the patent may sell a limited interest in the machine made by such owner, or limit the uses to which such machine may be put and provide that it shall not be used by the purchaser or licensee to manufacture certain specified articles or descriptions of goods. It is not probable, nor is it necessary to hold, that the owner of a patent can compel the owner (having a limited ownership) or licensee to use—that is, operate—a patented machine or article or device; but if the license is to use it in a particular way and for a particular purpose, or with particular and specified materials, and no other, and the limitations and conditions imposed violate no law and involve no such violation, it cannot be doubted that the licensee (or limited owner, if he be such) may be restrained or enjoined from using it in some other way, or for some other purpose, or with some other materials. It seems to this court that this doctrine is too firmly established to be seriously questioned. Indeed the right to enjoin and the necessity for enjoining a violation of such a restrictive agreement as to the use of the machine or device, or of the license, as that is the better term to describe the situation, would seem to be the necessary and the only adequate remedy if courts would maintain and enforce the rights of ownership possessed by the patentee or his assignee as by the decisions of the Supreme Court they are declared to be. Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co. et al., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Tubular Rivet & Stud Co. v. O'Brien et al. (C. C.) 93 Fed. 200; Cortelyou v. Lowe, 111 Fed. 1005, 49 C. C. A. 671; Brodrick Copygraph Co. of New Jersey et al. v. Roper (C. C.) 124 Fed. 1019.

The Button Fastener Case, supra, has been frequently cited and approved in more than one circuit. It was cited in Cortelyou et al. v. Lowe, supra (Second Circuit C. C. A.), and of it the court, per curiam, said:

"This cause comes here on appeal from an order granting preliminary injunction. The case upon which the order was granted is in its facts practically identical with the one which was before the Circuit Court of Appeals of the Sixth Circuit in Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 25 C. C. A. 267, 77 Fed. 288, 35 L. R. A. 728. We fully agree with the opinion of the court in that case, and think the decision should control the case at bar."

It is followed and approved in Tubular R. & S. Co. v. O'Brien, supra (Lowell, D. J.), and in Brodrick C. Co. of N. J. et al. v. Roper, supra (Brown, D. J.), and seems to be recognized as the law of the First Circuit.

In Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., supra, which must be accepted as correctly declaring the law for the Second Circuit, the syllabus is as follows:

"1. Patents—Conditional Sale of Patented Machines—Public Policy—Infringement. It is competent for the owner of a patent for a machine for fastening buttons to shoes with metallic fasteners to sell such machines subject to a condition that they shall be used only with fasteners manufactured by the seller, title to revert on breach of the condition. Even though the fasteners are not patented, and the result of the restriction is to give the owners of the machine patent a monopoly of their manufacture and sale, this does not make the condition void as in restraint of trade or against public policy. A purchaser of the machine would be, in effect, a mere licensee, and the use of it by him contrary to the condition would be, not only a breach of contract, but a violation of the monopoly, for which an injunction suit would lie. [C. C.] 65 Fed. 619, reversed. State of Missouri v. Bell Tel. Co. [C. C.] 23 Fed. 539; State v. Delaware & A. Tel. & Tel. Co. [C. C.] 47 Fed. 633; Id., 2 C. C. A. 1, 50 Fed. 677—distinguished.

"2. Same—Notice of Condition. In such case it is immaterial that the patent owner sells the machines through jobbers, and not directly to users, where the machines each bear a conspicuous metal label with the condition of the sale inscribed thereon, and both the jobbers and their vendees have notice thereof.

"3. Same—Contributory Infringement. Where machines for fastening on buttons are sold by the patentee upon the condition that only the staples manufactured by such patentee (which are not patented) shall be used therein, the manufacture and sale by another party, to the users of such machines, of staples which are intended to and can only be used therein, is a contributory infringement, and will be enjoined. [C. C.] 65 Fed. 619, reversed. Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 14 Sup. Ct. 627, 152 U. S. 425 [38 L. Ed. 500], distinguished."

In that case the questions involved here are exhaustively and intelligently discussed.

In Tubular Rivet & Stud Co. v. O'Brien, supra, the syllabus is as follows:

"1. Patents—Infringement—Violation of License. Where the owner of a patent on a machine for setting lacing studs licenses the use thereof on condition that the licensee shall only use studs manufactured by the licensor, such studs not being patented, it is an infringement for the licensee to use the machine for setting studs obtained from others in violation of the license.

"2. Same—Contributory Infringement. In such case, a third person who sells to the licensee studs of his own manufacture, knowing that they are to be used in the patented machine in violation of the terms of the license, and intending that they shall be so used, is guilty of contributory infringement, and will be enjoined."

When the maker and vender of the rotary neostyle parted with it, with the license restriction thereon, conspicuously made a part thereof, it was notice of the restriction; notice that a license only was being granted; a limited and restricted ownership or interest in the patented machine only was being conferred.

In the Button Fastener Case, supra, at page 290 of 77 Fed., page 269 of 25 C. C. A. (35 L. R. A. 728), it is said:

"In view of the conspicuous character of both the machine and the notice permanently affixed thereon, every one buying must be conclusively presumed

to have notice that the owners of the patents intended by the inscription on the machine to grant only a restricted license for its use. and it is difficult to see why such purchaser is not to be regarded as acquiring and accepting the structure subject to this restriction. The buyer of the machine undoubtedly obtains the title to the materials embodying the invention, subject to a reverter in case of violation of the conditions of the sale. But, as to the right to use the invention, he is obviously a mere licensee, having no interest in the monopoly granted by the letters patent. A license operates only as a waiver of the monopoly as to the licensee, 'and estops the licensor from exercising its prohibitory powers in derogation of the privileges conferred by him upon the licensee.' Rob. Pat. §§ 806–808. It has been said that the sole matter conveyed in a license is the right not to be sued. Hawks v. Swett, 4 Hun, 146. A licensee is one who is not the owner of an interest in the patent, but who has, by contract, acquired a right to make or use or sell machines embodying the invention. Gayler v. Wilder, 10 How. 477 [13 L. Ed. 504]; Oliver v. Chemical Works, 109 U. S. 75, 3 Sup. Ct. 61 [27 L. Ed. 862]; Rob. Pat. §§ 606–608. All alienations of a mere right to use the invention operate only as licenses. It must follow, therefore, that the purchaser of one of complainant's machines subject to a restricted use takes the structure with a license to use the invention only with staples made by the patentee. That the complainant sells the machine through jobbers, and not directly to those who buy for use, is immaterial, under the facts stated on the face of the bill. The jobber buys and sells subject to the restriction, and both have notice of the conditional character of the sale and of the restriction on the use. Supply Co. v. Bullard, 17 Blatchf. 160, Fed. Cas. No. 294; Cotton Tie Co. v. Simmons, 106 U. S. 89, 1 Sup. Ct. 52 [27 L. Ed. 79]. That the buyer enters into an implied agreement that he will not use the machine contrary to the terms of his license, and that there is in the agreement a provision for a reverter of the title to the structure, may operate to give the patentee a remedy under general principles of law, as for damages for a breach of contract, or for recovery of the machine. It may be that a suit for a breach of contract would not be a suit depending on the patent laws, and would therefore be cognizable by the state courts, as intimated in Hartell v. Tilghman, 99 U. S. 547 [25 L. Ed. 357], and White v. Rankin, 144 U. S. 628, 12 Sup. Ct. 768 [36 L. Ed. 569]. The remedy of complainant may be a double one; for liability may rest either upon the broken contract, or for the tortious use of the invention. Rob. Pat. §§ 1225–1250, and notes. If a patentee may lawfully make and sell machines embodying his invention, and restrict the use of the invention in respect of territory, or time or business, or purposes to which it may be put, or material to be used in conjunction therewith, it would seem very obvious that the effect of the restrictions and limitations on the use would operate to prevent the machine from passing, as in the case of an unconditional sale, beyond the monopoly of the patent. The control reserved by the patentee as to the use of the machine has the effect of continuing it within the prohibition of the monopoly. The license defines the boundaries of a lawful use, and estops the licensor from the assertion of his monopoly contrary to its terms. On the other hand, a use prohibited by the license is a use in defiance of the monopoly reserved by the patentee, and necessarily an unlawful invasion of the rights secured to him by his patent. The license would be no defense to a suit for infringement by a use in excess of its terms. The patentee has the exclusive right of use, except in so far as he has parted with it by his license. The essence of the monopoly conferred by the grant of letters patent is the exclusive right to use the invention or discovery described in the patent. This exclusive right of use is a true and absolute monopoly, and is granted in derogation of the common right, and this right to monopolize the use of the invention or discovery is the substantial property right conferred by law, and which the public is under obligation to respect and protect."

In the case at bar, the complainants having expended time, skill, and money to make this rotary neostyle a success, and being the owner of the patent under which it was made and of the machine when made, they were at perfect liberty, so long as they violated

no positive law, to place it in the hands of users or others, under such conditions, limitations, and restrictions as they saw fit to impose. They had the right to impose such conditions, restrictions, and limitations as in their judgment would secure the commercial success of the machine. To secure such success, it was necessary to provide supplies, such as ink, etc., of a particular kind and quality. This they did, and they stood ready to furnish these supplies. The person taking it received it, and, if he used it, used it subject to these conditions and limitations, and was bound to observe them. He agreed to use these supplies and no other on this machine, and he was bound to observe his agreement. If it is contended that there was no written contract with the restrictive license agreement contained therein, the answer is that nothing of the kind was necessary. The machine could be seen, was seen, and the notice was a conspicuous part thereof, would have been seen, must have been seen, had the person receiving it looked. He was bound to look. If he did not, or was prevented by accident or any act of the complainants from seeing the machine, it was his duty to return it on discovering the agreement attached thereto.

The purchaser of personal property, with certain exceptions, such as articles for food, etc., takes it subject to all defects plainly observable. He is bound to look, to exercise his senses. The seller has the right to believe he will look and exercise his senses, and that he has when he accepts the property. Not so, however, as to hidden defects known to the seller, and not so when the seller misleads or so distracts the attention of the purchaser as to prevent his seeing. In putting these machines upon the market, the complainants have made the license agreement as conspicuous as the machine itself. The label itself is white, with black letters; the machine black. There was no fraud or deceit. The takers and users of the machines were and are bound by the license restriction placed thereon. A patent may be infringed in either of three ways; by the unlawful making, or by the unlawful selling, or by the unlawful using of a patented invention. This is elementary. 3 Robinson on Patents, § 890; Goodyear Shoe Machinery Co. v. Jackson, 112 Fed. 148, 50 C. C. A. 159, 55 L. R. A. 692. If, then, the owner of the patent has given to another the right to use one of the machines made under the patent in a particular way only, or with supplies necessary to its use of a particular character or make only, the use of it in any other way, or with any other supplies or materials necessary to its operation, is necessarily a violation of the agreement, limitation, or license, and therefore unlawful. The word "unlawful" in this connection does not imply a criminal use of the machine or device, but a violation of the contract or agreement under which same is held and used. It follows that, by knowingly using a rotary neostyle made under this patent in question with ink other than that made and furnished by the Neostyle Company, the user violates the agreement and becomes a wrongdoer, and is "unlawfully using" the patented invention, and is therefore an infringer of the patent. It is not a breach of contract simply, but an unlawful and an unauthorized use of the patented

invention. The cases cited, especially the Button Fastener Case (77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728), fully sustain these statements. See, also, 2 Robinson on Patents, § 812, where it is said:

"In the absence of express restrictions in the license, this right of use is unlimited as to place, quantity, and method, and may be continued during the term for which the patent has been granted, although the use must be confined to the precise invention covered by the patent of the licensor. Express restrictions as to place, time, quantity, or mode of use are binding on the licensee, and render all use contrary to such restrictions an infringement of the patent. A license to use within a certain district only, or at a certain shop, or on a certain line of railway, gives no authority to the licensee or his vendees to employ the invention in another district, or at a different shop, or on a new or an extended line of railway. A license to use a specified number of the patented articles, or to use the patented process for the production of a certain quantity of its results, does not empower the licensee to use a greater number or produce a greater quantity, even though he is willing to pay the licensor additional royalties or license fees in proportion to the increase of his use of the invention. A license to use for a given purpose only, or in a particular manner, or for a period less than the duration of the patent, binds the licensee with equal strictness, and makes him liable as an infringer for any excess of use beyond what is distinctly conferred upon him."

We are thus brought to the question of contributory infringement. It would seem clear that "contributory infringement" ought to include and does include more than "the intentional aiding of one person by another in the unlawful making or selling or using of the patented invention." In Goodyear Shoe Machinery Co. v. Jackson et al., 112 Fed. 146–148, 50 C. C. A. 159, 55 L. R. A. 692, this is the definition given. It is also stated, "The essence of contributory infringement lies in concerting or planning with others in an unlawful invasion of the patentee's rights." The syllabus reads:

"1. Patents—Contributory Infringement. The essence of contributory infringement of a patent lies in concerting or planning with others in an unlawful invasion of the patentee's rights, which is usually done by making or selling a part of the patented invention with the intent and purpose of aiding another in its sale or use. Contributory infringement cannot be predicated of the rebuilding or replacing of parts of a patented machine by a purchaser for his own use."

See, also, Thomson-Houston Electric Co. v. Kelsey Electric R. S. Co. (C. C.) 72 Fed. 1016, 1017.

If A., for his own gain or emolument or advantage, or for the gain or advantage of some other person, induces B., licensee of a valid patent, to violate the terms of the license and use the patented device in a manner or for a purpose that makes B. an infringer, he should be held guilty of contributory infringement. In such case A. does not aid the infringer in doing the wrongful act (in the strict sense), but he does induce him to commit it. But it is not necessary to go beyond the decided cases in determining the question now before the court.

In Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co. et al., 75 Fed. 1005, 22 C. C. A. 1, the court held:

"1. Patents—Contributory Infringement. An injunction on the ground of contributory infringement may be granted against one who, by his advertise-

ments and course of business, shows a willingness to co-operate with any infringer who may present himself, by making and selling to him a device or element of a patented combination, to be used in connection with other parts obtained from a different source. Wallace, Circuit Judge, dissenting."

In Tubular Rivet & Stud Co. v. O'Brien (C. C.) 93 Fed. 200, the complainant was the owner of patents for setting lacing studs, which patents were embodied in machines made by it. These machines were licensed by the complainant by a written lease, which provided that the licensees should use in the machines only those studs manufactured by the complainant, and that upon a violation of any of the conditions of the lease the right to the further use of the machine by the licensees should be forfeited, and the complainant might take possession thereof. The defendant was selling and offering for sale to those licensees studs of their own manufacture, knowing that same were to be used in the licensed machines and in violation of the provisions of the lease, and intended that the studs should be so used. It was alleged, and for the purposes of the case was conceded, that the defendant had induced and persuaded, and was inducing and persuading, the licensees to violate the lease and infringe the patent. It was held that this constituted contributory infringement, and the acts alleged were enjoined. The syllabus of the case has been quoted already.

In Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co. et al., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, the syllabus of which has been quoted already, there was no written lease. The machines were sold on condition, which condition was attached to the machine substantially in the same manner as is the condition attached to the rotary neostyle in the case at bar. That case was decided on a demurrer to the bill, and the allegation was that no machines had ever been sold except upon condition, and that there was attached to each machine a conspicuous metal plate on which was plainly expressed a restriction upon the use of the machine, to the effect that the machine was sold and purchased "to use only with fasteners" made by the complainant, or the Peninsular Novelty Company, predecessors in title to the patents embodied in the machine, and that title should revert at once upon any violation of this restriction. It was alleged that the users had full notice of such restriction and purchased the same subject thereto. It was further alleged that the defendants in that case, with full knowledge of the restriction, were making and selling staples adapted only to use with those machines, and that they were guilty of contributory infringement, because such staples so made and sold by them were adapted for use in those machines only, and were made and sold with intent that they should be used in violation of the restriction placed upon the use of the machines aforesaid. It was further alleged that the defendants had persuaded and induced the licensees of said machines to purchase and use the staples made by the defendants on such machines, and to thus knowingly and continuously violate the restriction. It was charged that the defendants were guilty of contributory infringement because they induced others to use the machine in excess of the license and fur-

nished the means to enable the licensees to so wrongfully use the machines.

It will be noted that in the case last mentioned there was no lease, and that the restriction placed upon the use of the machine was in substance and effect the same as employed by the complainant in the case now before the court. In that case there was a provision that title to the machine should revert to the seller on a violation of the restriction. The court held, however, that title to the machine did not pass, and that the person taking and using the machine with that limitation thereon held, not as owner, but as licensee. What the court said in that case on that subject has been quoted already. In the judgment of this court it is entirely immaterial that there was not a written lease or a provision that title should revert in case of a violation of the license condition attached to the machine. The restrictive agreement in the case now before the court was upon the machine, and must have been seen and read by the licensee, and, as he kept the machine, it imposed the obligation upon him to comply with the condition, and by not returning it he assented to such condition and limitation, and became bound thereby.

In Cortelyou v. Lowe, 111 Fed. 1005, 49 C. C. A. 671, and Brodrick Copygraph Co. of N. J. et al. v. Roper (C. C.) 124 Fed. 1019, while the facts are not stated, it is understood by the court, and was conceded in substance, that the facts were substantially the same as in the case now before the court. Those cases were decided on motions for preliminary injunction. This case, on substantially the same facts and involving the same legal questions, is being heard upon the merits.

In this case it is satisfactorily established by the evidence that the defendant not only supplies the ink for use upon the rotary neostyle made and sold by the complainants under the license agreement before mentioned, which ink is used by the licensees in infringing the patent by violating such agreement, but induces and procures such infringement—that is, the use of such ink by such licensees—by means of misstatements and misrepresentations as to the character and legal effect of the authority conferred upon the licensee. It appears that the attention of the complainants was brought to the fact that one of the rotary neostyles disposed of by it under such license agreement was not turning out satisfactory work. A representative of the Neostyle Company examined into the matter, and found that the licensee had and was using ink, made by and bearing the defendant's label, similar to the ink made by the Neostyle Company. This ink made by the defendant and sold by it was put up in one-pound cans, and bore the inscription "Rotary Neostyle." It further appears that the licensee had ordered ink made by the Neostyle Company, but the order had been filled with ink made by the defendant. It appears that the representative of the defendant was making efforts to sell defendant's ink for use upon the rotary neostyle made and licensed by the complainants' company, and this agent or representative of the defendant insisted that it was all right to use upon that machine the ink made by the defendant, notwithstanding the license restrictions on

the machine. Even were it true that in this particular instance, to which attention has just been called, the licensee did not intend to violate the license agreement and violated same unknowingly, such fact does not relieve such licensee from the charge of infringement. In fact, such licensee was infringing. In fact, it was violating the license agreement. Here was infringement, and the defendant is guilty of contributory infringement, because it knowingly, intentionally, and willfully induced the licensee to use ink made by it, the defendant, instead of ink made by the complainant company. And the defendant did this with knowledge of the license restriction. Some of these facts are inferred, and must be inferred, from other facts clearly proved by positive testimony. In fact, the defendant has not only knowingly and willfully and intentionally, for its own gain and profit, induced the licensee to violate the license agreement and thus infringe, but it has palmed off upon such licensee goods of its own manufacture and production in place of goods made by the complainant company. It would appear from the evidence that the defendant is not only guilty of contributory infringement, but of unfair competition in trade. Such methods ought not to be sanctioned. Such acts ought to be enjoined. The defendant company claims, in substance, that it did not know what the words "Rotary Neostyle" meant. Defendant company insists it did not know the rotary neostyle was patented and placed in the hands of users under the agreement mentioned. Under all the proof in the case, this court cannot assent to this proposition. It is evident that the defendant knew of the rotary neostyle, knew the rights of its makers and sellers, knew of its great utility, and, from all the proof, the court is satisfied it knew it was a patented machine or device. The defendant made its ink for and labeled it as ink for a rotary neostyle. Upon the ink made and sold by the complainant company was the following notice, viz.:

"Notice to rotary neostyle users. The rotary neostyle is sold with a proper license restriction governing the use of stencil paper, ink and other supplies, and is so marked, thus insuring to the purchaser absolute protection against infringing and spurious imitations which may be offered. The sole legal right to make and sell supplies for use on said rotary neostyle is vested in us, and care should be taken to see that said supplies when purchased are plainly marked with our name as makers. Neostyle Company, New York City, U. S. A., 30 Reade Street."

This court finds that the defendant had actual notice or is chargeable with notice of the license agreement, and furnished ink of its manufacture to one or more of the licensees of the complainants with knowledge of such license agreement, and intending to induce such licensee or licensees to violate the same, and that the acts of the defendant in this regard were for its own pecuniary benefit.

On the subject of what constitutes contributory infringement, attention is called to a note to Edison Electric L. Co. v. Peninsular Light, P. & H. Co., 101 Fed. 831, 43 C. C. A. 485, 489.

The defendant has the right to make ink and to sell ink, and to make and sell the same kind of ink it sold or caused to be sold to the licensee or licensees of the complainants, but it has no right,

directly or indirectly, to dispose of same with intent or purpose that it shall reach the hands of the users of the rotary neostyle. See Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co., 129 Fed. 105, 63 C. C. A. 607.

In Loew Filter Co. et al. v. German-American Filter Co. of New York, 107 Fed. 949, 47 C. C. A. 94, it was held that:

"One who manufactures and sells an article adapted to and intended for no other use than that of practicing a patented process contributes to the infringement by the users, and stands on the same ground as to liability."

The proof in the case now before the court does not show that the ink made by the defendant is only adapted to and intended for use upon the rotary neostyles. For aught that appears, it may be used for other purposes and in other places. This court cannot enjoin the defendant from making and selling its ink, but it can enjoin, and ought to enjoin, the defendant from infringing or procuring the infringement of the Lowe patent in question here by procuring licensees thereunder to violate the conditions imposed by the license agreement attached to the patented machines. The injunction should run against the doing of this or the commission of any acts that would procure such a violation.

The court has given careful attention to Morgan Envelope Co. v. Albany Perforated Wrapping Paper Company, 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500, and finds nothing therein in any way inconsistent with the conclusions here reached.

The complainants are entitled to a decree for an injunction as prayed and for an accounting. The decree, if not agreed upon, may be settled before me at Binghamton, N. Y., June 13, 1905.

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## IRONCLAD MFG. CO. v. DAIRYMEN'S MFG. CO.

## SAME v. ORANGE COUNTY MILK ASS'N.

(Circuit Court, S. D. New York. May 26, 1905.)

PATENTS—INFRINGEMENT—MILK CANS.

The Haigh patent, No. 607,433, for a milk can, the essential features of which are in the construction of the neck portion, which is double, one part fitting over the other, one having a flaring re-enforcing flange, and the other an annular recess, forming together, when closed, a flush-joint interlocking means, while not strictly a pioneer patent, discloses patentable invention in a marked degree, and is entitled to a liberal range of equivalents; the can shown being stronger in the neck portion, and also more sanitary, than any in the prior art. Also *held* infringed.

This is a suit in equity to restrain the alleged infringement by defendants of United States letters patent No. 607,433, granted to the complainant July 19, 1898, as assignee of Henry B. Haigh, and also for an accounting. This patent relates to the construction of milk cans—more particularly the upper or neck portion. The application was filed by Haigh on the 22d day of October, 1897. The defendants say: "Two defenses are relied upon: First, that the patent in suit is invalid for want of patentable invention; and, second, that defendants' milk can does not infringe."

Kenneson, Crain, Emley & Rubino (George E. Morse and Frank S. Black, of counsel), for complainant.

William Wallace White and Sweezy & Glover (Duncan & Duncan, Henry D. Williams, Frederick S. Duncan, and Richard L. Sweezy, of counsel), for defendants.

RAY, District Judge. The defendant insists that in view of the prior art the complainant's patent, known as the Haigh patent, No. 607,433, of July 19, 1898, for improvement in milk cans, does not disclose patentable invention, and that, if any one or more of the claims of that patent can be sustained, it or they are narrow claims, on specific and defined combinations, and that, as defendant's can contains none of these combinations, so construed, it does not infringe. The defendant has put in evidence and cites several United States patents as showing the prior art and sustaining his contention, among which are the following: Milligan, No. 107,521, of 1870; Milligan reissue, No. 5,850, of 1874; Tripp, No. 489,644, of 1893; Tiepke, No. 374,380, of 1887; Burnett, No. 231,531, of 1880; Sangster, No. 100,454, of 1870; Wolf, No. 516,255, of 1894. These all relate to milk cans, and will be referred to later. The complainant, on the other hand, insists that the Haigh patent in question is a pioneer patent, and entitled to a broad and most liberal construction. The complainant says:

"It [the invention] solved a vexatious commercial problem, created a revolution in the industry, and seized and holds the trade. * * * Complainant rests its case upon the proposition that its patent is fundamental and basic."

It is well known to those who use milk cans either for the transportation of milk upon wagons or railroad trains that there are two essentials in a successful can: First, special strength about the neck portion; and, second, perfect sanitation—that is, such a construction that the joints on the inside of the can will not take and retain the milk, or interfere with a perfect cleansing after the milk has been removed. Milk is a great absorbent of impurities, and will take them from the atmosphere. It rapidly sours when exposed to the warm air or to heat, and will become unfit for human consumption if put in a clean can, tightly closed, when first taken from the cow. Even a few drops of sour milk retained in the inside seams or joints of a can, if there be any, will rapidly sour or contaminate the pure milk put therein, whether it be a few gallons, or enough to fill the can. Flush joints, so constructed as to be impervious to the milk (that is, so constructed that milk cannot get into them), are essential to a proper milk can. It may be that as yet a "proper" milk can has not been made, but it is evident that the alleged inventor of complainant's can was aiming to produce one. So as to strength. Owing to the mode of handling these cans in transportation, both when filled and when empty, great strain comes upon the can, especially about the neck portion, and the seams are liable to spring or open so as to take in more or less of the contents of the can, and so as to defy perfect cleansing. The result is an unsanitary condition of the can, and the consequent rapid contamination of the entire contents. Hence the necessity for a strong-necked

can, so far as possible free of seams; the necessity of having the seams, if any, flush-joint seams, entirely closed, and at such a point as to be easily reached and perfectly cleansed. "Strength" and "perfect sanitation" were the aims of Haigh, the inventor. What was in the mind of the inventor is best shown by the claims of the patent and extracts from the specifications. The claims are as follows:

"(1) A milk can comprising a breast member provided with a neck portion, and a mouth member provided with a neck portion, one of said neck portions extending within and being overlapped by the other neck portion, and one of said neck portions having a flaring re-enforcing and locking flange, and one of said members having an annular recess for the reception of said flaring flange, whereby the breast member and mouth member are locked together by a flush-joint interlocking means.

"(2) The herein described milk receptacle, comprising a mouth member provided with a depending neck portion, and an annular recess above said neck portion, and a breast member having an upwardly extending neck portion extending within and overlapped by said mouth neck portion, and having a flaring locking and re-enforcing flange seated in the recess of the mouth member, and forming therewith a flush joint, whereby the mouth neck portion and the breast neck portion are each re-enforced one by the other throughout the entire area thereof, and whereby the point of juncture of said neck portion is located outside of the interior of the can.

"(3) A milk can comprising a breast member provided with an integral neck portion, and a mouth member provided with an integral neck portion, one of said neck portions extending within and being overlapped by the other neck portion to form an annular space intermediate said integral neck portions, and one of said neck portions having a flaring re-enforcing and locking flange, and one of said members having an annular recess for the reception of said flaring flange, whereby the breast member and mouth member are locked together by a flush-joint interlocking means, and whereby such interlocking means forms a closure for completely closing said annular space.

"(4) A milk can comprising a mouth member provided with an integral neck portion, a breast member also provided with an integral neck portion, said integral neck portions so overlapping each other and connected together as to form a closed, protected annular space intermediate such integral neck portions, and a re-enforcing band inclosed in said space, intermediate said neck portions, and forming a treble re-enforced neck.

"(5) The herein described milk can, comprising a mouth member provided with a depending neck portion, and an annular recess above said neck portion; a breast member provided with an upwardly extending neck portion, extending through and overlapped by the mouth neck portion throughout the entire area thereof, and having an outwardly extending flaring locking and re-enforcing flange seated within the annular recess of the mouth member, and forming therewith a flush joint above the neck of the can, said flaring flange constituting re-enforcing means for the mouth member adjacent to the neck angle thereof and an annular metal band intermediate the neck portions of said breast and mouth members, and of the same area as each of the said neck portions, substantially as described."

In the specifications it is said, among other things:

"This invention relates to milk cans, and more particularly relates to the construction of the upper or neck portion of the can, and has for its object to provide an improved can, having the neck portion thereof re-enforced in a peculiar and effective manner, and in such a way as to permit the neck of the can to be made of two parts, each one interlocking with the other and each re-enforcing the other, whereby the mouth portion and the breast portion of the can can be constructed independently of each other, and therefore with greater facility than when made in one piece, and, when placed in position relatively to each other, will form a neck of superior durability, each part of which overlaps the other part thereof throughout its entire area.

* * * Heretofore milk cans have been constructed in various ways, one of which has been to make the mouth, neck, and breast of the can in one integral piece or structure, which, aside from the difficulty in obtaining such a structure, has resulted simply in the production of a can which is extremely weak at the neck portion thereof, where it should be of great strength and rigidity, as the neck, being formed in one piece with the mouth and breast, is of the same thickness as such breast and mouth, and therefore, not being re-enforced, it follows that when the cans are subjected to rough usage and handling, by catching the same under the flaring mouth, as is usually the case, especially when empty, such cans soon become bent at the neck portion thereof, and by reason of such flexure the proper fitting of the cover is prevented, and the usefulness of the can thereby impaired. It is the purpose of this invention to permit the ready and easy construction of the upper portion of the milk can, while at the same time so re-enforcing the neck portion thereof that the rough handling or usage of the same will not affect or impair the usefulness of the can. In a general way, the upper portion of this can or receptacle comprises a mouth member having a neck portion, and a breast member also having a neck portion, preferably of the same area as the neck portion of the mouth, the neck portion of one member fitting within and being preferably completely overlapped by the neck portion of the other member, and the neck portion of one member interlocking with the neck portion of the other member, so that, as compared with the mouth and breast portions of the can, the neck thereof is of greater thickness and rigidity. In the preferred form thereof herein shown and described, the flaring mouth member, 2, of the can, A, is provided with a depending neck portion, 3, and immediately above such neck portion with an interior annular recess, 4. Figs. 1 and 4. The breast member, 5, of the can is drawn inwardly to form an upwardly extending neck portion, 6, and shown in one construction of less diameter than the neck portion, 3, so that it can be inserted in and overlapped by said neck portion, 3. Each neck portion extends at an angle to its respective breast or mouth member, thereby rendering such neck part rigid. Before the neck parts are completely assembled, the neck portion, 6, of the breast member is in this construction of greater width or area than the mouth neck portion, 3, whereby the upper part thereof is adapted to overlap a portion of the mouth proper above the angle thereof, and form locking means for the two neck portions and the breast and mouth members, and also re-enforcing means for the mouth at the angle thereof. When the parts are assembled (Fig. 1) the neck portion of the breast extends upwardly through the neck part, 5, and projects above the same, such projecting part being bent or turned outwardly at a relatively sharp angle to form a locking flange, 7, which rests in the annular recess, 4, and so locks the neck portions and the breast and mouth members together; the upper edge, 7', of said flange being flush with the inside face of the mouth. The lower edge of the mouth neck portion, 3, rests on the breast member, and may project slightly below the point of juncture of the breast neck portion, 6, with the breast, thus protecting such juncture point. By this construction when the parts are assembled it will be seen that one neck portion is substantially of the same area or width as the other neck portion, so that one completely overlaps and re-enforces the other throughout the entire area thereof. From the above it will be seen that the locking flange, 7, also serves as a re-enforcing means for the mouth member at the point of juncture therewith of its neck portion, 3, and consequently at the mouth angle, while at the same time it will be seen that the actual joint or point of connection, 8, of the breast neck portion with the mouth neck portion is at a point remote from the angle of the neck, and in a location outside of the interior of the can, so that the joint is perfectly observable, and is accessible for cleaning, without requiring special care on the part of the operator. From the foregoing it will be seen that an improved can is provided, having a neck of extreme strength and rigidity, and heavily re-enforced at the point of greatest strain, each neck portion forming such neck being of the same width or area, and that the neck is so constructed as to avoid the making of any seam within the can which would be unobservable or inaccessible, thereby avoiding any increased liability (over the ordinary cans heretofore in use) of retaining

dirt or germs, and thereby impairing the sanitary value of the can. * * * When the parts have been assembled and firmly locked together, they are subjected to the usual coating or tinning operation, whereby the seams are filled and the joints firmly cemented together by the coating metal, which acts as a soldering medium. In the construction of can shown in Figs. 3 and 5, when this tinning operation has been completed the band will be securely closed in and protected in its closed and protected space from oxidation by water or by the acids which are formed from any of the metallic or other fluids that may be left on the can. From the foregoing it will be seen that the mouth and breast portions of the can can be formed of separate members, thereby facilitating the construction of the upper portion of the can, while at the same time the weak point, and the one which is usually subjected to the greatest injury and the roughest usage, is thoroughly reenforced and protected, and that owing to the flush joints the retention of dirt or germs is obviated, and the sanitary value of the can is not impaired, and that, furthermore, by the construction of cans shown in Figs. 1, 3, 4, and 5, the locking joint is observable, so that any dirt or foreign matter forming at such point can be readily observed during the cleansing operation, so that by the present improvement a can is secured, which, from a sanitary point of view, is equal to a can made without joints, while at the same time is of greater durability and rigidity and more easily constructed than such a jointless can."

The necessity and utility of making the necks of cans strong had long been recognized. In a patent to one William Frost (Reissued No. 26,098, November 15, 1898) for a milk can, we find this statement:

"The object of this invention is to render milk cans far more durable than hitherto, so that they will be competent to withstand in a very great degree the wear and tear consequent to transportation. Milk is conveyed to cities in these cans, and mostly on railroads, and they are stowed or packed closely together in cars, and soon are rendered useless by abrasion and the bruises they receive by rough handling."

Many other patents recognize the same difficulties—notably one to Fliehr, No. 391,039, of October 16, 1888. In this we find the following:

"It is well known among persons engaged in the handling of milk cans that, owing to the rough usage they necessarily receive and numerous other causes, the neck portion of the can, and particularly the mouth, is the first to render the can unfit for use."

It is evident that Haigh was not the first to recognize and attempt to remedy this condition in milk-can construction, for in all or nearly all of the patents hereinbefore mentioned we find an attempt to make a double-necked can, in whole or in part. Milk cans are constructed with a flaring mouth, rapidly narrowing to the neck, which neck is a few inches in length. At the lower end of the neck the can broadens into the shoulder or breast part, which is curved or dome-shaped, and this in turn runs or merges into the body part of the can, the sides of which are perpendicular. The neck proper is perpendicular. The upper part of the can, including mouth and neck portion, is known in the patent as the "mouth member," while the next part below is known therein as the "breast member." Each has a neck portion or extension. It will be noted that the neck part of the mouth member extends downwardly, while the neck part of the breast member extends upwardly, and the one being of a slightly diminished diameter—it may not be material which—will slip within the other; and, if each neck part is of the same length, the one

will extend upwardly to the outward swell of the mouth part, and the other downwardly to the outward swell or dome of the breast portion. So far we have two cylindrical neck pieces or parts, slipping the one within the other, similar to the sections of a stove pipe. This construction, thus far, as applied to milk cans, is not new, for we find it on the Milligan, Tripp, and Tiepke patents, before mentioned, and to a degree in the Wolf patent. It will also be observed, as bearing on the sanitary question, that, if the neck part of the breast member or portion extends upwardly inside the neck part of the mouth member, the seam or joint in the inside of the can will be at the bottom or lower part of the mouth, and at the top of the upper end of the neck, where it can be easily seen and reached, and kept in a strictly sanitary condition. If, however, the reverse construction is adopted, and the inside seam or joint comes at the bottom or lower extremity of the neck, it is still in sight, and easily reached and cleansed. Under the Haigh patent in suit, either construction is permissible. The Haigh patent does not stop at the double-neck feature. It proceeds to designate and specify as one of its elements "a flaring re-enforcing and locking flange," which belongs to and forms a part of "one of said neck portions," and also, as another element, "an annular recess for the reception of said flaring flange," which recess belongs to "one of said members"; that is, either to the "mouth member" or the "breast member." It is not material whether this "annular recess" and "flaring flange," when the parts are assembled, are at the lower or at the upper portion or end of the neck proper, except as bearing on the ease of seeing and observing the joint formed thereby, and keeping same clean and free from anything that might contaminate the milk. It is important here, as bearing on the patentability of the device, as well as on the question of infringement, to determine what is meant in the patent by the words or expressions "annular recess," and "flaring re-enforcing and locking flange," and "locked together," and "flush-joint interlocking means." These are elements of the patent in suit, and, if it so be that the alleged infringing can does not contain or use these elements, there is no infringement. So, too, if all there is to the patent or claims of the patent is (1) a milk can having (2) a breast member provided (3) with a neck portion, and having (4) a mouth member provided (5) with a neck portion, and (6) so constructed or assembled or put together that one of said "neck portions" extends within the other "neck portion," there is, in view of the prior art, neither patentable invention disclosed, nor infringement shown. And even if there be patentable invention in such case, there is no infringement.

Claim 1 of the patent as originally filed was this:

"I claim as my invention (1) a milk can comprising a breast member having a neck portion, and a mouth member having a neck portion, one of said neck portions extending within and being overlapped by the other neck portion throughout its entire area."

This was rejected by the Patent Office on the Tiepke patent of December 6, 1887, No. 374,380, and was abandoned.

Claim 2 of the patent as originally filed, now claim 1 as allowed,

and hereinbefore given in full, read the same as now, with the exception that as filed it provided that, where one of the neck portions extended within the other, it was "overlapped" by the other "throughout its entire area." These last words were voluntarily stricken out by the applicant. It will be noted that all of claim 2 as filed, claim 1 as allowed, down to the provision for the flange, recess, and locking together "by a flush-joint interlocking means," is merely claim 1 as rejected and abandoned. What made this claim (now 1) patentable were these latter provisions for "flange," "recess," and "flush-joint interlocking means." These elements evidently were regarded as new by the Patent Office. Clearly so in the combination.

For these reasons, we are not to give a narrow, or restricted, but a broad, construction to the language of claim 1 of the patent in suit, so far, at least, as it relates to these elements. It is well to mention here that claim 3 of the patent as filed (claim 2 as allowed) was not changed, except by the voluntary striking therefrom of the words "throughout its entire area" in the same connection before mentioned with reference to striking those words from (now) claim 1.

"Flaring" means opening or spreading outwards. "Re-enforcing" means adding to or aiding or strengthening. "Flange" is an internal or external rib or rim for strength, or it may be for other purposes. At the end of a pipe or bar of iron it may be a ring or a plate on one side, both sides, or, if in the round bar of iron, on the entire circumference. A "recess" is a space formed by the receding of the wall. Here it would be a receding of the side of the can. It would be a circular receding of either the side of the neck of the can or the side of the breast portion of the can. "Interlocking" means united with, to embrace, to connect with, to flow into, to be connected in one system, to interlace firmly. It does not mean necessarily that these parts of the can are to be interlocked in the sense that a door is locked. Indeed, on a careful examination of the patent and all its claims, and a careful reading of the specifications, I am satisfied that it was not intended, in using the words "locking" and "locked," to indicate or suggest that the parts are to be locked together so as to prevent the one from being pulled away from or out of the other. These words were used in the broader sense already indicated. It is evident, however, that in the construction either the neck portion or the breast portion is to have a flange or its equivalent, and that one of the members is to have a recess or its equivalent, so as to form, when the parts are assembled, put together, and spun, a flush-joint interlocking means. The purpose of this flush-joint interlocking means formed by the flaring flange and the annular recess for the reception thereof is not to prevent the breast member from being pulled away or separated from the mouth member, but to secure in the structure a tightly closed flush joint on the inside of the mouth of the can, somewhere at the foot of the mouth member or top of the neck, or not lower down than the foot of the neck of the can. Another purpose is to secure a

double-necked can so arranged and put together as to add strength and durability and rigidity to the neck of the can, and also in a degree to the mouth part and breast part of the can, for here is where the greatest strain comes. These purposes are gathered clearly from the specifications of the patent already quoted. A careful examination and reading of the claims and specifications in the patents forming a part of the prior art fails to show anticipation or want of patentability in the complainant's can, in view of such prior art.

The court fails to find in the prior art means for securing proper sanitation; that is, such a construction on the interior of the can as to bring the seams and joints into view, and so interlocked and closed as to form a flush seam or surface, so that perfect cleanliness may be obtained. In the Frost can of 1859, tinned iron hoops were provided, having their ends connected together by rivets, and these were soldered on to the can. The object was to strengthen the can. In the Preston patent of 1863 the improvement related to the banding of milk cans for the purpose of strengthening them. In this construction the parts were riveted together, and rivet heads were found on the inside of the can. The inventor said:

"In order to prevent any accumulation of dirt or grease around the rivet heads, especially in the inside of the can, we covered them with solder, so as to produce a smooth and nearly even surface thereat."

It does not seem necessary to give here the salient features of each patent in the prior art. Suffice it to say the court has examined them all. In the Shepherd milk can (United States patent of May 28, 1889, No. 404,117) the purposes of the improvement were substantially the same as declared by Haigh in his specifications. Shepherd says:

"The object of this invention is not only to protect and strengthen the cans, but also to protect them at the seams, and to prevent the lodgment of any milk between the seams and the outer bands which I employ for re-enforcing the seams."

He then graphically describes the rough usage, wear and tear, to which milk cans are exposed, and then continues:

"Many ineffectual efforts have been made to render them able to withstand this rough usage for any considerable time. One of the greatest difficulties that this frequent banging about causes is the breaking open of their seams, and when this occurs the milk will be more or less 'swashed' all over the can, and it will then get into even the minutest crevice in the broken seam or seams. The great damage resulting from this is, however, not confined merely to the expense and delay of repairing or replacing the can, nor to the mere loss of the milk which thus escapes, though this is serious enough; yet it is slight compared to the consequent continuing damage to the milk which may afterward be put into the same can, and which damage is caused as follows, viz.: When the milk once enters the crevices of a broken seam, it cannot be all got out, not even by careful and constant washing, or by any known means, for it insinuates itself into the minutest part of the fracture, and more or less of it will remain, defying any effort to remove it, and wherever it remains it not only, like all decaying animal matter, will emit a most offensive and intolerable odor, but it will also seriously affect and damage all milk afterward placed in such can."

He then further describes the bad effects, and shows the necessity of a remedy. Two remedies—one for adding strength to the can,

and the other for sanitary purposes—are suggested by his patent. He then says:

"It is this existing state of facts that has led to my present invention, the object of which is to furnish a milk can for railway and other transportation with seams so protected that, even with the rough usage that cans are subject to, the seams cannot be broken, and consequently no milk can find its way and lodge where it cannot be got at, and they may be thoroughly cleansed every day, and with no fear of the evil effects above mentioned."

Other patents prior to the Haigh patent speak of these defects in cans, the bad results, the necessity for a remedy, etc. Other inventors labored in this field, seeking to accomplish the results Haigh was aiming at. Hence this court cannot find that Haigh was strictly a "pioneer." See Ford v. Bancroft, 98 Fed. 309, 312, 39 C. C. A. 91, 95:

"Where a patent represents a marked advance in the art (for example, where an inventor for the first time accomplishes a certain result by organizing several groups of instrumentalities into a single automatic machine, as in the Morley patent for sewing shank buttons to a fabric, or in the Reece patent for a buttonhole sewing machine), such a patent is called a 'pioneer'; and the courts, in its construction, have adopted a liberal rule with respect to equivalents."

In Westinghouse v. Boyden Power Brake Co., 170 U. S. 561, 562, 18 Sup. Ct. 707, 718, 42 L. Ed. 1136, the court said:

"To what liberality of construction these claims are entitled depends to a certain extent upon the character of the invention, and whether it is what is termed in ordinary parlance a 'pioneer.' This word, although used somewhat loosely, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what had gone before."

But this court is of the opinion that the Haigh patent discloses patentable invention in a marked degree, and that he made a marked advance in the art.

The reissued Milligan patent of April 28, 1874, No. 5,850, for "improvement in milk cans," had for its object "to provide the strongest can with the least amount of metal, and the simplest construction." He had a single claim for a combination "to form a double-sided and double-bottomed can." The object of the Burnett patent, No. 231,531, of August 24, 1880, was to strengthen the bottom of the can, and also the body where it joins the breast. He says:

"The lower end is fortified by the presence of the bottom, as also, usually, by additional hooping; but the upper end, where the body joins to the breast, although it may be fortified by one or more hoops, is still peculiarly liable to blows which temporarily or permanently change its shape. * * * The neck and mouthpiece or bowl are not much liable to injury. I form the neck double. I by that means secure an unusually strong and perfect hold on the bowl and breast."

Burnett did not even recognize the main difficulty Haigh sought to remedy, viz., the weakness of the neck itself, the great strain upon it, etc. His mode of making the neck double is not like that of Haigh. The Tiepke patent of December 6, 1887, No. 374,380, re-

lates not at all to sanitation, but to the making of a strong double neck. He says:

"My said invention relates to cans for transporting milk and other commodities, having the usual cylinder and bottom, but provided with a double neck and breast to give those parts greater strength and durability."

This was the idea and purpose of claim 1 of the Haigh patent when first filed, and which claim was rejected and abandoned. This left all the claims of the patent in suit for a strong-necked, sanitary can, with a new and a peculiar construction, and of it the witness Henry C. Milligan says:

"In these large cans, the important feature that the buyer of these cans has in mind, to start with, is the greatest strength where the greatest strength is required, and where the neck members are so joined that a flush, sanitary union is obtained. As I have defined and as is defined by all the trade—the trade's construction of 'sanitary,' in this sense—I state, in my opinion, there never was such a can produced until the invention of H. B. Haigh was put into practical use and manufactured on a commercial scale. * * * In looking at this Haigh can, its construction—easy and practical and commercial way in which it is constructed—I state, from my knowledge of the art, that it is absolutely new in the features, all of which I have rendered an opinion on."

The Wolf can, of March 13, 1894, No. 516,255, in claim 1, speaks of a ring circumscribing the lower edge of the body of the can, while claim 3 relates to the construction of the bottom of the can, and claim 4 relates to the connection between the main body of the can and the breast portion and the flaring neck, and a cover having an annular channel in its under face to receive the edge of the cylinder. Claim 2 of that patent is as follows:

"In a milk can, a ring composed of two flanges and a shoulder, one flange, h, circumscribing the lower edge of the breast, b, the other flange, i, circumscribing the upper edge of the cylinder, a (this being the main body of the can), attached thereto, substantially as and for the purposes set forth."

In the specifications the patentee says:

"The ordinary cans are also weak in the neck, as they are constructed with a dished rim soldered to the upper edge of a cylinder, the lower edge of which is soldered to the breast of the can. I form the dished rim, j, and a portion of the neck, k, of one piece, and also the breast, b, and the lower portion of the neck, k', of one piece, lapping the portions, k and k', and forming only one annular soldered or riveted joint, l, at the strongest part of the neck, or near the middle thereof."

He says nothing of sanitation.

The conclusion is inevitable, giving a fair construction to the complainant's patent, that it discloses patentable invention, as before stated, of a marked degree and character. The proof shows that it met with great favor with the dealers in and users of milk cans. In short, it met with great commercial success. It was stronger, better, more durable, and much more sanitary than any can upon the market or known to the trade. Many of its features were old, but the combination is new, and some of the elements of the combination are entirely new. The combination of elements has produced in a sense a new result. The result obtained is a very much improved mode of constructing a milk can. A much stronger

and better can is produced at a lessened cost of production, and the sanitation is far better than that found in any can of the prior art. The Patent Office saw patentable invention in the device and construction of Mr. Haigh. The patent is presumptively valid, and this presumption has not been overcome. The defense of want of patentable invention fails.

We come now to the question of infringement. Here the evidence, in one view of the case, is somewhat involved, and quite conflicting. In the first place, the defendants deny that their construction, conceding it to be as the complainant claims, is an infringement of the Haigh patent. In the next place, the defendants contend that the only cans constructed by them that could by any possibility be held an infringement were accidental cans, and that they ceased their manufacture as soon as it was discovered that these so-called accidental cans even imitated the construction of the complainant's can. The alleged infringing can has been during the trial, and will be, referred to as the "John Street Can." No one will assert that the defendants are not at liberty to make and use a can of the Milligan or Tiepke construction. But it is contended that defendants have done much more than this. The John Street can, the alleged infringing can, has (1) a breast member provided with a neck portion; (2) a mouth member provided with a neck portion; (3) one of said neck portions extending within, and being overlapped by, the other neck portion; (4) one of said neck portions having a flaring re-enforcing and (in the broad sense) locking flange; and one of said members (the other) having an annular recess, which receives the lower edge or end of the neck part of the mouth member, but in the John Street can this edge is not bent over so as to fit or go into the recess. Such bending over is unnecessary, for the locking is complete, in the broad sense, and a flush joint on the interior of the mouth of the can and at the bottom or lower extremity of the neck is secured without such bending over; and we have the breast member and the mouth member locked together in this construction by a flush-joint interlocking means. On the outside of the can, the neck portion of the breast member, extending upward in a straight line until it reaches the angle of the mouth member (that is, the point where the curve of the bowl terminates), bends outward at that end, forming a flange, which, coming at and in the recess made by the angle of the bowl and neck, the two (the angle forming a recess, and the bent end or edge of the neck of the breast member forming a flange therein) make such a structure that we have the two members locked together at this point indicated above. But here we do not have, nor do we require, a flush joint, for we are on the outside of the can. However, by beveling the lower edge or end of this neck member or flange we may easily have a flush joint. This construction gives a re-enforcing and locking flange at one point, and a flaring re-enforcing and locking flange at the other. The construction differs somewhat from that of the Haigh patent, but it is contended that this is in form, merely, and that it appropriates the principle of the Haigh patent, and that, in so far as they differ, the one is the well-known equivalent of the other. In fact,

it is asserted that the John Street can is almost a reproduction of one form of construction shown by the Haigh patent. This court is of the opinion that the defendants cannot escape the charge of infringement on the ground of slight and really immaterial changes in construction, so long as every element of the Haigh patent is appropriated and used to produce the same result in the same way, although the elements are combined in a somewhat different manner. See Walker on Patents (4th Ed.) § 350, where it is said:

"Sec. 350. No substitution of an equivalent for any ingredient of a combination covered by any claim of a patent can avert a charge of infringement of that claim. But like substitution of something which is not an equivalent will have that effect. The doctrine of equivalents may be invoked by any patentee, whether he claimed equivalents in his claim, or described any in his specification, or omitted to do either or both of those things. The patentee, having described his invention and shown its principles, and claimed it in that form which most 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. Combination patents would generally be valueless in the absence of a right to equivalents, for few combinations now exist, or can hereafter be made, which do not contain at least one element, an efficient substitute for which could readily be suggested by any person skilled in the particular art. But where a patentee states in his specification that a particular part of his invention is to be constructed of a particular material, and states or implies that he does not contemplate any other material as being suitable for the purpose, it is not certain that any other material will be treated by a court as an equivalent of the one recommended in the patent, though celluloid has been held an equivalent of metal in one well-considered case which depended upon the point."

As to combination claims, see Walker on Patents (4th Ed.) § 349, where it is said:

"Sec. 349. Omission of one ingredient of a combination covered by any claim of a patent averts any charge of infringement based on that claim. A combination is an entirety. If one of its elements is omitted, the thing claimed disappears. Every part of the combination claimed is conclusively presumed to be material to the combination, and no evidence to the contrary is admissible in any case of alleged infringement. The patentee makes all the parts of a combination material when he claims them in combination, and not separately."

As to the presence or absence in the John Street can of the elements of the Haigh patent the experts differ, and the court is left to examine the structures and claims and specifications and drawings, and, aided by these opinions of the experts, make a decision. Having caused the cans of the Haigh patent and alleged infringing cans of the John Street can type and construction to be brought into court and sawed into sections, this court is possessed of a decided opinion on the subject, derived from inspection and observation, but has not felt at liberty to be guided by that opinion thus formed, unless confirmed by the testimony of the witnesses. This reading of the evidence (a matter of time and patience) shows wide differences of opinion among honest experts—men experienced in milk-can construction and the wants and requirements of the trade. Henry C. Milligan says:

"Claim 3, claim 1, claims 4, 5, together with the specifications and the drawings, clearly show that the exhibit marked 'John Street Can' has the salient points and all the equivalents embodied in the invention of H. B. Haigh."

He also says, in reference to the Haigh patent:

"I have carefully examined the patent in question, and I find that it possesses features which are peculiar to itself—different, from features which I will explain, from any can heretofore made—so that, in my opinion, with the knowledge of the art dating back to its incipiency, this can, as constructed, I believe to be the pioneer can. It possesses the feature of having a double neck, joined by a seam sanitary in every respect."

He then says:

"I state unequivocally that I see no difference between the exhibit marked 'John Street Can' and what is known as the 'Haigh Can.' The salient features of the Haigh can, which, in my opinion, were new at the time the patent was issued; the features which I call attention to (that of a double neck joined by a sanitary seam)—those features are absolutely the same in the exhibit referred to."

Without quoting from other witnesses or calling specific attention to defendants' expert evidence, it is sufficient to say that one, at least, says the elements of the Haigh patent which differentiate it from the Milligan can and others are absolutely wanting in the John Street can. In substance and effect, this court agrees with the conclusion of complainant's expert, and finds that defendants' infringe. While this is a structure, and not a machine, I think the doctrine of Morley Machine Co. v. Lancaster, 129 U. S. 263, 273, 275, 9 Sup. Ct. 299, 32 L. Ed. 715, applies. The John Street can, however, has no improvement on the Haigh patent. See, also, McSherry Mfg. Co. v. Dowagiac Mfg. Co., 101 Fed. 716, 41 C. C. A. 627; Reece B. H. Mfg. Co. v. G. B. H. Mfg. Co., 61 Fed. 958, 10 C. C. A. 194; Western Electric Co. v. Home Tel. Co. (C. C.) 85 Fed. 649.

The complainant is not confined to the exact construction shown in the drawings. I find no words so limiting the patent. Much evidence was taken in open court—a very satisfactory manner of taking testimony in patent cases—on the question of the character and extent of the infringement, if infringement there has been. The defendants claim, as stated, that, by reason of the peculiar construction of the machinery used by them in manufacturing cans, the spinning wheel would occasionally overrun the point where it should have stopped, and where it was intended to have it stop, and form an outside recess in the neck part of the breast member, just below the lower end or edge of the neck part or portion of the mouth member; thus making the alleged flush interlocking and re-enforcing joint and connection on the inside so closely resembling that of the Haigh patent. This claim has not failed of serious consideration, but the court is satisfied that too many cans of that construction—John Street cans—were in use for that contention to prevail. If it be true that the defendants have only constructed and used or vended cans not having the objectionable features since the discovery of the alleged peculiar action of the spinning machine, and have wholly discontinued the manufacture thereof, an injunction will do no harm, and an accounting will disclose but little damage.

The complainant is entitled to an injunction and an accounting.

## UNITED SHIRT & COLLAR CO. et al. v. BEATTIE et al.

(Circuit Court, N. D. of New York. June 10, 1905.)

No. 6,954.

PATENTS—INVENTION AND INFRINGEMENT—FOLDING MACHINE.

The Pine patent, No. 645,871, for a folding machine designed and used for folding the edges of collars, cuffs, and like articles, was not anticipated in the prior art, and covers a true combination, which discloses novelty and patentable invention. Also *held* infringed.

In Equity.

Suit in equity for alleged infringement of United States letters patent No. 645,871, dated March 20, 1900, application filed October 3, 1894, granted to United Shirt & Collar Company of Troy, N. Y., assignee of James K. P. Pine, for a "folding machine." The machine is used for the folding or inturning of the edges of collars, cuffs, and like articles, particularly in the manufacture of shirts, collars, and cuffs. The complainant Reece Folding Machine Company is the sole and exclusive licensee under said patent of the United Shirt & Collar Company. The defendants are extensive manufacturers of folding machines. The suit was commenced October 14, 1902. The defenses relied on are anticipation, lack of novelty and invention, that the patentee is not the sole inventor, and noninfringement.

Edwin H. Brown, for complainants.
George A. Mosher, for defendants.

RAY, District Judge (after stating the facts as above). There are six claims in the patent in suit. Each claim embraces or includes the following features: A support or bed for the blanks of collars, cuffs, or other articles to be folded. A blank is the material cut into shape for folding. A templet, or die, or former, or presser, having expanding and contracting plates with edge portions adapted to bear directly upon the blanks while resting upon the support or bed. When the folding is to be done, this templet, die, former, or presser is lowered upon the blank which rests upon the bed, and, after being so lowered, is raised to a position some little distance above the bed, where it remains for use in another operation. The plates or blades of the templet are expansible and contractible with reference to a common center, and expand and contract in or below the plane of a body piece or stock to which they are attached. When this templet, die, former, or presser is in use, its blades or plates are expanded, and their edge dimensions then approximate to, but are less than, the outline or outer edge of the blanks themselves. This is so that the edge portions of the blanks may be turned up and inwardly and folded over the edges of the plates or blades; and thus on each machine each blank, if the plates, etc., are not changed, is made of the same size and corresponds in size and shape to the collar, cuff, or other article to be manufactured from the blank. When the blades are contracted, the folded edges of the blank are freed from the templet, die, former, or presser. Also infolders or folders, as they are called. These folders are mounted upon the bed in such a manner that they may be moved toward and from each other. They are constructed in such a man-

ner that when the blades of the templet or presser bear upon the blanks to be folded the edges of the blanks by the inward movement of the infolders may be turned or folded over the edges of the plates or blades, and thus retained in the folded condition. In the structure there is such a combination of the templet, plates, and infolders that, after the infolders have been moved toward each other and toward their inward position, thereby folding or turning over the edges of the blanks, the templet, plates, or blades may be contracted so as to free them from the folded edges of the blanks and from the infolders. Then the templet blades and templet may be raised to the position occupied by them when out of use. There is also a combination of the bed and infolders, whereby a blank lying between the two may be pressed. This may be done by a relative vertical movement of these parts toward each other. This may be done by either a rising movement of the bed, or a downward movement of the infolders, or by a movement of both toward each other. These parts and combinations made according to the patent in question form a machine which will fold and press the folds in a blank designed to be made into a collar, a cuff, or some analogous article. One object is to fix in position by pressure the edges of the blank after being folded over, and this pressing is done between the support or bed and the infolders.

It is not regarded as necessary here to point out the differences in the scope of the different claims of the patent. I find and hold, under all the evidence in the case, that the patentee, Pine, assignor to the complainant United Shirt & Collar Company was the sole inventor of the patent in suit, and I also find that there is no lack of novelty or of invention if it be true that anticipation is not shown. In short, I come, in the consideration of this case, to the question, in the patent in suit is invention disclosed in view of the prior art? It is contended that the patent in suit was anticipated by certain patents to which attention will be directed. The question is mainly one of fact, and will not require extensive discussion, as it would not be profitable to indulge therein. Should I attempt to discuss all the evidence in the case bearing upon this question, no particular light would be thrown upon the question at issue. It is evident that the patent in suit, as finally granted, had a long, hard road to travel, as is disclosed by the proceedings in the Patent Office and the length of time that elapsed between the filing of the application and the granting of the patent. The patent is presumed to be valid, and to my mind this presumption is strengthened by the consideration given the case in the Patent Office before the patent was granted. Prior use must be proved beyond a reasonable doubt. A preponderance of evidence will not suffice. There is in this case considerable evidence of prior use, but its character is such, all things considered, that I cannot say the defense is established.

The United States letters patent to George Boxley for "improvement in machines for folding blanks for collars and cuffs," No. 199,615, dated January 29, 1878, and for "plaiting machine," No. 263,014, dated August 22, 1882, and United States letters patent to Rumrell for "machine for making book covers," No. 64,038, dated

April 23, 1867, also patent for "hat rounding machine," to Wenstrom, of May 13, 1884, No. 298,643, and patent to Jackson, October 10, 1893, No. 506,402, "machine for making book covers," and several others, have been carefully examined. I fail to find in these the following element found in the patent in suit, viz. (claim 1): "And means whereby the folds of the blanks may be pressed between the support (bed) and the infolders after withdrawal of the plates of the templet (die, former or presser) from the folds, and thereby fixed with a sharp fold"; (claim 2) "and means for producing a relative vertical movement between the bed and the infolders sufficient to produce a sharp fold in the blanks after withdrawal of the plates of the templet from beneath the infolders"; (claim 3) "and means whereby the infolds thereby formed may be pressed between the infolders and the bed after the templet plates are withdrawn therefrom, and before the infolders have been moved outwardly, substantially as shown and described"; (claim 4) "and means for forcing the bed against the infolders after the templets are withdrawn, whereby by operating the several elements as and in the order specified a cuff or collar may be infolded on all sides at one operation and the infold fixed therein with a sharp fold by pressure after the templet plates have been withdrawn from the infolds, substantially as and for the purpose specified."

In the brief of the complainants I find this statement referring to the Boxley machine of 1878:

"There is no good reason for doubting that Boxley, with the aid of persons employed in the machine shop of William H. Tolhurst, made some kind of a machine comprising a stationary bed, a templet capable of being raised and lowered relatively to said bed and provided with two expanding and contracting plates or blades arranged at opposite ends of a body or stock, and two infolders arranged to slide upon the bed towards and from each other. Undoubtedly in that machine a blank could be held upon the bed by the edges of its templet plates or blades, while the infolders were moved towards each other to turn or fold over the edges of the blank; and the folded blank could undoubtedly be left unengaged upon the bed so that it could be picked off the bed if the plates or blades of the templet were contracted and the infolders moved to their extreme outward positions."

It is necessary to understand that the templet, or die, or former, or presser is not the means used, in complainants' patent at least, for pressing the folded edges of the collars or cuffs. This templet or presser in all the devices comes down and presses or holds the blank on the support or bed while the infolders turn the edges of the blank over the edges of the blades of the templet, and it is after this is done, and after the blades of the templet or presser are contracted and withdrawn from the folded edge of the blank and raised, that the pressing of these folded edges of the blank is done, not by the templet, but by the pressure of the blades of the infolder on the bed, which pressure may be caused by raising the bed against the infolders or by the downward movement of the infolders or by the movement of both towards each other. Claim 1 says nothing as to this movement of the bed, etc.—whether vertical or otherwise. Claim 2 makes this movement a relative vertical one, while claim 3 is not limited to a vertical movement. I cannot see that this is

a material consideration, however, in considering the Boxley patent of 1878. It is conceded by the defendants that this Boxley patent does not show or refer to the operation of pressing the fold of the blank between the "support" or "bed" and the infolder after the templet has been withdrawn. If this patent did show this, I should, I think, be compelled to hold that anticipation has been definitely shown. But the defendants assert that, while the patent of Boxley does not show this operation, either in claims or specifications, the Boxley machine, in evidence and before the court, does show it, and that the proof is satisfactory, and in fact conclusive, that this Boxley machine for a long time—years—prior to the issue of the Pine patent in suit was in more than one case publicly used to fold and press the fold between the bed or support and the infolder, and therefore we have complete anticipation and prior public use established. A careful examination and operation of the Boxley machine in evidence, and before the court, discloses that this pressing of the folded edge of the blank after the withdrawal of the die, presser, or templet, between the bed and infolders may be done by this Boxley machine. It is done by withdrawing and raising the templet and then extending the blades of the templet and lowering it upon the blades of the infolders still extended over the folded edge of the blank. This presses the infolders down upon the folded edges of the blank collar or cuff; and as it is between the bed and infolder it is pressed—not exactly in the manner described in complainants' patent, but sufficiently so—it is claimed to show prior use, etc. It is possible that the Boxley patent was used to some extent in this manner, but I am not satisfied it was so used. Clearly, the Boxley machine was never constructed to be used for such a purpose. Used in that way, its usefulness would soon be destroyed. It is not necessary to go into details of evidence showing why I have reached this conclusion. The combination of the patent in suit is not a mere aggregation. It is true that in the Jackson patent of October 10, 1893, No. 506,402, we have:

"My invention relates to machines for performing the operations above indicated, and consists of a vertically reciprocating male former and a female former, provided with horizontally adjustable and vertically movable folding plates; and further of mechanism which operates upon the alternate downward movement of the male former to force the folding plates inward over the female former in position to be struck by the male former and to be forced downward into the female former, and of the devices and combinations of devices hereinafter more specifically set forth and claimed."

And in claim 1:

"In a machine for making book covers, the combination of a vertically reciprocating male former, a female former, a series of guide plates supported in suitable bearings, a series of folding plates connected to and horizontally movable with the guide plates, means for imparting horizontal, parallel motion to the guide and folding plates, and means whereby the folding plates may be moved vertically in relation to the guide plates; all substantially as described."

But it is true of many valid combination patents that each element standing alone has its counterpart somewhere. If we do not find it in one art, we find it in another. Sometimes it is found in an

analogous art, and many times not. But, after all, we come to the questions in the case of a particular patent whether or not in the combination of elements all are old? Has this combination, for this purpose, been made before? If so, was the one made operative or inoperative? Have we a new combination of old elements working in a different manner and producing a new result, or an old result in a substantially better and less costly manner? Is the combination so made up that each element performs its old function in the old way? These and many others are presented for the consideration of the court in determining whether or not we have a patentable invention, and whether or not there was prior use or abandonment to the public, or anticipation. A discussion of these questions with reference to the evidence in this case might be made almost interminable. I am satisfied and hold that complainants' patent in question contains novelty, and discloses invention, within the adjudged cases. Anticipation or prior use are not proved. Infringement is clearly established.

The complainants are entitled to a decree accordingly, and for an accounting.

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ROBINSON v. S. & B. LEDERER CO. et al.

(Circuit Court, D. Rhode Island. June 10, 1905.)

No. 2,667.

PATENTS—ANTICIPATION—SWIVEL.

The Robinson patent, No. 452,320, for an improved swivel hook, *held* not anticipated, valid, and infringed, and the patentee not barred from relief by laches, on a motion for preliminary injunction.

In Equity. On motion for preliminary injunction.

Ellis Spear, Jr., for complainant.

Horatio E. Bellows, for defendants.

BROWN, District Judge. The letters patent in suit (No. 452,320, to E. L. Robinson, dated May 12, 1891) are for an improvement in swivels. It is admitted that the defendants make swivels exactly like that described in the patent. The defendants insist that the complainant is estopped by his laches from seeking relief, and that the patent is invalid by reason of anticipation by prior patents, and by swivels made by these defendants before the date of the patent in suit.

We will consider first the affidavits as to anticipation by these defendants. B. B. Lederer testifies that in 1886 George H. Evans, a swivel maker employed by S. & B. Lederer, showed him samples of a swivel having a flat two-armed V-spring and a blind pivot, similar in every respect to the swivel set forth in the patent in suit, and informed him that he had applied or was about to apply for a patent thereon; that the device sufficiently interested him to give Evans permission to try their manufacture in the shop of S. & B. Lederer as early as 1887. He produces also an exhibit (Defendants' V-Spring Swivel) and certain tools which he contends were used

in his factory in 1889 or prior thereto. He admits that the defendants have purchased swivels of the complainant. S. L. Lederer testifies that as early as 1887 the firm were manufacturing swivels similar to that identified as Defendants' Exhibit V-Spring Swivel, and produced as one of the first swivels made by the firm of S. & B. Lederer. Nathan B. Evans testifies that in 1886 his brother, George H. Evans, made a model of a swivel similar to the swivel marked "Defendants' Exhibit V-Spring Swivel," and applied in said year for letters patent therefor. William J. Thompson testifies that he witnessed the making of swivels similar to the Defendants' Exhibit V-Spring Swivel; "that in the spring of 1886 George H. Evans entered the employ of the firm of S. & B. Lederer, and that a few months thereafter deponent noticed swivels of the character above identified being manufactured at the Lederer factory; that deponent's interest in this swivel was emphasized by frequent conversations with George H. Evans, who talked a great deal about his new swivel." Edgar A. Mowry testifies that Evans, in an interview, alleged that he had been for a long time successfully making for S. & B. Lederer swivels containing a V-shaped spring, and desired to make such swivels for the deponent's firm.

Upon the whole evidence, there can be no doubt that the defense of anticipation by the defendants rests upon swivels made in consequence of suggestions of Evans. The defendants do not fortify their testimony by any evidence as to the application by Evans for letters patent.

The complainant, however, introduces a copy of the application of Evans for letters patent, filed October 19, 1886. While this application shows a V-spring swivel, it is very clear that it does not show the features described and claimed in the patent in suit. It follows, therefore, upon the evidence submitted, that the defendants' Exhibit V-Spring Swivel does not conform to the description of the swivel which Evans sought to patent. Upon this condition of proof, I can attach little weight to the contention that the patent in suit was anticipated by the manufactures of the defendants. Moreover, testimony as to the character of the defendants' exhibit, and an inspection of that exhibit, tend to throw additional doubt upon it as a sample of what was produced in defendants' factory during the time of Evans' employment. In view of the explicit statements by both B. B. and S. L. Lederer as to the exact conformity of the article made by them with that described in the patent in suit, and of the apparent inaccuracy of that statement in view of the testimony as to Evans' connection with the manufacture, I cannot accept as sufficient their affidavits to the effect that they had asserted the invalidity of the Robinson patent. The defense of anticipation by the defendants, and acquiescence by the patentee in infringement by these defendants, in my opinion, is not sufficiently made out for the purposes of the hearing on this petition.

Certain prior letters patent are produced by the defendants to show anticipation, or the lack of patentable novelty: No. 337,908, to W. F. Whiting, dated March 16, 1886; No. 299,336, to D. F. Briggs, dated May 27, 1884; No. 348,811, to A. Abrahams, dated

September 7, 1886; No. 39,659, to O. S. Judd, dated August 25, 1863; No. 55,563, to R. L. Webb, dated June 12, 1866; No. 155,843, to W. E. Sparks, dated October 13, 1874; No. 286,739, to E. H. Smith, dated October 16, 1883; No. 322,438, to J. Gibbons, dated July 21, 1885. While these patents are sufficient to show that the patent in suit is narrow in scope—involving, perhaps, no important novelty in the mechanical principles of operation—they do not seem to me sufficient to show that the patent is not valid, as showing an improved construction, which combines simplicity, durability, and cheapness. In fact, they tend to show that the patentee succeeded in accomplishing by few and simple means what others had accomplished by means less simple and practical. Regarding the invention as dealing with the problems of practical manufacture, rather than as the solution of any novel mechanical problem, I do not think that the prior patents are sufficient to overcome the presumption of validity. While the patent has not been sustained by prior adjudication, there is evidence of general acquiescence for about 14 years.

Under these circumstances, a preliminary injunction may issue.

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## AMERICAN CARAMEL CO. v. THOMAS MILLS & BRO.

## SAME v. QUAKER CITY CHOCOLATE & CONFECTIONERY CO.

(Circuit Court, E. D. Pennsylvania. June 8, 1905.)

Nos. 26, 42.

PATENTS—INVENTION—MACHINE FOR CUTTING CARAMELS.

The Hershey patent, No. 532,554, for a machine for cutting candy, is void for lack of patentable invention in view of the prior art.

In Equity. Suit for infringement of patent. On final hearing.

Wm. J. Smyth and Henry E. Everding, for complainants.

Henry P. Brown and Augustus B. Stoughton, for respondents

J. B. McPHERSON, District Judge. The patent involved in these two suits, No. 532,554, was applied for on May 3, 1893, and was granted to the applicant, Milton S. Hershey, on January 15, 1895. It is for an improved machine for cutting caramels, candy, and similar products, the object of the device being to subdivide sheets of the material into parts suitable for use. The machine may be described as follows: A stationary table, having a transverse slot or opening, is supported by a frame. Above the slot a blade shaft is journaled, having rigidly fixed thereto annular cutting blades, so placed as to cut the material into strips of a suitable width. Below the slot a plain roller is journaled, and the shaft and the roller are so geared that their meeting surfaces revolve in the same direction, and whatever is caught between them is drawn through to the other side. The sheet of caramel or other candy is placed upon a flexible plate or pad of felt, rubber, blotting paper, or similar material, and the end of the pad is inserted between the

shaft and the roller by the hand of the operator, whereupon the pad is drawn through and the sheet of candy is cut into strips. The pad is then turned half way around, and the cutting operation is repeated, thus converting the strips into small squares. The following paragraphs from the specification show what the patentee believed to be the advantages of this method:

"The frictional contact of the blades with the pad is the result of thorough, clean, and continuous cuts in the sheets of material carried by said pad, as there can be no motion thereof other than that communicated to it jointly by the blades and roller, which are actuated positively by the same gear, and as the nature of the pad permits the blades to bite into the same and insure the cutting of the material by the movement of said pad. * * *

"By my construction the successful application of the device through which is applied the frictional force required to move the pad carrying the material to be cut also necessitates the cutting of that material, thereby utilizing said device in a two fold manner and reducing the amount of machinery necessary for the purpose, as well as making a corresponding reduction in the friction to be overcome and the cost of the more numerous parts otherwise necessary."

The claims are as follows:

"1. The combination, with a slotted table, of a shaft having blades and journaled above said slot, a roller journaled below the slot, said shaft and roller being so geared that their adjacent parts move in the same direction, and a plate or pad adapted to be drawn between said blades and the roller by the frictional action thereof, for the purpose specified.

"2. The combination, with a slotted table, of a shaft having blades and journaled above said slot, a roller journaled below the slot, said shaft and roller being so geared that their adjacent parts move in the same direction, and a flexible plate or pad adapted to be drawn between said blades and the roller by the frictional action thereof, for the purpose specified.

"3. The combination, with a slotted table, of a vertically adjustable shaft having blades and journaled above the slot, said shaft and roller being so geared that their adjacent parts move in the same direction, and a flexible plate or pad adapted to be drawn between the blades and the roller by the frictional action thereof, substantially as and for the purpose specified."

Several defenses are made to the charge of infringement, but I shall refer to only one, the lack of patentable novelty, since I believe this defense to be well founded. It cannot be doubted that every element in the machine is old—the pad, the annular cutter, the slotted table, and the rotary bed—and therefore, unless these elements in combination show novelty, there is no invention to support the patent. I have considered with care the testimony and the arguments of counsel upon this point, and shall announce without discussion the conclusion to which I have come, namely, that the patentee has done no more than to take an old and well-known pad, and put it through a cutter resting upon one kind of bed rather than upon another, both kinds being also old and well known. In the last analysis, this seems to me the essence of the machine, and I have been unable to see that this required the exercise of the inventive faculty.

In each case, therefore, a decree may be entered dismissing the bill at the costs of the complainant.

## THE NECK.

(District Court, W. D. Washington, N. D. May 19, 1905.)

No. 2,896.

1. TREATIES—RULES OF CONSTRUCTION.

Treaties between nations are usually prepared with great care by men of learning and experience, accustomed to select words apt to express precisely and fully the intention of the contracting parties, and should be given a reasonable, rather than a liberal, construction. There is no authority for reading into a treaty, under the guise of construction, extraordinary provisions, not necessary to give full effect to the intention expressed.

2. SEAMEN—JURISDICTION TO DETERMINE RIGHTS—EFFECT OF TREATY WITH GERMANY.

Article 13 of the treaty of December 11, 1871, between the German empire and the United States (17 Stat. 928), which gives the consular officers of each country exclusive power to determine differences between the captains and crews of vessels of their own nation, and prohibits the courts of the other country from interfering therein, does not expressly or by implication grant privileges or confer powers which exempt a German vessel employing seamen in a port of this country from the obligation to observe the restrictive provisions of section 24 of the act of December 21, 1898, c. 28, 30 Stat. 763 [U. S. Comp. St. 1901, p. 3079]; nor does it deprive the admiralty courts of the United States of jurisdiction to determine the rights of an American seaman who enters and leaves the service of a German vessel within this country.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Ambassadors and Consuls, §§ 16–20.]

3. ADMIRALTY JURISDICTION—RIGHT OF CITIZEN TO INVOKE—EFFECT OF TREATY.

A citizen of the United States cannot be deprived by treaty of his constitutional right to invoke the jurisdiction of the national courts of admiralty to determine a cause within the admiralty and maritime jurisdiction to which he is a party, and which is cognizable within the United States.

4. SEAMEN—SIGNING IN VIOLATION OF STATUTE—RIGHT TO WAGES.

Libelant, a citizen of the United States, signed as a seaman on a German vessel before the German consul at the port of New York for a voyage to Japan, and was paid a month's wages in advance, in violation of section 24 of the act of December 21, 1898, 30 Stat. 763 [U. S. Comp. St. 1901, p. 3079]. When the vessel reached a Pacific port of the United States, he left it without the consent of the master, and brought suit in a court of admiralty to recover his wages for the time served. *Held*, that the court had jurisdiction, since, having been signed in violation of the statute, the contract was void, and he never became legally a member of the crew; that for the same reason he had the right to leave the vessel at any time, and was entitled, under such statute, to recover wages for the full time served, without deduction on account of the advance payment.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, § 74.]

In Admiralty. Suit for seaman's wages by a citizen of the United States against a German vessel. The case involves questions as to the jurisdiction of the court to take cognizance against the protest of a German consul, and the right of a seaman hired in this country, who received an advance at the time of signing shipping articles, to leave the vessel before expiration of the stipulated term

for which he was hired, and to claim compensation for the time of actual service. Decree in favor of libelant.

A. W. Buddress, for libelant.
Edward Von Tobel and James Kiefer, for claimant.

HANFORD, District Judge. The material facts in this case are that the libelant, a citizen of the United States, was hired at the port of New York in the month of April, 1904, to serve as a seaman on board the German ship Neck on a voyage from New York to Japan, and return to a port in Europe or in North America, not to exceed a period of three years' duration, for which he was to receive wages at the rate of $18 per month. Shipping articles for said voyage were signed before the German consul at New York, and the libelant was paid one month's wages in advance, and went on board and served as a seaman until the 27th day of December, 1904, on which date, at Port Townsend, in the state of Washington, he left the vessel without the consent of the master. Including said advance, the libelant had been paid on account for his services $60.80, and this suit is to recover the balance of the wages earned, without credit for the advance; the libelant claiming that the shipping articles are invalid, as to him, by reason of the advance being made in violation of the twenty-fourth section of the act for the protection of American seamen, approved December 21, 1898, c. 28, 30 Stat. 763 [U. S. Comp. St. 1901, p. 3079].

An answer has been filed by the captain, who appears as claimant of the ship, in which he pleads as a defense that the libelant is a deserter—he having left the service of the ship in violation of the contract contained in the shipping articles signed at New York—and denies the jurisdiction of this court, on the ground that the ship is a German ship, and that the German empire is represented at Seattle by a consul of that nation, duly accredited and recognized, and by the provisions of article 13 of the treaty between the United States and the German empire, concluded and signed at Berlin December 11, 1871, said consul is invested with the exclusive power to take cognizance of and to determine all differences between captains and members of the crews of German vessels, and the courts of this country are expressly forbidden to interfere in these differences. The German consul has also, in writing and orally, protested against the exercise of jurisdiction by this court in this case. The article referred to reads as follows:

"Art. XIII. Consuls-general, consuls, vice-consuls, or consular agents shall have exclusive charge of the internal order of the merchant-vessels of their nation, and shall have the exclusive power to take cognizance of and to determine differences of every kind which may arise, either at sea or in port, between the captains, officers, and crews, and specially in reference to wages and the execution of mutual contracts. Neither any court or authority shall, on any pretext, interfere in these differences, except in cases where the differences on board ship are of a nature to disturb the peace and public order in port, or on shore, or when persons other than the officers and crew of the vessel are parties to the disturbance." 17 U. S. Stat. 928.

It is to be observed that by the terms of the article the power conferred upon consuls is restricted to the determination of differ-

ences between the captains, officers, and crews of the vessels of their respective countries, and the prohibition upon the courts is correspondingly limited; and it is my opinion that, if the libelant never became legally bound to serve as a member of the crew, he had a natural right and a legal right to leave the ship at any port of this country, and, having actually exercised this right, he was not, in fact or in contemplation of law, a member of the crew at the time of instituting this suit. Therefore the case does not involve differences to be determined between the captain and a member of the crew, as the opposing parties, and the case is not within the terms of the treaty.

The question raised is not a matter of mere private concern, affecting only the immediate parties, but is of national interest, for, whilst the pleadings admit that the libelant signed the shipping articles, and there is no pretense of any disability on his part, or of duress or want of sufficient consideration, the transaction is impeached for an alleged violation of an act of Congress; and it is inconsistent with national self-respect for a court of the country to disclaim jurisdiction, and remand the parties for a determination of such a question to the representative of a foreign government, not charged with responsibility for the due enforcement of our national laws. For that reason I consider that it is proper to give a strict construction to the treaty, and to hold that a seaman claiming wages for services rendered is not to be deemed a member of the crew of a ship, and obligated to submit differences respecting his rights to the determination of a representative of a foreign government, if he was never legally bound to serve as a member of its crew for a specified voyage or a definite period of time.

By the decision of the Supreme Court in the case of The Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, foreign ships in ports of the United States are subject to the same restrictions as the merchant ships of this nation in the matter of hiring seamen, imposed by the act of Congress of 1898. See, also, The Kestor (D. C.) 110 Fed. 432; The Troop (D. C.) 117 Fed. 557, affirmed in 125 Fed. 672, 60 C. C. A. 362; The Alnwick (D. C.) 132 Fed. 121.

It is contended, however, that this case must be distinguished from the cases cited by the fact that German ships are exempted from the restrictions of the statute of 1898 by a proviso therein. Subdivisions "a" and "f" of section 24 of the statute referred to, and to which the proviso is appended, read as follows:

"(a) That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages to any other person. Any person paying such advance wages shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not less than four times the amount of the wages so advanced, and may also be imprisoned for a period not exceeding six months, at the discretion of the court. The payment of such advance wages shall in no case, excepting as herein provided, absolve the vessel or the master or owner thereof from full payment of wages after the same shall have been actually earned, and shall be no defense to a libel, suit, or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment as seaman, or from any person on his behalf, any remuneration

whatever for providing him with employment, he shall for every such offense be liable to a penalty of not more than one hundred dollars. * * * (f) That this section shall apply as well to foreign vessels as to vessels of the United States; and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for a similar violation: provided, that treaties in force between the United States and foreign nations do not conflict." 30 Stat. 763 [U. S. Comp. St. 1901, pp. 3079, 3080].

The proviso is not an original source of privilege, but is a polite disclaimer of any intention to abrogate existing international treaties. Therefore the question now to be considered is this: Was there any treaty in force on the 21st day of December, 1898, granting to German merchant vessels special and unrestricted permission to hire seamen in the ports of this country, or delegating to German consular officers administrative and legislative powers to supervise and regulate the hiring of seamen in this country for service on German vessels? Such a grant of privileges or delegation of powers is not found in any treaty between the United States and the German empire, unless, by liberal construction of the paragraph above quoted from the treaty of December 11, 1871, its provisions may be enlarged so as to be deemed to contain implied privileges and powers of the extraordinary import suggested. International treaties are usually, if not invariably, prepared with great care by men of learning and experience, accustomed to select words apt to express precisely and fully the intention of the contracting parties. Therefore a reasonable, rather than a liberal, construction must be given to agreements solemnly entered into by nations; and there is no authority for reading into an international treaty, under the guise of construction, extraordinary provisions not necessary to give full effect to the intention expressed. In the Eudora Case the Supreme Court recognized the injustice to our own citizens of exempting foreign vessels from the restrictive provisions of the act of 1898, and it would be contrary to elementary principles to admit privileges and exemptions by mere implication to the disadvantage of the commerce of our own country. It is my conclusion that the treaty does not expressly or by implication grant privileges or confer powers in conflict with the restrictive provisions of the statute under consideration, and that German vessels are not, by the proviso appended to subdivision "f," exempted from the obligation to observe the requirements of our laws respecting the employment of seamen within this country.

The decision of this case might be rested upon the reasons and authorities above set forth, but there is another aspect of the case in which I find matter of paramount importance, and the most substantial ground for sustaining the jurisdiction of the court in this case. The Constitution of the United States is the supreme law of the land, and all treaties, statutes, and laws must read or be construed so as to be harmonious with the Constitution, or, if repugnant to its provisions, deemed null and void. Aliens cannot, as a matter of right, require the courts to adjudicate their controversies. In the exercise of discretion, the courts having jurisdiction of

admiralty causes may take jurisdiction of suits by alien seamen against foreign ships, as a matter of comity, or refuse to do so, and the government may, by treaty stipulations, bind the courts to observe a policy of noninterference; but the government, including the courts, exists for the benefit of the people who constitute the body politic, and every individual citizen has an absolute right to invoke the justice of the country through the established tribunals in the manner prescribed by general rules. Exclusive jurisdiction of all admiralty and maritime causes cognizable within the United States is by the Constitution vested in the national courts, and a citizen of the United States who is a party to a suit of admiralty and maritime jurisdiction cannot be deprived of the right to have such a suit adjudicated by a court upon which admiralty jurisdiction has been conferred pursuant to the Constitution. The Falls of Keltie (D. C.) 114 Fed. 357; 25 Am. & Eng. Encyc. Law (2d Ed.) p. 118. It would be just as competent and just as reasonable to require merchants to refer their controversies arising out of maritime transactions to local magistrates for determination, as to require American seamen to submit their differences respecting wages to consular representatives of foreign countries.

The libelant is a citizen of the United States, and this suit is to recover wages earned as a mariner in employment which commenced and terminated within the United States, and it is a case of admiralty and maritime jurisdiction. Therefore I hold that this court cannot refuse to entertain it, nor disregard the provisions of the statute which make the contract contained in the shipping articles invalid. The libelant had a lawful right to quit the service of the vessel upon arrival at Port Townsend without forfeiting the wages earned while in the service. After crediting payments made to him, other than the advance, the balance due is $100, for which amount, with costs, a decree will be entered.

## THE KNICKERBOCKER.

(District Court, S. D. New York. May 8, 1905.)

TOWAGE—INJURY TO TOW BY COLLISION WITH LOG—LIABILITY OF TUG.

A tug which was engaged with another in towing four scows up the Hudson river in the early morning *held* not in fault for the capsizing of one of the scows by striking some floating object, probably a partly submerged log, although the man on watch was not attending strictly to the duties of lookout; the lookout on the other tug, which was by her side, and only 30 feet away, having failed to see the object.

In Admiralty. Suit against tug for injury to tow.

Peter S. Carter, for libellant.

Amos Van Etten, for claimant.

ADAMS, District Judge. This action was brought by Agnes A. McGirr, the owner of the scow F. Smith, for damages received by that boat, while in tow on hawsers of about 75 fathoms, of the tugs

Knickerbocker and Williams, going up the Hudson River in the early morning of the 29th of October, 1904. The Knickerbocker was apparently in charge of the tow, which consisted of 4 boats, arranged in 2 tiers, the Smith being in the head tier on the starboard side. The Williams joined in the towing after Spuyten Duyvil was passed, putting out a hawser to the port side of the Smith. The Knickerbocker was towing on the starboard side and her hawser led to the starboard side of the Smith. The Williams was about 30 feet to the port of the Knickerbocker. The tide was flood. It was a clear moonlight night, with very little wind. When above Yonkers, the Smith, loaded with manure on deck, careened and turned upside down, dumping her load.

The libellant charges the Knickerbocker with negligence in proceeding at an excessive rate of speed and in not having a lookout. The claimant contended that the upsetting was due to the poor and leaky condition of the scow and because she was improperly loaded and top-heavy.

The testimony shows that the scow was in good condition and properly loaded and that the accident was the result of collision with some floating object, probably a log, which broke a hole in her forward end, whereby she filled and turned over. The tugs were going at a moderate rate of speed and the only question in the case is whether the Knickerbocker fulfilled her duty with respect to lookout. Her master was at the wheel and she had a deck hand on watch. He was not stationed forward attending strictly to a lookout's duty, but moved around the deck, forward and aft, and at the time of the accident was probably in the pilot house, talking to the master. The Williams had a lookout duly stationed on deck.

The first knowledge the tugs had of the accident was the Williams shooting forward, through being relieved of the towing strain. She then went back and finding the Smith capsized, took her out of the tow and delivered her at a wharf on the river between Yonkers and Hastings.

What troubled me on the trial and does now, is the question whether the Knickerbocker exercised such care with regard to lookout as her duty to the tow required. No one on either of the tugs saw any floating objects and those on board these vessels are usually quite solicitous about encountering any such that might prove injurious to the tug or tow, especially the former, as damage is liable to follow if they get in the propellers. The men on the boats in tow spoke of seeing several logs in their vicinity but apparently they did not pay very much attention to them or communicate with the tugs until after the happening of the accident. The log, if it was one that did the injury, was probably submerged to a great extent and escaped observation in that way. The Knickerbocker did not have a vigilant lookout, but the Williams did and he failed to see the log. In looking the case over, I fail to see any negligence on the part of the tug which should condemn her.

Libel dismissed.

## SMITH & BENHAM v. CURRAN & HUSSEY.

(Circuit Court, W. D. Pennsylvania. May 6, 1905.)

No. 8.

1. CONTRACTS—MISREPRESENTATIONS INDUCING—INDEPENDENT INVESTIGATIONS.
Where defendants, who had knowledge of engineering, before contracting to construct certain waterworks went on the ground, occupied a month in making investigations, preliminary surveys, etc., and were afforded every opportunity to acquire knowledge of the exact conditions, they were not entitled to defend an action for breach of the contract on the ground that they were induced to make it by plaintiffs' false representations.

2. SAME—DAMAGES—PROSPECTIVE PROFITS.
Plaintiffs, under a contract with defendants for the construction of a water pipe line, agreed to advance $105,000, which might be increased to $110,000 in case the line cost that much, for which they were to receive one-half of the capital stock of a corporation to be formed—the par value of such half to be $300,000—less such portion as they agreed should be given to certain others. A minute survey of the property disclosed that the scheme was not necessarily impracticable, but that its success was exceedingly doubtful; that its cost would largely exceed the estimate; and that the water obtainable was much less than was supposed—whereupon defendants declined to proceed. *Held*, that the profits claimed to have been lost to plaintiffs by defendants' breach of contract were too speculative and doubtful to be allowed.
[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 75.]

3. SAME—EXPENDITURES.
Where defendants broke their contract with plaintiffs to construct a water pipe line, plaintiffs, though not entitled to recover as damages expenses incurred in furthering the scheme prior to the execution of the contract by defendants, were entitled to recover expenses necessarily incurred thereafter, and before breach, in carrying out their portion of the agreement.
[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 92–98.]

4. SAME—INDEMNITY BONDS.
Where, as a part of the preliminary negotations for the construction of a water pipe line under a contract between plaintiffs and defendants, a bond was executed by plaintiffs to a city, in order to hold a contract for the purchase of water, on which plaintiffs became liable by defendants' breach of the contract and refusal to construct the pipe line, plaintiffs were not entitled to recover of defendants, by reason of such bond, until they had been compelled to pay damages assessed thereon to the city.

Trial by the Court without a Jury.

H. M. Gillette and E. W. Smith, for plaintiffs.

J. Rodgers McCreery, for defendants.

ARCHBALD, District Judge.[1] This is an action for damages for breach of a contract, brought by Henry B. Smith and William L. Benham, of Bay City, Mich., against Orville P. Curran, Jr., and Curtis G. Hussey, of Pittsburg, Pa.; the parties so named being citizens of the respective states in which they reside. The defendants deny their liability, on the ground that the contract

[1] Specially assigned.

was procured by misrepresentation, and they also dispute the damages which the plaintiffs claim. The case is submitted to the court without a jury, on the evidence introduced at a previous trial, at which the jury disagreed and were discharged; from which the facts are found to be as follows:

The Facts. (1) In 1894 one J. A. Jones conceived the idea of obtaining a water supply at the head waters of the San Luis Rey river, in the foothills of the San Jacinto Range, Cal., some 20-odd miles back from the ocean, and furnishing water for purposes of irrigation in the San Luis Rey Valley, and to the city of Oceanside at the coast. The stream referred to is not a large one, and not only was the water which flowed upon the surface to be utilized, but underground percolations, which exist and are available in that region by reason of the character of the soil, were to be developed and brought to the surface by means of driven wells. The supply so obtained was to be conducted by means of a gravity pipe line from the proposed head, above Pala, to a distributing reservoir at Oceanside, a distance of twenty two or three miles; water for irrigating purposes being taken off for farms and ranches at various intermediate points. In the development of the scheme, and in order to give it a substantial basis, a contract was secured with the city of Oceanside by which, in consideration of the delivery of 100 miners' inches of water, the city was to pay $25,000 in cash when the pipe line was completed, and an annual rental thereafter of $2,500. A contract with a large ranch owner named McWhirter was also secured, who was to pay $37,500 cash and $3,750 annual rental, in return for 150 inches of water; and there was an understanding with another ranch owner, named Utt, that he would pay $28,500 cash and $2,850 rent for 114 inches. Some 82 different farmers along the line further agreed to pay an aggregate of $26,625 cash, on completion of the work, and an annual rent of $5,700, in return for 228 inches of water, and were, in addition, to contribute 1,242 acres of land, which it was estimated would be worth when irrigated about $100 per acre. A tract of 120 acres was also purchased by Jones, at the point where the stream breaks through the foothills, for the beginning of the pipe line; and, the prospective course of the line having been staked out, a right of way over the public highways was secured from the commissioners of San Diego county, in which the San Luis Rey Valley is situated, and arrangements made for it over private lands which would be crossed for a large portion of the distance. Some landowners at the upper end, however, did not give their assent.

(2) In the latter part of the same year (1894) Jones brought the project to the attention of the plaintiffs, Smith & Benham, one of whom was a manufacturer of wooden pipe and lumber; and the other, assistant general freight agent of the Michigan Central Railroad. They in turn consulted R. P. Lamont, an engineer of Chicago, who became interested in the scheme, and, after having gone out to Oceanside to look it over, gave it as his opinion that a line could be built for about $100,000, of which

$60,000 would be required in the first six months; the money from the sale of water rights taking care of the enterprise after that. Later on, through Lamont, the plaintiffs were introduced to the defendants, Curran & Hussey, who were contracting engineers, Lamont and Curran having been previously associated together in business; and on October 31, 1895, the parties met together at Pittsburg, where the project was thoroughly discussed, the following prospectus being submitted by the plaintiffs in that connection:

"Capacity of pipe line, over 3,000 inches (miners') daily.
"Water sells from $250 to $500 per inch.
"Annual rental $25 to $50 per inch, making over $100,000 per annum for life of pipe line, over the following property secured. 120 acres at head of pipe line with flowing stream at all times of the year; also flowing wells—good pure water.
"Filing of 5,000 miners' inches from river, first right.
"Natural reservoir, capacity ten billion gallons water.
"Right of way from county commissioners.
"Right of way from property owners full length of line.
"Contracts already signed, giving first mtgs. on real estate for water for over $100,000.
"Pipe line about 22 miles in length—gradual descent—760 feet fall. Large amount of land covered as plan of construction, viz.: enclosed pipe 36 inches laid on skids, natural flow, reach all land not higher than head and can follow lay of land. This allows of land being irrigated entire length of line instead of at end of pipe line, as when water is carried in ditches.
"Location San Luis Rey Valley, Oceanside, San Diego Co. Calif.
"End of line, have contract with city for $25,000—100 inches."

Attached to this prospectus was a list of those who were said to have contracted for water, with the number of inches to be taken by each, and the quantity of land they were respectively willing to contribute, the written contracts for which, as it was understood, were held in escrow by E. S. Payne, a banker at Oceanside, pending the carrying out of the project. The result of this interview was a preliminary or provisional agreement, a copy of which is set forth in the plaintiffs' statement, and made part of these findings, by which the defendants, in substance, undertook to investigate the proposed pipe line, and if it appeared that the cost would not exceed $100,000, and that the contracts, water rights, and privileges, including that with the city of Oceanside, had the value represented by the plaintiffs, to enter into a contract to build the line for the sum named, as soon as a charter for an irrigating company had been procured by the plaintiffs under the laws of California; the plaintiffs, on their part, agreeing to turn over to such company all their rights, privileges, deeds, and contracts, receiving the whole of the capital stock in return, and transferring two-fifths to the defendants, retaining two-fifths for themselves, and holding the other one-fifth for Jones and Lamont.

(3) Immediately following the execution of this agreement, Curran went out to Oceanside to make investigations, reaching there November 11th; and within the next few days he went twice over the ground with Jones, who pointed out the proposed line cut through the brush and staked, representing it as suitable and

as having been the subject of a survey. He was also taken to the head of the line, and shown the stream that was to be utilized, observing and making an estimate of its flow, which he figured at about 300 miners' inches; and the place where the underground waters were to be developed was pointed out, and, in a general way, the lands intended to be irrigated. He was further taken to the Payne bank, where the water contracts held in escrow were produced, and the list which he had of them was checked off and verified. He was not informed, however, of the fact that a number of these contracts had been canceled at that time on account of the failure to complete the pipe line by the time set; advantage having been taken by the parties of a provision in each, allowing them to do so. In all, he remained about a month at Oceanside and vicinity; looking into other water systems, getting estimates on the cost of the work, and busying himself with general matters connected with the scheme. During this time, under the stress of a counter proposition made by other parties—Grant & Puterbaugh—the city councils of Oceanside were also threatening to cancel their contract on the ground that the time fixed for the completion of the work (February 1, 1895) was long since past. Curran at once interested himself to prevent this and try and get an extension, and, for the purpose of doing so, at the instance of Benham, who had also in the meantime come out to Oceanside, a letter was written November 30th, in the name of the defendants, addressed to the plaintiffs, to be used before the councils, wherein it was, in substance, declared that the defendants had investigated the proposed pipe line, and were prepared to enter into a contract for its construction according to the existing (provisional) agreement between the parties, with a reservation as to the price which is not important. On the strength of this on December 10th a new contract was entered into with the city of Oceanside, in the name of Smith, to whom Jones on December 2d had formally assigned and transferred all his rights and interests; this contract being to substantially the same effect as before, except that the work was to be completed by July 31, 1896. A bond which was exacted by the councils was further given by Smith, with Benham and Lamont as sureties, in the sum of $15,000, to secure the fulfillment of the undertaking by the time named.

(4) Having got the measure into this shape, Curran returned East, and on December 17, 1895, the parties met again—this time at Chicago—and entered into the agreement on which suit is brought, a copy of which is set forth in the plaintiffs' statement and made part of these findings. It was there, in substance, agreed by the defendants, confirming what had gone before, that, in accordance with plans and specifications to be by them furnished, and by the plaintiffs approved, they would construct a 36-inch wooden pipe line from a point on the San Luis Rey river, about 3 miles above Pala Mission, to the site selected for the reservoir at Oceanside, estimated to be 23 miles; such pipe line to be commenced as soon as convenient, and completed by July 31, 1896; the right of way to be furnished by plaintiffs as fast as needed.

In consideration of this undertaking, the plaintiffs agreed to pay the defendants $105,000 within four months after the completion of the work; this sum being based on an estimated length of the line of 23 miles, with provision for a proportionate increase or deduction in case it varied one way or the other therefrom, and with a further provision that the defendants should be paid the actual cost if it exceeded the sum named, up to $110,000 as a limit. The plaintiffs also agreed to organize a corporation under the laws of Illinois, which was the state finally selected, with a capital of $600,000, to which they were to transfer all contracts, rights, and privileges, receiving in return the whole capital stock, and assigning one-half of it, fully paid, to the defendants as an additional consideration for the pipe line, which later was to become the property of the corporation when completed. There were other elaborate provisions with regard to the financing of the scheme, which do not need to be noted, except that the defendants were to furnish an indemnifying bond of $15,000 to the city of Oceanside, to take the place of the one outstanding on which the plaintiffs were obligated. While nothing is said in the agreement as to Jones and Lamont, it was understood that they were to be taken care of by the plaintiffs out of their one-half of the stock. Following this, on December 2d, Jones, as noted above, transferred to Smith all his rights and contracts, and on December 10th further conveyed to him the 120 acres of land which he had purchased at the head of the line. The former were in turn assigned by Smith to Curran & Hussey December 26th, and on February 28, 1896, the land was also deeded to them—in trust, however, for the corporation which was to be formed. An order was also given December 18th, by Smith on Jones, to turn over to the defendants all construction material and property which he had on hand, which was done.

(5) After the execution of the final agreement, and some following correspondence between the parties with regard to the formation of the proposed corporation, the organization of which by common consent was deferred for the time, the defendants about the middle of January, 1896, went out to Oceanside to carry out the project. The first thing to be done was to make a survey, in order to definitely locate the line on which the pipe was to be laid, to accomplish which the defendants got together a corps of engineers, and put them in the field. It was then for the first time discovered that the only approach to a survey which had been previously made was one by Jones, with an ordinary carpenter's level, to determine the grade, and without definite plans or profiles. The defendants' engineers were engaged in their work about six weeks, completing it the middle of March, and making careful and extended surveys and estimates, from which it was ascertained that the cost of constructing the line would far exceed the amount for which the defendants had undertaken it, and that the results to be derived would be very much less than had been represented. It was found, for instance, that the flow of the stream at the proposed intake was 275 miners'

inches, and, in the opinion of Mr. Miller, the defendants' engineer, nothing beyond that could be developed. I am not prepared to adopt this view, but I do find that enough could not be so obtained to make up the 3,000 miners' inches spoken of in the prospectus, and it is doubtful whether even the 592 inches could be secured, which were necessary to meet the outstanding irrigation and other contracts. By going three miles up the stream, however, and developing other branches, a somewhat better showing could be made. There was a serious discrepancy, also, in the elevations. Instead of there being a gradual fall of 760 feet to work with, the proposed intake was only 475 feet above tide, and the site selected for the reservoir at Oceanside was 284 feet, leaving but 191 feet between the two, although it was possible that the reservoir could be effectively put 100 feet lower. Nor was the fall a gradual one. For some 21 or 22 miles to Gonzales Corner (a controlling point if the project of extending the system into Vesta Valley, which seems to have been contemplated, was adhered to) the fall was approximately but 3 feet to the mile, which would only be sufficient to deliver 1,100 miners' inches, as a maximum, in a 36-inch pipe. Abandoning, however, the idea of getting over into Vesta and lowering the Oceanside reservoir as suggested, an average fall of about 10 feet per mile could be secured, which would increase the delivery to about 1,900 inches. Adhering, also, to the line staked out by Jones, about halfway down the course, just south of Gopher Cañon, the ground was 40 feet higher than at the starting point, and 75 or 80 feet above a hydraulic grade line of 3 feet to the mile; necessitating either a tunnel or a heavy cut, over a mile long, at great expense. A practical line could be secured, however, which would avoid this difficulty, but would vary about a mile from the one originally proposed, and increase the length of it, a survey and location of which were made. It was further found that the pipe at certain points, instead of being laid at grade, would have to be carried over deep gullies on high trestles, materially increasing the expense. All things considered, the cost of the line as estimated by Mr. Miller, on the best practicable location, was $437,000. As to the farms to be irrigated, with the owners of which contracts had been secured, pledging certain contributions of land and money when the work was completed, it was developed by the survey that about half were higher than the line, and not able, therefore, to derive any benefit from it, in addition to which, as already stated, a large number of the parties had given notice of forfeiture for failure to complete within the time limited. Difficulties were further experienced with regard to the right of way, particularly at the upper end of the line, where several landowners expressly refused it, at first even forbidding a survey across them. Water rights for irrigating purposes were also claimed in the stream by certain riparian owners below the intake, which, if substantiated and insisted upon, would seriously cripple the enterprise.

(6) After expending about $5,000 or $6,000 in these surveys and investigations, or, if the value of their own time and services are

included, some $7,000 or $8,000, and being convinced, as the result, that the scheme was impracticable, the defendants so notified the plaintiffs at an interview in Chicago April 27, 1896, at which the subject was discussed at length, although no definite conclusion was reached. Afterwards, on May 2d, in order to bring the matter to a head, Mr. Gillette, the plaintiffs' attorney, wrote to the defendants, stating that his clients were ready to perform their part of the contract, and insisted that it should be carried out by the defendants, to which the defendants, by Mr. Lord, made reply a few days later that they had not yet fully decided what they would do, and proposed to look into it further. On June 6th, however, they notified the plaintiffs that they did not intend to go on; and on June 24th they offered to return all the contracts, rights of way, etc., which had been transferred, but the plaintiffs refused to accept them. This suit was begun in September, 1899, without anything further having passed between the parties. The project which was the basis of the agreement between them has never been proceeded with or developed by the plaintiffs, nor, so far as appears, by any other parties, and remains to-day in substantially the same situation as when it was dropped by the defendants.

The Law. Taking up first the question of the defendants' liability upon the facts so found, before discussing the subject of damages, it is idle to argue that the agreement is invalid because it was induced by fraudulent misrepresentations on the part of the plaintiffs. However widely divergent the conditions, on which the success of the enterprise depended, are found to be from what was represented in the discussions between the parties leading up to the agreement, the defendants, through Curran, who went upon the ground and was given all the information asked for, undertook an independent investigation, after the preliminary or provisional agreement, and before entering into the final one, and by that they are bound. It does not matter that this was not thorough, although a month was given to it; or that it failed to develop the discouraging features which subsequently appeared. Every opportunity was afforded to make it as full as was necessary, and there were many things, such as the flow and fall of the stream, the character of the country to be traversed, the distance (which is now complained of as some three miles more than was stated), and the elevation and lay of the land, which were apparent to the observation of any one, and presumptively much better understood and appreciated by the defendants, with their technical engineering training, than by the plaintiffs. There is no pretense, and certainly there is no evidence, that the plaintiffs did not honestly believe and rely upon the representations made in the prospectus, by which they were apparently as much misled as the defendants; their confidence and good faith being shown by the large amount of money which they were prepared to advance. The most that can be said is that they ought to have known with exactness the truth of what was asserted in the prospectus before allowing it to be made the basis of nego-

tiations. But whatever might have been the result, had the matter rested there, the defendants, very properly, before going into a project of this character and magnitude, took time to look into it; and if they failed to inform themselves as fully as they might and ought, not having protected themselves by a warranty, they cannot now be heard to say that the agreement was entered into in reliance upon the representations of the plaintiffs, and that, these having failed, they are relieved.

The law upon this subject is well settled, as will appear by a reference to a few of the authorities. Thus in Slaughter v. Gerson, 13 Wall. 379, 20 L. Ed. 627, it is said:

"Where the means of knowledge are equally available to both parties, and the subject of purchase is alike open to inspection, if the purchaser does not avail himself of these means and opportunities he will not be heard to say that he has been deceived by the vendor's misrepresentations. * * * And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained."

So, in Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678, which was a bill to rescind a contract to purchase a mine, it was said:

"Where the purchaser undertakes to make investigations of his own, and the vendor does nothing to prevent his investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresentations."

In Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246, a bill was filed to restrain the enforcement of purchase money due on land, and for a recoupment of damages by reason of false representations with regard to it. The land was a plantation lying along the Mississippi river, and the sale was effected through a real estate agent, who delivered to the prospective buyer a written memorandum with regard to the property, wherein it was, among other things, stated that 1,060 acres were under cultivation, and that 800 acres, according to the owner, or 500, according to the levee engineer, were "above overflow"—thereby meaning above any overflow from the river previously experienced—both of which representations failed. In a letter accepting the property, the purchaser expressly declared that he did so on the statements made as to the amount, character, etc., of the land; but it appeared that prior to this he visited the plantation, with a view to inspecting it before purchasing, and was taken over it from one end to the other by the party in charge; and it was held that he was bound. "The general principles applicable to cases of fraudulent representation," says Fuller, C. J., "are well settled. * * * The representation must be in regard to a material fact, must be false, and must be acted upon by the other party in ignorance of its falsity, and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were approximate, immediate, and material. If the purchaser investigates for himself, and nothing is done to prevent his investigation from being as full

as he chooses, he cannot say that he relied on the vendor's representations." To the same effect are Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931, and Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419, in the latter of which it is reiterated that:

"When the means of knowledge are open and at hand, or furnished to the purchaser or his agent, and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor."

Cases announcing the same doctrine could be almost indefinitely multiplied, but it will be sufficient to refer to Attwood v. Small, 6 Clark & Fin. 232; Jennings v. Broughton, 5 De G., M. & Gord. 126; Haywood v. Cope, 25 Beav. 140; Mahaffey v. Ferguson, 156 Pa. 156, 27 Atl. 21; Tuck v. Downing, 76 Ill. 71; Ludington v. Renick, 7 W. Va. 273; Hall v. Thompson, 1 Smedes & M. 443; Colton v. Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137; Long v. Warren, 68 N. Y. 426. They all with one accord impose upon a party who is given opportunity to investigate, and undertakes to do so, the responsibility for the result, unless he protects himself by a warranty, or by such subsequent assurances at the time of entering into the contract as amounts to it.

In the present instance much that appears in the prospectus consists not so much in a statement of existing facts, as a representation with regard to things to be brought into existence, as to which, as is said in Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105, the law gives a very different effect; and, as a mere suggestion of possibilities, it is a question how far the defendants, in any event, had the right to rely upon them. East v. Worthington, 88 Ala. 537, 7 South. 189; Bondurant v. Crawford, 22 Iowa, 40; Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105. But passing that by, even as to those statements which were given a more definite and positive form, the defendants, not only having taken it upon themselves to make an investigation, but having expressly agreed to do so, cannot now say, according to the doctrine announced in the cases cited, that they put faith in the representations made by the plaintiffs with regard to the project, however extravagant they have been proved, so as to entitle them to avoid the agreement on the ground of deceit or fraud.

The defendants therefore being undoubtedly liable on the agreement, the only question is as to the damages which have been sustained by its breach. The principal claim made by the plaintiffs is to the profits which it is said they have lost, which it is contended were large and assured. With regard to this, however, there is considerable to be observed. The scheme which the parties had in contemplation, into which the agreement entered, while not necessarily impracticable, could not, in my judgment, have been realized to the extent anticipated. As is shown above, the supply of water required for any great success was not there, being apparently limited to the possibility of some 500 miners' inches; the elevation of the proposed intake was much less than was cal-

culated, making it difficult to secure a suitable hydraulic grade line; and the cost of construction was likely to far exceed the estimate of $100,000 which had been relied on; all of which correspondingly reduced the probability of remunerative results. As their part of the agreement, the plaintiffs were to advance for the construction of the pipe line the sum of $105,000, which might be increased to $110,000, in case it cost that much, for which they were to receive one-half of the capital stock of the corporation to be formed, of the par value of $300,000 (their share), less such portion as was to be given to Lamont and Jones, which is not shown. Assuming that the defendants are chargeable with the failure of the enterprise, because of the refusal to carry out their part of it—although the scheme is still open, and others can possibly be interested in it on equally favorable terms if it has merit—the stock which the plaintiffs were to get represents their ultimate interest; and the value of it, less its cost, stands, therefore, as the measure of their loss because of the enterprise not having been carried through. This value, however, it is manifest, cannot be determined with any certainty. It depended upon the success of the project, which was necessarily problematical, if not doubtful. The most that can be said is that if the difficulties spoken of above, and others which existed, were overcome, the corporation, upon the completion of its line, might have expected to receive from the city of Oceanside, and the different ranch owners and farmers with whom contracts had been made, the amounts which they had respectively pledged, including the land that was to be contributed, from which, no doubt, considerable would have been realized. All this was contingent, however, on the ability of the corporation to meet its part of the undertaking, and this was dependent upon its developing a water supply of at least 592 inches, which was apparently only in part to be had. It was also dependent—outside of the contract with the city of Oceanside—on how far the lands of those who had been drawn into the scheme could be irrigated, a large part of which undoubtedly could not be, because of their being above the grade of the line. A number of these landowners, moreover, long prior to the breach of the defendants' agreement, had terminated their contracts, availing themselves of their right to do so; the time limited for the completion of the work having expired. And even those who had given no notice had the right to do so for the same reason at any time. No doubt, many, if not all, of these parties could be got back, if the water was ready to deliver; but, as the matter stood, there was nothing to be relied upon in this direction with any certainty. It is useless to ask for damages, therefore, as though the money which was to be paid and the bonus land which was to be contributed was so much cash in hand which the plaintiffs have lost. All that can be said is that these were possible resources which might be realized, and when they were would aid in giving value to the plaintiffs' share in the enterprise, but, until they were, could not be counted on.

It will be seen from these considerations that the success of the scheme and the results to the plaintiffs in return for the one hun-

dred and odd thousand dollars which they were required to put into it were most uncertain. It is indeed a grave question whether the plaintiffs are not by just so much the better off than if the project had been carried out to the end, having their money instead of having sunk it. But at the most they would have had nothing but their $300,000 of stock, the intrinsic value of which it is altogether impossible to estimate even approximately. It might have proved valuable. It might have been worthless. No one can say which, nor, if of value, how much. While it is true that the law does not array itself against the recovery of anticipated profits by way of damages (8 Am. & Eng. Ency. Law [2d Ed.] 618, 620; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Lazier Gas Engine Co. v. Du Bois, 130 Fed. 834, 65 C. C. A. 172), it does against those which are speculative and doubtful (Iron City Toolworks v. Welisch, 128 Fed. 693, 63 C. C. A. 245; Howard v. Stillwell Mfg. Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147), and that is the character of those which we have here.

Facts as to Profits Claimed as Damages. I therefore find, as a matter of fact as well as of law, that the profits claimed to have been lost by the plaintiffs by the failure of the defendants to perform the agreement in suit were uncertain, speculative, and doubtful, and cannot be allowed.

The plaintiffs further claim the value of the time and money which they have expended on this project. Directing our attention first to that which preceded the final agreement, I find the facts to be as follows:

Facts as to Expenditures Preceding Final Agreement. Up to December 17, 1895, the date of the final agreement between the parties, the plaintiffs had expended in endeavoring to promote and develop the project in question, including the value of their own time and services, the sum of $15,238.01, the items of which appear in the exhibit attached to the plaintiffs' statement, which is hereby made a part of these findings, as though incorporated therein. On this they were paid by the defendants for supplies and other property turned over to them the sum of $1,985.86, leaving a balance of $13,252.15. This amount includes $750 paid for 120 acres of land bought by Jones at the head of the line, which the plaintiffs still own. It also covers $1,860 charged for their own time and services, including meetings with the defendants at Chicago and Pittsburg in negotiating for an agreement. It does not appear that any of it was incurred at the instance or request of the defendants; by far the larger part being before the parties had ever met, and the material which they got out of it having been paid for. Upon what principle these expenditures are claimed, it is difficult to see. It is true that the plaintiffs may have invested this much in the project, which they will not get back unless it is revived. But this is not to be laid at the defendants' door. Even if the project had gone on, the plaintiffs would still have been out this money, except as it was made up to them by the profits derived from

the venture, if successful, which it would, however, by so much have reduced.

There are also particular objections to individual items, such as the $750 paid for the Jones land, of which they still have the benefit, and the $1,860 charged for their own time and services, with which the defendants had nothing to do. But without stopping upon this, taking the expenditures as a whole, upon no consideration do any of them enter into the damages for which the defendants are responsible, and they are therefore disallowed.

The plaintiffs also claim for expenditures made and obligations incurred after the execution of the agreement, with regard to which the case is different, and as to which I further find:

Facts as to Expenditures after Execution of Agreement. Since December 17, 1895, when the agreement was executed, the plaintiffs, in furtherance of their part of it, and in some instances at the direct suggestion of the defendants, paid out money and became obligated to the extent of $3,630.82, which they would not have done except for the agreement, and of which they have now lost the entire benefit by the failure of the defendants to keep it. The items which make up this sum are set forth in the margin—those which bear date after the breach of the agreement being really incurred before it;[2] and they now, with interest, amount to $5,525.

| | | | | |
|---|---|---|---|---|
| Jan. | 13. | To cash paid expense acct., Bay City | $ | 29 54 |
| April | 20. | " check sent Jones | | 139 66 |
| " | 30. | " " " " | | 150 00 |
| March | 4. | " pipe and fixtures purchased from Mich. Pipe Co. | | 485 49 |
| " | " | " cash paid for letter file | | 1 00 |
| May | 28. | " " " N. C. Johnston, Treas., for Jones hotel bill | | 19 50 |
| July | 2. | " check to West. Un. Tel. Co. | | 26 10 |
| " | 14. | " " " Curran & Hussey | | 20 00 |
| " | 20. | " costs and protest fees Curran & Hussey note | | 130 65 |
| Aug. | 17. | " cash paid Harmon and Verner | | 6 00 |
| Sept. | 22. | " " " Jones, acct. salary and expenses | | 252 35 |
| Oct. | 3. | " " " " " " " " " | | 189 80 |
| | | " petty expenses of Jones at Bay City | | 5 50 |
| | | " hotel bill " " " " " | | 35 00 |
| | | " cash paid E. A. Cooley on acct. Crow note, for expse. incurred San Luis Rey Valley operations | | 973 91 |
| | | " cash paid Jones in adjustment of his matters | | 566 32 |
| | | " " " Curran & Hussey's draft for money for Jones to go to Bay City | | 500 00 |
| | | " counsel fees and services of H. M. Gillette with regard to forming corporation | | 100 00 |
| | | | | $3,630 82 |
| | | Interest | | 1,894 18 |
| | | | | $5,525 00 |

Two matters claimed by the plaintiff in this connection, however, do not come within this category—$51.12, attorney's fees paid J. L. Stoddart, and $1,966.55, balance claimed by Jones; and one,

[2] 1896.

for $500, counsel fees in negotiating with defendants, only partially. The Jones claim has not been paid or assumed by the plaintiffs, and there is nothing to show how it is made up, or that they are obligated for it; much less, that it is a matter with which the defendants are chargeable. The same also is substantially true of the attorney and counsel fees, with this exception: There is evidence that Mr. Gillette did some work looking to the organization of a corporation under the Illinois law, which would be the legitimate subject of a charge against the defendants; that duty having been imposed on the plaintiffs by the agreement, and therefore properly undertaken by them. The value of these services does not appear, but I venture to estimate them at $100, which I allow. The rest of the attorney and counsel fees, covering the negotiating and settling of the provisional and final agreements, as well as legal advice when a breach was imminent, are not a legitimate subject of claim, and are therefore refused.

As to the indemnifying bond of $15,000, which was given to the city of Oceanside by Smith, with Benham and Lamont as sureties, on account of which damages are also claimed, it will be sufficient to discuss the question of liability when the plaintiffs are shown to have suffered by reason of it. While suit has been threatened, it has gone no further, and, the obligation not being absolute, the mere fact that it is outstanding amounts to nothing, until they have been compelled to pay something on account of it.

As the result of these conclusions, the plaintiffs are entitled to judgment, which is hereby directed to be entered in their favor in the sum of $5,525 with costs, and the counterclaim of the defendants is denied.

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## WERCKMEISTER v. AMERICAN TOBACCO CO.

(Circuit Court, S. D. New York. March 23, 1905.)

COPYRIGHT—ACTION TO RECOVER PENALTY FOR INFRINGEMENT—EVIDENCE.

In a suit under Rev. St. § 4965 [U. S. Comp. St. 1901, p. 3414], to recover the penalty of $10 for each infringing copy of a copyrighted painting in defendant's possession, the judgment in a prior action in replevin brought under the same section, in which plaintiff recovered the infringing sheets, is not evidence that they were found in defendant's possession, although it recites that such was the fact, since that question was not an issue, nor a finding upon it essential to a forfeiture of the sheets.

At Law. On motion for new trial.

Antonio Knauth, for plaintiff.
William A. Jenner, for defendant.

WHEELER, District Judge. Section 4965, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3414], provides that, if any person shall infringe a copyright in any of the ways specified—

"He shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further

forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; one-half thereof to the proprietor and the other half to the use of the United States."

The plaintiff, as proprietor of a copyrighted picture called "The Chorus," brought replevin to recover 1,196 sheets of the same, as forfeited to him by the defendant, in which the marshal returned that he found the same in the possession of the defendant, and in which it was "adjudged that the plaintiff have and retain and is entitled to the possession of 1,196 sheets, each containing a copy of the plaintiff's copyrighted picture 'Chorus,' found in the possession of the defendant, and replevied by the United States marshal as alleged in plaintiff's complaint." This suit is brought to recover $10, as forfeited for each of these copies, as found in possession of the defendant. Upon the trial the plaintiff offered no evidence of the finding of any copies of the picture in the possession of the defendant but the record in the former case, whereupon a verdict for the defendant was directed, and this motion was made.

The plaintiff relies upon the recital in the former judgment as a conclusive adjudication that the sheets were found in the possession of the defendant. As to this it is to be noticed that there are, or may be thought to be, two distinct forfeitures imposed by this statute—one of the sheets, wherever found, to the proprietor; and the other of $10 to him and the United States for each sheet found in the possession of the defendant. In the former suit the material question would be as to whether there was infringement which would work a forfeiture of the title to the sheets, and the decision upon that may be so far conclusive. The question of finding in possession of the defendant was not material, but only incidental, and a finding upon that would not seem to be conclusive. It was not within the issue joined in the case upon which the parties would be bound to bring their proofs or afterwards remain silent concerning them, but was merely descriptive of the things forfeited and independent of that issue, and the finding upon it would not be material or conclusive. If this pecuniary forfeiture is only a part of the same forfeiture as that of the sheets, there could, on familiar principles, be but one recovery upon the one forfeiture; and, there having been one recovery of the sheets, the right of recovery would be satisfied, and there could not be another of the money. The decided cases do not seem to be in harmony about this, but, whichever are right, it seems clear that, if there is but one forfeiture, there has been one recovery, which is all there can be, and, if there are two, there are two different issues to be tried on evidence of facts constituting each forfeiture in each action, respectively. And if there are two forfeitures, there must be two actions, for the rights are different—one belonging to the proprietor alone, and the other to him and the United States. A judgment for the proprietor would not conclude the United States, and consequently not the defendant, for both parties must be concluded by an estop-

pel, or neither is. This was the view taken at the trial on which a verdict was directed for the defendant, and the learned argument for the plaintiff on this motion has not changed it.

Motion denied, and judgment on verdict.

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## In re WIESEN BROS.

(District Court, E. D. Pennsylvania. May 27, 1905.)

No. 1,749.

BANKRUPTCY—ASSETS—RECOVERY BY TRUSTEE—ADVERSE CLAIMS.

Where, on petition of bankrupts' trustee to recover the balance collected on certain of the bankrupts' assigned accounts after payment of the debt for which they were assigned, the secured creditor answered, admitting that it held a certain amount, to which it made no claim, but alleged that it had been served with notice of a further assignment thereof by the bankrupts to B., who, though notified of the bankruptcy proceedings, took no steps to claim title to the fund before the referee, the creditor was properly ordered to pay such amount to the trustee without prejudice to B.'s right to prove his claim to the fund in the hands of the trustee.

Certificate of Referee.

See 135 Fed. 442.

Edmund Bayly Seymour, Jr., for trustee.

J. Hector McNeal and Francis A. McCarron, for Central Trust & Savings Co.

J. B. McPHERSON, District Judge. The following report of the learned referee (Alfred Driver, Esq.) contains a full statement of the facts that give rise to the question now before the court:

"On October 5th, 1903, the above-named debtors admitted in writing their inability to pay their debts, and on October 6, 1903, a petition in bankruptcy was filed against them, and on October 9th a receiver was appointed. On October 26, 1903, the adjudication was entered.

"The trustee had filed his petition alleging that said bankrupts in October, 1903, transferred to the Central Trust & Savings Company book accounts to the value of $4,683, and that said trust company collected of said accounts about the sum of $4,400, and now holds the sum of $694.95 over and above the amount it paid for said accounts, which sum is held by it as transferee or assignee of said bankrupts, and to which it makes no adverse claim; and the trustee prays for an order on said trust company to show cause why it should not pay over said sum of $695.95 to the trustee.

"Answering said petition, the Central Trust Company alleged that, from time to time, said Wiesen Bros. transferred to it book accounts of the face value of $4,678.50, but denies that it paid $3,511.44 for the same, and, on the contrary, alleges that it loaned said Wiesen Bros. $3,511.44 upon said book accounts, and that certain allowances were made by said Wiesen Bros. to the debtors upon said accounts, amounting to $154.37, and that after deducting certain allowances, interest, charge for services in collection, etc., there remains in the hands of the trust company the sum of $695.95, which the said company is not 'permitted to pay over to the trustee by reason of the fact that on or about the 3rd day of October, 1903, one Belber filed with said Central Trust & Savings Co. a copy of an assignment of any interest which said Wiesen Brothers might have had in said book accounts after said Central Trust Co. had been reimbursed for its advances, charges, etc.,' and

the trust company prayed that the petition of the trustee might be dismissed, or that the referee refrain from making any order thereon until it had been determined by a court of competent jurisdiction in whom the title to the said $695.95 is vested.

"Afterwards the trust company filed a supplemental answer, stating as new matter that on or about the 2d day of February, 1904, one Henry S. Belber began suit against it, in the court of common pleas of Philadelphia county, to recover the said sum of money alleged to be assigned to him by said Wiesen Bros., and that said suit is still undetermined, and prayed that the rule to pay be discharged, or that the referee refuse to make an order thereon until said suit is determined and the ownership of said fund decided.

"Attached to the answer are the following writings, which are copies, the originals not being produced:

"Philadelphia, Oct. 3, 1903.

"Central Trust & Savings Company, Philadelphia, Pa.

"Gentlemen: Please take notice that we have sold to Henry S. Belber all our interest in and to the accounts against the following debtors (Here follows a list of names of the debtors but without a list of the amount due by each debtor or of the total amount due.).

"You will please pay to them any and all moneys to which we may be entitled.

"Yours truly, Wiesen Brothers."

"Philadelphia, Oct. 3, 1903.

"Central Trust Company, 4th & Market Sts., City.

"Gentlemen: Please take notice that I claim all moneys which you may receive upon the following accounts assigned to you by Wiesen Bros. (here follows a list of names of the debtors but without a list of the amount due by each debtor or of the total amount due or claimed.).

"If these accounts are not promptly paid, please advise me so that I may take such steps as are necessary for the protection of my interests.

"Yours truly, Henry S. Belber,
"2529 N. 33rd St., City."

"No evidence has been taken, or offered to be taken, upon the petition and answer by either party. Said Belber has not appeared, or intervened in any way in this proceeding. Belber has been restrained by order of this court from prosecuting his said suit in the court of common pleas.

"It appears by the pleadings, upon which this matter comes for decision, that the trust company does not assert title to said sum of $695.95; on the contrary, it is shown that it has no interest or ownership whatever in it.

"Although the alleged assignment of the money in question and the claim for it made by Belber were made October 3, 1903, two days before the admission of the bankrupts of their inability to pay their debts, and three days before the petition in bankruptcy was filed, Belber did not sue for the same until February 23, 1904, nearly four months after the adjudication had been entered.

"It is not shown by the answer when the money was collected by the trust company, or when the accounts were transferred to it; the allegation is that 'from time to time' the accounts were transferred to it.

"The trust company does not assert that it has the right to possession of this money by reason of its claim adverse to the bankrupt, and has not attempted to prove that such a claim existed at the time the petition in bankruptcy was filed.

"In Mueller v. Nugent, 184 U. S. 1, it is decided that a bankruptcy court has power by summary proceedings to compel the surrender to the trustee in bankruptcy of property of the bankrupt which has come into the hands of a third party before the filing of the petition in bankruptcy, to which he asserts no adverse claim.

"In the matter before us, there is no adverse claim made by the trust company, and no intention, expressed or apparent, to defend any such claim. The defense set up appears to be that the referee is without summary jurisdiction to require the payment to be made to the trustee, for the reason that the fund is claimed by another person, under a notice of claim dated Octo-

ber 3, 1903, which was on Saturday, and the admission of insolvency was made on October 5, 1903, which was on Monday.

"The alleged claimant is not called, nor is any of the bankrupts called by the respondent to show the bona fides of the transaction. There is nothing in the record to show that the claim made by Belber is asserted in good faith, or whether his claim is colorable or actual.

"In this case the trust company received certain accounts of the bankrupts, and made advances thereon to the bankrupts, and, after realizing upon the accounts and paying itself in full, admits a balance in its hands to which it has no ownership, and to which it makes no adverse claim. It is not sufficient to prevent the trustee from obtaining possession of this fund to allege that it is claimed by another person. There is no proof of the title in Belber.

"Upon the case as presented, there is nothing to prevent the determination of the matter by summary proceedings before the referee, and, the trust company not being an adverse claimant, the trustee is entitled to the possession of the fund."

In this ruling I think the referee was right. The trust company asserts no adverse claim on its own behalf, and there is not a scintilla of competent evidence to support the claim of Belber. It is not distinctly averred by the answer that Belber has even a formal title, for the trust company merely sets up as hearsay evidence that the bankrupts and Belber have so declared by certain letters, and of these the originals were neither offered nor proved. Belber's claim may be well founded, but at present there is nothing whatever to support it, or to indicate that it is made in good faith. He knew of the proceedings in bankruptcy at least as early as April 13, 1904, when the restraining order was made against him, but he took no steps to assert his title before the referee, and he did not appear to oppose the order now under consideration, although he knew that an application therefor was being made by the trustee.

It is therefore ordered that the trust company pay over to Charles J. McNulty, the bankrupts' trustee, the sum of $695.95, now in its hands, which appears to be the property of the bankrupts; but this order is without prejudice to whatever right Henry S. Belber may have to present and prove his claim upon the money in the hands of the trustee. And it is further ordered that the said Belber be enjoined and restrained until the further order of the court from prosecuting his suit in the court of common pleas of Philadelphia county against the Central Trust & Savings Company, in which suit he is seeking to recover the same sum of money from the trust company.

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## UNITED STATES v. 59,650 CIGARS et al.

(District Court, S. D. New York. May 6, 1905.)

PRACTICE—COURT RULE—NOTICE TO SURETY ON BOND—SERVICE ON ATTORNEY OF OBLIGOR.

A bond had been given to abide by the judgment to be entered in in rem proceedings for the forfeiture of merchandise seized for violation of internal revenue laws. On a judgment of forfeiture being rendered, an order was entered for the stipulators to the bond to show cause why judgment should not be entered against them; this order being served on the attorney for the obligor on the bond, but in no way upon one of

the sureties. Such service was *held* sufficient notice to the surety, the case being analogous to the rule of the court, under the head of "Admiralty," that, in case of admiralty stipulations, service upon the proctor of the party binds the surety; this rule becoming applicable by virtue of the further rule that "arrangement of rules under distinct heads is not to prevent their covering every mode of procedure in the court to which they may be applicable."

Marx & Miller, for the motion.

Henry L. Burnett, U. S. Atty., and Henry A. Wise, Asst. U. S. Atty.

ADAMS, District Judge. This is a motion for an order vacating and setting aside a judgment docketed against Betty Glück on the 29th day of March, 1905, for the sum of $1217.45.

It appears that certain cigars and tobacco were seized by the Collector of Internal Revenue on the 25th day of September, 1903, for a violation of the United States Revenue Laws, under section 3453 of the Revised Statutes [U. S. Comp. St. 1901, p. 2278]. Thereafter the Collector turned the property over to the Marshal for this district, under authority of section 3458 [U. S. Comp. St. 1901, p. 2281]. Thereafter Rosa Simon, claiming to be the owner of said property, caused the same to be appraised and subsequently it was delivered to her upon giving the following stipulation:

"Know all men by these presents, that we Rosa Simon, Max Schoenberger & Betty Glück are held and firmly bound unto the United States of America in the full and just sum of Thirteen hundred dollars, money of the United States; for which payment, well and truly to be made, we bind ourselves, jointly and severally, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 28th day of September, in the year one thousand nine hundred and three.

The condition of the foregoing obligation is such that whereas Ferdinand Eidman, Collector of the Third District of New York, has seized, by virtue of the 3453rd section of the Revised Statutes of the United States, as enacted June 22, 1874, the following named and inventoried goods and chattels, wares, and merchandise, as forfeited to the United States, and the same on application made by Rosa Simon to Ferdinand Eidman, collector of the said district, to examine the said property, on the ground that it cannot be kept without great expense, has been found by the said collector necessary to be sold to prevent such expense; and whereas he, the said collector, has appraised the said property, as hereinafter set forth; in accompanying inventory; and whereas the said Rosa Simon alleges herself to be the owner of said property so seized and inventoried as aforesaid, and the same, at the ensealing and delivery hereof, is returned to Rosa Simon, as the owner thereof:

Now, therefore, if the said Rosa Simon shall well and truly abide the final order, decree, or judgment of the court having or taking cognizance of the claims of the United States upon the said goods, chattels, wares, and merchandise seized as forfeited as aforesaid, and pay the amount of said appraised value of said property, as he or they may be ordered and directed by said court, then the above obligation shall be void and of no effect, otherwise to be and remain in full force and virtue."

Thereafter the cause was called for trial and a verdict directed for the Government. A judgment was subsequently entered on the verdict and an order granted for the stipulators to show cause why judgment should not be had against them. This was served upon the attorneys for the claimant of the property but not in any way

upon Betty Glück, who has apparently had a judgment entered against her without any actual notice.

The question is whether the absence of such notice affects the validity of the judgment.

The obligation which Betty Glück entered into was to abide the final order, decree or judgment of the court. This is analogous to proceedings in admiralty, where, in in rem proceedings, the parties to a bond are supposed to be represented by the proctor for the claimant.

Admiralty Rule 57 of this court provides:

"Where proceedings on a decree shall not be stayed by an appeal, and the decree shall not be fulfilled or satisfied in ten days after notice to the proctor, if there be any, of the party against whom it shall be rendered, it shall be of course to enter an order that the sureties of such party cause the engagement of their stipulation to be performed, or show cause in four days, or on the first day of jurisdiction afterwards, why execution should not issue against them, their lands, goods and chattels, according to their stipulation; and, if no cause be then shown, due service having been made on the proctor of the party, if there be any, a summary decree shall be rendered against them on their stipulations, and execution issue; but the same may be discharged upon the performance of the decree and payment of all costs and clerk's charges. This rule does not apply to sureties on bonds given under section 941 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 692]."

The practice hereunder, however, is not confined strictly to admiralty matters. It is provided in Miscellaneous Rule 98:

"The above arrangement of rules under distinct heads is not to prevent their governing every mode of procedure in Court to which they may be applicable; but conflicting provisions under different heads are to be restricted each to the head of practice under which it is placed."

There is nothing conflicting in the provisions of the rule which would prevent its application to a case of this kind. It will be observed that Rule No. 57 explicitly provides that if no cause be shown, i. e., why a judgment should not be entered against the sureties, due service having been made on the proctor of the party, a summary judgment will be entered on the stipulation, as was done here. When the parties executed this stipulation, presumably they did it with knowledge of the rules and practice of the court, which rendered the attorney of the claimant here the proper person upon whom to serve the order to show cause and no cause having been shown, the judgment was properly entered. No cause is shown now why the stipulator should be relieved from the obligation of her bond.

The motion is without merit and should be denied.

AXLINE v. TOLEDO, W. V. & O. R. CO. et al.

(Circuit Court, S. D. Ohio, E. D. December 17, 1903.)

No. 1,135.

1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—DEFENDANT IMPROPERLY JOINED.

On the question of diversity of citizenship of the parties, within the statutes as to removal of causes, one improperly joined as a defendant is to be disregarded.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 79–81.

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

2. RAILROAD COMPANIES—LEASE OF ROAD—LIABILITY OF LESSOR FOR LESSEE'S NEGLIGENCE.

Rev. St. Ohio 1892, § 3305, providing that, notwithstanding an Ohio corporation leases its railroad, it shall remain liable, as if it operated the road, and both lessor and lessee shall be jointly liable on all rights of action accruing to any one for any negligence or default growing out of the operation or maintenance of the road, or in any wise connected therewith, relates only to the duties of a carrier, and does not make the lessor liable to an employé of the lessee injured through the lessee's failure to perform its duties as master.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 802–813.]

E. W. James, for plaintiff.
Pomerene & Pomerene, for defendants.

THOMPSON, District Judge. This cause is submitted upon a motion to remand the same to the court of common pleas for the county of Coshocton, in the state of Ohio (the court in which it originated), upon the ground that diverse citizenship, within the meaning of the removal acts, is not shown. Under these acts it is necessary that all the parties on one side of the controversy shall be citizens of a different state or states from all the parties on the other side, and in this case the record shows that the plaintiff and the defendant the Toledo, Walhonding Valley & Ohio Railroad Company are citizens of the same state, to wit, Ohio; but it further appears that the Toledo, Walhonding Valley & Ohio Railroad Company is improperly joined as a defendant, and its citizenship therefore should be disregarded. The tort set up in the original petition was not the joint tort of the defendants, nor was the Toledo, Walhonding Valley & Ohio Railroad Company a party thereto in any respect. The plaintiff was a servant of the Pennsylvania Company, employed in the operation of a railroad, and was injured while in that service, as is alleged, by reason of the negligence of that company. The Toledo, Walhonding Valley & Ohio Railroad Company was the owner of the railroad, and the Pennsylvania Company was its lessee: and it is claimed that the Toledo, Walhonding Valley & Ohio Railroad Company is liable to the plaintiff

for the injury he sustained, under section 3305 of the Revised Statutes of Ohio of 1892, which provides:

"* * * And notwithstanding such lease the corporation of this state, lessor therein, shall remain liable as if it operated the road itself, and both the lessor and lessee shall be jointly liable upon all rights of action accruing to any person for any negligence or default growing out of the operation and maintenance of such railroad, or in any wise connected therewith."

This law has relation to the duties of the railroad company as a common carrier, and in that respect is declaratory of the common law, and is not applicable to the plaintiff's case, which is founded upon the contract of service between the plaintiff and the Pennsylvania Company, and not upon any duty which the Pennsylvania Company, as a common carrier, owed to the plaintiff. If the Pennsylvania Company had undertaken to carry the plaintiff as a passenger, as in the case of Central Ohio Company et al. v. Mahoney, 114 Fed. 732, 52 C. C. A. 364, and while being so carried the plaintiff had been injured by reason of the negligence of that company, both companies would have been jointly liable, under the provisions of the Ohio statute referred to, because the injury would have been caused by the failure of the Pennsylvania Company to perform the duty imposed upon it by law as a common carrier; but the plaintiff was not being carried as a passenger over the railroad, but was a servant in the employ of the Pennsylvania Company, and the duty which that company owed him arose out of the contract between them, and was not imposed by law upon grounds of public policy. Rev. St. Ohio 1892, § 3305; Quested v. Newburyport & Amesbury Horse R. Co., 127 Mass. 204; Hukill v. Maysville & B. S. R. Co. (C. C.) 72 Fed. 745, 752–753.

The motion to remand will be overruled.

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## THE BULLEY.

(District Court, S. D. New York. May 9, 1905.)

SHIPPING—LIABILITY OF VESSEL—TORTS OF MASTER AND CREW.

A vessel is liable for a tortious act of her master or a member of her crew on board in her service by which another vessel is injured, although committed without the authority or knowledge of the owners.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 346.]

In Admiralty.

De Lagnel Berier, for libellant.

Carpenter, Park & Symmers, for claimant.

ADAMS, District Judge. This action was brought by Daniel McCarron, the owner of the steamtug William C. Nicoll, to recover for damages sustained by that tug by reason of a tortious act of the steamtug Bulley.

The cause of action is stated in the libel as follows:

"Second: That on the 16th day of January, 1905, between 5 and 6 o'clock in the forenoon the said tug 'William C. Nicoll' was lying tied up to the bulk-

head in a slip at the foot of Morris Street, Jersey City. That said tug was without steam at the time and that only one member of her crew was on board and in charge of said tug. That at the time aforesaid, the steam tug Bulley came into the said slip under her own steam and her master or some person in charge of her requested the man in charge of your libellant's steam tug to move the 'William C. Nicoll' and give way to the steam tug 'Bulley.' That the man in charge of the Nicoll declined to do so: first, because it was a public dock where the Nicoll was lying and where she had a right to be, and second: because the Nicoll was without steam or motive power of her own and was unable to move. That the 'Bulley' was equipped with a low pressure boiler and that it is customary when such boilers are to be cleaned to put into them a large quantity of soda and then to blow off the water and steam from the boiler. Upon information and belief your libellant alleges that the 'Bulley' had, prior to coming in the slip as aforesaid, deposited a quantity of soda in her boiler for the purpose of cleaning the same as aforesaid; and that when your libellant's steam tug refused to move as requested by the master of the 'Bulley,' the latter ranged alongside about six feet distant from the port side of the 'Nicoll' and proceeded to blow off her boiler toward the 'Nicoll,' thereby deluging her with hot water and steam from the former's boiler and destroyed all the paint on the port side of the hull and house of the 'Nicoll.'"

The claimant in answering alleged:

"VI. That if the libellant was damaged as stated in the libel, any action of the tug 'Bulley,' contributing to such damage was the wilful act of some person or persons on the said tug and not within the scope of their employment by the claimants."

The libellant excepted to this allegation on the ground of its being insufficient and irrelevant and it was agreed between the parties that the question of the liability of the Bulley, should be determined thereupon.

The libellant urges that the fact that the injury complained of was a maritime tort is sufficient of itself to render the Bulley responsible therefor.

The claimant urges that no liability attaches to the Bulley from an injury to another vessel inflicted maliciously by one of her employees.

While under the law of master and servant there might be much to sustain the claimant's position, as it is admitted that the act was a wilful one of some person on the tug, not within the scope of his employment, yet under the maritime law, it seems to be well settled that a vessel committing a tort is liable therefor, notwithstanding an unauthorized act on the part of some person on board.

A few citations from leading authorities will suffice to sustain this position.

In The United States v. The Brig Malek Adhel, 2 How. 210, 11 L. Ed. 239, a case was presented for forfeiture of the vessel by reason of an act of piracy. It was admitted that her owners never contemplated or authorized the aggressive acts of the vessel, which were committed under false pretenses and wantonly and wilfully without provocation or justification. In delivering the opinion of the court, Mr. Justice Story said (pages 232–234 of 2 How., pages 248, 249 of 11 L. Ed.):

"The next question is, whether the innocence of the owners can withdraw the ship from penalty of confiscation under the act of Congress. Here, again,

it may be remarked that the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. The vessel or boat (says the act of Congress) from which such piratical aggression, &c., shall have been first attempted or made shall be condemned. Nor is there anything new in a provision of this sort. It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever, to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct under our revenue laws; and has been applied to other kindred cases, such as cases arising on embargo and non-intercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs. In the case of The United States v. The Schooner Little Charles, 1 Brock. 347, 354 [Fed. Cas. No. 15,612], a case arising under the embargo laws, the same argument which has been addressed to us, was upon that occasion addressed to Mr. Chief Justice Marshall. The learned judge, in reply, said: 'This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel; which is not the less an offence, and does not the less subject her to forfeiture because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offence. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore not unreasonable that the vessel should be affected by this report.' The same doctrine was held by the court in the case of The Palmyra, 12 Wheat. 1, 14 [6 L. Ed. 531], where referring to seizures in revenue cases, it was said: 'The thing is here primarily considered as the offender, or rather the offence is primarily attached to the thing; and this whether the offence be malum prohibitum or malum in se. The same thing applies to proceedings in rem or seizures in the Admiralty.' The same doctrine has been fully recognized in the High Court of Admiralty in England, as is sufficiently apparent from the Vrow Judith, 1 Rob. Adm. 150; The Adonis, 5 Id. 256; The Mars, 6 Id. 87, and indeed in many other cases, where the owner of the ship has been held bound by the acts of the master, whether he was ignorant thereof or not.

The ship is also by the general maritime law held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

The China, 7 Wall. 53, 19 L. Ed. 67, is a leading case upon the subject. There a question arose as to the exemption of a vessel for collision liability by reason of being in charge of a compulsory pilot. In holding the vessel liable, Mr. Justice Swayne said (page 68 of 7 Wall., page 73 of 19 L. Ed.):

"The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss

of the vessel or by abandoning it to the creditors. But while the law limited the creditor to his part of the owner's property, it gave him a lien or privilege against it in preference to other creditors.

The maxim of the civil law—sic utere tuo non lædas alienum—may, however, be fitly applied in such cases as the one before us. The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He would often be unable to respond by payment—especially if the amount recovered were large. Thus, where the injury was the greatest, there would be the greatest danger of a failure of justice. According to the admiralty law, the collision impresses upon the wrong doing vessel a maritime lien."

In The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969, in discussing the question of a lien, Mr. Justice Gray said (page 120 of 170 U. S., page 547 of 18 Sup. Ct. [42 L. Ed. 969]):

"The foundation of the rule that collision gives to the party injured a jus in re in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrong doer, liable for the tort, and subject to a maritime lien for the damages."

It follows that the exception should be sustained and a decree entered for the libellant, with an order of reference.

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## DOWNEY v. LOZIER MOTOR CO.

(District Court, S. D. New York. May 5, 1905.)

1. SHIPPING—RIGHT TO POSSESSION OF ENGINE—FAILURE OF VESSEL OWNER TO PAY PURCHASE PRICE.
   The owner of a yacht who had a gas engine installed therein to be tried for 30 days, and then either accepted and paid for or returned, and who, although not accepting the engine or paying anything for it, retained and used it for a year, is not entitled to recover possession of it from the builder, to whom it was returned for repairs, without paying the purchase price.

2. SAME—LIEN FOR EQUIPMENT—SURRENDER OF POSSESSION TO OWNER.
   Respondents, who equipped libelant's yacht with an engine, lost the right to a common-law lien on the vessel for the price by surrendering possession to libelant without payment; and such right was not revived by a subsequent delivery of the vessel to respondents for repairs, although they were entitled to such lien for the value of the repairs then made.

In Admiralty. Suit for possession of vessel.

Albert A. Wray, for libellant.

Hatch, Keener & Clute and A. Delos Kneeland, for respondent.

ADAMS, District Judge. This action was brought by Wallace Downey against the Lozier Motor Company to recover possession of the yacht Marguerite.

The libellant alleges that the yacht was delivered to the respondent to make necessary repairs upon and alterations to her engine and the respondent has refused to re-deliver the yacht to him, notwithstanding due demand has been made therefor, and has wrongfully taken out part of the engine and retained the same.

The respondent alleges, in substance, that the libellant is not the

owner of the engine of the yacht or entitled to the possession thereof but that the respondent is entitled to possession by reason of certain work done on her at the instance of the libellant in installing a motor and 20 horse power Lozier engine about the 30th of May, 1903, for the sum of $1,000, which the libellant was to try for a period of 30 days and then pay $500 of the purchase price and the balance of $500 within 60 days thereafter, if the certain trips which were to be made, proved satisfactory, otherwise to return the motor and engine to the respondent; that thereafter the libellant had and used the said yacht with the motor and engine and by his acts and conduct in reference thereto he fully received, accepted and expressed his satisfaction therewith but has never paid a dollar therefor; that the libellant after he received the yacht placed an inexperienced and incompetent person in charge thereof as engineer, who negligently operated the engine and the boat so that she took in sand and crippled and injured the pump; that the libellant ran said engine and motor without the pump and used it without water circulating through the same as required in the operation thereof, on account of which the engine became broken and impaired, the pumps crippled, the nipples of the exhaust pipe melted and the engine discolored, hot and burnt and the clutch of the engine spoiled. It is further alleged that the libellant returned the yacht to the respondent on various occasions between the 30th of May, 1903, and June 11, 1904, the date of the filing of the libel herein, and during those times the respondent performed labor and services upon the yacht at the instance and request of the libellant, and furnished repairs thereto and thereupon, set forth in detail in an exhibit annexed to the answer herein; that the respondent furnished two or three new foundation beds for the engine and a new reversing clutch to take the place of one which had been injured by the said engineer of libellant, who operated the same when improperly driving the engine at full speed. It is further alleged that the reasonable value of the repairs referred to in said exhibit was $866.68 which with $1,000, the price of the engine, makes the sum of $1,866.68, which is due and owing from the libellant to the respondent and wholly unpaid. It is further alleged that the yacht was brought back to its yards at the request of the libellant prior to June 11, 1904, and left for further repairs and alterations which were made, and was so in their possession at the time of filing the libel and in consequence thereof the respondent claims a common law lien for the amount of the repairs and materials furnished. It is further alleged that when a demand was made by the libellant for the delivery of the yacht, a bill was presented for the repairs and for the engine and motor, and payment demanded but the same was refused and no part has ever been made. It is further alleged that on or about May 26, 1904, the libellant agreed for a valuable consideration that he would relinquish all claims that the engine was imperfect or out of order for any other cause than that of the neglect and abuse of his own engineer and agreed to pay for said repairs and on the following day thereafter refused to carry out the said agreement.

The testimony shows that such an agreement was originally made

as contended for by the respondent. It, however, desired to please the libellant, for advertising purposes, and did not insist upon a strict performance of the contract.

The beginning of the trouble between the parties arose out of a misunderstanding about the reversing clutch. The libellant expected one that would reverse full speed instantly as in steam engines but the respondent said its clutch would not stand such treatment nor would any one used with gas engines owing to the great number of revolutions made by them. A steam engine can be reversed instantly, owing to the moderate number of revolutions made by it, but the gas engine, making some 400 revolutions a minute, has ordinarily to be slowed down somewhat before it is reversed, so that the clutch will not be called upon to withstand an instant application of such a great strain as is incident to that number of revolutions. The libellant, however, insisted upon putting the engine constantly to such a test, with the result that the clutch almost invariably gave out and then the libellant condemned the engine. This seems to have been unreasonable. The propeller of the gas engine turns with such rapidity that an immediate reversal is actually impossible in practice without injury to the gear. The time that is required to reverse is practically not much greater than with steam engines, even when allowance is made for slowing the engine before the reversing takes place. In steam engines, a reversal is a much more complicated matter, requiring a little time to change the machinery from going in one direction to the opposite. In gas engines the machinery always goes the same way, but the clutch operates to turn the propeller in an opposite direction to that which the engine is going. This naturally requires a little time but that is not of importance as about 15 seconds suffices, and is probably not more than a vessel propelled by steam would take in the operation. The testimony indicates that this engine, operated in the method to preserve its integrity, would bring the vessel from full speed ahead to a stand still in the water in about two lengths, which is apparently not excessive.

It appears that the libellant was too exacting about the engine in all respects. The contract provided that he should furnish a bed for the engine and he first used one which had been provided for the small steam engine which he found insufficient to propel the boat as he wished, hence the desire to change, but when arrangements for the new engine were made, the old foundation was suffered to remain. It was, however, quickly found to be unsatisfactory on account of the excessive vibrations the rapid revolutions of the engine caused in the boat. Then the libellant had a new foundation put in and the engine was installed upon it, but the vibrations remained. The boat was then sent to the respondent's establishment at Plattsburgh, and the experts there condemned the foundation because, though substantial enough, it was not properly fastened to the frames of the boat. A new foundation was put in at Plattsburgh and when fastened to it, the engine did not cause any more vibration than necessarily attends a gas engine and the libellant in this respect ceased to find fault.

Another complaint of the libellant was that the pipe which was used to take in the water required by the engine was placed too much under the bottom of the boat and hence drew in sand which got into the machinery and caused trouble. It appears that it was placed near the keel in the usual place, as the credible testimony of the respondent shows, and such sand as found entrance was the result of the libellant's running the boat on sand bars, where it was not designed to navigate. It does not appear that there was any just cause of criticism in this respect.

Another complaint of the libellant was that sufficient speed was not attained by the engine but it appears that the revolutions which were mentioned to him were substantially furnished and in several instances, in writing, he expressed his satisfaction in such respect.

After going over the case very thoroughly, I find no merit in the libellant's contentions. I have no doubt that the principal trouble arose out of his repeated attempts to use the engine as he would a steam engine and his dissatisfaction because he could not obtain the same results. If he had used this engine properly, it would, in all probability, have yielded such satisfaction as he was entitled to. He had no right to demand that his requirements should in unreasonable respects be yielded to. He occupies a very inconsistent attitude in expecting possession of the engine while he contends that it continues to be unsatisfactory. He has not paid for it and apparently does not wish to, yet he contends that he should have it given to him as if he were the owner, when in fact he has no title.

The respondent on the other hand has gone great lengths in endeavoring to satisfy the libellant but without success.

The question remains, and it has not been discussed before me or in the briefs submitted, whether the respondent is entitled to hold the boat against the libellant under the common law possessory lien it claims. It is well settled that such lien is lost by a voluntary surrender of the possession. The General Smith, 4 Wheat. 438, 4 L. Ed. 609; 19 Eng. & Amer. Enc. of Law 28. There are no circumstances here from which a revival of the lien might be inferred. It seems that no idea of a lien existed until after the respondent last obtained possession, and the boat had been many times in the possession of the libellant since the installation of the engine, so that it can scarcely be held that the lien, which may have existed in the beginning, remained throughout the time the parties were disagreeing about the work.

It appears, however, that since the boat last went into the possession of the respondent, work has been done on her to the extent of $222.98, for which it is apparently entitled to a lien. To that extent the respondent is justified in retaining possession. If the libellant wishes to contest the correctness of this amount which is taken from the bill annexed to the answer and is supported by the respondent's testimony in a general way, he may move for a reference for such purpose.

Libel dismissed. Decree to be settled upon 5 days' notice

BAILLIE et al. v. LARSON et al.

(Circuit Court, D. Idaho, N. D. June 6, 1905.)

1. MINES—PUBLIC LANDS—STATE LAWS.
Under Rev. St. U. S. § 2338 [U. S. Comp. St. 1901, p. 1436], providing that, as a condition of sale of mineral lands, the local Legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development, the state of Idaho was authorized to pass Act March 15, 1899 (5 Sess. Laws, p. 442), granting to an owner of ground, with a mining tunnel located thereon, the right to run the same through the claims of other parties, and providing for the payment of all "actual damages or injury done to the owner of the claims crossed" by such tunnel.

2. SAME—EMINENT DOMAIN—MINING CLAIMS—TUNNEL RIGHTS—PUBLIC USE.
Rev. St. Idaho 1887, § 5210, as amended by Act March 3, 1903 (7 Sess. Laws, p. 203), declaring that tunnels and other means of working mines are declared to be public uses, within the statutes relating to eminent domain, and Act March 15, 1899 (5 Sess. Laws, p. 442), granting to any owner of ground with a tunnel located thereon the right to run the same through the claims of others on payment of all actual damages or injury done to the owner of the claims crossed by the tunnel, are not unconstitutional, as a deprivation of property without due process of law, in violation of the fourteenth amendment of the federal Constitution, in that the construction of a mining tunnel is in fact a private, and not a public, use.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 886; vol. 18, Cent. Dig. Eminent Domain, § 79.]

Heyburn & Batting and E. J. Hunter, for complainants.
Walter A. Jones, for defendants.

BEATTY, District Judge. The very important question involved is the right of a party to run a mining tunnel through the mining premises of another party.

On May 11, 1905, the defendants in this action commenced proceedings in the state court against the complainants for the condemnation of a tunnel right through the latter's mining claims. On May 16th these complainants demurred, and also caused the case to be removed to this court. On May 13th complainants commenced this action, asking an order to restrain defendants from running their tunnel, already commenced, through complainants' ground. They allege that defendants are mining and carrying away "rock, ores, and other things of value" from their premises, but I am convinced that no ore or thing of value is being taken. If this were so, it would be easy to protect complainants against loss, but they have expressly declined all protection except by injunction. Also I am convinced that this tunnel cannot damage complainants, but, rather, might prove a benefit, by the development of their ground. The only ground upon which a restraining order can be justified is the naked legal right of complainants to entirely exclude defendants from their premises. It is most earnestly urged that this right is so absolute that it is substantially beyond the discretion of the court to refuse it. It is also said that if this relief is not speedily granted the defendants may extend their tunnel through the premises, and be beyond the court's jurisdiction. The question

involved is too important and far too intricate for inconsiderate determination, but it is not admitted that the result suggested must follow. If complainants are now entitled to a restraining order, they would be entitled to an order restraining defendants from using the tunnel even after its completion, especially as they have commenced these proceedings. Their rights must be measured by their action, and cannot be controlled by the court's delay. Neither can heed be given to the suggestion that this is a struggle between the weak and the strong. While the court is never without sympathy for the deserving weak, the law must run its course.

It appears that defendants base their right to run this tunnel upon section 2323, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1426], granting tunnel rights, and upon the Constitution and laws of this state providing for easements to mining properties.

In Calhoun G. M. Co. v. Ajax G. M. Co., 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200, the claim of the locator of a tunnel site under said action to run his tunnel through a prior mining location was directly involved, and was determined adversely to the claim. While section 2322 [U. S. Comp. St. 1901, p. 1425], in express terms, grants to the "locator of all mining locations" only "the exclusive right of possession and enjoyment of all 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," the courts have reached the conclusion that such locators own everything lying perpendicularly under such surface, excepting veins apexing without the same. In accordance with this doctrine the court on page 509 of 182 U. S., page 890 of 21 Sup. Ct., 45 L. Ed. 1200, says:

"The same reasoning disposes of the claim of plaintiff in error to the right of way for its tunnel through the ground of defendant in error, so far as the right is based on the statutes of the United States. So far as it is based on the statutes of Colorado, it is disposed of by their interpretation by the Supreme Court of Colorado."

The effect of this ruling seems to be that in pursuance of section 2338, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1436], a state may enact such laws for mining easements, which, under the construction of state courts, might grant the tunnel rights claimed by these defendants.

The state enactments on this subject which appear to be in force, are: (1) Act of January 12, 1877 (Rev. St. 1887, §§ 3130–3142), of which sections 3132–3134 and 3140, 3141 are amended by act of March 9, 1899 (5 Sess. Laws, p. 350). By said sections 3130, 3131, the owner of a mining claim is granted certain easements, including tunnel rights through other mining claims, "upon compliance with the provision of this chapter" for condemnation of such easements. (2) An act "concerning mining tunnels," of March 15, 1899 (5 Sess. Laws, p. 442), grants to any owner of ground with a tunnel located thereon the right to run the same through the claims of other parties, and provides for the payment of all "actual damages or injury done to the owner of the claims crossed" by the tunnel. (3) The Constitution of the state, by section 14, art. 1, de-

clares that the necessary use of land for the drainage or working of mining tunnels and otherwise is "a public use, and subject to the regulation and control of the state." Private property may be taken for public use, but "not until a just compensation to be ascertained in a manner prescribed by law, shall be paid therefor." And (4) under the title "Eminent Domain," Rev. St. 1887, § 5210, amended by Act March 3, 1903 (7 Sess. Laws, p. 203), tunnels and other means of working mines are defined as "public uses."

It is useless to seek, through discussion, the intent of these enactments. They design to grant the owner of mining property the right to run a tunnel to it through the property of other parties, and they denominate such an easement a "public use." Have the people of Idaho the right under the delegation of power to them by said section 2338, Rev. St. U. S., or otherwise, to enact such laws? I think this question is answered in the affirmative by the Supreme Court, by its decision of May 15, 1905, in Clark v. Nash, just received in the advance sheets (25 Sup. Ct. 676, 49 L. Ed. 1085). Clark and his codefendants owned an irrigating ditch for their lands. Nash owned land beyond them, and asked to have their ditch so enlarged as to convey water through it to his land. The court says:

"The plaintiffs in error contend that the proposed use of the enlarged ditch across their land for the purpose of conveying water to the land of the defendant in error alone is not a public use, and that therefore the defendant in error has no constitutional or other right to condemn the land, or any portion of it. * * * They argue that, although the use of water in the state of Utah for the purposes of mining or irrigation or manufacturing may be a public use, where the right to use it is common to the public, yet that no individual has the right to condemn land for the purpose of conveying water in ditches across his neighbor's land for the purpose of irrigating his own land alone, even when there is, as in this case, a state statute permitting it. * * * But whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and therefore a valid enactment, may depend upon a number of considerations, relating to the situation of the state, and its possibilities for land cultivation, or the successful prosecution of its mining or other industries."

It is further said that a public, as distinguished from a private, use, may often depend upon some peculiar conditions of the soil or climate, or other peculiarity of the state, and upon many different facts surrounding the subject, and that the people of the state and its courts must be familiar with such facts and with the necessity of the situation, and that such consideration should have influence. It is concluded:

"But we do not desire to be misunderstood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land."

If the right claimed in that case can be held a public use, and the statutes upon which it is based can be sustained as constitution-

al, no good reason can be assigned why the claim involved in this case, and the Idaho laws upon which it rests, should not also be so held and sustained. True, in that case the "absolute necessity" of the easement to enable the party to "make any use whatever of his land" had its influence with the court. So the absolute necessity of this tunnel may be urged here. The defendants might, at great expense and inconvenience, go a long distance around through vacant ground, if it could be found, but the same might be said of the ditch claimant. When necessity is made a basis, the degree thereof becomes an element. What the degree must be, to justify the right, can be resolved, perhaps, only by a comparison of the necessity of one with the injury to the other party. Again, to make a public use depend upon the many interested, is neither a safe or just rule. It should rather be upon some principle. The same conditions or necessities applying to the many or to an individual should be followed by like rights to each. Such seems to be the tendency of some of the later rulings, and only on such principle can they be explained. The conclusion must be, and is, that the laws of this state grant the defendants the right they claim.

But admitting that such is the intent of the state laws, complainants claim that they are in conflict with the fourteenth United States constitutional amendment. As this proposition is as much applicable in the case of Clark v. Nash, 25 Sup. Ct. 676, 49 L. Ed. 1085, as in this, it must be inferred that the court concluded that no such conflict existed; and, as we cannot infer that the decision was one of oversight, no further discussion of this question will be indulged.

But one decision of our state Supreme Court (Latah County v. Peterson, 3 Idaho, 398, 29 Pac. 1089, 16 L. R. A. 81) bearing upon this subject has been found. It sustains, as constitutional, section 933, Rev. St. 1887, providing for private roadways, and this was in the interest of an individual.

It is the law that the owner of land entirely surrounded by that of his neighbors may force an outlet. Why may not the same law of necessity apply to mining property, when so located that easements on other properties must be permitted, or the value of the property be practically destroyed?

Other decisions bearing upon the question involved have been cited, but discussion of them is foreborne because it is thought that the case of Clark v. Nash, 25 Sup. Ct. 676, 49 L. Ed. ——, controls. Whether defendants can avail themselves of this right until after they shall have complied with the statutes for condemnation of such right is a question which occurs to me, but, as it has not been discussed, little more than suggesting it will now be done. Said section 3131, Rev. St. Idaho 1887, provides for the right "upon compliance with the provisions of this chapter," which include condemnation procedure. The section of our Constitution mentioned also provides that the right shall not accrue "until a just compensation to be ascertained in a manner prescribed by law, shall be paid therefor." The said later act of March 15, 1899, granting tunnel rights only, is silent as to how or when they must be acquired, and

provides only that the owner of the tunnel shall be liable for the actual damages or injury caused by it. Does this intend, as to tunnels, to repeal the act for condemnation proceedings? Even if it does, would it not be in conflict with the constitutional provision noted?

While inclined to think that condemnation proceedings should proceed possession, I shall for the present delay issuing a restraining order, for several reasons: (1) I am convinced that the tunnel is doing no material, if any, injury to complainants' property. (2) That defendants are amply able to respond in damages for any injury resulting. (3) There is some question whether complainants have not assented to the running of the tunnel. Defendants say they did. Complainants deny it, but it is evident they knew what was being done, and took no steps to object until after defendants commenced their condemnation proceedings; and to these they have interposed a demurrer, and thus delay. There are most important questions involved, which will not be finally settled by this court, and it will do all it can to have them settled as soon as possible by a higher court. If the defendants move with all the celerity they can to prosecute the condemnation proceedings, or if complainants interpose delay thereto, I think I should not issue a restraining order; but think I should if the complainants interpose no objections to such proceedings, and defendants do. My action may be governed by that of the parties and their good faith in the matter, and I now reserve the right to act upon my own motion if I become convinced from the conduct of the parties that I should. I suppose a restraining order would put the case in a condition to have these weighty questions speedily reviewed, which may be the shorter route to a settlement.

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## In re McLEAN-BOWMAN CO.

(District Court, M. D. Pennsylvania. June 6, 1905.)

No. 459.

BANKRUPTCY—DEBTS—CHARACTER—EVIDENCE.

A corporation, prior to bankruptcy, issued $10,000 of its stock to one of its officers, to be by him pledged for a loan. Thereafter, in order to take up such loan, an application was made to claimant for a loan of an equal amount, which he made after examining the corporation's affairs, taking a note signed by the incorporators individually; both, however, intending that the debt should be that of the corporation. Thereafter the stock was reissued to claimant without his knowledge, until after he was solicited to transfer the same by his son for the benefit of the corporation, which he did. *Held*, that the transaction amounted to a loan for the corporation's benefit, and not to a purchase of the corporation's stock.

In Bankruptcy. On certificate from referee sur exceptions to proof of debt of Peter McLean.

C. H. Bergner, for exceptions.
W. M. Hargest, for Peter McLean.

ARCHBALD, District Judge. The right of the claimant to participate as a creditor of the bankrupt in the funds of the estate depends on the question whether the $10,000 which he advanced in July, 1902, was a loan to the company, as he alleges, or to the individual members of it whose note he took, or was a purchase of that much of its common stock, as is contended by the exceptants. This is not to be determined by the particular form in which the transaction was cast, although that is not to be entirely disregarded, but rather by the essential character of it, which, so far as the note which was taken at the time was concerned, may undoubtedly be shown without impinging upon the rule which prohibits the variation of a writing by parol except in the case of fraud, accident, or mistake; the claim not being on the note, as it is to be observed, but outside of it; the note being merely referred to by the claimant as a security which he held.

The immediate facts do not seem to be in any serious controversy, however much it may be otherwise as to the inferences to be drawn from them. The bankrupt corporation was organized in August, 1901, and conducted a large department store in the city of Harrisburg, Pa. Its authorized capital was $30,000, of which $20,000 was subscribed and paid in at the outstart; leaving 100 shares, or $10,000, which remained undisposed of until some time in November or December, 1901, when a certificate for it was issued to John A. Borland, one of the original incorporators. This $10,000 of stock, however, did not belong to Borland, but stood for a loan of that amount which was obtained on the strength of it by the McLean-Bowman Company from the Harrisburg Trust Company; the certificate being issued to Borland at the request of the trust company, so that its name might not appear in the transaction. After this loan had been carried for about a year, on July 22, 1902, the trust company pressed for payment, and, the Bowman-McLean Company not being in shape to respond, Mr. Boyer, one of the members, sought out the claimant, Peter McLean, who was in business at York, Pa., and solicited a loan of $10,000 for the company, whose affairs, as he stated, were prospering. Mr. McLean did not give an immediate answer, but the next day he came to Harrisburg, taking with him a certificate of deposit for the amount desired, made out to the order of the McLean-Bowman Company, and, after further discussion of the situation, turned this over to the company, and it was deposited to its credit. In order to secure this advance, a judgment note for $10,000, due one day after date, and stipulating for interest at the rate of 6 per cent. per annum, payable quarterly, was signed by Boyer, Bowman, Borland, and Robert McLean, the four existing members of the company, individually, and given to Peter McLean, the claimant. This completed the transaction for the time being. That it was understood and intended by all parties to be a loan to the company, pure and simple, I am fully persuaded. Peter McLean so testifies, and so, practically, do Borland, the president, and Bowman, the secretary and treasurer—both expressing surprise at finding themselves held for it personally by the judgment note which they had given—while Boyer and Robert Mc-

Lean, the others present, were not examined; not being able, as I understand it, to be reached. It is a fact, however, that on the same day the certificate of stock for $10,000, which had been issued to Borland for the benefit of the Harrisburg Trust Company, was taken up—the loan for which it was pledged having been paid with the money borrowed of the claimant—and a new certificate was issued in his name. It is claimed by him that this was done without his knowledge, and it is certain that the certificate was not delivered at the time, but remained in the safe of Robert McLean, his son, at Harrisburg, until a year and two months later, when, the McLean-Bowman Company being again in difficulty, and an effort being made by certain parties to extricate it, to do which a control of all the stock was deemed necessary, the certificate was taken to Peter McLean, at York, by Robert McLean, his son; and there, on September 7, 1903, at the latter's request, he indorsed it over, expressing surprise at its production.

Under all the circumstances, the right of the claimant to stand as a creditor of the bankrupt company must, in my judgment, be sustained. As already stated, this right depends upon the real nature of the transaction, rather than the forms by which it was attended. Or, to speak plainly, if it was in fact a loan of so much money to the bankrupt concern, it does not matter that the individual note of the members was taken, or that a certificate of stock for the amount of it was contemporaneously issued to the claimant. These things are, no doubt, to be considered in determining its character, but they are by no means controlling. The issuing of this same block of stock to Borland to secure the Harrisburg Trust Company for the loan which Mr. McLean's money paid off did not differ materially from the arrangement by which it is now sought to make him out a stockholder; and yet, as that was unquestionably a loan, there is no reason why this should not be also. Nor does it affect its character that the members who solicited the money gave their individual note to secure it, instead of that of the company. No doubt, they thus became personally liable, but there was nothing unusual in their assuming such liability considering their interest; nor did it necessarily relieve the company from the obligation for it, if that was the real understanding. As bearing upon this, it is to be noted that the money was directly solicited for the company, its affairs were discussed, and the assurance given that it was prospering. Moreover, the certificate of deposit procured by Mr. McLean from the bank at York before he started for Harrisburg, where the transaction was consummated, was made out to the company; showing with whom he supposed he was dealing. On the other hand, it is most remarkable, if the $10,000 advanced was intended to pay for so much stock, that nothing whatever was said about it by anybody, as seems to have been the case, and that a certificate for it was not delivered or asked for. Still more remarkable is it that a note should have been taken, on which interest was stipulated to be paid, and was paid, quarterly, not by the parties who signed it, but by the company. All things considered, the only consistent and reasonable conclusion to be drawn is that

the money was a loan to the company, the note being either intended as additional security, or being put in the form that it was by mistake—the parties confessedly having very little business experience—and the stock being added as collateral, to be held as it had been previously by the Harrisburg Trust Company. That the claimant ever intended to become, or in fact was, a holder of this stock, I am not persuaded. He was the holder of $8,000 of preferred stock, but that is another matter.

The objections are overruled, and the claim is allowed as proved.

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FARSON et al. v. CITY OF CHICAGO.

(Circuit Court, N. D. Illinois, E. D. May 11, 1905.)

No. 27,630.

FEDERAL COURTS—PRELIMINARY INJUNCTION—JURISDICTION.

Where, in a suit to restrain the enforcement of certain city ordinances providing for the examination and licensing of automobile operators, on the ground that the city had no power from the state to pass the same, the court was not satisfied that it had jurisdiction of the subject-matter of the suit, a motion for preliminary injunction would be denied.

Chas. F. Davies, for complainants.

J. W. Beckwith, Asst. Corp. Counsel, for defendant.

KOHLSAAT, Circuit Judge. The bill herein is filed by John Farson and others to restrain the city of Chicago from enforcing two certain ordinances adopted by the city council on July 11, 1904, requiring persons to submit to an examination before a board therein provided, and to procure from said board a certificate of qualification, before operating on the streets of the city any automobile, autocar, or other similar vehicle, and requiring automobiles to display identification numbers of the size and character therein set out. The ordinance requiring examination provides certain qualifications on the part of the applicant as to the free use of both arms and both hands, absence of defects in hearing and eyesight, freedom from heart disease, etc. It further provides that the applicant shall not be addicted to the excessive use of alcoholic liquors or be of a reckless disposition. Other requirements are set out touching applicant's knowledge of the machine to be operated, and his ability to handle same. Said ordinance further provides that, in order to defray the expense of this regulation, each applicant shall pay the sum of $3 to the city of Chicago, and, if the applicant shall be found competent to operate an automobile of the type mentioned in his application, a certificate shall be issued to him by the board. This certificate is renewable annually upon payment of $1. Both ordinances provide a fine for the violation thereof, not less than $5 nor more than $25 for each offense. The bill sets out that the city of Chicago is enforcing said ordinances, and that persons who have not complied therewith are arrested and fined; that complainants use automobiles for pleasure, and not for hire; that the city has

only such powers as are conferred by statute; that said ordinances are in violation of the fourteenth amendment of the Constitution of the United States, in that they deprive complainants of their property without due process of law, and deny them the equal protection of the laws. The bill prays that the city of Chicago and its agents be restrained from enforcing or attempting to enforce the provisions of said ordinances, and for other appropriate relief. An answer has been filed by the city, which, while raising the question of the jurisdiction of this court, goes to the merits of the bill. The matter comes on now to be heard on the motion of complainants for a preliminary injunction, and the motion is supported by the usual affidavits. Counter affidavits are filed by the city. On the argument of this motion it was contended by the defendant that the court had no jurisdiction of the subject-matter, and briefs on this question were submitted by the parties, as well as on the merits.

The burden rests upon complainants on this motion for a preliminary injunction to satisfy the court as to its jurisdiction of the parties or subject-matter, as well as upon the merits of the controversy. Huntington v. City of New York (C. C.) 118 Fed. 683. The complainants are all citizens of Illinois. The jurisdiction of the court is invoked on the ground that the ordinances in question are in violation of the fourteenth amendment of the Constitution of the United States, and the attention of the court is directed to subsection 16 of section 629 of the Revised Statutes [U. S. Comp. St. 1901, p. 506], which provides:

"The Circuit Courts shall have original jurisdiction as follows: Of all suits authorized by law to be brought by any person to redress the deprivation under color of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

The section above set out is clearly inapplicable to the case at bar, and has reference solely to those actions brought under the statute to redress the deprivation of the civil rights secured by sections 1977 and 1979 of the Revised Statutes [U. S. Comp. St. 1901, pp. 1259, 1262]. Holt v. Indiana Mfg., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374. The jurisdiction of the court to consider the bill must be sustained, if at all, under Act March 3, 1875, c. 137, 18 Stat. 470, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], which provides as follows:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States."

There then arises for determination the question whether or not this is a suit of a civil nature in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the Constitution or laws of the United States. No serious question is made by the city as to the sufficiency of the allegations of the bill to make out a case for the con-

sideration of a court of equity. Nor, in my judgment, can there be. It is contended, however, that the requisite jurisdictional amount is wanting. The bill alleges, and the answer denies, that the amount in controversy, exclusive of interest and costs, as to each petitioner exceeds the value of $2,000. No showing is made by complainants as to this fact, other than the allegation to that effect in the bill. The amount involved in determining the jurisdiction of the federal court in such a case as the one at bar is the value of the right to be protected, or the extent of the injury to be prevented, by the injunction, or, applying the principle concretely, the value of the right of each of the complainants to use his automobile on the streets of the city free from the restriction of the ordinances in question. It is conceded that, if any of the complainants drives his automobile on the street without first complying with the ordinances in question, he will be subjected to continuing arrests and fines. On the other hand, by complying with the ordinances he can secure immunity, and then proceed to recover from the city on account of moneys illegally paid. He is, of course, under no obligation to adopt the latter alternative, and can invoke the aid of a court of equity to enjoin the enforcement of a void ordinance. Whether, however, under such a situation, and where, as in this case, it is not shown or alleged that it is impossible for complainants to comply with the terms of the ordinances, and are consequently precluded by said ordinances from the right of the use of the streets, the value of the right to be protected is of a value requisite to give this court jurisdiction, is a matter of very grave doubt in my mind.

Turning, now, to the question as to whether the suit is one arising under the Constitution, two elements must concur to give the court jurisdiction: (1) The suit must be one actually, and not potentially, arising under the Constitution, as said by Mr. Chief Justice Fuller, speaking for the court in New Orleans v. Benjamin, 153 U. S. 411–424, 14 Sup. Ct. 905, 38 L. Ed. 764; and (2) it must appear at the outset that the alleged deprivation was by act of the state. Barney v. City of New York, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737. The contention of complainants' counsel at the argument, and, as I read it, a fair inference from the bill, is grounded upon the theory that the city council was without power to pass the ordinances in question; that is to say, that the council was acting beyond the scope of the powers delegated to the municipality by the state, and that the ordinances are therefore void. The court must look to the substance of the bill to determine whether there is in fact a federal question presented, or whether the federal question, if there be one, is but incidental to the controversy. As above stated, stress is laid by counsel for complainants upon the fact that the city council had no power to pass the ordinances. Unless the alleged invasion of the rights secured by the fourteenth amendment to the Constitution can be imputed to the state, no federal question is presented to confer jurisdiction on this court. The matter of the interpretation of state statutes is one that primarily belongs to the state courts. It may well be, and, indeed, the cases cited by counsel for complainants seem

strongly to indicate that the state court will so hold, that the ordinances are void for want of power in the municipality to enact them. City of Chicago v. Collins, 175 Ill. 455, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. Rep. 224; City of Chicago v. Banker, 112 Ill. App. 94. The federal courts should be slow to assume jurisdiction, unless it appears that a federal question is necessarily involved in the case. If under certain conditions a federal question may, but not necessarily will, arise, the parties should be relegated to their cause of action in the state court, where they may avail themselves in a proper case of their right to a review by the Supreme Court of the United States on a writ of error to the highest tribunal of the state. As said in the case of New Orlenas v. Benjamin, supra:

"The judicial power extends to all cases in law and equity arising under the Constitution, but these are cases actually and not potentially arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction and application of the Constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily, the question of the repugnancy of a state statute to the impairment clause of the Constitution is to be passed upon by the state courts in the first instance, the presumption being that in all cases they will do what the Constitution and laws of the United States require; and, if there be ground for complaint of their decision, the remedy is by writ of error under section 709 of the Revised Statutes [U. S. Comp. St. 1901, p. 575]. Congress gave its construction to that part of the Constitution by the twenty-fifth section of the judiciary act of September 24, 1789, c. 20, 1 Stat. 85, and has adhered to it in subsequent legislation."

See, also, Hamilton G. L. & C. Co. v. Hamilton City, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963.

If, then, as I view it, complainants' substantial remedy against the ordinances in question is the want of power in the city to enact them, their relief must be found in the state courts. This question lies at the threshold of the case, and the federal questions, if any, are subservient and incidental thereto—questions potentially arising under the Constitution. And where, as in the case at bar, complainants come into court, not admitting the right of the city to enact the legislation in question, but strenuously insisting on its want of authority from the state, I am of the opinion that the federal court should refuse to take jurisdiction of the suit.

Of course, on a motion of this kind, the question of jurisdiction will not be decided, but in view of the doubts expressed above, and the fact that the court is not persuaded that complainants will be able to show that this court has jurisdiction of the subject-matter, the motion for a preliminary injunction is denied. The parties may within a short day, if they desire, present the matter to the court in an appropriate way to secure a ruling on the question of jurisdiction which will permit of its review in the court above.

## In re LUKENS.

(District Court, E. D. Pennsylvania. June 2, 1905.)

No. 1,741.

1. BANKRUPTCY—STATUTES—CONSTRUCTION—TITLE OF TRUSTEE.
Bankr. Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], providing that claims which, for want of record or for other reasons, would not have been valid liens as against the claims of creditors of the bankrupt, shall not be liens against his estate, states an exception to the rule that a bankrupt's trustee takes no better title than the bankrupt possessed, and this because it forbids the holder of an instrument who might have had a lien if he had recorded it before bankruptcy to acquire such a lien by recording it thereafter.

2. SAME—MORTGAGES.
Under the Pennsylvania law declaring that a mortgage on real estate creates a mere lien to secure the debt, and does not convey an estate in the land remaining in the mortgagor, where the mortgagee failed to record his mortgage, given for the purchase price of real estate, until after the mortgagor became bankrupt, he was not entitled to payment in full from the proceeds of the mortgaged property as against general creditors.

In Bankruptcy. Certificate of referee.

Edward H. Hall, for trustee.

J. F. E. Hause, for mortgagee.

J. B. McPHERSON, District Judge. The undisputed facts in this case are as follows: Nathan Lukens, the bankrupt, took title to a house and lot of ground on April 4, 1901, and his deed was recorded on that day. He borrowed $800 of the purchase money from Hannum Baldwin, and gave a mortgage therefor, but the mortgage was not recorded for more than two years. On September 29, 1903, Lukens was adjudged a voluntary bankrupt, and on October 16th a trustee was duly elected and qualified. On October 22d the mortgage was recorded. In March, 1904, Baldwin received a dividend of $266.86 out of the proceeds of personal property belonging to the bankrupt, the dividend having been declared on the bond accompanying the mortgage. In August following, the referee ordered the house and lot to be sold free of liens and incumbrances, and the trustee sold it in September for $925. Baldwin claimed to be paid the balance of his mortgage in full, and the referee sustained the claim, relying upon Mellon's Appeal, 32 Pa. 121, Britton's Appeal, 45 Pa. 177, Tryon v. Munson, 77 Pa. 250, and McLaughlin v. Ihmsen, 85 Pa. 364. The reasons for his decision are thus given in the report:

"The foregoing authorities clearly indicate the nature and effect of a mortgage, whether recorded or not, and that it is not merely a security for a debt, but a conveyance of the mortgagor's title and estate in the land covered by the mortgage. They show further that, though unrecorded, a mortgage is perfectly good and lawful, not only against the mortgagor himself, but also against all others except bona fide purchasers for value and lien creditors without notice. The act of assembly of May 19, 1893 (P. L. 108), seems to have contained an attempt to change the law, as it had been, so as to let in general creditors of the grantor or bargainor. But the Supreme Court in Davey v. Ruffell, 162 Pa. 443, 29 Atl. 894, held that this attempt was abor-

tive, and that the act is to be read as though the word 'creditors' was not in it.

"At the time Mr. Lukens was adjudged bankrupt, the estate he had in the mortgaged premises was his equity of redemption, and nothing more; and that was the whole and only estate therein that was cast upon the trustee in bankruptcy, or which he had power to sell under the order of the referee. It is true that the order directed him to sell the property freed and discharged from the liens and incumbrances thereon, but that was for the convenience of bidders, and did not affect the rights of the mortgagee in any way.

"I am aware that in a recent case in bankruptcy, Re John A. Thorp (D. C.) 12 Am. Bankr. Rep. 195, 130 Fed. 371, it was held that section 70a gives to the trustee only the rights of the bankrupt, but that subdivisions "a" and "d" of section 67 invalidate an unrecorded lien, and thus practically place the trustee in the position of an innocent purchaser for value without notice. If this case is to be understood as giving to the trustee a higher or greater title and estate in the mortgaged premises than the bankrupt himself had at the time he was adjudged bankrupt, then I must respectfully decline to follow it. It is inconceivable that the trustee can be vested with any higher or greater title and estate than the bankrupt held at the time of adjudication. The true interpretation of the bankrupt law in this respect, as I view it, is to be found in Re Kellogg (D. C.) 7 Am. Bankr. Rep. 270, 112 Fed. 52, and cases therein referred to.

"After careful consideration of the whole question, I am of opinion that the claim made on behalf of the mortgagee should be allowed; that he is legally and equitably entitled to priority, and to be paid in full out of the proceeds of sale of the mortgaged premises."

It is undoubtedly true that two apparently conflicting lines of decision by the Supreme Court of Pennsylvania concerning the nature and effect of a mortgage may be found without difficulty, one line being represented by the cases that are cited in the referee's report, which speaks of a mortgage as being "an interest or estate in the land itself, capable of enjoyment, and enabling the mortgagee to grasp and hold it actually, and not a mere lien or potentiality to follow it by legal process and condemn it for payment. The land" (it is further said) "passes to the mortgagee by the act of the party himself, and needs no legal remedy to enforce the right. But a lien vests no estate, and is a mere incident of the debt, to be enforced by a remedy at law, which may be limited." Tryon v. Munson, supra. The other line of cases regards a mortgage as essentially a security for the payment of money, passing no estate that can be taken for a debt of the mortgagee, but conferring a lien merely, although it is a lien that may be enforced (among other remedies) by an action of ejectment, under which the mortgagee may obtain possession of the land and may apply the net profits to the payment of the mortgage debt. Thus, in Rickert v. Madeira, 1 Rawle, 328, Mr. Justice Rogers, delivering the opinion of the court, said, inter alia:

"That a mortgage is but a chose in action, a mere evidence of debt, is apparent from the whole current of decisions. A devise of a man's personal estate carries with it all his mortgages. A mortgage may be released by an instrument not under seal, and an assignment of the bond, which usually accompanies the mortgage, transfers the right to the mortgage itself; for whatever will give the money secured by the mortgage will carry the mortgaged premises along with it. The forgiving the debt, although by parol, will draw the land after it as a consequence. The whole result of the cases is that a mortgage, although in form a conveyance of land, is in substance but a security for the payment of money; and the debt being paid, or in any manner extinguished, the mortgagee becomes a trustee for the mortgagor."

In Presbyterian Corporation v. Wallace, 3 Rawle, 109, where the subject is elaborately considered by Chief Justice Gibson, it is said, on star page 128:

"In form, a mortgage is certainly a conveyance; but it is unquestionably treated at law here, in the way it is treated in equity elsewhere, as a bare incumbrance, and the accessory of a debt. As between the parties it is a conveyance, so far as is necessary to enforce it as a security. As regards third persons, the mortgagor is the owner, even of the legal estate. This distinction, which, if attended to, will be found to reconcile the apparently jarring dicta of the judges, is as firmly established by the practice and decisions of the courts in Pennsylvania as any other in the law. If the mortgagee had the title for any other purpose than to afford him a remedy, it would not be easy to account for the absence of all the incidents of his supposed ownership; yet his estate, if such it be, certainly cannot be set up as outstanding to bar an ejectment by the mortgagor, or an action of trespass, or a proceeding to obtain compensation for a privilege under a statutory license; nor is it subject to taxation, or lien by judgment, or sale on execution, or survivorship by reason of joint tenure, or courtesy or dower. It does not break the descent of the estate, or require a reconveyance to vest the title, or prevent it from vesting in a purchaser, or affect the validity of a second mortgage."

Craft v. Webster, 4 Rawle, 242, is to the same effect. On star page 252, Mr. Justice Kennedy uses this language:

"The mortgage is merely a lien upon his land, as a security for the payment of the money or fulfillment of some engagement therein mentioned. The mortgagee has no subsisting interest in the land which he can convey, either absolutely, conditionally, or qualifiedly, or even mortgage to a third person. The mortgage is purely an incident to the debt, as completely so as the bond is to the debt that it has been given to secure the payment of, and its existence cannot possibly be imagined without the debt."

And he added on page 255:

"A mortgage in Pennsylvania is literally and legally now understood to be but a bare security for the payment of the money or performance of other acts therein mentioned, and, at most, only a chose in action."

Asay v. Hoover, 5 Pa. 21, 45 Am. Dec. 713, cites Rickert v. Madeira with approval, and goes on to say:

"Emphatically, in this state, a mortgage, like a judgment, confers upon the mortgagee nothing more than a lien upon the land, which may be defeated by payment of the money loaned at any time before sale made by the sheriff, in pursuance of our acts of assembly giving a remedy to the creditor."

Wilson v. Shoenberger's Executors, 31 Pa. 295, declares it to be—

"The settled law of the Pennsylvania mortgage that, though in form a conveyance of title, it is in reality, both at law and equity, only a security for the payment of money or performance of other collateral contract. And none the less so because the defeasance, instead of appearing in the original deed, is contained in an accompanying or subsequently executed instrument."

In Lennig's Estate, 52 Pa. 135, Mr. Justice Agnew, who wrote the subsequent opinion in Tryon v. Munson, declares, without qualification, that

"A mortgage is but a security for a debt, the estate in the land remaining in the mortgagor, and the mortgagee having no estate whatever, except the mere legal title as the means of enforcing payment."

And, not to incumber this opinion with further citations, in the recent case of McIntyre v. Velte, 153 Pa. 350, 25 Atl. 739, Wilson v.

Shoenberger's Executors was approved in a brief opinion, wherein the court also said:

"A mortgage is but a security for the payment of money, with the right of lien upon the mortgaged premises to enforce payment. It is not stamped with the character of real estate, but is a bare incumbrance or charge."

Many other cases are referred to in 12 Pepper & Lewis' Dig. Dec. 20, 415b et seq., where the whole subject is satisfactorily digested. It may perhaps be safely concluded that a mortgage in Pennsylvania is held to be either an estate or a lien, as the equities of the particular case may require, but that the general rule holds it to be a lien only, and not an estate.

The cases upon which the referee relies decide that an unrecorded mortgage is good against the mortgagor, or against subsequent purchasers and lien creditors with notice; and this decision is not to be controverted. Neither do I question the further proposition that, speaking generally (for there are certainly some exceptions to be noted), a trustee in bankruptcy takes no better title to the bankrupt's property than the bankrupt himself possessed. But I am unable to take the further step and decide that, because a mortgage in Pennsylvania conveys for certain purposes a formal title or estate in the land, a bankrupt mortgagor has nothing left but an equity of redemption, and therefore his trustee can take nothing more. On the contrary, I am of opinion that the general rule in Pennsylvania is that a mortgage, recorded or unrecorded, is a mere security for money, and gives a lien, but not an estate in the ordinary sense of the word. It follows, I think, that the plain, unambiguous language of section 67a of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) states an exception to the rule that the trustee takes no better title than the bankrupt himself possessed, and it states such an exception because it forbids the holder of an instrument, who might have had a lien if he had recorded it before the bankruptcy, to acquire such a lien by recording it afterwards. This necessarily gives the trustee a better title than the bankrupt possessed, but it was competent for Congress to provide that such a result should follow a failure to record, and, as I think, the act has so provided. It is argued that the federal decisions are conflicting concerning the effect of section 67a and section 70 (30 Stat. 564, 565 [U. S. Comp. St. 1901, pp. 3449, 3451]), considered together. The principal cases are referred to in Re Thorp (D. C.) 12 Am. Bankr. Rep. 195, 130 Fed. 371, and Re Kellogg (D. C.) 7 Am. Bankr. Rep. 270, 112 Fed. 52. So far as they may not be in harmony, the better reason seems to me to lie with the courts that are disposed to give its plain ordinary meaning to the language of section 67a. I do not see why a delinquent mortgage creditor who has slept upon his rights should be regarded with favor, and should have the benefit of any subtlety of construction. It seems to me that Congress intended to say, inter alia, to such creditors:

"If from lack of diligence you have failed to record your mortgage before the beginning of bankruptcy proceedings, you shall not acquire a lien afterwards, although you do record it then. Indeed, even if you have acquired

a lien, it may be avoided under certain conditions; but, in any event, you must have a formal, completed lien when the suit is begun, or you shall never acquire it."

The creditors of the bankrupt, whether they have liens or have none, are entitled in fairness to know what the bankrupt's financial standing is, and a creditor who fails to record his mortgage, and thereby gives to the mortgagor a fictitious credit, pro tanto, has no reason to complain—at least so far as subsequent creditors are concerned—because the statute forbids him to come in afterwards and claim for himself the very property of which he has allowed the bankrupt to appear as the absolute owner.

Re Garcewich, 115 Fed. 87, 53 C. C. A. 510, is not opposed to the conclusion to which I have come, as will appear from the following sentence in the opinion of the court:

"Under the present bankrupt act, as under previous bankrupt acts, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act."

In the present case, as I think, there is an incumbrance of the property which is void as against the trustee by the positive provision of section 67a. See, also, Chesapeake Shoe Co. v. Seldner, 122 Fed. 593, 58 C. C. A. 261.

The decision of the referee is reversed, and he is instructed to distribute the fund in accordance with this opinion.

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## In re PORTERFIELD.

(District Court, N. D. West Virginia. May 20, 1905.)

1. BANKRUPTCY—LIENS—PROCEEDINGS IN STATE COURTS.

A deed of trust executed by a bankrupt to his wife was recorded less than four months before the institution of a suit against him in the state court, but more than four months before the institution of bankruptcy proceedings against him, which were instituted within four months after the bringing of the said suit. In that case no attempt was made by the state court to take actual possession of the property conveyed, but all parties interested, including the holder of the legal title to the land conveyed, became parties to the bankruptcy proceedings, proved their debts, and submitted to a sale of the land free from liens, and the fund arising therefrom was paid into the court of bankruptcy for distribution. *Held*, that the petitioning creditors were not entitled to have such fund distributed according to Code W. Va. 1899, c. 74, § 2, declaring that every transfer by an insolvent debtor attempting to prefer any creditor shall be void as to such preference, and that all the property so attempted to be transferred shall be applied and paid pro rata on all debts owed by the debtor at the time of the transfer.

2. SAME—STATE LAWS—CONSTRUCTION—PREFERENCES.

Code W. Va. 1899, c. 74, § 2, provides that every transfer made by an insolvent attempting to prefer any creditor or to secure such a creditor for a debt to the exclusion or prejudice of any other creditor, shall be void as to such preference or security, but shall be for the benefit of all creditors of the debtor, and the property so attempted to be transferred or charged shall be applied and paid pro rata on all the debts

owed by the debtor at the time such transfer or charge is made, and that a suit to avoid the same shall be in behalf of all creditors "existing" at the time of the transfer, but that its benefit will not be extended to existing creditors unless they agree to contribute to the costs, etc. *Held*, that such act does not provide for the "vacation" of a preference, but secures a preference to a class of creditors, and hence a suit brought to enforce the same within four months of the filing of the bankruptcy petition was void as a proceeding for the imposition of a lien within Bankr. Act July 1, 1898, c. 541, § 67, cl. "f," 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450].

8. SAME—BONA FIDE TRANSFERS—DOWER.

Where a bankrupt being indebted to his wife for money loaned agreed by parol to execute a deed of trust to her on certain land to secure the debt, and more than four months before the filing of a bankruptcy petition against him he in fact executed a second deed of trust on the land to her in consideration of her surrendering her contingent right of dower in the land to the extent of $12,500 of its value by signing the first deed of trust on the express condition that her debt should be secured by a second deed, and there was no evidence on which to base a finding as to the value of such dower right, her deed would be sustained as a valid lien to the amount secured thereby.

4. SAME—TAXES—PAYMENT—EVIDENCE.

Where a bankrupt was a deputy sheriff, and as such was required to collect all taxes assessed against lands and personal property, etc., and his testimony that the taxes on his own property had been paid by him in money was uncontradicted, and it also appeared that the tax receipts were in the bankrupt's possession, a finding as against the estate of the sheriff that the bankrupt had paid his taxes was justified.

Angus McDonald and Forest W. Brown, for bankrupt and Mrs. Porterfield.

Mason & Mason, D. B. Lucas, and Joseph Trapnell, for creditors.

DAYTON, District Judge. When this case was referred back by my predecessor to Referee James D. Butts for his further consideration, he directed him to file a written opinion, which he has done, and it is as follows:

## Opinion of Referee.

As I understand the facts in this case which are not disputed, Geo. Porterfield was, on the 12th day of November, 1902, the date of his adjudication as a bankrupt, a resident of Charles Town, Jefferson county, West Virginia, and the owner of a farm in Jefferson county, known as "Cassilis." That Eugene Baker was sheriff of said county from January 1, 1897, to January 1, 1900, and that during that period Porterfield was his deputy for Charles Town district, and intrusted with the collection of the taxes for said district. That Porterfield's real and personal property was situated within said district. That on the 11th day of June, 1902, Porterfield conveyed to John Porterfield, trustee, his farm Cassilis, to secure his wife, Susan E. Porterfield, in the payment of a debt due her by note of $4,976.48. Upon the same day he executed a deed of trust on the same farm to secure Milton Rouss in the sum of $12,500 (about which there is no dispute, the only controversy being relative to the deed of trust to secure Susan E. Porterfield). The deed of trust to secure the latter was executed more than four months prior to the adjudication in bankruptcy, and for a valid consideration, which is not disputed. That Porterfield, in consideration of moneys loaned him from time to time by Susan Porterfield prior to June 11, 1902, had repeatedly promised to execute a deed of trust on Cassilis to secure her the payment of the same, and that there was no fraud in the transaction leading up to the execution of the deed of trust of June 11th, 1902. That on August 30, 1902, Eugene Baker instituted a suit in the circuit court of Jefferson county, West Vir-

ginia, to set aside and avoid said deed of trust of June 11, 1902, upon the ground that the making of the same was a preference under the provisions of section 2, c. 74, of the Code of West Virginia. There are other creditors involved in the controversy, who have filed petitions in the cause, who set up the same contention as made by the representative of Eugene Baker. All of the property, both real and personal, to which the bankrupt was entitled at the date of the adjudication, came into possession of the trustees in bankruptcy, and was by them sold without objection on the part of creditors. The representatives of Baker claimed there was due them from Porterfield the sum of $611.47, taxes due on the farm Cassilis and on his personal property, and that the lien of Susan E. Porterfield created by the deed of trust of June 11, 1902, should not be audited in her favor by the referee. Pleadings were made up on both contentions, testimony taken and submitted, arguments by counsel, and all matters were submitted to the referee, who decided: First. That Porterfield had paid the amount of taxes claimed from him. Second. That the lien in favor of Susan E. Porterfield was a valid one, and as such should be audited in her favor, which was accordingly done.

From this decision of the referee a review was asked and obtained, and at the October term, 1904, of the United States District Court for the Northern District of West Virginia, his honor John J. Jackson, judge of said court, heard the cause, and upon consideration thereof ordered the same to be committed to the referee for such further proceedings as was set out in the order then made, all of which appear in the record of the cause. The referee again heard the cause on the original and amended pleadings and evidence and argument of counsel. The order made in the cause by the honorable District Judge on the 28th day of October, 1904, directed the referee to "report specifically the facts in regard to the payment of the taxes of Porterfield." The cause now presents itself to the referee for decision upon the two points raised by counsel for the creditors: (1) Had Porterfield paid the taxes when the creditors sought to charge him with their payment before the referee? (2) Was the lien created in favor of Susan E. Porterfield by the deed of trust of June 11, 1902, a valid one, which she was entitled to have audited in her favor by the referee?

In answer to the first proposition it seems that it must be answered by the facts as disclosed from the testimony in the cause, and in following the order of the honorable judge of the District Court the "facts specifically" bearing on that point raised must be given prominence. The only testimony in the cause was that of Porterfield, the bankrupt. At page 2 in the summary of his evidence in the record, upon the point of the payment of the taxes in money, the following language will be found: "The tax bills had been taken from the taxbooks of Porterfield, and were in his pocketbook, and in his possession. Did not know just what amount of uncollected tax bills remained in said taxbook. Does not know how much he was indebted to High Sheriff Baker, if anything. Always thought he had sufficient uncollected tax bills, when credited with commissions, etc., to square himself with High Sheriff Baker. Always regarded his individual taxes which he had in his hands for collection paid to High Sheriff Baker. Says he paid them as he did other taxes—just in money. Took from the taxbooks in his possession and custody the tax bills on his individual property from time to time." These extracts from Porterfield's testimony, standing, as it seems, uncontradicted, prove that he paid these taxes in money. He was the deputy sheriff, and the legal custodian of the taxbooks for Charles Town district. His own tax bills, along with others, were in these books, and he had a perfect right to extract them and cancel them in the same way as he would do in other cases. It was insisted in argument that, being largely in arrear with Baker in settling the taxes for Charles Town district, that any moneys that he might have paid to Baker or his agents should have been applied first to the settlement of the shortage. In a settlement with Porterfield, Baker might perhaps require this; but there is no evidence on that point, and it seems immaterial what the relation of debtor and creditor may have been between Porterfield and Baker, if it can be shown that Porterfield paid in money one particular debt it seems he is absolved from further liability for it. He swears that he paid his individual taxes in money, and that he took them from the taxbooks. This evidence seems conclusive of the payment of these taxes in money.

On the second point: It is not denied that the deed of trust of June 11, 1902, in favor of Susan E. Porterfield, was fairly entered into between the parties thereto, and that there was no fraud in its procurement, and that it was executed four months prior to the adjudication of Porterfield as a bankrupt, or that the consideration was valid. It is admitted that it was executed in furtherance of repeated promises on the part of Porterfield to do so to secure the sum of moneys which he had at times prior thereto borrowed from her. But it is insisted by the creditors of Geo. Porterfield that the making of said deed of trust was a preference, which was void under the provisions of section 2 of chapter 74 of the Code of West Virginia of 1899. It was also insisted by counsel for creditors that, inasmuch as the suit on the part of Eugene Baker v. Porterfield et al. had been commenced in the circuit court of Jefferson county to test the questions involved growing out of the making of said deed of trust, that the bankruptcy court should stay further proceedings, and permit the state court to determine all questions affecting said deed of trust. This latter proposition seems entirely without merit. The court of bankruptcy had attained jurisdiction over the property and effects of the bankrupt. His property had passed into the possession of the trustees of the bankruptcy court. It had been sold at public sale by the trustees, without objection on the part of creditors, and there was no other forum in which questions concerning it could be determined, or through the medium of which the funds could be distributed and the estate settled up. The fact that the suit of Baker v. Porterfield et al. having been commenced in the state court prior to the adjudication of Porterfield a bankrupt in no sense affects the jurisdiction of the bankruptcy court, for the law is now well settled that suits in the state courts begun before the adjudication in bankruptcy must be stayed after adjudication, though the property of the bankrupt may be in custody of the state court through a receiver, and that on adjudication the state court must order its receiver to turn over the property of the bankrupt held by him to the trustees in bankruptcy. See Hanson v. Stephens et al. (Ga.) 42 S. E. 1028. All questions relating to the estate of the bankrupt must be determined in a court of bankruptcy. In re Mertens, 12 Am. Bankr. R. 709, 131 Fed. 515. "An action concerning the same will not be permitted to proceed further in the state courts." See Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Bank v. Sherman, 101 U. S. 407, 25 L. Ed. 866. "A referee in bankruptcy has jurisdiction in the first instance to determine the questions of the validity of the claim of a third party to a lien upon or an interest in property or the proceeds of property lawfully in the custody of the trustee in bankruptcy." In re Rochford, 124 Fed. 182, 59 C. C. A. 388; In re Cobb (D. C.) 96 Fed. 821. At page 823, Judge Purnell uses this language: "After the adjudication in bankruptcy the bankrupt court takes jurisdiction of the estate and all matters pertaining thereto, and will administer the same to a final settlement. Parties having or claiming an interest in the bankrupt estate must submit them to the bankruptcy court. No other court, and no person acting under process, can, without permission of the bankruptcy court, interfere with it; and to do so is a contempt." Counsel for creditors cited and urged in support of their contention that the state court should be permitted to proceed with the cause the cases of Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, and Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128; but an examination of these cases will show that proceedings therein had been commenced in the state courts many years prior to the passage of the bankrupt law of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), and that the property and funds had been reduced to possession and were in the custody of the state court, and, as the cases had proceeded so far, the bankruptcy court, on the ground of comity, should not interfere; but no case can be presented sustaining that position where the facts arose and the suit was instituted in the state court since the passage of the bankruptcy act of 1898 and the amendments thereto. The most recent decision of the Supreme Court of the United States is In re Watts and Sacks, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933. In that case, at page 27, 190 U. S., page 724, 23 Sup. Ct., 47 L. Ed. 933, Chief Justice Fuller says: "The bankruptcy laws are paramount, and the jurisdiction of the federal court in bankruptcy, when properly involved in the administration of the affairs of insolvent persons and corpo-

rations, is essentially exclusive." It seems, therefore, that the contention of counsel for the creditors that the state court should have been permitted to proceed to determine the questions involved growing out of the execution of the deed of trust of June 11, 1902, and to administer so much of the funds of the bankrupt's estate as was covered by that deed of trust, is not sustained by authority.

As to the validity of the lien in favor of Susan E. Porterfield, created by deed of trust of June 11, 1902. It is not denied that this lien was given for a fair, valuable, and adequate consideration, and no attempt is made to avoid it under any provision of the bankruptcy law bearing on the subject; but it is earnestly insisted that the fact of its execution made it a preference under section 2 of chapter 74 of the Code of West Virginia of 1899, and the court of bankruptcy should so hold. This statute seems to contemplate the securing of a certain class of creditors, the securing of which to the exclusion of others works a preference. But they must be in the same class, and it will hardly be contended with hope of success that one who held a valid lien either in law or equity on the property of the debtor at the time of the execution of a conveyance could be said to be in the class mentioned in the statute. A general creditor could be affected, but not a lien creditor. In this cause the question arises, did Susan E. Porterfield hold a legal or equitable lien on the farm of Geo. Porterfield at the time of the execution of the deed of trust of June 11, 1902? Her counsel insist that at that date she held an equitable lien as effective as though it had been executed and duly recorded prior to that date, based on the agreement made between her and Geo. Porterfield growing out of the loans of moneys made to him, and that the final execution of the deed of June 11, 1902, was but a mere carrying out of that to which she in equity was entitled long before its execution. There is no evidence in the record tending to show that any agreement in writing to give this lien was ever made between the parties, and all the evidence tends to show that it was a parol agreement fully and fairly executed on the part of Susan E. Porterfield and promised to be executed on the part of Geo. Porterfield at times when she loaned him the money. The evidence shows that she parted with her money on the faith of and in consideration of his promises, and at a time when he was solvent. Did these facts constitute an equitable lien in favor of Susan E. Porterfield on the farm known as Cassilis prior to June 11, 1902?

Courts of equity look with favor on liens of this character, though created by parol agreement, upon the principle of considering "that done which should have been done." 1 Jones on Mortgages, pp. 156 and 763; Snyder v. Martin, 17 W. Va. 276, 41 Am. Rep. 670; Fidelity Co. v. Shenandoah Valley R. Co., 33 W. Va. 762, 11 S. E. 58; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847; Ketchum v. St. Louis, 101 U. S. 306, 307, 25 L. Ed. 999. In Burdick v. Jackson, 7 Hun, 489 (N. Y. Sup. Ct.), the court held that: "A parol agreement in respect to lands cannot be avoided in equity because it is not in writing, when there has been a part performance of it. An assignee in bankruptcy stands in the shoes of the bankrupt, and takes the transfer of the bankrupt's estate subject to the lien on it; and a mortgage given by a bankrupt 18 days before the filing of the petition, if given pursuant to a parol agreement so to do 15 months before, and based upon a good consideration, is not a fraudulent preference which will be adjudged void under the provisions of the bankrupt act." "An agreement based upon a valuable consideration to give a mortgage will be treated in equity as a mortgage." See Dean v. Anderson, 34 N. J. Eq. 496, wherein the whole subject is discussed at great length and with great learning. Courts of bankruptcy are courts of equity, and will administer rights and remedies in accordance with the general principles of equity which prevail in and have been adopted by the United States Circuit Courts, and though state courts and state statutes may hold to the contrary. The federal courts, in administering the bankrupt laws, will follow the general principle of equity in determining rights and remedies. This matter is thoroughly discussed and decided in James v. Gray, 131 Fed. 401, 65 C. C. A. 385. Under this decision, if Susan E. Porterfield had a valid equitable lien on the 11th day of June, 1902, she was entitled to enforce it in the bankruptcy court when she invoked relief therein, the statutes of the state of West Virginia and the state decisions thereunder to the contrary.

But, aside from this, the evidence in this cause and the decisions supra show that on the 11th day of June, 1902, when the deed of trust was executed, that she held a valid equitable lien on the farm Cassilis, owned by Geo. Porterfield, and that her debt secured thereby was not of the class that the giving of said deed of trust would affect, and thus bring her within the prohibition of section 2, c. 74, of the Code of West Virginia of 1899, and thus create a preference, and an avoidance of the lien in her favor. She was clearly entitled to have the lien audited in her favor, and it is so ordered.

In affirming the conclusions arrived at by the referee, I desire briefly to set forth some of the reasons that have actuated me in so doing.

1. It is to be noted that the deed of trust in favor of Mrs. Porterfield was recorded less than four months before the institution of Baker suit in circuit court of Jefferson county, but more than four months before the institution of the bankruptcy proceeding against her husband. It will be noted, also, that the bankruptcy proceeding was instituted within four months after the institution of Baker's suit in the state court, and that in the latter case no attempt was made by the state court to take actual possession of the property involved by the appointment of a receiver or otherwise. On the contrary, it appears that all parties interested, including Baker's representative and Rouss, who held the legal title to the land through his trustee for the security, undisputed, of his debt of $12,500, have come into the bankruptcy case, proved their debts, and submitted to a sale made therein under order of the referee, whereby the farm was sold free and acquit from all liens, and the fund arising therefrom is now entirely under the control and awaiting the distribution of the bankrupt court. Under these circumstances I hold that the petitioning creditors, independent of the exclusive character of the bankruptcy jurisdiction, cannot now rely upon the pendency of the case in the state court to give them the relief asked, to wit, the distribution of the funds according to the requirements of section 2, c. 74, of the Code of West Virginia of 1899; and this for two reasons: (a) Because the state court never took possession of the property; and (b) because the parties have, in effect, waived any rights they might have had in this particular, and have submitted to the federal court's jurisdiction. I base this holding upon the principles laid down in such cases as Southern Loan & Trust Co. v. Benbow (D. C.) 96 Fed. 514; Frazier v. Southern L. & T. Co., 99 Fed. 707, 40 C. C. A. 76; Hagan v. Lucas, 10 Pet. 401, 9 L. Ed. 470; Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Bank v. Calhoun, 102 U. S. 256, 26 L. Ed. 101; In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660; In re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933; In re Tune (D. C.) 115 Fed. 906; Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 334, and exhaustive note thereto of Mr. Black; s. c., 76 Fed. 296; East Tenn. V. & G. R. Co. v. Atlanta & F. R. Co. (C. C.) 49 Fed. 608, 15 L. R. A. 109; The Willamette Valley, 66 Fed. 565, 13 C. C. A. 635. The jurisdiction of the bankrupt court

is exclusive, at least when fully and rightfully obtained over the property itself, as held in such cases as In re Watts, supra; and all state laws for the administration of insolvent estates, and all actions and proceedings under such laws, under such circumstances, are suspended, as held by such cases as In re Smith (D. C.) 92 Fed. 135; Tua v. Carriere, 117 U. S. 201, 6 Sup. Ct. 565, 29 L. Ed. 855; In re Bruss-Ritter Co. (D. C.) 90 Fed. 651; Lea v. West Co. (D. C.) 91 Fed. 237. It would therefore be plainly impossible to direct in this case a distribution of the funds in accordance with the directions of the suspended state laws instead of in accordance with the clear mandatory provisions of the bankrupt act, which will not suffer Mrs. Porterfield's preference to be now assailed because recorded more than four months prior to the filing of the petition in bankruptcy.

2. The bankrupt act in express terms sets aside all preferences given within four months of the filing of the petition. It goes further, and excludes participation by creditors who have within that period received preferences by conveyance, transfer, assignment, or incumbrance, except such preference be surrendered. It also provides that all levies, judgments, attachments, or other liens obtained through legal proceedings against an insolvent within four months prior to the filing of the petition in bankruptcy shall be void. On the other hand, section 2, c. 74, of the West Virginia Code of 1899, under which Baker's suit in the state court was brought, is somewhat contradictory in its terms. It reads in part:

"Every transfer or charge made by an insolvent debtor attempting to prefer any creditor of such insolvent debtor or to secure such a creditor or any surety or indorser for a debt to the exclusion or prejudice of any other creditor, shall be void as to such preference or security, but shall be taken to be for the benefit of all creditors of such debtor, and all the property so attempted to be transferred or charged shall be applied and paid pro rata upon all the debts owed by such debtor at the time such transfer or charge is made."

It then limits this provision by requiring suit to be brought within a year, or, if such transfer or charge be admitted to record within eight months after its execution, then said suit must be brought within four months of such recordation. Such suit is to be deemed brought in behalf of all creditors existing at the time of the transfer, but its benefit will not be extended to existing creditors unless they come in and agree to contribute to costs; but those who do so come in are to share pro rata with the creditor who had the transfer or charge made in his favor, to the exclusion of subsequent creditors and existing creditors who do not join in the suit. The question at once arises whether this statute should be construed as one setting aside preferences or giving preferences. It does not in fact set aside the original preference given the creditor by the transfer or charge; on the contrary, by reason of the preference having been given him by the act of the debtor, this proceeds to give certain other creditors a like preference as against all others. It may be fairly construed as a statute giving class preference. See Feely v. Bryan (W. Va.) 47 S. E. 307, where Brannon, J., holds the filing

of a claim before a commissioner is a sufficient joinder in the suit, but the demand must have existed at the time of the transfer. If this construction be the correct one to be given to this statute—and we believe it to be so—then the suit instituted by Baker in the state court was one brought to secure a preference for himself and others belonging to a class, as against other creditors, and, having been instituted within four months of the filing of the petition in bankruptcy, must be held a void proceeding, as having given by its institution a lien, under clause "f" of section 67 of the bankrupt act (30 Stat. 564 [U. S. Comp. St. 1901, p. 3450]).

3. Both the state and bankrupt act recognize the right to make a transfer giving preference for a new, and not an existing consideration or debt, if made in good faith. In this case it cannot be denied that Mrs. Porterfield gave a new and valid consideration, but did so in consideration of the securing of an existing debt. She surrendered her contingent right of dower in and to her husband's farm to the extent of $12,500 of its value by signing the Rouss trust deed upon the express condition that her debt should be secured by a second trust deed. This consideration for a conveyance on her part has been held to be valid in law, and in its nature unassailable for fraud so far as given for equivalent to dower, because it is the surrender of an absolute right guarantied to her expressly by the law. Glascock v. Brandon, 35 W. Va. 84, 12 S. E. 1102; Blanton v. Taylor, Gilmer, 209; Harvey v. Alexander, 1 Rand. 219, 10 Am. Dec. 519; Taylor v. Moore, 2 Rand. 563; Wm. & Mary College v. Powell, 12 Grat. 372. Under both the state and the bankrupt act would not Mrs. Porterfield's preference be upheld to the extent of the value of this new consideration? In such event, under the state act she would be entitled to preference under her deed to the value of her contingent dower, and then, admittedly, she would be further entitled to her pro rata share with the other existing creditors for the balance of her debt. Glascock v. Brandon distinctly holds that the court, by reason of the difficulties inherent in the circumstances, will enter into no nice or exact calculations in estimating the value of this contingent right of dower. In this case, as in that one, we are left wholly in the dark as to what this interest was worth at the time; nor are we given any information as to what was the value of the preference secured by her for it. This would depend upon the amount of debts existing at the time that would have joined in Baker's suit and secured a pro rata distribution with her. She might, by this prorating, have lost from $1 to over $4,000; nobody knows how much or how little. The record is silent as to this. Again, nothing is told us as to Porterfield's health, habits, and reasonable expectancy of life; nothing of Mrs. Porterfield's either. On the other hand, we do know that Porterfield secured $12,500 in cash out of the farm, out of which, if he should die to-morrow, Mrs. Porterfield would lose to the extent of $2,651.13, for her age is given, and the calculation on a present basis is easily made. Who has given us any information in this record by which we can form any estimate as to whether this dower right, contingent now, possibly liable to become vested

to-morrow, would be less, equal, or more than the value of this preference given in consideration of its surrender? It seems to us peculiarly a case where we ought to follow Glascock v. Brandon, and enter into no speculative calculations, but, as in that case, solve the doubt in favor of the wife, who has parted with a right of value, and which cannot be restored to her except by a compensation necessarily uncertain and problematical. Therefore, if I had to follow in this case the state law—which I hold I do not—I would under it uphold this preference to Mrs. Porterfield.

4. As to the claim for taxes it may be said, in addition to what Referee Butts has said, that both Baker and Porterfield were officers of the law, acting as such under oath, and subject to its requirements and penalties touching the matter of the collection of these taxes; the one being sheriff, the other his deputy. Their duties were clear and explicit. The law commanded them each year on and after August 1st to collect all taxes assessed against lands and personal property; to distrain for such after November 1st if property of the owner could be found; if not, within a certain period to return the lands delinquent, and, under distinct provisions set forth, sell the same for such taxes. It was the primary duty of Baker, as sheriff, to see that these legal provisions were strictly carried out both by himself and by his deputies. He could make no exceptions. Porterfield's taxes were required to be collected or returned in precisely the same way as every other taxpayer's—every year—unless paid. He has testified he did pay them, though the testimony may not be clear that such payments were made as separate and distinct ones, instead of in connection with others for taxes collected by him. There is no other evidence. It seems to me that, even without his testimony, in the absence of the tax receipts from Baker's custody and their presence in Porterfield's custody, we must assume and conclude that Baker had suffered and agreed to their being regarded as paid and satisfied by Porterfield either by direct and distinct payment as a single transaction each year or by the general payments made in regard thereto and other taxes collected by him from time to time. That such general payments were made is not disputed. For us to hold that these taxes were not paid to Baker, and were not regarded and understood as so paid, would be to hold in his interest, or that of his estate, he being now dead, that for the full four years of his official term he distinctly and knowingly violated the law and his oath of office by not collecting them. This I am not prepared to assume in the absence of any proof whatever to that effect, and in the face of Porterfield's direct testimony to the contrary.

## In re MARMO.

(District Court, D. New Jersey. June 1, 1905.)

1. FEDERAL COURTS—HABEAS CORPUS—APPEAL—STATUTES—APPLICATION.
Act Cong. March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], providing that an appeal may be taken from any Circuit Court to the Supreme Court of the United States in any case which involves the construction or application of the Constitution of the United States, and also in any case in which the Constitution or law of the state is claimed to be in contravention of the Constitution of the United States, is applicable to appeals in habeas corpus proceedings.
[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 1012, 1013, 1017; vol. 25, Cent. Dig. Habeas Corpus, §§ 103, 104.]

2. SAME—LEAVE TO APPEAL—DENIAL—DISCRETION.
Where an application to a District Judge for a writ of habeas corpus alleged that petitioner's imprisonment was in violation of the federal Constitution, the court was without discretion to refuse to allow an appeal to the Supreme Court from an order denying the writ, though it appeared that the same was without merit.
[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 1012, 1013, 1017; vol. 25, Cent. Dig. Habeas Corpus, §§ 103, 104.]

On Petition for Allowance of Appeal from Judgment Denying Writ of Habeas Corpus.

Chauncey H. Beasley, for petitioner.

Henry Young, Prosecutor of the Pleas of Essex County, N. J., opposed.

LANNING, District Judge. The petitioner has been convicted in the court of oyer and terminer, in the county of Essex, of murder in the first degree, and sentenced to be hanged to-morrow, June 1, 1905. Application has this day been made to me for a writ of habeas corpus, the allegation being that the trial court was not properly constituted and that the petitioner is now being held in confinement contrary to the provisions of the fourteenth amendment to the federal Constitution. Having concluded that the petition sets forth no cause of illegal confinement, I denied the writ.

The petitioner has now presented to me a petition of appeal, and requested me to allow it. At first I was disinclined to do so, because it seemed to me that I was vested with a discretionary power as to whether I would or would not allow the appeal. But, after such examination of the authorities as I have been able to make in the hour or two at my command, I have concluded that there is such doubt upon the subject that I ought to allow the appeal.

In the Lennon Case, 150 U. S. 399, 14 Sup. Ct. 126, 37 L. Ed. 1120 (A. D. 1893), the Supreme Court said:

"While the right of appeal from the judgments of Circuit Courts on habeas corpus directly to this court, in all cases, is taken away by the act of March 3, 1891, that right still exists in the cases designated in section 5 of that act."

In Craemer v. Washington State, 168 U. S. 127, 18 Sup. Ct. 2, 42 L. Ed. 407 (A. D. 1897), the court said:

"Under existing statutory provisions appeals may be taken to this court from final decisions of the Circuit Courts in habeas corpus in cases, among

others, where the applicant for the writ is alleged to be restrained of his liberty in violation of the Constitution or of some law or treaty of the United States, and if the restraint is by any state court, or by or under the authority of any state, further proceedings cannot be had against him pending the appeal. Such being the law, it has happened in numerous instances that applications for the writ have been made, and appeals taken from refusals to grant it, quite destitute of meritorious grounds, and operating only to delay the administration of justice."

In the Durrant Case (C. C.) 84 Fed. 318 (A. D. 1898), it appears that a petition for a writ of habeas corpus by one who had been convicted of murder was denied, and that the judge who denied the writ of habeas corpus also refused an order allowing any appeal from his judgment. But in the Sun Hung Case (C. C.) 24 Fed. 723, the right of appeal to the Supreme Court in habeas corpus cases was held to be absolute. Judge Sawyer in that case said:

"Had I the discretion I certainly should deny an appeal in this case. I think it is a case with which the Supreme Court should not be troubled. I do not think there is enough in it to justify taking it up. There is no question of law involved. If there is no discretion in these cases, every case of habeas corpus of this character, whichever way decided, can go to the Supreme Court on appeal. Upon examination I have come to the conclusion that I have no discretion in the matter, and that the right of appeal is absolute."

In the Jugiro Case, 44 Fed. 754, Judge Lacombe, upon a second application to the Circuit Court for the Southern District of New York for a writ of habeas corpus, said:

"Whether this is the second or the twenty-second application, however, is immaterial. Under the statutes as they stand, it seems to be left for the petitioner alone to determine, not only how many times he will apply for the writ, and whether he will appeal from its denial, but also how often he will, by such appeal, invoke the operation of section 766, Rev. St. [U. S. Comp. St. 1901, p. 597], which provides that until final judgment thereon any proceeding against his person under state authority shall be null and void."

Since the two cases last above mentioned were decided the act of March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], creating Circuit Courts of Appeal, has been enacted. The law of procedure in habeas corpus proceedings was by that act to some extent modified. Section 5 of that act (26 Stat. 827 [U. S. Comp. St. 1901, p. 549]) provides that an appeal may be taken from any Circuit Court to the Supreme Court of the United States "in any case that involves the construction or application of the Constitution of the United States," and also "in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States." This provision of the act of 1891 is applicable to appeals in habeas corpus proceedings. In the Storti Case, 109 Fed. 809 (A. D. 1901), the Circuit Court for the District of Massachusetts refused a writ of habeas corpus, and also refused an order allowing an appeal, the court saying:

"Counsel may file their petition for appeal, which we will deny, because we consider the appeal frivolous. We will follow the Circuit Court for the Ninth Circuit in Durrant's Case, 84 Fed. 317, 322. We agree that we would better deny the appeal now, because that gives counsel an opportunity to

seasonably reach the Supreme Court or some justice thereof, or to file a petition in the state courts for a writ of habeas corpus."

A note added to the case states that an order allowing an appeal was subsequently signed by Mr. Justice Gray. When the case was considered by the Supreme Court, 183 U. S. 141, 22 Sup. Ct. 73, 46 L. Ed. 120, Mr. Justice Brewer said:

"The grounds set forth in this petition for a discharge by the federal court of the petitioner from the custody of the warden are wholly without foundation, and the case is another of the numerous instances in which, as said by Mr. Chief Justice Fuller in Craemer v. Washington State, 168 U. S. 124, 128, 18 Sup. Ct. 2, 42 L. Ed. 407, 'applications for the writ have been made, and appeals taken from refusals to grant it, quite destitute of meritorious grounds, and operating only to delay the administration of justice.'"

And in Dimmick v. Tompkins, 194 U. S. 546, 24 Sup. Ct. 781, 48 L. Ed. 1110 (A. D. 1903), Mr. Justice Peckham said:

"The appeal directly to this court from the decision of the Circuit Court denying the writ of habeas corpus was proper under the averments contained in the petition that the imprisonment of the appellant was in violation of the federal Constitution."

Inasmuch as the time fixed for the execution of the petitioner in the case now before me will have arrived within the next 24 hours, and before application for a writ of habeas corpus can be made to a Justice of the Supreme Court, and inasmuch as the Supreme Court has not intimated in any of the cases before it that a Circuit Judge has the right to refuse to allow an appeal from a judgment denying a writ of habeas corpus, and inasmuch as the inferior federal courts are divided on the question, I deem it my duty to allow an appeal in this case, notwithstanding the fact that I consider this to be another case "quite destitute of meritorious grounds and operating only to delay the administration of justice."

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## PENNSYLVANIA CO. v. BAY et al.

(Circuit Court, N. D. Illinois, E. D. June 1, 1905.)

No. 27,261.

1. FEDERAL COURTS—JURISDICTION—DISMISSAL OF BILL.

Under Judiciary Act March 3, 1875, c. 137, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], declaring that if in any suit commenced in the Circuit Court it shall appear to the court's satisfaction at any time after the suit has been brought that it does not really and substantially involve a dispute within the court's jurisdiction, the court shall proceed no further, but shall dismiss the suit, it is the duty of the court to stop the proceedings and dismiss a bill, either on objection or on its own motion, whenever and in whatever way it appears that jurisdiction is lacking.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 897, 898.]

2. SAME.

Where a bill in the federal courts to enjoin the business of buying and selling nontransferable railroad tickets alleged that the value of the business sought to be protected amounted to $5,000, exclusive of interest and costs, such averment would be treated as prima facie true for the purpose of sustaining the court's jurisdiction, notwithstanding an allegation in the answer that the amount in controversy was less than $2,000, until defendant had sustained the burden of affirmatively showing that

the requisite jurisdictional amount was wanting during the progress of the case.

3. SAME—EQUITY PLEADING—DEMURRER.
A demurrer to a plea or answer in equity is improper.

4. SAME—EXCEPTIONS.
An exception to an answer to a bill in equity for insufficiency only raises the questions whether a sufficient discovery has been made by the defendant, whether the averments have been fully answered, and whether the averments excepted to are scandalous and impertinent, but not whether they are sufficient in point of law.

5. SAME—INJUNCTION—TICKET BROKERS—DEFENSE.
Allegations in an answer to a bill to restrain the business of buying and selling nontransferable railroad tickets that complainant was a common carrier, bound to transfer every person at the same rate, and that nontransferable conditions, etc., were void; that complainant had been aware for years of the practice of ticket brokers to buy and sell such tickets; that it had furnished tickets to them for sale; and other facts tending to show a waiver of such nontransferable provisions and laches in the enforcement thereof—were matters admissible under the issues raised by the bill, and were therefore not subject to exceptions.

6. SAME—TRUSTS—INTERSTATE COMMERCE ACT—SHERMAN ACT—VIOLATION.
In a suit by a railroad company to restrain a ticket broker from buying and selling nontransferable railroad tickets, an allegation in the answer that complainant was a member of a joint passenger association composed of various competing railroad lines, made for the purpose of preventing competition in violation of the interstate commerce and Sherman acts, and that the alleged nontransferable conditions on such tickets were uniform, and invalid under such acts, was not within the issues presented by the bill, and was therefore subject to exception; the illegality of the combination being a matter which could only be taken advantage of in a direct proceeding.

Geo. Willard and F. R. Babcock, for complainant.

Moses, Rosenthal & Kennedy (Moritz Rosenthal, of counsel), for defendants.

KOHLSAAT, Circuit Judge. This suit is one of 17 similar suits brought by various railroads against the ticket brokers or ticket scalpers of the city of Chicago to enjoin the said defendants, their agents, etc., from buying, selling, dealing in, or in any way using, or procuring persons other than the original purchasers to use, nontransferable tickets, or portions thereof, issued by the said railroad companies. Certain of the defendants have answered the bill. The substantial portions of the bill and answer, so far as they are pertinent to the inquiry now before the court, will hereinafter be set out. Exceptions have been filed by complainant to certain paragraphs of the answer, and the cause has come on for hearing on these exceptions.

Before taking up the matter of the exceptions, however, it is necessary to consider the question of the jurisdiction of the court, a point raised by defendants at this time, and it is urged upon the court that the requisite jurisdictional amount is wanting. The bill avers that the amount involved—that is to say, the value of the business sought to be protected—amounts to the sum of $5,000, exclusive of interest and costs. The answer charges that the amount in controversy is less than $2,000, and therefore not suf-

ficient to confer jurisdiction. Counsel for defendants now insists that, inasmuch as it cannot be determined clearly from the bill what amount is in controversy, proceedings must stop, and the court cannot consider the case further until complainant, by more apt averments in its bill, puts the question of the jurisdiction of the court beyond doubt. And as a basis for this contention counsel points out the fifth section of the judiciary act of March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], the material part of which is as follows:

"If in any suit commenced in the Circuit Court * * * it shall appear to the satisfaction of said Circuit Court at any time after such suit has been brought * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, the said Circuit Court shall proceed no further therein, but shall dismiss the suit."

Prior to the act of March 3, 1875, the question of jurisdiction, if apt averments appeared in the pleadings, could be raised only by a plea in abatement, and a plea to the merits was a waiver of the plea in abatement. Farmington v. Pillsbury, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114. The harshness of this rule, which was held to prevent the court, in the absence of such plea, from taking notice of colorable transactions made to give the court jurisdiction, was modified by said act of 1875. This act was held to change the rule so far as to allow the court at any time, even without plea or motion, to stop proceedings, and dismiss the suit, whenever a fraud on its jurisdiction was established. Williams v. Nottawa, 104 U. S. 209, 26 L. Ed. 719; Hartog v. Memory, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725. Later in the case of Morris v. Gilmer, 129 U. S. 326, 9 Sup. Ct. 292, 32 L. Ed. 690, Mr. Justice Harlan, in speaking of this want of jurisdiction, says:

"And the statute does not prescribe any particular mode in which such fact may be brought to the attention of the court. It may be done by affidavits, or the depositions taken in the cause may be used for that purpose."

And still later, in the case of Anderson v. Watts, 138 U. S. 701, 11 Sup. Ct. 449, 34 L. Ed. 1078, the court holds that objection to the jurisdiction may be availed of in the answer. It seems, therefore, that whenever and in whatever way it appears that the jurisdiction of the Circuit Court is lacking, it then becomes the duty of the court under the statute to stop proceedings and dismiss the bill. Before, however, the court takes such a step, a legal certainty of the want of jurisdiction must arise from the facts as they are made to appear on the record. Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729. That such a certainty as the law requires rarely can be had from an inspection of the pleadings is manifest. The allegation of jurisdictional facts is prima facie true, and the burden of the affirmative averment in a plea in abatement of facts showing such want of jurisdiction is upon the party making such averment. Adams v. Shirk (C. C. A. 7th Cir.) 117 Fed. 801, 55 C. C. A. 25. And it has been held by the Court of Appeals for the Sixth Circuit, in the case of Butchers' & Drovers' Stock Yards Co. v. Louisville & N. R. Co., 67 Fed. 35, 14 C. C. A. 290, that where the

bill alleges damages in excess of $2,000, which allegation is denied by the answer, and no proof as to that fact is offered, the court will not dismiss the bill for want of jurisdiction. As said by the court in the case of Adams v. Shirk, supra, the office of the plea there filed, and of the allegation in the answer now being considered, is but a motion or suggestion to the court to protect itself from imposition. At this time it is impossible to determine the amount in controversy, or to find facts upon which can be based a legal conclusion that the requisite jurisdictional amount is wanting. If at any time, when the proofs are in, or in the progress of the case, it appears affirmatively from the record that the allegations of the bill are false, and that the court has not jurisdiction, the court will, of its own motion, dismiss the suit. The motion of defendants to dismiss the suit for want of jurisdiction will be denied at this time.

Passing now to the exceptions to certain parts and paragraphs of the answer, it must first be inquired as to the scope and purpose of an exception in equity pleading and the proper practice to be observed in relation thereto. A demurrer to a plea or answer is unknown in equity practice. Daniell's Chancery Pleading, p. 542; Grether v. Wright, 75 Fed. 742, 23 C. C. A. 498, and cases therein cited. If the sufficiency of an answer as a defense is to be tested, the case may be set down for hearing on bill and answer. Grether v. Wright, supra; Walker v. Jack, 88 Fed. 576, 31 C. C. A. 462. An exception to an answer for insufficiency raises, therefore, not the question of the sufficiency of the answer in point of law, but the question as to whether a sufficient discovery has been made by the defendant, or the averments fully answered. If such complete answer has been made, exception to new matter therein will not lie for insufficiency. Exceptions to an answer will also lie for scandalous or impertinent matter contained therein. Daniell's Chancery Pleading, p. 759, note; Barrett v. Twin City Power Co. (C. C.) 111 Fed. 45. But not for new matter setting up an affirmative defense to the bill. Adams v. Bridgewater Iron Co. (C. C.) 6 Fed. 179. Impertinent matter has been defined by Judge Simonton in the case of Barrett v. Twin City Power Co., supra, as new matter in an answer which is irrelevant and forms no sufficient ground for defense. "The best rule," says Kent, "to ascertain whether the matter in an answer be impertinent, is to see whether the subject of the allegation could be put in issue or be given in evidence between the parties." The rule, then, seems to be that as to such matters in an answer as are irrelevant to the issues made, and which raise collateral questions not proper to be put in evidence between the parties, an exception for impertinence will lie; but that those matters which, save for the legal insufficiency, would be a defense to the bill, are not open to attack by such exception. Applying the rule to the exceptions in the case at bar which are three in number, I will take them up in the order in which they are made.

1. The first exception is to paragraphs 7 and 8 of the answer. Paragraph 7, in substance, alleges that complainant is a common carrier, charged with the duty of carrying at the same rate to and

from the same points each and every person who desires to be so transported, and that any limitation provided in the railroad ticket to the effect that it is nontransferable, and all conditions restraining the use of said ticket by any other than the original purchaser, are beyond the power of said complainant to impose; that they are without consideration and void; that after the sale of such ticket by the original purchaser thereof said complainant was bound to transport the person to whom it might be transferred, subject only to reasonable rules as to safety and comfort. Paragraph 8 alleges that such tickets are property, and transferable by the owner or holder, and that any provision to the effect that the unused portion of such ticket should become forfeited if used by any person other than the original purchaser, etc., is void. The exception, if sustained, must be on the ground that the foregoing paragraphs are impertinent. But these portions of the answer set up matter clearly within the issues raised by the bill, and are therefore not impertinent. The sufficiency of the defense as a matter of law cannot be considered in this way. The exception is not well taken.

2. The second exception is to the ninth, tenth, and eleventh paragraphs of the answer. These three paragraphs charge that complainant is a member of a passenger association, formed of connecting and competing lines, and that complainant and the other members of said association have unlawfully combined, and still combine and conspire, together to restrain trade and commerce, and to monopolize the same by fixing and maintaining noncompetitive rates; that the tickets set out in the bill of complaint are uniform in terms and conditions as a result of such unlawful agreement, contrary to the Sherman act and interstate commerce act; that the bills herein are filed as a further result of such illegal agreement, to prevent defendants from continuing in business, and to deprive them of the right to follow a lawful occupation. The averments of these matters are elaborate, and are but briefly stated above to indicate the character thereof. Is this a matter of defense admissible under the issues raised by the bill? I think not. Counsel for respondents has endeavored to distinguish this case from the case of Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, but I am of the opinion that there is no difference in principle between the cases, and that the rule announced by the court in that case is controlling in the case at bar. The bill, if it can be sustained—and upon that point I express no opinion, for the case is not before the court on the merits—must be sustained on the ground of the right of complainant to equitable relief against unwarranted interference by respondents with contracts between the said complainant company and its passengers who have assumed certain obligations with respect to the use of tickets, and which said obligations have been violated, said respondents, through their acts, having made possible and assisted in such violations. Assuming, as is set forth in the answer, that a ticket is issued as a result of such an agreement between the various members of a railway association, I do not understand that it is any defense

to an action for the breach of the contract evidenced by the ticket that the railroad company that issued it is a member of an unlawful combination that is engaged in dictating in what form and for what price the tickets should be issued. The unlawful combination, if it exists, can be reached under the provisions of the statutes which make such a combination illegal; but only by a direct proceeding. A suit to redress or prevent violation of the ticket contracts is, as said by the court in the Connolly Case, "in no legal sense dependent upon or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy." And the Court of Appeals for this circuit, in the case of Dennehy v. McNulta, 86 Fed. 827, 30 C. C. A. 422, 41 L. R. A. 609, said, "Nor can such fact [that a corporation may constitute an unjust monopoly] be invoked collaterally to affect in any manner its independent contract obligations or rights." It seems to me clear, therefore, that if complainant would have a cause of action against respondents to restrain the interference by them with nontransferable tickets issued under special agreement with the purchasers thereof, that such right can in no way be affected or questioned in this proceeding by the fact that complainant is a member of an association which may unlawfully be formed for the purpose of determining under what terms its members shall issue such tickets. See, also, Strait v. Natl. Harrow Co. (C. C.) 51 Fed. 819. The second exception must therefore be sustained.

3. The third exception is taken to paragraphs 12 and 13 of the answer. Paragraph 12 charges that the railroad companies and complainant have been aware for years of the practices of the ticket brokers as to the sale of said tickets; that they have requested respondents to sell such tickets, and have furnished the tickets to them for sale; and sets up further facts tending to show a waiver on the part of the railroad company of the right to insist upon a performance of the terms of the ticket contracts. Paragraph 13 charges facts as tending to show that complainant and other railroad companies have been guilty of laches. The reasons stated on the first exception to the answer above are applicable here. Both paragraphs contain matter of appropriate defense in equity to the bill. The exception is not well taken.

The first and third exceptions are therefore overruled, and the second exception sustained for the reason that the matter contained in the ninth, tenth, and eleventh paragraphs of the answer is impertinent.

## GLUCOSE REFINING CO. v. CITY OF CHICAGO et al.

(Circuit Court, N. D. Illinois, E. D. May 23, 1905.)

No. 27,599.

1. MUNICIPAL CORPORATIONS—CITY ORDINANCES—INVALIDITY—JURISDICTION.
In a suit to enjoin the enforcement of city ordinances, federal jurisdiction cannot be predicated on an allegation that in passing the ordinances the city exceeded its charter powers; such question being one for the determination of the state courts.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 897.]

2. SAME—AMOUNT IN CONTROVERSY.
Where, in a suit in a federal court to enjoin the enforcement of a municipal smoke ordinance, complainant alleged that it was a foreign corporation, and that the amount involved was largely in excess of $2,000, exclusive of interests and costs, the bill sufficiently showed jurisdiction of the federal courts.

[Ed. Note.—Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

3. SAME—EQUITABLE JURISDICTION—MULTIPLICITY OF SUITS.
Where a bill to enjoin enforcement of an alleged illegal municipal smoke ordinance, providing a fine for each separate violation, alleged that it was filed on behalf of complainant and all others similarly situated, and charged that not only was complainant harassed by a multiplicity of suits, but that more suits were threatened by defendant city for violation of the ordinance; that there were a large number of manufacturing plants in the city of Chicago similarly situated with complainant, and similarly affected; that the ordinance was void, and that a compliance therewith would work irreparable injury and loss of property—a cause of action for equitable relief was presented; and this though a decree restraining further prosecutions under the ordinance would incidentally interfere with criminal proceedings in the state courts.

4. SAME—PROCEEDINGS IN STATE COURTS—INJUNCTION.
Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], providing that federal courts shall not enjoin proceedings in state courts, does not limit the power of the federal court to restrain parties of whom it has jurisdiction from instituting proceedings in any court.

[Ed. Note.—Federal courts enjoining proceedings in state courts, see notes to Garner v. Second Nat. Bank, 16 C. C. A. 90; Central Trust Co. v. Grantham, 27 C. C. A. 575; Copeland v. Bruning, 63 C. C. A. 437.]

5. SAME—NUISANCE—POWER TO DECLARE.
Rev. St. Ill. art. 5, c. 24, par. 75 (Hurd's Rev. St. 1903, p. 294), providing that a city council in cities shall have the power to declare what shall be a nuisance, to abate the same, and to impose fines on parties who may create, continue, or suffer a nuisance to exist, authorized the Chicago city council to pass Ordinance March 23, 1903, § 10, declaring the emission of dense smoke from the stack of any boat, locomotive, or chimney anywhere within the city, with certain exceptions, to be a public nuisance.

6. SAME—UNIFORM OPERATION.
Chicago City Ordinance March 23, 1903, § 10, declares the emission of dense smoke a public nuisance, and prohibits such emission for more than three minutes, or, in case fire boxes are being cleaned or new fires started, for six minutes, in any hour of the day or night, but declares that no prosecution shall be had against plants installed prior to the passage of the ordinance until the expiration of a year, in order to permit the owner to rebuild or re-equip the same, provided he commences his plans to do so at once. *Held*, that such ordinance was not unconstitutional, in that

it did not operate equally on a manufacturer maintaining a chimney serving only one fire box, and on complainant, who maintained two chimneys, one serving 16 fire boxes, and the other 7; it not appearing that complainant, by some alterations in its plant, could not comply with the ordinance.

Kretzinger, Gallagher, Rooney & Rogers, for complainant.
Howard S. Taylor, for defendants

KOHLSAAT, Circuit Judge. Prior to March 23, 1903, complainant was the owner of the sugar refining plant in question, situated in the city of Chicago. On that date the city passed an ordinance, section 10 of which, so far as it is pertinent herein, reads as follows:

"The emission of dense smoke from the smokestack of any boat or locomotive, or from any chimney anywhere within the city, shall be deemed and is hereby declared to be, a public nuisance, but no prosecution for the emission of dense smoke shall be commenced, unless within ten days prior thereto at least three notices shall have been mailed to the offender that dense smoke has been seen emitted from his premises. The owner or owners, lessee, agent, or manager of any boat or locomotive, and the proprietor, lessee or agent of any building, factory, mill, works, or other establishment having smokestacks or chimneys, who shall permit or allow dense smoke to issue or to be emitted from the smokestack of any such boat or locomotive, or the chimney of any buildings, factory, mill, works, or other establishment having smokestacks or chimneys within the corporate limits to exceed three minutes (excepting in cases where the fire box is being cleaned out or new fire built therein, in which case the limit shall be six minutes) in any hour of the day or night, shall be deemed and held guilty of creating a nuisance, and shall for every such offense be fined a sum of not less than ten dollars ($10) nor more than one hundred dollars ($100). * * * Provided, that no prosecution under this ordinance shall be commenced against the owner, or owners, lessee, agent or manager of any boat, locomotive, or the proprietor, lessee or agent of any building, factory, mill, works or other establishment having smoke stacks or chimneys, the plant of which shall have been installed prior to the passage of this ordinance, until the expiration of one year after the passage of this ordinance, within which to rebuild and re-equip the same in accordance with the provisions of this ordinance: provided further, that no such owner, owners, lessee, agent or manager shall be entitled to said one year unless he shall at once commence his plans for the rebuilding and re-equipping of such plant and shall proceed with such work to the satisfaction of the board upon inspection at intervals of three months during said period of one year."

For violation of this ordinance, the city proceeded to prosecute complainant, and has already instituted 18 suits, and threatens to bring further suits. The bill is filed by complainant, for itself and on behalf of all persons and corporations similarly situated, to enjoin the further institution of suits, on the ground that the ordinance is obnoxious to the federal Constitution, and otherwise invalid.

The cause is now before the court on a motion for a preliminary injunction, based upon the bill of complaint, duly verified, and the affidavit of Colville, its master mechanic. The defendants present no defense papers. The matter therefore comes up upon the allegations of the bill and affidavit alone, which, in so far as they are proper to be considered as matters of fact, must for the purposes of this hearing be taken as admitted. From these it appears that complainant is a corporation of New Jersey, and that the amount in-

volved is largely in excess of $2,000, exclusive of interest and costs. These facts alone sufficiently show jurisdiction in this court. No jurisdiction in the federal courts can be predicated upon complainant's allegation charging that in passing the ordinance in question the city of Chicago exceeded its charter powers. Where it appears from plaintiff's pleadings that such power was wanting in the city, the question becomes one for the state courts to determine. Barney v. City of New York, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737; Arrowsmith v. Harmoning, 118 U. S. 194, 6 Sup. Ct. 1023, 30 L. Ed. 243; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667.

It is insisted by defendants that the bill discloses no case for jurisdiction in equity. In City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. Rep. 224, it is held that the enforcement of a void ordinance may be enjoined to prevent a multiplicity of suits, at the instance of any person whose interests are impaired by it, where there exists a right affecting many persons. The bill alleges that not only is complainant harassed by a multiplicity of suits, but that more are threatened by defendants; that there are a large number of manufacturing plants in the city of Chicago similarly situated with complainant; and that it files the bill in its own behalf, and in behalf of all other persons and corporations in like situation, thereby bringing the case within the rule in Chicago v. Collins aforesaid, and the authorities therein cited. The rule laid down in that case is approved in Poyer v. Village of Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494. In Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155, the court says, "But it is well settled that there are two exceptions to the rule that courts of equity will not interfere to restrain trespasses, whether committed under form of law or otherwise." These exceptions are (1) to prevent irreparable injury; (2) to prevent a multiplicity of suits. In Third Ave. R. Co. v. Mayer, 54 N. Y. 161, the court holds that the imminence of innumerable suits in a justice court, where there is no right of consolidation, as in a court of record, justifies the interference of equity. In Brewing Co. v. Superior, 93 N. W. 1120, the Supreme Court of Wisconsin lays down the rule that equity may enjoin prosecutions for misdemeanors or violations of municipal ordinances "where they are resorted to or threatened as a means of preventing the enjoyment of property rights, and there is no other way of adequately remedying the mischief." The allegations of the bill at bar bring the case fairly within this principle of law. Jurisdiction of a court of equity is further sustained by the following: Mayor, etc., of Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239. If the allegations of the bill are to be sustained, it is evident that the remedy at law is not "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity," to quote the language of the Supreme Court in Boyce v. Grundy, 3 Pet. 210, 7 L. Ed. 655. Here not only may the multiplicity of suits be avoided, but the validity of the ordinance may be settled once for all. The bill also charges that to comply with the ordinance would work irreparable injury. If the ordinance be void,

this ground, also, would warrant the interposition of equity. Walla Walla v. Walla Walla Water Co., 172 U. S. 12, 19 Sup. Ct. 77, 43 L. Ed. 341; Springhead Spinning Co. v. Riley, L. R. 6 Eq. 558. Even though the decree of a court of equity might operate incidentally to restrain criminal proceedings, yet, where the threatened proceedings will work irreparable injury and loss of property, jurisdiction in equity will be sustained. Manhattan Iron Works v. French, 12 Abb. N. C. 446; Quint v. Board, etc., 64 Miss. 483, 4 South. 548; Atlanta v. Gate City Light Co., 71 Ga. 106; Georgia R. Co. v. City of Atlanta (Ga.) 45 S. E. 256; Port of Mobile v. R. Co., 84 Ala. 115, 4 South. 106, 5 Am. St. Rep. 342. There are cases holding suits for breach of such an ordinance to be civil proceedings—as, for instance, Graubner v. Jacksonville, 50 Ill. 87; Oshkosh v. Schwartz (Wis.) 13 N. W. 552.

Some question is made as to the right of the federal court to grant the relief asked for, by reason of the provisions of section 720 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 581]. While this court will not attempt to restrain the state court in a pending proceeding, the statute may not be construed to limit the power of the federal court to restrain parties from instituting proceedings in any court. Texas Ry. Co. v. Kuteman, 54 Fed. 547, 4 C. C. A. 503. As to suits not yet begun, this court has prior jurisdiction to the state court, and for that reason, also, the rule does not apply. French v. Hay, 22 Wall. 253, 22 L. Ed. 857; Sharon v. Terry et al. (C. C.) 36 Fed. 337, 1 L. R. A. 572; State of Louisiana v. La Garde et al. (C. C.) 60 Fed. 186. It therefore seems clear that the court has jurisdiction for the purposes of this hearing.

The ordinance declares the issuance of dense smoke within certain limits for the period named therein to be a nuisance per se, and requires no proof of the actual effect of such smoke. This, the bill charges, the city council has no power to do, since smoke was not held to be a nuisance at the common law, and may or may not be a nuisance in fact. In the absence of statutory provisions the municipality would be without power so to declare it. Lake View v. Letz, 44 Ill. 81; St. Louis v. Heitzberg Brwg. Co., 141 Mo. 375, 42 S. W. 954, 39 L. R. A. 551, 64 Am. St. Rep. 516; Dillon on Municipal Corp. (4th Ed.) §§ 95, 374; Am. & Eng. Enc. of Law, vol. 21, p. 270. Paragraph 75 of article 5, § 1, of chapter 24 of the Revised Statutes of Illinois (Hurds' Rev. St. 1903, p. 294), provides that the city council in cities shall have the power "to declare what shall be a nuisance and to abate the same and to impose fines upon parties who may create, continue or suffer nuisances to exist." Under this provision of the charter the ordinance aforesaid was passed. With regard to the effect of this class of legislation, Dillon, in his work on Municipal Corporations (4th Ed.) § 308, says: "It is competent for the Legislature to delegate to municipal corporations the power to make by-laws and ordinances with appropriate sanctions, which, when authorized, have the force, in favor of the municipality and against persons bound thereby, of laws passed by the Legislature." In Mason v. Shawneetown, 77

Ill. 537, the court holds that such an ordinance "cannot be regarded otherwise than a law of and within the incorporation." At page 740 of volume 21 (2d Ed.) Am. & Eng. Enc. of Law, it is said, "In so far as the Legislature may declare nuisances, a municipality may be empowered by ordinance to declare things or acts nuisances, though they might not be such in the absence of such ordinance," subject to the cognizance of the courts as to reasonableness. To the same effect is Laugel v. Bushnell, 197 Ill. 26, 63 N. E. 1086, 58 L. R. A. 266. In this case the court proceeds to classify nuisances, and says:

"(3) Those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. The power granted by the statute to the governing bodies of municipal corporations to declare what shall be nuisances, and abate the same, etc., authorizes such bodies to conclusively denounce those things falling within the first and third of these classes to be nuisances."

In a case involving an ordinance declaring a slaughterhouse to be a nuisance under the foregoing clause of its charter, the Supreme Court of Illinois, in Harmison v. Lewiston, 153 Ill. 313, 38 N. E. 628, 46 Am. St. Rep. 893, says:

"By virtue of the statute above quoted, and in the light of the interpretations placed upon it by these decisions, we think power was conferred upon appellee to adopt the ordinance in question."

In section 379 of Dillon's work aforesaid, it is said:

"Much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with unless they are manifestly unreasonable and oppressive, or unwarrantably invade private rights, or clearly transcend the powers granted them."

"But in doubtful cases," says the Supreme Court of Illinois in the case of N. Chicago City Ry. Co. v. Lake View, 105 Ill. 212, 44 Am. Rep. 788, "where a thing may or may not be a nuisance, depending upon a variety of circumstances, requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering [declaring the running of steam cars upon the streets to be a nuisance], their action under such circumstances would be conclusive." This general rule is also recognized in Roberts v. Ogle, 30 Ill. 459, 83 Am. Dec. 201; Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; State v. Heidenhain, 42 La. Ann. 483, 7 South. 621; Walker v. Jameson, 140 Ind. 598, 37 N. E. 402, 39 N. E. 869, 28 L. R. A. 679, 683, 49 Am. St. Rep. 222; Monroe v. Gerspach, 33 La. Ann. 1011; Gundling v. Chicago, 176 Ill. 349, 52 N. E. 44, 48 L. R. A. 230; Cincinnati v. Miller, 11 Ohio Dec. 788; People v. Detroit White Lead Works, 82 Mich. 472, 46 N. W. 735, 9 L. R. A. 722; People v. Lewis, 86 Mich. 276, 49 N. W. 140. The case of St. Paul v. Gilfallin, 36 Minn. 298, 31 N. W. 49, quoted by defendants, is in fact an authority for the complainant herein. It holds that, in the absence of such legislative authority as that under which the ordinance here involved was enacted, the city of St. Paul had no power to declare dense smoke to be a nui-

sance, but conclusively intimates that such power existed in Illinois as to justify the decision in Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698, and North Chicago City Ry. v. Lake View, aforesaid.

It is clear that the city of Chicago is invested with the power to declare what is a nuisance, and to abate the same. Whether it has the power to declare dense smoke a public nuisance, or a nuisance per se, is raised in the case of Harmon v. Chicago, supra. The court there says it does not pass upon the power of the city to make the issuance of dense smoke a public nuisance, but sustains a fine of $50 assessed against appellant, based upon that ordinance; thereby holding the ordinance valid, since it can hardly be contended that the ordinance, which clearly makes dense smoke a nuisance per se, could be bad as such, and good when evidence is adduced to show a nuisance in fact. That case involved the issuing of dense smoke from a tug in the Chicago river. The court took judicial notice of the fact that the Chicago river is in the midst of the city. Complainant's bill shows its plant to be near the river. The court proceeds further to say:

"At common law a nuisance was anything that worked hurt or damage. A public or common nuisance was that which affected the public, or was an annoyance to the King's subjects at large. Precisely that is the character of the dense smoke emitted from defendant's tugboat."

The court says again:

"Certainly anything that is detrimental to certain classes of property and business in a populous city, and is a personal annoyance to the public at large within the city, needs not to be defined by ordinance or by lexicographers to be known to the common mind as a public nuisance. It is so per se. * * * Nor will any subtle distinctions be indulged in as to what is meant by 'dense smoke,' as those terms are used in the ordinance. The terms will be understood as commonly employed, and this court will understand by 'dense smoke' precisely what everybody else does that has ever seen a volume of dense, dark smoke as it comes from the smokestack or chimney where common soft or bituminous coal is used for fuel in any considerable quantities."

It is true the parties had put in an agreed statement of facts in this case, showing what were the effects of dense smoke, and the decision must be considered in the light of that fact. In the case of Monroe v. Gerspach, supra, the court holds that:

"Inasmuch as the question of nuisance is one of fact, it becomes necessary in populous towns to regulate such matters by public ordinance, and public policy requires that the municipality should not be disturbed in the exercise of its powers unless it clearly transcends its authority."

In the case of Village of Des Plaines v. Poyer, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524, the court hold the ordinance invalid upon the ground that, in their judgment, the act prohibited was not a nuisance. In like manner the court in Hoops v. Village of Ipava, 55 Ill. App. 94, hold that the act prohibited was a nuisance. Judge Gary, in Field v. Chicago, 44 Ill. App. 410, quotes Justice Caton in Munn v. Burch, 25 Ill. 35, to the effect that "courts will not pretend to be more ignorant than the rest of mankind."

From the foregoing authorities it follows that the city of Chicago was acting within its charter powers in passing the ordinance un-

der consideration, and that the court should not interfere with the enforcement thereof unless there was involved an unreasonable exercise of the charter power. It is held in the case of Harmon v. Chicago, supra, that a municipality cannot by ordinance make that a public nuisance which was not in fact such. The same rule is laid down in numerous cases, and must be deemed a settled rule for the purposes of this motion. It is also well settled at common law that acts or things which (1) are prejudicial to public morals, (2) dangerous to life, and (3) injurious to public rights were nuisances per se. "Formerly," says Wood in his work on Nuisances, p. 766, "all those trades and uses of property which by experience had been demonstrated to be noxious and hurtful were held to be nuisances per se." While science has gone far to remedy the baneful effects of many of the acts and uses then condemned as per se hurtful to persons, morals, and property, it has necessarily added many which were not at that time such, or so considered. The rule above stated has often been made to bend to suit the requirements of commerce or manufacture. Practically an utter absence of factory smoke betokens an utter absence of people who might have been subjected to inconvenience or injury thereby. It seems clear that all regulations of the uses of property should be created with a reasonable reference to the necessary demands of trade and manufacture. While, of course, life, health, and morals are of primary consideration, mere inconvenience and discomfort might not be. In the former there can be no comparison of advantages with disadvantages. The welfare of the individual and the state, from every viewpoint, demands that public health, life, and morals shall not be one whit compromised. From the foregoing citations it will be seen that certain trades and uses of property were declared to be nuisances per se because they were demonstrated to be noxious and hurtful by experience. Ivonton v. Perlie, 15 Shaw & Dunlap, 775. They included tanneries, limekilns, forges, and many other enumerated uses. More recently the running of hogs in the streets, and slaughterhouses, have been so held.

As above noted, there has been some disagreement of the courts as to smoke, and questions have arisen with regard to the power of a legislature to declare the issuance of dense smoke within corporate limits to be a nuisance, without regard to the immediate surroundings. The authorities in support of this power have been cited above. The bill admits the issuance of dense smoke, and it is a matter of common knowledge, of which the court may take cognizance (State v. Tower [Mo. Sup.] 84 S. W. 12; Moses v. U. S., 16 App. D. C. 428; Field v. Chicago, supra), that smoke emitted from a tall chimney is carried over a wide territory, and that when dense it deposits soot to such an extent as to injure property and health wherever it spreads. It is doubtful whether any one of the common-law uses or trades did or could affect so large a community as does dense smoke issued from such a chimney as that of complainant. But the court is not left to this source of knowledge. There can be no stronger declaration of the character of such an act than that of the community at large. The ordinance

in question is the expression of the people's representatives in this city, which, in turn, makes it the summing up of all the judgment of all the people upon that subject. Soon Hing v. Crowley, 113 U. S. 708, 5 Sup. Ct. 730, 28 L. Ed. 1145. All things considered, it is plain that the ordinance in question was a reasonable exercise of the power given to the city in its charter, and, that being so, the court will not be warranted in holding the ordinance invalid as in excess of the power of the city.

There remains yet to be considered the allegation that the ordinance operates unequally upon complainant's plant, and is therefore unconstitutional. It does appear from the bill that prior to the passage of the ordinance, and up to the time the bill was filed, complainant's chimneys discharged smoke—one for sixteen fire boxes, and one for seven—and that it is required by the ordinance to observe the same rule as to the time during which dense smoke can be issued as is required of the chimney serving one fire box. It is therefore claimed that the ordinance, while not so upon its face, yet, when applied to conditions as they exist, operates unfairly upon complainant, and constitutes a discrimination. The ordinance deals only with chimneys, and places them all upon the same footing. It provides: (1) That the emission of dense smoke shall be a public nuisance. (2) That three notices shall be mailed ten days before prosecution is commenced. (3) The emission of dense smoke for more than three minutes, or, in case fire boxes are being cleaned or new fires started, six minutes, in any hour of the day or night, shall be deemed a nuisance, and punished by fine. (4) It further provides who shall see to its enactment. (5) No prosecution can be had against plants installed prior to the passage of the ordinance until the expiration of a year from its passage, in order to rebuild and re-equip the same, provided the owner commences at once his plans so to do. Thus it is seen complainant had a year in which to construct its plant so as to enable it to comply with the ordinance, and it nowhere appears that complainant, by some alterations in its plant, could not comply with the provisions thereof. If it is to be admitted that each fire box is to have the privilege of smoking one-twentieth of an hour, and in certain cases one-tenth of an hour, then it is manifest the ordinance would permit complainant's chimney to smoke practically all the time, which would defeat, of course, the object of the ordinance.

The case of Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546, cited by complainant, is not in point. The ordinance there under consideration provided that prisoners immediately upon arrival at the jail should have their hair cut off to a uniform length of one inch from the head. This required the removal of the queue from a Chinaman, and a consequent and peculiar degradation. The court holds that the passage of the ordinance exceeded the powers of the board of supervisors, and that the cutting of the hair could not be construed into a measure of discipline or health, and showed upon its face that it was done to add to the severity of the punishment of the prisoner, he being a Chinaman. There is in the ordinance in question no evidence of any attempt to deal unevenly

with complainant, nor can any be inferred. In Soon Hing v. Crowly, supra, Justice Field says:

"The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation."

If the ordinance now under consideration is a legitimate exercise of the police powers of the city, it should be interfered with by the courts with extreme caution. Again, it is not clear from the bill that dense smoke is unavoidable, or that the creation of it is of advantage to complainant. I am of the opinion that, under its police powers, under the facts of this case, the city has the right to regulate the emission of dense smoke from chimneys, as such, without regard to the use owners and operators make of them. The argument of complainant that in its operation the ordinance works unequally, and therefore is void, finds its premise in the assumption that complainant has an unqualified right to maintain his property in the condition as it existed at the time the ordinance was passed. This manifestly is not tenable, for private property is held subject to the reasonable exercise of the police powers of the state. Nor does the fact that one may be able to comply with the ordinance without making a change in his property, while another must make certain alterations to conform thereto, render the enactment void for inequality. The bill charges that the enforcement of the ordinance will damage it to the extent of $25,000. "Special burdens," says Justice Field in Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, "are often necessary for general benefit." The position taken by complainant involves the whole question of the suppression of dense smoke. If the health and morals of the city require it, even such a result as the bill declares should not be allowed to defeat the efforts of the authorities by proper means to protect the public. Again, in Barbier v. Connolly, supra, the court uses the following language in speaking of the rights secured by the fourteenth amendment:

"But neither the amendment, broad as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes called the 'police power,' to prescribe regulations to promote the peace, morals, education, and good order of the people."

Even a long-exercised right would not protect against an ordinance such as is here involved, if the public weal was at stake. Fertilizing Co. v. Hyde Park Co., 97 U. S. 659, 24 L. Ed. 1036; Brannon on the Fourteenth Amendment, p. 230.

The broad underlying principle which should control in cases of this character is that rights of owners and users are all held subject to the right of the proper authority to require them to conform to all those regulations which are absolutely essential to the preservation of life, health, morals, and good government. The regulations must not consist of whims or matters of taste, but of things vital. It is difficult to adjust the exact rights of business interests and public good, but, once adjusted, society, as organized, has the

power from time to time, as need requires, to assert itself for the protection of itself. The motion for a preliminary injunction must be denied.

The cause has been passed upon at some length by the court on suggestion of counsel that such a course might facilitate a disposition of the cause on the merits. Inasmuch as no appeal lies from the denial of the motion for a preliminary injunction, counsel are at liberty to take steps to that end if they can agree upon the means.

## THE ROMA.

(District Court, S. D. New York. May 27, 1905.)

SHIPPING—OBSTRUCTION OF SLIP BY LINE—NEGLIGENCE.

A steamship had been moored in one side of a slip for three days, during which time the bulkhead at the inner end of the slip had been occupied each night by a small passenger steamer making regular daily trips. On the third day the ship ran a hawser across the slip, making it fast to the pier on the other side, a few feet above the water. When the steamer came in about sunset no notice of the presence of the line was given her until she was within 100 feet, when she was shouted to from the ship and reversed, but struck the hawser and was injured before she lost headway. *Held*, that the ship was negligent in not placing a light upon the hawser or otherwise notifying the steamer of its presence, and was liable for the damage caused; that the smaller vessel was not in fault either for excessive speed or because she had no lookout, it not appearing that one could have seen the obstruction better than the master, who was at the wheel in the pilot house 12 feet from the stem.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 96–102.]

In Admiralty.

Wing, Putnam & Burlingham, for libellants.
Benedict & Benedict, for claimant.

ADAMS, District Judge. This action was brought by Charles A. Macrea and Elizabeth Macrea, the owners of the Alberta M., a small steam passenger vessel, to recover the damages sustained by reason of a collision between that vessel and a line stretched across the water from the steamship Roma, lying at a wharf in the Atlantic Basin, Brooklyn, to a neighboring wharf, on the evening of the 7th day of November, 1904. Two passengers were injured and join in the action to recover damages therefor.

The Alberta was engaged in the business of carrying passengers between her landing place at India wharf in Brooklyn and Bayonne, New Jersey. She had regularly occupied the bulkhead between piers 33 and 34, which bounded the slip, for about 18 years, paying wharfage therefor. She was a screw steamer about 72 feet long and 15 feet beam, with an upper deck, the forward part of which was occupied by the pilot house. The latter was about 12 feet aft the stem. The slip was about 1000 feet long.

The Roma was a transatlantic passenger steamer of the Fabre line, about 432 feet long and 45 feet wide. She came to the wharf on the 4th of November and after that time had been lying near

the inner end of pier 33 with her bow about 40 feet from the bulkhead. Her port side was nearest to the pier. Her officers had seen the Alberta passing out of the slip in the morning and returning in the evening of each day.

On the day in question the Alberta left her pier in the basin for Bayonne at 7 o'clock A. M., carrying passengers. She left there again at 4:50 o'clock P. M., bound for her Atlantic Basin destination, with numerous passengers on board, expecting to reach there at 5:30 o'clock, but she was a little delayed in entering the gap of the basin by the presence of another vessel there and it was a few minutes later when she turned in to the slip.

The Roma, a little after 4 o'clock, had stretched the hawser, which was 6 or 7 inches in circumference, across the slip, leading from her after bitts to pier 34. The hawser was about 25 feet above the water at the ship and ran down to a few feet above the level of the water on pier 34. As the Alberta approached the line, she was shouted to to avoid it and the master at the wheel stopped and reversed the engine but not in time to avoid the hawser, which swept the upper part of the pilot house off and injured two of the passengers, who were in the room back of the pilot house.

On the day in question, it was sunset at 4:53. The end of the evening twilight was between 6:20 and 6:35 o'clock. It was becoming dark as the Alberta turned into the slip and difficulty in seeing there was increased by structures on the adjoining piers, which were about 20 feet high, and by buildings back of the bulkhead.

At the time of the accident the Roma was probably somewhat breasted off from the pier, owing to her having been moved slightly to let a coal boat, which had been moored between the steamship and the pier, pass out. The steamship had not been moved sufficiently to give any warming of the operation, so far as the hawser was concerned.

The questions in the case are: (1) Whether the Roma was guilty of negligence in obstructing the slip without giving notice of the presence of the hawser and (2) Whether the Alberta was negligent in failing to observe it in time.

It is settled that vessels stretching hawsers across slips in the nighttime without adequate warning are responsible for the damages caused thereby to careful navigators (The Fulda [D. C.] 31 Fed. 351; Erie R. Co. v. Oceanic Steam Nav. Co. [D. C.] 121 Fed. 440), and this is a stronger case for the libellants than either of those cited, inasmuch as the Alberta was well known to the Roma to be a regular occupant of the bulkhead at the head of the slip during the nights. It was especially incumbent upon the Roma, therefore, to give the Alberta notice of the presence of the hawser, when the darkness came on. It is contended by her that she did so by the warning shouts of persons on the steamer and in the vicinity and I have no doubt that such shouts were given, and, if in time, would have served the purpose. They did not, however, warn the Alberta in season. It was alleged in the original answer that the shouts were given as the Alberta rounded into the slip by a compe-

tent man stationed at the end of the pier for such purpose, but the answer was amended and this allegation was omitted. The testimony shows that the shouts were given as the Alberta was probably within about 100 feet of the hawser and too late for her to stop in time, although she was moving slowly and carefully towards her berth and reversed when they were understood. These shouts were in a foreign language, principally French, and the purport of them was not immediately grasped by the master of the Alberta, who was depending more upon his eyes than his ears, to ascertain what was ahead of him. Of course he should have been alert with his ears also, but I think he was sufficiently so. It is not at all clear that if he had reversed the engines of his boat as soon as he could reasonably have been expected to hear the first shout, the collision would have been avoided. It is urged by the steamship that as the hawser was broken, it is evident that the Alberta was moving faster than she should have been, but it appears that her headway was practically stopped at the gap and as she went ahead under one bell only, her rate of speed can not be held to be excessive. Her full speed was about 7 knots, and it is not probable that she was making more than 3½ to 4 when she observed the hawser and reversed. The hawser was a light one, less than 2½ inches in diameter, and as it was stretched across the space, it did not require much of a pressure to break it. I am constrained to hold that no sufficient warning was given her of the hawser being there. It seems that the proper signal to be given was a light on the hawser. It was dark enough to render such a light visible for some distance and it would have conveyed at once an intimation of danger which navigators would be bound to notice. I think that the Roma must be held in fault.

Whether the Alberta should be regarded as contributing to the accident is also to be determined. She was a small craft with a crew of three persons altogether and had no lookout. If her complement of men was insufficient, she is not for that reason to be excused for not having a lookout forward, if one would have been of service, but I am not able to see how the presence of a watchful person there would have averted the accident. I had occasion to consider a somewhat similar question in Erie R. Co. v. Oceanic Steam Nav. Co., supra, and concluded that any warning which could have been given by a lookout would have been useless, because if he were stationed on deck, the hawser would have been above the line of his vision. Here the hawser was probably a little lower and the darkness was not so great, but it seems that for practical purposes the same result should be reached. There is not enough variance in the cases to reach a different conclusion.

Decree for the libellants, with an order of reference.

## THE TRANSFER NO. 10.

(District Court, S. D. New York. May 12, 1905.)

COLLISION—TUGS WITH TOWS MEETING—KEEPING TO WRONG SIDE OF CHANNEL.

A transfer tug with two car floats in tow alongside *held* solely in fault for a collision between one of such floats and a meeting schooner in tow on a hawser, which took place in East river between the Bronx shore and North Brothers Island, on the ground that the tug was unnecessarily on the wrong side of the channel, and, although agreeing by signal to pass port to port, did not give the other tug and her tow sufficient room.

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham, for libellant.
Henry W. Taft and Joseph H. Choate, Jr., for Transfer No. 10.
John F. Foley and Howard S. Harrington, for Director.

ADAMS, District Judge. This action was brought by the Rockland-Rockport Lime Company, the owner of the schooner Jordan L. Mott, to recover against the Transfer No. 10, the damages received by the schooner by reason of a collision with a car float in tow of that tug, on the 28th of September, 1904. The schooner was in tow, on a hawser of about 20 fathoms, of the steamtug Director, and bound east through the East river, going to Rockland, Maine, with a load of coal. The collision occurred between North Brother's Island and the Bronx shore about 7:15 o'clock P. M. Proper lights were duly exhibited by all of the vessels. The tide was flood, about 2 miles in strength. The schooner was using her helm but had no sails set. There was no wind to affect the vessels. The Director was brought in by petition. At the end of the trial, a fault of not following the Director, was alleged by No. 10 against the schooner and an amendment allowed raising that question.

The floats of the Transfer were going from New York to the claimant's float bridges at Oak Bluff, New York. Finding them occupied when she arrived, the tug moved down the river to the mooring crib, which lies on the Bronx side of the channel, a few hundred feet below the bridges, to await an opportunity for the floats to get in to the bridges to unload. There she found two other transfer tugs, No. 14 and No. 17, each also with two floats in tow, awaiting an opportunity to get to the bridges. No. 10 tied up outside of them. All lay heading down the river. Shortly afterwards No. 14, which was nearest to the shore, was called to the bridges. She was obliged to go out far enough to clear the bridge racks and then drop back with the tide. This involved the other tugs and floats also going out and while they were executing the manœuvre, the collision occurred by the forward port corner of the port float of No. 10 striking the port side of the schooner about 30 feet from her bow, doing considerable damage. The schooner was 85 feet long.

The Director and No. 10 saw each other when they were about one-fourth of a mile apart and exchanged a signal of one whistle, which was shortly afterwards repeated. There is no dispute between the parties save as to the point of collision with respect to

the shores, the schooner and the Director contending that it was as near North Brother's Island as it was safe for them to go, and the Transfer that there was ample room for the Director and tow to navigate in. The space between the buoy and Oak Bluff is about 800 feet.

It is not seriously disputed by No. 10 that she was well over to the shore of North Brother's Island. Her pilot says that her port float was within about 200 feet of the southern side of the channel, so that there was that much navigable water left for use by other boats, but it appears that he considered the channel 900 or 1,000 feet wide there when it was actually 800, and his estimate of the distance of 200 feet may be reduced. The 3 transfers, with their 6 floats, were probably between 300 and 400 feet wide. Concededly they had to go out 150 feet from the end of the pier at which they were lying in order that No. 14 might get properly to the bridges and in this way they occupied a large part of the channel, so that a space of 200 feet was rather a large estimate. It is testified by those on the tug and tow that they went as much to the southward of the channel as was prudent but nevertheless the collision took place as above described. The facts in the case and the question of fault have been fully and elaborately argued but there does not seem to be very much to say about it. The Transfer was obviously in fault for being on the wrong side of the channel and her signals indicated that she would give the tug and tow the room they were entitled to. They kept well, if not closely, to their side of the channel and in view of the rights of the vessels and of the agreement between the tugs, I see no other conclusion to arrive at than that No. 10 should be held for the damages.

In some respects the case resembles that of The Teaser (D. C.) 118 Fed. 81. There a vessel was being towed on a hawser through the East river between Blackwells Island and New York. Transfer No. 14 was towing some floats there and held primarily responsible for the collision, but the damages were divided because it seemed that the other tug did not observe the proper precautions with respect to stopping when it became apparent that the Transfer was not fulfilling her duty to keep away from the port side of the channel. The decision was reversed on appeal with respect to the division (127 Fed. 305, 62 C. C. A. 223) because the tug being encumbered with a tow astern, it was held she was entitled to hold on to the last minute. The case is quite in point here with respect to the duty of the navigating vessels to keep to their own sides of the channel.

It is contended here that the No. 10 could not go to her starboard on account of the presence of the other transfers inside of her, but if that was the situation, it does not seem that it helps her because she must abide by the result of being forced into an improper position by the other transfers, which have not been brought into the action, perhaps for the reason that they have the same owner. But, in any event, it does not appear that such an excuse can prevail here, because at the time of collision, the others were out of her way and there was ample room for No. 10 to go down or

back up the river. Either would doubtless have been inconvenient but that contention can not be received to relieve her from a wrong. I do not consider that fault has been established against either the Director or the schooner.

Decree for the libellant against No. 10, with an order of reference. The petition against the Director is dismissed.

## MICHIGAN RAILROAD TAX CASES.

PERE MARQUETTE R. CO. v. POWERS, Auditor General. DETROIT & M. R. CO. v. SAME. CHICAGO & N. W. RY. CO. v. SAME. TOLEDO, S. & M. RY. CO. v. SAME. MICHIGAN AIR LINE RY. CO. v. SAME. GRAND TRUNK WESTERN RY. CO. v. SAME. MICHIGAN CENT. R. CO. v. SAME. ANN ARBOR R. CO. v. SAME. CINCINNATI, S. & M. R. CO. v. SAME. CHICAGO, D. & C. GRAND TRUNK JUNCTION R. CO. v. SAME. MUNISING RY. CO. v. SAME. LAKE SUPERIOR & I. RY. CO. v. SAME. MARQUETTE & S. E. RY. CO. v. SAME. CHICAGO, M. & ST. P. RY. CO. v. SAME. MINERAL RANGE R. CO. v. SAME. PONTIAC, O. & N. R. CO. v. SAME. MINNEAPOLIS, ST. P. & S. S. M. RY. CO. v. SAME. COPPER RANGE R. CO. v. SAME. GOGEBIC & M. R. R. CO. v. SAME. MANISTEE & N. E. R. CO. v. SAME. ESCANABA & L. S. R. CO. v. SAME. GRAND RAPIDS & I. RY. CO. v. SAME. WISCONSIN & M. RY. CO. v. SAME.

(Circuit Court, W. D. Michigan, S. D. May 19, 1905.)

1. JURISDICTION OF FEDERAL COURTS — FEDERAL QUESTION — SUIT AGAINST STATE OFFICER.

   A federal court has jurisdiction of a suit to restrain the collection of taxes levied under provisions of the Constitution and statutes of a state, which the bill, in good faith, alleges are repugnant to the Constitution of the United States, and where it is also alleged that the defendant, as a state officer, by his acts under said state Constitution and statute is about to deprive complainants of their property without due process of law.

2. SAME—EQUITY—RETAINING CASE TO ADMINISTER FULL RELIEF.

   Where the jurisdiction of a federal court has been properly invoked for relief against assessments as discriminating against complainant, and depriving it of the equal protection of the laws, in violation of the fourteenth constitutional amendment, although such federal question is determined against complainant, the bill may be retained for the decision of other questions arising on the record.

3. CONSTITUTIONAL LAW — EQUAL PROTECTION OF LAWS — LIMITATION ON STATE'S POWER OF TAXATION.

   The provisions of the fourteenth constitutional amendment, prohibiting states from depriving any person of his property without due process of law, and from denying to any person the equal protection of the laws, do not prevent a state from changing its system of taxation in all proper and reasonable ways, nor compel it to adopt any iron rule of equality, but it may lawfully classify property for the purposes of taxation, and impose different rates on different classes; it being sufficient if there is no discrimination in favor of one as against another of the same class, and the method of assessment and collection of the tax is not inconsistent with natural justice.

4. TAXATION OF RAILROADS—POWER OF STATES—CONSTITUTIONALITY OF METHOD OF TAXATION.

Article 14, § 10, of the Constitution of Michigan, as amended in 1900, authorizes the Legislature to provide for the assessment of the property of corporations at its true cash value by a State Board of Assessors, and for the levying and collection of taxes thereon. It requires the Legislature to provide a uniform rule of taxation for all property so assessed, and that the rate of taxation shall be the rate which the State Board of Assessors shall ascertain and determine is the average rate levied upon other property upon which ad valorem taxes are assessed for state, county, township, school, and municipal purposes. Act No. 173, p. 236, Pub. Acts 1901, enacted pursuant to such constitutional provisions, provides for the assessment and taxation of the property of railroad and similar corporations by the State Board of Assessors, and that they shall ascertain and determine the average rate of taxation of other property by means of reports of the action of local taxing bodies, and that the taxes, when collected, shall be applied to certain state purposes. *Held*, that such laws were not unconstitutional, as depriving the corporations of their property without due process of law, or denying them the equal protection of the laws, on the ground that the rate of taxation was not determined and fixed by the Legislature, but that it was in fact fixed by the Constitution and the Legislature; the determination of the rate by the State Board of Assessors being clerical only, and the method of fixing it from the average rate of state and local levies for the current year being not only legal and within the legislative discretion, but also equitable.

5. SAME.

Such statute (Act No. 173, p. 236, Pub. Acts Mich. 1901) is not in violation of article 14, § 14, of the state Constitution, which provides that "every law which imposes * * * a tax shall distinctly state the tax and the object to which it is to be applied," nor is it objectionable because it provides for no hearing as to the rate before the tax is imposed, since, the rate being fixed by the Constitution, and the duty of the State Board of Assessors being merely to ascertain it by a mathematical calculation, such board has no discretion to change it.

6. SAME.

A state statute is not in violation of the fourteenth constitutional amendment, as denying the equal protection of the laws, because it provides a method of taxing the property of railroad corporations different from that applied to the property of other corporations or individuals, although the latter may incidentally own or operate railroads; the fact that railroad corporations, as such, are vested with different and greater powers than other corporations or individuals, being a sufficient reason for their separate classification for purposes of taxation.

7. SAME.

A statute providing a method of taxation of a particular class of property different from that applied to other classes is not invalid, as in violation of the rule of uniformity of taxation imposed by the state Constitution, because it does not provide for equalizing the valuation of such class with other classes, where all the statutes require assessments to be made at actual value, and thus provide for uniformity if faithfully administered.

8. SAME.

Under the well-established rule that a state has power to provide for the taxation of different classes of property by different methods, a statute providing a special method of taxing the property of railroad corporations is not unconstitutional, as denying such corporations the equal protection of the laws, because it taxes their property, including credits, at its cash value as a unit, while other statutes, providing for the taxation of individuals, permit the deduction of indebtedness from credits.

9. SAME—ENJOINING COLLECTION OF TAX—INEQUALITY IN ASSESSMENT.
The collection of a tax levied against the property of railroad companies on an assessment at its actual value cannot be enjoined on the ground that other property in the state was assessed at less than its actual value, in violation of the statute, unless it is shown that such undervaluation was fraudulent, intentional, and systematic.

In Equity. Suits to enjoin collection of taxes.

Until the legislation complained of in these cases, railroad corporations, express companies, car loaning companies, etc., were taxed in the state of Michigan specifically upon their gross earnings. For the purpose of enabling the Legislature to pass an act for their taxation by an ad valorem system of assessment, placing their property for that purpose upon the same basis with that of other corporations and individuals throughout the state, the Constitution was amended in 1900. The amendment permitted the Legislature to provide for the assessment of the property of corporations at its true cash value by a State Board of Assessors, and provided for a uniform rule of taxation for such property, and that the rate of taxation on such property should be the rate which the State Board of Assessors should ascertain and determine as the average rate levied upon other property on which ad valorem taxes are assessed for state, township, county, school and municipal purposes. At the next session of the Legislature, in 1901, Act No. 173 (page 236), was passed,[1] which is entitled "An act to provide for the assessment of the property of railroad companies, union station and depot companies, express companies, car loaning companies, stock car companies, refrigerator car companies and fast freight line companies; and for the levying of taxes thereon by the State Board of Assessors, and for the collection of such taxes," under the provisions of which act the companies affected were required to make reports to the State Board of Assessors, which board was required to prepare an assessment roll and assess the property of such corporations, the property of the several corporations being described thereon by a general statutory description, which in the case of the railroad companies was required to be "real estate, rolling stock, right of way and appurtenances thereto, and all other property used in carrying on the corporate business, and subject to taxation by the State Board of Assessors." In determining the true cash value of the property of the railroad companies, it is provided that the board should be guided by the relation which the number of miles of main track within the state of Michigan bears to the entire mileage of the main track of said companies, both within and without the state. After the completion of such roll the Board of Assessors is required to meet at the state capitol at Lansing on the third Monday of December of each year, and continue in session from day to day for so long a period as may be necessary, not later than the 15th day of January next thereafter, for the purpose of reviewing their assessment; and any company or persons interested shall have the right to appear during such period and be heard as to the valuation of the property of any such company, and the State Board of Assessors, on such application, or on its own motion, is given authority to correct the assessment or valuation of the property of such company in such manner as will, in its judgment, make the valuation thereof just and equal. It is made the duty of the clerk of the board of supervisors in each county in the state, not later than the 1st day of November in each year, to report to said board the equalization made by the board of supervisors of the assessment rolls of the several townships therein, which report shall contain a statement of the amount of ad valorem taxes to be raised in the several municipalities in such county for state, county, township, municipal, school, and other purposes, and a statement of the correct valuation of the property in each of said municipalities, as taken from the assessment rolls of said municipalities for the year in which such equalization is made. It is made the duty of the supervisor or other as-

[1] Note.—Copies of the amendments to the Constitution and of Act No. 173, p. 236, of 1901, are attached to this opinion.

sessing officer of cities and villages governed by special charters, which provide for the collection of ad valorem taxes, which are not reported to the board of supervisors for the purpose of equalization or review, and the supervisors or other assessing officers of cities organized under general laws, to make within said time a report to said board of all ad valorem taxes raised in any of such municipalities which have not been reported to the State Board of Assessors, for the purpose of equalization and review. The act further provides, in section 12 (page 245), that after the receipt of such reports, and not later than the 15th day of December in each year, the State Board of Assessors shall ascertain and determine the average rate of taxation of the then current year levied upon other property upon which ad valorem taxes are assessed for state, county, township, school, and municipal purposes, and shall enter the same upon its record forthwith, together with the method by which such average rate was ascertained and determined. The board is required to tax the property of the several companies, as assessed by it, at the rate as determined, and the amount of the taxes is to be extended upon the assessment roll, opposite the description of the respective companies' properties. The taxes so extended are made a debt owing from the companies, and become a lien upon all of the property, real, personal, and mixed, of said companies, from the time of extension until payment, which lien may be enforced by seizure and sale of the property, or so much thereof as is necessary to satisfy the same. The board is required to annex to its roll its warrant commanding the Auditor General to collect said sums, which warrant is authority, in case of the neglect or refusal of any company to pay its tax, for levying on the same by distress and sale of the property of the corporation. All taxes collected under the act are to be applied in paying the interest upon the primary school, university, and other educational funds, and the interest and principal of the state debt, in the order recited, until the extinguishment of the state debt, other than the amounts due to educational funds, when such taxes shall be added to, and constitute a part of, the primary school interest fund.

The State Board of Assessors proceeded under the act for the collection of the taxes for the year 1902, assessing the property of the companies at what they believed to be its true cash value. Acting under the provisions of section 12 of the act, to ascertain and determine the average rate of taxation for the year 1902 levied upon other property upon which ad valorem taxes were assessed for state, county, township, school, and municipal purposes, they believed it to be their duty to determine whether such other property had been assessed at its true cash value, and proceeded accordingly, and did ascertain and determine that such property had not been assessed by the assessors thereof at its true cash value, but that it had been assessed at a sum greatly less than its true cash value, and determined the true cash value of such property to be the sum of $1,715,000,000, making thereby the amount of the assessed valuation of said property as determined by them greater than the amount of valuation as assessed by the local assessors, as shown by the reports made to said board by the clerks of the boards of supervisors; and by such determination the board ascertained and determined the rate of taxation to be levied upon the properties of said companies to be $13.68905 per $1,000 of the assessed valuation thereof, and levied said rate of taxation upon the property of said companies. The tax roll made upon that basis, with the proper warrant of the board, was delivered to the Auditor General for collection. Thereupon application was made to the Supreme Court of the state by the board of education of the city of Detroit for a writ of mandamus to said State Board of Assessors, to require them to redetermine the rate of taxation to be levied upon the property of said companies, by taking for such determination the assessed value of the other property as the same had been made by the local assessors. The Supreme Court granted the writ of mandamus; holding that under the provisions of said Act No. 173 the State Board of Assessors had no authority to thus equalize the assessment of said other property, and that their duty in determining the rate of taxation to be levied upon the property of said companies was to take the valuation of said other property at the assessment made thereof by the local assessors. Board of Education v. State Board of As-

sessors, 133 Mich. 116, 94 N. W. 668. Acting under the direction of the Supreme Court, the State Board of Assessors redetermined the rate of taxation levied upon said other property for state, county, township, school, and municipal purposes on the basis of the said assessment of said property made by the local assessors, and thereby made the rate of taxation to be levied upon the property of said companies $16.55329 per $1,000 upon the said assessed valuation thereof. For such tax a new assessment roll was made by said board, with its proper warrant annexed thereto for the collection of said tax, and delivered to the Auditor General.

To stay the collection of those taxes these suits are brought, in which complainants allege that the general properties of the state, other than railroad property, upon which taxes were assessed for state, county, township, school, and municipal purposes, were assessed at less than the true and actual cash value, and at about 82 per cent. thereof; that unincorporated persons, associations, partnerships, and joint-stock associations possess and operate railroads in Michigan, and own property similar in character and engaged in the same business and owned under the same circumstances as the railroad property of the complainants; that railroad companies, among whom were some of the complainants, operate sleeping cars, and that sleeping cars were also operated by corporations or institutions independent of railroads; that interurban and street railways and their property are engaged in the same business as complainants.

The defendant filed answers to the bills of complaint, which deny all statements setting up the unconstitutionality and invalidity of the constitutional amendments and Act No. 173, p. 236, of 1901, and the system of taxation invoked thereby, and, in addition, set forth in denial of allegations of the bills that the general properties of the state, upon which ad valorem taxes are assessed for state, county, township, school, and municipal purposes, were not assessed at less than their true and actual cash value, but were for 1902 presumptively, conclusively, and actually assessed at their true and actual cash value, and further setting forth that the properties of the complainant companies, as assessed by the State Board of Assessors, pursuant to Act No. 173 for the year 1902, were assessed at much less than the true and actual cash value thereof. The answers also denied the allegations of the bills in regard to sleeping car companies and interurban and street railway companies, and as to railroad and similar property to that owned and operated by complainants, being owned by unincorporated persons or institutions not subject to taxation under Act No. 173.

The objections interposed by the complainants to the system of taxation of railroads invoked by the Constitution and statute, as stated in their bills of complaint are that it violates:

(a) The fourteenth amendment to the federal Constitution in that: (1) The selection, of the corporations subject to taxation by a State Board of Assessors by said act is arbitrary, not based on material and inherent differences in the corporations taxed or their property from other corporations and property, and does not constitute proper classification for purposes of taxation. (2) While individuals and corporations generally are entitled under the general laws of the state to have their bona fide debts deducted from their credits, no such provision exists and no such deduction is allowed in the case of complainants. (3) A higher rate of taxation is imposed on the property of complainants than upon the property of other corporations and persons claimed to be similarly situated. (4) The rate of taxation to which complainants are subject is dependent on the action of local officers, over whom complainants have no control, before whom they cannot be heard, and whose action they have no right to have reviewed in the courts, or otherwise. (5) The rate is fixed without legislative judgment as to the need of the funds benefited by the tax in any year. (6) The act operates to impose a tax upon the property of complainants situate in other states. (7) No opportunity is given complainants for a hearing upon the determination of the State Board of Assessors in fixing the average rate. (8) By neglecting to provide for equalization of the property of corporations taxed under Act No. 173 with other property of the state, the fourteenth amendment of the federal Constitution is violated, and equal protection of the laws denied.

(9) As complainants had no notice of, or opportunity to be heard upon, the redetermination of the average rate, in the preparation of the duplicate assessment roll and the spreading of the tax thereon, due process of law was denied. (10) The constitutional provision and statute deprive complainants of their property without due process of law. (11) In requiring other tax laws to state distinctly the tax and its object, and not making a similar requirement as to acts providing for the taxation of corporations by a State Board of Assessors, discrimination results. (12) In that every other law which imposes a tax on property in the state of other corporations, companies, associations, and persons is required to state distinctly such tax and its object, while Act No. 173 does not state distinctly the tax it imposes. (13) By reason of the fact that the other property of the state, subject to ad valorem assessment for taxation for state, county, township, school, and municipal purposes, the average rate imposed upon which throughout the state is determined by the State Board of Assessors by mathematical computation, by dividing the aggregate amount of taxes levied and raised for the purposes enumerated by the aggregate assessed valuation of such other property at which average rate taxes are levied upon the assessed value of the property of complainants as fixed by the State Board of Assessors, is not assessed at its true and actual cash value, but at only about 82 per cent. thereof, while the property of complainants is assessed at its true and actual cash value, a discrimination results against complainants.

(b) That it violates section 8 of article 1 of the United States Constitution, in attempting to regulate commerce among the several states.

(c) That it violates section 4 of article 4 of the United States Constitution, guarantying to every state a republican form of government.

(d) That Act No. 173 violates sections 10 and 11 of article 14 of the Michigan Constitution: (1) In that the selection of the corporations subjected to taxation by a State Board of Assessors by said act is arbitrary, is not based on material and inherent differences in the corporations taxed or their property from other corporations and property, and does not constitute proper classification for purposes of taxation. (2) In not giving complainants a hearing on the question of the rate of taxation to be imposed upon their property. (3) In including within its provisions the property of the corporations named in the act, to the exclusion of all other corporations in the state. (4) In not providing a rule of taxation uniform, except on property paying specific taxes, by not permitting the deduction of complainants' debts from their credits, while permitting that deduction to other property owners. (5) In that if Act No. 173 is susceptible of the inclusion of highway taxes in the dividend in reaching the average rate, it violates section 11 of article 14.

(e) That Act No. 173 violates the provisions of section 32 of article 4 of the Michigan Constitution, in giving no right of hearing to complainants upon the question of the rate of taxation to be imposed upon their property.

(f) That Act No. 173 violates the provisions of section 12 of article 14 of the Michigan Constitution, requiring all assessments to be on property at its cash value, in not permitting the corporations taxed thereunder to deduct their debts from their credits, as permitted to property owners generally.

(g) Said act violates section 14 of article 14, providing that every law which imposes, continues, or revives a tax shall distinctly state the tax and the objects to which it is to be applied, and that it shall not be sufficient to refer to any other law to fix such tax or object.

(h) That Act No. 173 is repugnant to the Michigan Constitution, in authorizing the imposition of taxes upon complainants without the exercise of legislative judgment on the rate of taxation to be imposed, or the need of the state of the amount of money required for the purposes to which the proceeds of said tax are to be devoted. (i) That the Board of Assessors, in reaching the average rate, included in the dividend taxes for other than state, county, township, school, and municipal purposes.

Frederick W. Stevens (Benton Hanchett, of counsel), for Pere Marquette R. Co.

O. E. Butterfield, for Detroit & M. R. Co.

O. E. Butterfield, R. C. Flanigan, and Lloyd W. Bowers (J. H. Krebs, of counsel), for Chicago & N. W. Ry. Co.

E. W. Meddaugh and Harrison Geer (L. C. Stanley, of counsel), for Toledo, S. & M. Ry. Co., Michigan Air Line Ry. Co., Grand Trunk Western Ry. Co., Cincinnati, S. & M. R. Co., and Chicago, D. & C. Grand Trunk Junction R. Co.

O. E. Butterfield and Henry Russel (Ashley Pond, of counsel), for Michigan Cent. R. Co.

Alexander L. Smith, for Ann Arbor R. Co.

Hill & Smith (William P. Belden, of counsel), for Munising Ry. Co., Lake Superior & I. Ry. Co., and Marquette & S. E. Ry. Co.

Hill & Smith (Burton Hanson, of counsel), for Chicago, M. & St. P. Ry. Co.

A. E. Miller (A. B. Eldredge, of counsel), for Mineral Range R. Co.

John H. Patterson, for Pontiac, O. & N. R. Co.

E. C. Chapin (Alfred H. Bright, of counsel), for Minneapolis, St. P. & S. S. M. Ry. Co.

Gray & Stone (A. R. Gray, of counsel), for Copper Range R. Co.

Howard Morris (Thomas H. Gill, of counsel), for Gogebic & M. R. R. Co.

Dovel & Smith, for Manistee & N. E. R. Co.

Charles C. Russell (Horace A. J. Upham, of counsel), for Escanaba & L. S. R. Co.

T. J. O'Brien, for Grand Rapids & I. Ry. Co.

E. C. Eastman (Jesse B. Barton, of counsel), for Wisconsin & M. Ry. Co.

Charles A. Blair, Loyal E. Knappen, Charles E. Townsend, and Timothy E. Tarsney (Roger Irving Wykes, of counsel), for Auditor General.

WANTY, District Judge, after making the foregoing statement, delivered the opinion of the court.

The defendant objects to any consideration of these cases because he says they are brought to restrain the collection of taxes levied by the state of Michigan, and, although brought against him as Auditor General, they are in effect suits against the state, of which the court has no jurisdiction. The jurisdiction of the court to restrain the collection of taxes, where the bill in good faith alleges that the Constitution and statute of Michigan under which the tax in question was levied are repugnant to the Constitution of the United States, and that the defendant, who is the Auditor General, by his acts under that Constitution and statute, which, it is claimed, deny to the complainants the equal protection of the laws, is about to deprive the complainants of their property without due process of law, could hardly be seriously questioned, after the repeated declarations of the Supreme Court, either on the ground that the suit is against the state, or on the ground that a federal question is not involved. Pennoyer v. McConnaughy, 140 U. S. 1–10, 11 Sup. Ct. 699, 35 L. Ed. 363; Ex parte Tyler, 149 U. S. 164–190, 13 Sup. Ct. 785, 37 L. Ed. 689; Scott v. Donald, 165 U. S. 58–

68, 17 Sup. Ct. 265, 41 L. Ed. 632; Tindall v. Wesley, 167 U. S. 204–220, 17 Sup. Ct. 770, 42 L. Ed. 137; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Prout v. Starr, 188 U. S. 537–542, 543, 23 Sup. Ct. 398, 47 L. Ed. 584.

But it is seriously contended by the defendant that if the federal questions which are raised by the bills, which it is conceded are not fictitious, and which gave the court jurisdiction, are decided against the complainants, although the court had jurisdiction to dispose of these questions, its jurisdiction immediately ceases, and it may not decide the question of the undervaluation of the property of the state which is not taxed under the statute in question, when compared with the valuation placed upon the property of the complainants which is so taxed. Of course, if the claim that the Constitution and statute of the state violate the Constitution of the United States is fictitious and fraudulent, the Circuit Court of the United States could not acquire jurisdiction; but if that claim is real, and the court acquires jurisdiction, it does not lose it because its decision on that question is against the complainants' contention. If this were not so, all bills for injunction, in which the jurisdiction of the federal court is invoked on account of a statute or Constitution of a state contravening the provisions of the federal Constitution, should be disposed of without putting the parties to the expense of taking testimony, because no testimony could possibly be considered. If it were found that the contention of the complainants was well founded, then an injunction would follow as a matter of course; and if it were found that the Constitution or statute did not violate the provisions of the federal Constitution, the jurisdiction of the court would immediately determine, and the bill be dismissed. If that contention is well founded, then in these cases two years of time, and many thousands of dollars spent in taking testimony, should have been saved. But we cannot assent to this view. If the court actually acquires jurisdiction, that jurisdiction, although acquired because the Constitution or law of a state is claimed to be in contravention to the Constitution of the United States, extends to all questions involved in the controversy, and not merely to the question of the violation of the federal Constitution. Jurisdiction of a federal court having been properly invoked for relief against assessments as discriminating against complainant, and thus depriving it of the equal protection of the laws, under the fourteenth amendment, where the complainant fails to show discrimination the bill may be retained to administer relief on other grounds, although the state court could afford adequate remedy. This was held in Louisville Trust Co. v. Stone, 107 Fed. 305, 46 C. C. A. 299, where Justice Day, in delivering the opinion of the Circuit Court of Appeals of this circuit, cites with approval the case of Nashville, etc., Railway Co. v. Taylor (C. C.) 86 Fed. 168, in which the grounds of federal jurisdiction are carefully examined and fully stated in an able opinion by Judge Clark. Where the Supreme Court of the United States acquires jurisdiction on appeal from this court only because a law of a state is claimed to be in contravention of the Constitution of the United

States, the appeal is not dismissed because the Supreme Court decides that the claim of the federal question involved is not well founded. If the claim is real and is made in good faith, then the Supreme Court acquires jurisdiction of the entire case, and of all questions involved in it.

In the case of Horner v. United States, 143 U. S. 570, 576, 577, 12 Sup. Ct. 522, 524, 36 L. Ed. 266, the court said:

"We are further of opinion that where an appeal or writ of error is taken direct to this court under section 5 of the act of March 3, 1891, in a case in which the constitutionality of a law of the United States is drawn in question, this court acquires jurisdiction of the entire case, and of all questions involved in it, and not merely of the question of the constitutionality of the law of the United States. This is shown by the fact that, under section 5, where an appeal or writ of error is taken direct to this court in a case in which the jurisdiction of the District Court or of the Circuit Court is in issue, it is specifically directed that 'the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision,' but there is no kindred limitation prescribed in regard to any of the other cases in which jurisdiction in this court of appeals or writs of error is given by section 5."

In Penn Mutual Life Insurance Co. v. Austin, 168 U. S. 685–695, 18 Sup. Ct. 223, 227, 42 L. Ed. 626, Mr. Justice White, delivering the opinion of the court, said:

"But the words of the statute which empower this court to review directly the action of the Circuit Court are that such power shall exist wherever it is claimed on the record that a law of a state is in contravention of the federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is not that the bill, without color of right, alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect, is that the right to a direct appeal to this court does not exist where it is claimed that a state law violates the Constitution of the United States, unless the claim be well founded. But it cannot be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case. The authorities referred to as supporting the position indicate that the argument is the result of a confusion of thought, and that it arises from confounding the power of this court to review on a writ of error the action of a state court with the power exercised by this court, under the act of 1891, to review by direct appeal the final action of the Circuit Court, where, on the face of the record, it appears that the claim was made that the statute of a state contravened the Constitution of the United States. These classes of jurisdiction are distinct in their nature, and are embraced in different statutory provisions. Having jurisdiction of the cause, there exists the power to consider every question arising on the record."

The case of Coulter v. Louisville & Nashville R. Co. (decided by the Supreme Court of the United States February 20, 1905) 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615, was a bill brought by a Kentucky railroad corporation against the members of the State Board of Valuation and Assessment of Kentucky, and the only ground of jurisdiction alleged was that under the laws of the state of Kentucky, as administered by its executive officers, the railroad company was deprived of the equal protection of the laws, contrary to the fourteenth amendment to the federal Constitution, because all property not exempt from taxation was required to be assessed at its fair cash value, and the assessing officers assessed a great

deal of the tangible property in the state below its cash value, and the complainants' railroad property was assessed at its full value. After deciding the federal question, which gave the court below jurisdiction, adversely to the complainants' contention, the court then examined the evidence, and decided the question of fact involved in the case on its merits, saying that:

"As the claim of right under the United States Constitution was not merely colorable, and as the evidence is here, we have considered the evidence, also; and our conclusion from that, as well as from the law, is that the bill must be dismissed."

The objections of complainants to the amendment of the Michigan Constitution and the statute under which the taxes in these cases were levied are repeated in different forms in the bills of complaint, but may be grouped under a few heads; and those serious and important questions thereby raised, and which were argued in the briefs of counsel, and orally at the bar, we will examine. In examining and deciding each of these questions, we shall not at any time forget that the taxing power of a state is necessary to its existence, and, being one of its attributes of sovereignty, a statute passed for the levy and collection of its revenue must not be held void by a federal court unless it is so clearly an illegal encroachment upon private rights as to leave no doubt of its invalidity.

The complainants complain that the provision of the fourteenth amendment to the Constitution of the United States forbidding the state to deprive any person of his property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, is violated by the amendment to the Constitution of the state of Michigan, and the statute made in pursuance thereof, under which the taxes in question in these cases were levied. As has been many times said by the Supreme Court, it was undoubtedly intended by the fourteenth amendment that no state should arbitrarily deprive any person of his property, and that equal protection and security should be given to all under like circumstances. No rule can be stated which will cover all cases, but the law must give the same protection to all persons in like condition, and impose no greater burden upon one than it does upon all others under similar circumstances. This protection extends to discrimination in laws for the levy and collection of taxes, as well as to all other legislation of a state; but perfect equality and uniformity in taxation is unknown, and an effort to obtain it as near as possible is the most that legislative wisdom can accomplish.

There can at this time be no question, after the frequent and uniform expressions of the federal Supreme Court, that it was not designed by the fourteenth amendment to the Constitution to prevent a state from changing its system of taxation in all proper and reasonable ways, nor to compel the states to adopt an iron rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as

against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892; Giozza v. Tiernan, 148 U. S. 657–662, 13 Sup. Ct. 721, 37 L. Ed. 599; Adams Express Co. v. Ohio, 165 U. S. 194–228, 17 Sup. Ct. 305, 41 L. Ed. 683; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; Billings v. Illinois, 188 U. S. 97, 23 Sup. Ct. 272, 47 L. Ed. 400; Merchants' & M. Bank v. Pennsylvania, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236; Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; Home Insurance Co. v. New York State, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025; Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; Clark v. Titusville, 184 U. S. 329, 22 Sup. Ct. 382, 46 L. Ed. 569; American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102; New York State v. Barker, 179 U. S. 279, 21 Sup. Ct. 124, 45 L. Ed. 194; Charlotte, etc., R. Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051; Travelers' Ins. Co. v. Connecticut, 185 U. S. 364, 22 Sup. Ct. 673, 46 L. Ed. 949; Kidd v. Alabama, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669; Turpin v. Lemon, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70; Florida, etc., R. Co. v. Reynolds, 183 U. S. 471, 22 Sup. Ct. 176, 46 L. Ed. 283.

It is urged by complainants that due process of law requires, in taxation, that the tax be levied by a legislative body which is chosen by and acts for the community that includes the person or contains the property taxed, which is not provided for by the amendment to the Michigan Constitution or the statute under consideration; that a protection is furnished to other taxpayers of the state by the laws which provide a legislative determination or judgment of the amount of taxes which ought to be imposed upon them, which determination or judgment is formed upon the consideration of the needs of the state or of the municipality for which the taxes imposed are to be devoted, and the amount of the taxation required to provide for such needs, while such protection is withheld from the companies subjected to taxation under the act in question; that the determination of the amount of taxes to be raised in any case or for any purpose is a legislative determination; that taxes for state purposes are determined by the Legislature, taxes for municipal purposes are determined by the boards, officials, or assembly upon whom is conferred by the state the legislative power to decide for what purpose and in what amount taxes may be raised; that in every case it is a legislative determination made in view of the public interests, and of the amount of taxes required for those interests, and this legislative power is exercised by officers chosen by or answerable to those directly interested in the district to be taxed; that the taxes here levied upon the railroad companies are strictly state taxes, imposed for state purposes, yet the Legislature does not determine the amount of the tax, nor is it determined by any legislative action which considers the subject of the tax; that the Legislature directs the amount of the complainants' taxes to be determined by the various county, township,

city, village, and school district electors, boards, councils, and officers, who, in their action by which the amount of the taxation of the railroads is determined, take no account, and can take no account, of the needs of the public in respect to the purposes to which the taxes are to be devoted; that the determination of the amount of the taxes to be paid by the railroad companies is not only arbitrary, but that it is the result of chance, arising out of conditions, circumstances, and actions which have no relation whatever to the objects or purposes for which the taxes are imposed upon the railroad companies.

If this is the provision of the constitutional amendment and legislation of the state of Michigan under consideration, in these cases there can be no doubt of its conflict with the fourteenth amendment of the federal Constitution. Chief Justice Marshall said of the power of taxation, in McCulloch v. Maryland, 4 Wheat. 427, 4 L. Ed. 579:

"The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the Legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation."

And again, in Providence Bank v. Billings, 4 Pet. 561, 7 L. Ed. 939, he said:

"This vital power may be abused, but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally."

This principle pervades our whole system, and has been reiterated in a multitude of judicial opinions in the federal and state tribunals from the time of Marshall to the present. Let us look at the constitutional amendment and statute of the state against which this criticism is directed, and see what foundation there is for it. The constitutional amendment provides that the Legislature shall provide a uniform rule of taxation for such property as shall be assessed by a State Board of Assessors, and the rate of taxation on such property shall be the rate which the State Board of Assessors shall ascertain and determine is the average rate levied upon other property upon which ad valorem taxes are assessed for state, county, township, school, and municipal purposes. The rate is prescribed by the Constitution and Legislature to be the average rate levied upon other property upon which ad valorem taxes are assessed. The Legislature may use any method to fix the rate, so long as it does not delegate its legislative function; and if the rate had been fixed at any certain percentage, or the average rate assessed upon other property for any year preceding the enactment, no constitutional objection could be urged to it. As was said by the federal Supreme Court in Delaware Railroad Tax Case, 18 Wall. 206–231, 21 L. Ed. 888:

"The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its

separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the state. Our only concern is with the validity of the tax. All else lies beyond the domain of our jurisdiction."

Then, if the Legislature had the absolute power to fix the rate, what more equitable rate could it have adopted than the average rate paid by the other taxpayers of the state? This seems not to have been a scheme to produce inequality, but a carefully devised scheme to distribute the burdens of taxation equally upon all taxpayers. However, the character of the rate cannot be brought in question here. The only question is, did the Legislature fix it, or is it fixed by the determination of the various legislative bodies of the different taxing districts into which the state is divided? "A rate ascertained as the result of that which is enacted may be regarded as authorized by law, as well as a rate declared in terms." Morton, Bliss & Co. v. Comptroller General, 4 S. C. 477. The local legislative bodies, in determining the amounts to be raised by taxation in their respective jurisdictions, and the assessing boards, in placing a valuation upon the property to be taxed, do not fix the rate, under this statute, to be paid by the complainants. They fix the rate to be paid by their several constituencies who appointed them, and to whom they are responsible; and the state Legislature, which is a body representing the complainants, fixes the rate at which the complainants are taxed to be the average rate placed on the other property of the state, which is ascertained by a mathematical calculation. The rates at which the respective communities are taxed are facts in the production of which the discretion of the officers and the needs of the various communities for which they act is certainly an element, but after the facts are produced the Legislature may take them for its guide in fixing a rate, as it may take any other fact which moves its discretion. If the Legislature were to convene each year after the assessments throughout the state had been levied, and should use the assessment rolls of the various assessing officers for the purpose of ascertaining the average rate levied upon other property upon which ad valorem taxes are assessed, and assess the property of complainants at that rate, there could be no constitutional objection to the tax; and yet the rate will be the same, and it would be ascertained in exactly the same way, except that a committee of the Legislature would do the clerical work of making the mathematical calculation, which, under the statute we are considering, is done by the State Board of Assessors. It seems clear that there is no discretion given to the State Board of Assessors in determining the rate at which the complainants' property is taxed under this statute, but that they perform only a clerical duty in taking the facts evidenced by the various assessment rolls in ascertaining a rate which has been fixed by the Constitution and Legislature.

In Home Ins. Co. v. New York, 134 U. S. 594–600, 10 Sup. Ct. 593, 595, 33 L. Ed. 1025, the court said:

"The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

And in Maine v. Grand Trunk Ry. Co., 142 U. S. 217–229, 12 Sup. Ct. 121, 122, 35 L. Ed. 994, the court said:

"If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the state as to the value of the privilege were limited to receipts of certain past years, instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and, if not, we do not see how a reference to the results of any other year could affect its character."

We do not think the method of determining the rate violates the fourteenth amendment to the federal Constitution, because we think the rate is fixed by the Michigan Constitution and Legislature, and not by the local legislatures and assessing officers of the counties, cities, towns, villages, and school districts of the state.

Taxation by average rate is not confined to Michigan. See chapter, 64, Pub. St. N. H., in force January 1, 1901; 1 Rev. Laws Mass. 1902, p. 227, c. 12, § 93, c. 14, §§ 37–40; 2 Rev. St. Mo. 1899, pp. 2175, 2176, §§ 9363, 9364; Laws Wis. 1903, pp. 496–499, c. 315, §§ 7–14. In Missouri "the average rate levied in the several school districts" is imposed upon railroads, and it has been sustained as not violating the state or federal Constitution, although the act requires the use, in determining the average rate, of taxes assessed in municipalities in which the railroad has no property. Chicago & Alton R. Co. v. Lamkin, 97 Mo. 496, 10 S. W. 200.

It is urged that the equal protection of the laws is denied to the complainants because section 14 of article 14 of the Constitution of Michigan, which provides that "every law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object," protects all other taxpayers except the companies taxed under the statute in question. This section has been construed by the state Supreme Court in the case of Walcott v. People, 17 Mich. 68–76, where the act taxing express companies was attacked as not in compliance with the section of the Michigan Constitution above quoted. That statute required the express company to pay into the treasury a specific state tax of 1 per cent. of the gross amount of its current business in the state. The court says:

"It is provided by article 14, § 1, Const., that 'all specific state taxes, except those received from the mining companies of the Upper Peninsula, shall be applied in paying the interest upon the primary school, university, and other educational funds, and the interest and principal of the state debt, in the order herein recited,' until the extinguishment of the state debt, other than the amounts due to educational funds, when such specific taxes shall be added to and constitute a part of the primary school interest fund.' It is apparent that the fundamental law has irrevocably prescribed the appli-

cation of all such specific state taxes as that imposed by the act in question, and that the Legislature could in no manner change the purpose or alter the destination of the tax. The application is not only unalterably fixed, but it is specifically defined, and nothing could be added by legislation but an idle repetition of the language of the Constitution. The statute distinctly describes the tax and directs its payment into the state treasury, and the Constitution then takes the subject from the sphere of legislative discretion, and decrees the uses to which the money must be appropriated. It inevitably follows that, by the conjoint operation of the statute and Constitution, the object to which the tax would be applied is made most distinct and certain, and no language in the act could make it more so."

The Constitution and statute here in question distinctly state that the educational fund referred to in section 1 of article 14 of the state Constitution will need each year the amount to be collected by the taxation of the property referred to in the act, at the average rate which is imposed upon other property upon which ad valorem taxes are assessed. If we are right in what has already been said in regard to the rate being fixed by the Michigan Constitution and Legislature, and not by the local Legislatures of the various assessing districts, then the law distinctly states the tax and the object to which it is to be applied, and does not conflict with section 14 of article 14 of the Constitution of Michigan.

In reply to the objection that no hearing is provided for before the tax is imposed, it is sufficient to say that, if a definite rate were imposed by the Constitution and statute, there could be no reason for granting a hearing, because the result could not be changed; and the Michigan Supreme Court has, in Board of Education v. State Board of Assessors, 133 Mich. 116, 94 N. W. 668, decided that the duty imposed by the Constitution and statute upon the State Board of Assessors, to ascertain and determine the average rate levied on other property upon which ad valorem taxes are assessed, is ministerial and consists of a mathematical calculation. There is, then, no more discretion in the State Board of Assessors than if the rate had been named in the Constitution and statute.

In Hagar v. Reclamation District, 111 U. S. 701, 709, 710, 4 Sup. Ct. 663, 668, 28 L. Ed. 569, the court says:

"Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally specific taxes on things or persons or occupations. In such cases the Legislature, in authorizing the tax, fixes the amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind or at a particular place, such as keeping a hotel or a restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law, and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for

franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it."

And in Spencer v. Merchant, 125 U. S. 345–354, 8 Sup. Ct. 921. 926, 31 L. Ed. 763, the court says:

"The precise wrong of which complaint is made appears to be that the landowners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it, as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the Legislature, and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The Legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion."

See, also, Fallbrook Irrigation District v. Bradley, 164 U. S. 174, 17 Sup. Ct. 56, 41 L. Ed. 369; Walston v. Nevin, 128 U. S. 582, 9 Sup. Ct. 192, 32 L. Ed. 544; Paulsen v. Portland, 149 U. S. 39, 40, 13 Sup. Ct. 750, 37 L. Ed. 637.

It is contended by the complainants that the classification of their property in the statute under which these taxes are levied is based solely on ownership, and does not include property of the same kind owned by natural persons or corporations which are taxed under the general laws of the state, and therefore denies to complainants the equal protection of the laws. It can hardly be contended, and we do not understand that the complainants seriously urge, that the fourteenth amendment, as applied to railroad corporations, does not permit a separate classification of their property for the purpose of taxation, as that question seems to have been placed, by authoritative decisions, beyond controversy.

In Kentucky Railroad Tax Cases, 115 U. S. 321, 336, 337, 6 Sup. Ct. 57, 63, 29 L. Ed. 414, Mr. Justice Matthews, in delivering the opinion of the court, said:

"The discrimination against railroad companies and their property which is the subject of complaint, as being unjust and unconstitutional, arises from the fact that, in the legislation of Kentucky on the subject, railroad property, though called 'real estate,' is classed by itself, as distinct from other real estate, such as farms and city lots, and subjected to different means and methods for ascertaining its value for purposes of taxation, and differing as well from those applied to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas, and water companies. These latter report to the Auditor the total cash value of their property, and pay into the treasury as a tax upon each $100 of its value a sum equal to the tax collected upon the same value of real estate; and their reports and valuations are treated as complete and perfect assessments, not subject to revision by any board or court, and conclusive upon the taxing officers. But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and

instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the Legislature has seen fit to impose."

Mr. Justice Miller, in State Railroad Tax Cases, 92 U. S. 575–611, 612, 23 L. Ed. 663, where a statute of Illinois made provision for the assessment of the property of railroad companies by a system different from that governing the taxation of other property, which was claimed to violate the provision of the state Constitution requiring uniformity of taxes, and the fourteenth amendment to the federal Constitution, said:

"There can be no doubt that all the classes named in this clause, including peddlers, showmen, innkeepers, ferries, express, insurance, and telegraph companies, are taken out of the general rule of uniformity prescribed by the first clause, and the only limitation as to them is that of uniformity as to the class upon which the law shall operate; that is, innkeepers may be taxed by one, ferries by another, railroads by another, provided that the rule as to innkeepers be uniform as to all innkeepers, the rule as to ferries uniform as to all ferries, and the rule as to railroad companies be uniform as to all railroad companies. As we have seen no evidence that the rule by which railroad property is taxed is not uniform in its action on all the railroad companies of Illinois, we can perceive no opposition to the Constitution of the state in that rule. But suppose it were otherwise; perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect."

In Pittsburgh, etc., Railway Co. v. Backus, 154 U. S. 421-425, 14 Sup. Ct. 1114, 1116, 38 L. Ed. 1031, a statute by which all property of individuals and ordinary corporations was subject to valuation and assessment by county officers, while the assessment of railroad property was committed to a State Board of Tax Commissioners, was sought to be held invalid as contravening the provisions of the fourteenth amendment to the federal Constitution. Justice Brewer, in delivering the opinion of the court, said:

"Notwithstanding the elaborate attack made both in brief and argument upon this act, it seems to us that its constitutionality has been practically settled by decisions of this court—especially those in State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663, and Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414. In both of those cases legislation providing for the assessment of railroad property by a state board, while all other property in the state was assessed by county officials, was held to be obnoxious to no provision in the federal Constitution."

In Florida Central, etc., Railroad Co. v. Reynolds, 183 U. S. 471–480, 22 Sup. Ct. 176, 180, 46 L. Ed. 283, a statute of Florida selected for the purpose of reassessment property of railroad companies which had escaped taxation, without at the same time providing for the collection of unpaid taxes on other property. This was objected to as discriminatory and in violation of the fourteenth amendment. The court, after reviewing at length cases construing and determining the application of the fourteenth amendment, held the act valid, saying:

"If the state had subjected railroads to taxation, while exempting some other class of property, it would be difficult to find anything in the four-

teenth amendment to overthrow its action. The mere fact that such legislation may operate with harshness is not of itself sufficient to justify the court in declaring it unconstitutional. These matters of classification are of state policy, to be determined by the state, and the federal government is not charged with the duty of supervising its action."

In Columbus Southern Railway Co. v. Wright, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. Ed. 238, it was held that a provision in a statute of Georgia distributing for taxation purposes the rolling stock and other unlocated personal property of the railroad company, for the benefit of counties traversed by the railroad, instead of taxing the property in the county where the railroad company had its principal office, does not violate the provision in the fourteenth amendment to the Constitution that no state shall deny to any person within its jurisdiction the equal protection of the laws.

In McHenry v. Alford, 168 U. S. 651, 665, 673, 18 Sup. Ct. 242, 42 L. Ed. 614, a specific tax on gross earnings in full of all taxation of land and other property of railroads, it was held, did not deprive other owners of similar lands, taxed upon their value, of equal protection of the laws.

The last expression of the Supreme Court of the United States on this question was in the case of Coulter v. Louisville & Nashville R. Co., supra, in which the question of the state's right to tax the property of corporations in a different class and at a different rate from the other property of the state is disposed of in a single sentence, as follows:

"If it be a fact that the franchise of a Kentucky corporation is taxed at a different rate from tangible property in the state, there can be no question that the state had power to tax it at a different rate, so far as the Constitution of the United States is concerned."

But the complainants contend that in the Michigan statute under consideration a different method is provided for the taxation of railroad property owned by railroad corporations and railroad property owned by individuals and other corporations. It is stated that a number of individuals and manufacturing corporations of the state own and operate railroads chiefly for logging purposes, but incidentally for carrying passengers and freight for hire, and that complainants' property is not legally subject to a different method of taxation than the property of these individuals and manufacturing corporations used in the same business.

The complainants are all incorporated under the statutes authorizing the incorporation of railroad companies, which statutes give to the complainants powers and privileges not enjoyed by any other corporations or individuals. It cannot be said that individuals and corporations which have no right of eminent domain and the various privileges accorded to railroad companies incorporated under the railroad statutes of the state are in the same class with railroad corporations which exercise these rights and privileges. The fourteenth amendment to the federal Constitution permits the legislative power of the state to classify property for the purpose of taxation according to its use by railroad companies which are given these powers and privileges. It is not necessary that all rail-

road property be taxed under one method and at the same rate, but it is only necessary that all property belonging to railroads in the same class be taxed alike. If it is conceded that these logging roads owned by manufacturing corporations or individuals are railroads, they certainly are not railroads of the same class with the complainants. It seems as though it must be as competent for the Legislature to place different classes of railroads in different classes, for the purpose of taxation, as it is to place railroads in a class by themselves, and tax them and their property differently from other persons. Street railroads, which are chartered by the ordinances of various cities, and electric suburban roads, organized under a general statute for that purpose, have different privileges and powers from those given to the roads organized under the general railroad statutes, and those roads built for service in the business in which individuals and manufacturing corporations are engaged have still further restricted powers and privileges; and we can see no reason why, in its discretion, the Legislature may not, for purposes of taxation, place the railroads organized under the general railroad statutes in a class by themselves, leaving the other roads to be taxed under the general laws of the state, without violating the fundamental principles of taxation, or the fourteenth amendment to the federal Constitution. The property of railroad corporations in Michigan has previous to the present act been taxed at a percentage of their gross earnings in lieu of other taxes; and it has never been thought that the property of a lumber company or manufacurer, used in the operation of a private railroad in his business, came within the terms of the statute, or that the statute was unconstitutional because such property was not included.

If we are right in concluding that the property of railroad corporations may lawfully be placed in a class by itself for the purpose of taxation, and be taxed under a method entirely different from that applied to other property, then a fortiori it is not necessary to make provision for the equalization of the assessment of the property so taxed with the other property of the state not so taxed. But it is insisted by the complainants that the Michigan Constitution requires all assessments to be at the cash value of the property assessed, and although it may be legal to provide for the assessment of the property of railroad corporations by a State Board of Assessors, and the assessment of other property of the state by local assessors, in order to have equality there must be an equalization of all the assessments, so that the property not assessed at its cash value may not pay a greater or less proportion than property so assessed. The Constitution of Michigan provides that all property paying ad valorem taxes shall be assessed at its cash value, no matter by what board or officers the assessment is made; and if the officers who make the assessments do their duty, as the law presumes they do, there is necessarily an equalization in the assessments. The argument at the hearing was founded on the presumption that there is and always has been in the state of Michigan a systematic violation of the requirements of the laws in this regard,

and that an equalization is necessary, so that all property may be assessed, not at its cash value, but at its relative proportion to its cash value when compared to the assessments placed on the other property in the state. Statutes cannot be declared invalid on the ground that the officers acting under them fail to perform the duty which the statutes impose. If the complainants have been discriminated against by a systematic and fraudulent failure on the part of the assessing officers to perform their duty, they may seek relief in a court of equity from the excessive burden placed upon their property by such failure; but the relief is from the misconduct of officers acting under valid statutes, and not from statutes which work injustice only when violated.

It is unnecessary to cite other authorities on this question, when it has been settled by the Supreme Court of the United States in the case of Cummings v. Bank, 101 U. S. 153–160, 161, 25 L. Ed. 903, where, speaking for the court, Justice Miller said:

"We thus see that one board of equalization has charge of the valuation of the real estate of the whole state once in every ten years, another has charge of the valuation of railroad property every year, and a third has charge of the valuation of shares of incorporated banks every year, and the amount fixed by these state boards is in every instance the final basis of taxing that species of property for state and county purposes. We are asked to decide that, as to this final board of equalization of bank shares, whose function is to equalize the valuation of those shares, as among themselves, throughout the state, with no power to consider the valuation of real estate which comes before another board only once in ten years, or other personal property and invested capital which never comes before any state board, that its operations must necessarily produce inequality in valuation as it regards other property, and is therefore void, as in conflict with the state constitutional rule of uniformity, and with the third section of the same article of the Constitution, declaring 'that all property employed in banking shall bear a burden of taxation equal to that imposed on the property of individuals.' But there are two reasons why we cannot so hold: First, it might be that in every instance the result would be the valuation of bank shares at a lower ratio in proportion to its real value than that of any other property, and therefore plaintiff would have no ground of complaint; and, secondly, what is more important, if these original valuations and equalizations are based always, as the Constitution requires, on the actual money value of the property assessed, the result, except as it might be affected by honest mistakes of judgment, would necessarily be equality and uniformity, so far as it is attainable. So that while it may be true that this system of submitting the different kinds of property subject to taxation to different boards of assessors and equalizers, with no common superior to secure uniformity of the whole, may give opportunity for maladministration of the law, and violation of the principle of uniformity of taxation and equality of burden, yet it is not the necessary result of these laws, or of any one of them: and a law cannot be held unconstitutional because, while its just interpretation is consistent with the Constitution, it is unfaithfully administered by those who are charged with its execution. Their doings may be unlawful, while the statute is valid."

It is urged by complainants that the act in question denies to them the equal protection of the laws, because, under the general laws of Michigan, in the assessment of personal property, debits are required to be deducted from credits, while this statute requires the credits of complainants to be taxed at their cash value, without any deduction of indebtedness owed by them; making a different rule of valuation, for which no just reason exists. Again, the right

of the state to make a classification by which railroad property may be lawfully taxed by a different method from that under which other property is taxed becomes important. If the conclusion we have reached in examining the cases upon this question is correct, then all railroad property, including credits, may be taxed under a different method from that applied to other property. If the credits are a part of the railroad property, used in the railroad business, it must be permissible to place them, for purposes of taxation, with the other railroad property in the state, in a separate class. The act under which these assessments were made provides that the description of the property upon the assessment roll may be "real estate, rolling stock, right of way and appurtenances thereto, and all other property used in carrying on the corporate business and subject to taxation by a State Board of Assessors"; and the whole act contemplates the taxation, as a unit, of all the property used in carrying on the railroad business of the railroad company.

In the case of Detroit, Grand Rapids & Western Railroad v. Railroad Commissioner, 119 Mich. 132, 77 N. W. 631, the railroad company claimed that the interest received by it on loans and deposits was not a part of the gross income received in carrying on its business, within the meaning of the statute which provided for the taxation of railroad companies at a percentage of the gross income received in carrying on its business; but the court held that the interest on loans and deposits should be included in the earnings from the railroad business, for the purpose of fixing the taxes.

And in Chamberlain v. Walter et al. (C. C.) 60 Fed. 788–793, Judge Simonton held that:

"A railroad is a unit, every part contributing to its purposes as a whole. If it be a corporation, its corporate purpose is the maintaining a railroad, and all and every part of this property must contribute to this purpose. Its right of eminent domain is limited to this purpose. This unit is made up of lands, personal property, choses in action, easements, all dependent upon and inseparable from each other, deriving their value from this inseparability —from the fact that they contribute to this unit. They differ from every other species of property, and the discrimination made, as between them and other corporations and individuals, in the methods and instrumentality by which the value of their property is ascertained, is not invalid. The mode prescribed by the Legislature of this state is to get at the value of the plant—that is, of all these elements going to make up the railroad—and to ascertain what their combined contributions making up this unit are worth. If they separated the component parts and attempted to fix separate values upon them, they would enter into an impossible task."

In one class properly segregated it would be competent for the state to exempt any part of the property or all of the property, while the same kind of property in another class was made to bear the whole burden of taxation; and a fortiori reducing credits by debits in one class, and not in another, or exempting credits entirely in one class and taxing them in another, does not exceed the power of the state, nor deny the equal protection of the laws. But under the terms of the act in question the credits, as such, are not necessarily taxed, but are taken into consideration by the board, as are all of the other fourteen items in the report of the companies provided to be filed, in determining the cash value of the property as a

whole. If the credits were taken into consideration, and no reduction was made in the value of the property, as a unit, on account of indebtedness which the company was shown to have, and the property was on that account assessed at more than its cash value, then the complainant should have appeared before the board at its meetings provided for by the act, for the purpose of reviewing the roll and correcting the valuation of the property, and had the valuation reduced. But if the statute could be construed to conflict with the general laws of Michigan, and it should be conceded that provision for deduction of debits from credits must be made, the statute would not be rendered void on that account, nor the assessment invalid. If the railroad company had no debts to deduct, it could not be harmed; and, if it had, that fact must be shown, before relief could be asked. Supervisors v. Stanley, 105 U. S. 305, 26 L. Ed. 1044.

We have come to the conclusion, after a careful examination of all of the objections urged against the validity of the constitutional amendment and statute of Michigan under which the taxes in these cases were levied, that they cannot be held to violate the Constitution of the United States; and therefore it is unnecessary for us to discuss the proposition of the defendant claiming that a railroad company, by voluntarily reorganizing under the general railroad law of the state after the adoption of the constitutional amendment and legislation, became subject thereto, and cannot question their validity.

The complainants urge that, if it is ruled that there is no valid objection to the law under which these taxes were levied, the assessments made in the year 1902, by the assessing officers generally, and in a great number of the different and various assessment districts of the state, of the property assessed otherwise than under the act in question, were intentionally made at less than the true cash value of the property assessed, and that the assessments so made did not express the real judgment of the assessing officers making the assessments, and thereby a greater rate and burden of taxation, to the extent of 18 per cent., was put by the State Board of Assessors upon the complainants' property than would have been put thereon if such assessments had been made by the assessing officers as required by law, and that, to the extent of such excess, the collection of taxes based thereon would deprive the complainants of their property without due process of law.

As we have already said, we think the court having jurisdiction of the case, notwithstanding the law has been found to be valid, has the power to examine the evidence and determine this question. In attacking these assessments the complainants must attack the judgment of officers who are by law intrusted with the determination of the value of the property, and the attack can only be effective by proving facts which make out a situation equivalent to fraud. The law is settled, and it seems to be agreed by counsel on both sides, that relief from an undervaluation of the other property of the state must depend upon that undervaluation having been so habitual, systematic, and intentional as to amount

to fraudulent undervaluation. The complainants have shown that there are 1,300 separate assessing districts in the state of Michigan, in which assessing officers prepare assessment rolls for their respective assessment districts. These assessment rolls are submitted to a local board of review, which has authority to change the valuations appearing on the rolls, and the law requires that this property shall be assessed at its true cash value. Under the repeated and almost universal demand for equal taxation, in 1899 the Legislature attempted, by the organization of a board of State Tax Commissioners, with general supervisory power over the local assessors, and authority to change the valuations placed upon the rolls to such an extent as to bring the same up to its judgment of the true cash value, to accomplish that object. The duties of the commissioners were "to take such measures as will secure the enforcement of the provisions of this act, to the end that all of the properties of the state liable to assessment for taxation shall be placed upon the assessment rolls, and assessed at their actual cash value." A table is found in the evidence, made by the Board of State Tax Commissioners after the board was appointed and it had investigated the subject, showing that, in the judgment of the board, the percentage of the value of property as found on the assessment rolls ranged from 22.8 per cent. to 108.7 per cent. of its true cash value, and that there was absolutely no uniformity in the undervaluation or overvaluation of property placed on the rolls. The commissioners attempted to force the assessing officers throughout the state to obey the law requiring them to assess all property for taxation at its true cash value. They endeavored to visit the different portions of the state and interview the assessing officers. They gathered evidence themselves and through employés, and endeavored to determine in what localities the law was being disregarded, and use their best efforts to correct all violations. They conferred with the assessing officers, held meetings with supervisors, and emphasized the importance of listing all property subject to taxation at its true cash value, and pointed out that equal taxation and uniformity of assessment throughout the state can be accomplished in no other way. Wherever they found undervaluations they attempted to correct them, and, if they found any officers who were willfully violating the law in regard to listing property at its true cash value, they in a number of instances prosecuted such officers. The commission found that, in their judgment, few assessments of property had been made at cash value, but they endeavored to correct errors as fast as they found them.

For the year 1902, when the assessed valuation of the property not taxed under the law in question, according to the judgment of the assessing officers, was $1,418,251,858, the tax commission estimated the valuation of the same property at $1,715,000,000. It is on account of the difference between the valuation placed upon this property by the assessing officers of the state and the valuation placed upon it by the tax commission that the complainants claim that the property not taxed under the law in question was assessed

at only 82.4 per cent. of its value. Members of the State Board of Tax Commissioners were placed upon the stand by the complainants, and testified that the old plan of assessing property at a percentage of its value still prevailed in 1902, and that they had made a return to an order to show cause in a suit brought by the board of education of the city of Detroit, heretofore referred to in the statement of this case, in which they stated that the undervaluation of the property of the state, subject to ad valorem taxes for state, county, township, school, and municipal purposes, throughout the state, was not the result of accident, inadvertence, or mistakes in judgment, but that undervaluation of such property was in a large number of municipalities of the state intentional and general, and that this practice of undervaluation had been in vogue in this state for a number of years, which statements they testified were true. The secretary of the board and some of its employés also testified that, in their opinion, the property not taxed under the statute in question was assessed at only a percentage of its cash value. It would take more space than could be allowed to review all of the testimony on this branch of the case, but when the history of the tax commission, as shown in the evidence in this record, is reviewed, it cannot be questioned that they have performed their duties in an energetic and effective manner. In the year 1899, on complaint of members of the commission, a number of the assessing officers were removed for underassessment of property; and that the commission succeeded in correcting a great many assessment rolls where the property had been undervalued previous to the organization of the commission is shown by the fact that the valuation of the properties of the state not taxed under the statute in question in this case was increased from 1899 to 1900 more than $349,000,000 (that is, from $968,169,087 in 1899 to $1,317,450,028 in 1900, an increase of more than one-third); and the aggregate value of the properties of the state not assessed under the statute in question in 1902 was raised to $1,418,000,251.58, making another increase of more than $100,000,000. If the address of the Governor to the Legislature, before this commission was organized, that the property of the state was assessed at only 65 per cent. of its cash value, was considered extravagant at the time, a justification for the creation of the commission can certainly be found in these figures. The testimony indicates that at the suggestion and solicitation of the commissioners the assessing officers and boards of equalization endeavored to comply with the law, and although, in the judgment of the members of the commission, they have not yet done so, it does not seem from the testimony that there was in 1902 the systematic, intentional, and illegal undervaluation which is necessary before the taxes of those alleged to be discriminated against can be set aside. Whatever the custom might have been previous to 1899 among assessing officers of the state, there certainly is nothing in this record which shows that there is now any general or uniform fraudulent underassessment, and, if the properties appearing on the rolls are underassessed, that conclusion must be reached by substituting the judgment of the members of the tax commission, who were sworn by

the complainants in the case, and their employés, for the judgment of the assessing officers. The testimony shows that the assessing officers, who reside in the districts in which the property is situated, have much better facilities for forming a judgment; and there is no testimony which shows that in the assessment of 1902, as a general rule, their judgments were not honestly formed.

In the case of Louisville & Nashville R. Co. v. Coulter (C. C.) 131 Fed. 282, which was much quoted and relied upon by complainants at the hearing, it was made to appear, and it is stated in the opinion it was conceded by the defendants, that the property of the state was assessed at not more than 70 per cent. of its cash value in 1891, and that there was as much property, compared in quantity, in 1902 as in 1891; and it was shown that in the year 1891 the assessments aggregated $480,930,623, and for the year 1902 they aggregated $534,417,269. From this, and from other testimony in the case, and other methods of computation set up by the judge in his opinion, which counsel for complainants say was followed by the members of the tax commission in this case, he finds that there was an illegal discrimination, within the requirements of the cases, and that "the taxable property in the state was systematically, habitually, and intentionally undervalued to at least the extent of 20% for the year 1902, first by the local assessing officers, and then by the equalizers." The court in its opinion said:

"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% valuation, when the bulk of the taxpayers pay on not exceeding an 80% valuation. This of itself is sufficient to require that this court should intervene."

When this case came before the Supreme Court of the United States (Coulter v. Louisville & Nashville R. Co., supra), the language used in reversing the decree below and dismissing the bill, when applied to the case at bar, seems to us to dispose of this contention of the complainants. Mr. Justice Holmes, in announcing the unanimous opinion of the court, said:

"The undervaluation in the counties, looked at from the point of view just indicated, also does not appear to have been such as to warrant the action of the court. It is not contended that a mere undervaluation would be enough. It is admitted that it must have been systematic and intentional. There is, no doubt, a natural inclination to think such an undervaluation probable, when it is suggested. But what is the proof? The state Constitution, whatever the statutes may have said, seems popularly to have been understood to have made a great change in the law. Practice before its adoption, therefore, can hardly raise a presumption as to practice afterwards, even on the liberal assumption that it properly could be considered in evidence. It is obvious that the accidental sales in a given year may be a misleading guide to average values, apart from the testimony that some at least of the conveyances did not report true prices, yet they furnish the chief weapon of attack. The testimony as to the board of equalization taking eighty per cent. of the reported sales was explained by the members of the board. It would be going very far to assume that they were committing perjury because to another mind the sales seemed more significant, and the explanations not very good. Inequality, we repeat, is nothing, unless it was in pursuance of a scheme. To make out that scheme, the anomalous course was followed of putting members of a tribunal established by law upon the witness stand to testify to the operations of their minds in doing the work

intrusted to them. Fayerweather v. Ritch, 195 U. S. 276-306, 307, 25 Sup. Ct. 58, 49 L. Ed. 193. But the prevailing testimony was that no such scheme was entertained. Whatever we may surmise or apprehend, making allowance for a certain vagueness of ideas to be expected in the lay mind, for the reasonable differences of opinion among the most instructed and competent men, and for the uncertainty of the elements from which a judgment was to be formed in the first instance, considering the still greater uncertainty of those from which the local judgment must be controlled, if at all, by persons having only the printed record before them, considering further that to maintain the bill imputes perjury to many witnesses whose character is not impeached, and finally recalling once more that we are dealing with a case that properly was not cognizable in the Circuit Court, we are of opinion that the bill must be dismissed."

The failure of complainants to show a fraudulent, intentional, systematic undervaluation of the property not assessed under the statute under which their taxes are levied makes a determination of the question of the undervaluation of the railroad properties unnecessary.

Decrees may be entered dismissing the bills.

NOTE.

Michigan Constitution, Article 14, as Amended in 1900.

Sec. 10. The state may continue to collect all specific taxes accruing to the treasury under existing laws. The Legislature may provide for the collection of specific taxes from corporations. The Legislature may provide for the assessment of the property of corporations, at its true cash value, by a State Board of Assessors and for the levying and collection of taxes thereon. All taxes hereafter levied on the property of such classes of corporations as are paying specific taxes under laws in force on November sixth, A. D., nineteen hundred, shall be applied as provided for specific state taxes in section one of this article.

Sec. 11. The Legislature shall provide an uniform rule of taxation except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law: provided, that the Legislature shall provide an uniform rule of taxation for such property as shall be assessed by a State Board of Assessors, and the rate of taxation of such property shall be the rate which the State Board of Assessors shall ascertain and determine is the average rate levied upon other property upon which ad valorem taxes are assessed for state, county, township, school and municipal purposes.

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Sec. 13. In the year one thousand nine hundred and one, and every fifth year thereafter, and at such other times as the Legislature may direct, the Legislature shall provide for an equalization of assessments by a state board, on all taxable property, except that taxed under laws passed pursuant to section ten of this article.

Act No. 173, p. 236, Pub. Acts 1901.

An act to provide for the assessment of the property of railroad companies, union station and depot companies, express companies, car loaning companies, stock car companies, refrigerator car companies, and fast freight line companies; and for the levy of taxes thereon by a State Board of Assessors, and for the collection of such taxes.

The People of the State of Michigan enact:

*Who to constitute state board of assessors.*

Section 1. That the Board of State Tax Commissioners created under the laws of this state, shall ex officio constitute a State Board of Assessors, one of whom shall be elected chairman of said board.

*Who to be secretary—Duties of—Proviso—Further proviso.*

Section 2. The secretary of the Board of State Tax Commissioners shall be ex officio secretary of the State Board of Assessors without extra compen-

sation, and shall keep a record of all its proceedings in addition to such other duties as may be required of him by said board, and shall devote his whole time to the duties of his office. In addition to the secretary said board may employ such other clerical assistance as may be necessary and required to perform the duties imposed upon it by this act: provided, that the compensation paid for such clerical assistance shall not in any case exceed one thousand dollars for each person employed, per annum: provided, further, that said board may employ such other assistance as may be necessary, with the consent of the Governor and the Board of State Auditors. The compensation of the said secretary and clerks, and all other necessary expenses incurred in carrying out the provisions of this act, shall be allowed by the Board of State Auditors upon proper vouchers approved by the chairman and secretary of the board, and paid by the State Treasurer out of the general fund.

*Board to have access to papers, etc.—May subpœna witnesses—Compensation of witnesses—Of persons serving subpœna—Powers of board.*

Sec. 3. Said board shall have excess [access] to all books, papers, documents, statements and accounts, on file or of record in any of the departments of state, subject to the rules and regulations of the respective departments relative to the care of public records. It shall have like access to all books, papers, documents, statements and accounts, on file or of record in counties, townships and municipalities. It shall have the right to subpœna witnesses, upon a subpœna signed by the chairman of said board and attested by the secretary thereof, delivered to such witnesses, which subpœnas may be served by any person authorized to serve subpœnas from courts of record in this state, and the attendance of witnesses may be compelled by attachment, to be issued by any circuit court in this state, upon proper showing that such witness has been properly subpœnaed and has refused to obey such subpœna. The person appearing in response to such subpœna shall receive like compensation as is allowed by the statutes of this state to witnesses in the circuit court, to be allowed by the Board of State Auditors upon the presentation of a copy of such subpœna, with the number of days' service and mileage endorsed thereon and approved by a member of said Board of Assessors, or the secretary thereof. The person serving such subpœna shall receive the same compensation now allowed to sheriffs or other officers for serving subpœnas. Said board shall have power to examine witnesses under oath, said oath to be administered by any member of the board, or by the secretary thereof. It shall have the right to inspect and examine the books, papers or accounts of any corporation, firm or individual owning property to be assessed by said board, and if such corporation, firm or individual refuse to permit said inspection and examination, or neglect or fail to appear before said board in response to its subpœna, said corporation, firm or individual shall, for each such refusal, neglect or failure, forfeit the sum of five hundred dollars to the state, the sum so forfeited to be recovered in a proper action brought in the name of the people of the State of Michigan, in any court of competent jurisdiction.

*Duties of board.*

Sec. 4. It shall be the duty of said board to make an annual assessment upon an assessment roll to be prepared by said board, of the property having a situs in this state as hereinafter defined, of railroad companies, union station and depot companies, express companies, doing business within this state, car loaning companies, and refrigerator and fast freight line companies, and all other corporations owning, leasing, running or operating any freight, stock, refrigerator, or any other cars, not being exclusively the property of any railroad company paying taxes upon its rolling stock under the provisions of this act, over or upon the line or lines of any railroad or railroads in this state.

*Term property, what to include—Proviso—Term company, how applied—"Property situs in state," what to include.*

Sec. 5. The term property as used in this act shall be deemed to include all property, real or personal, belonging to the corporation subject to taxation under this act, including the right of way, roadbed, stations, cars, rolling stock, tracks, wagons, horses, office furniture, telegraph or telephone poles, wires, conduits, switchboards, and all other property used in carry-

ing on the business of said corporations or owned by them respectively, and all other real and personal property and all franchises, said franchises not to be directly assessed, but to be taken into consideration in determining the value of the other property: provided, however, that this definition shall not include, apply to or subject to taxation such real estate as is owned and can be conveyed by such corporations under the laws of this state which is not actually occupied in the exercise of their franchises or in use in the proper operation of their roads or their corporate business; but such real estate so excepted shall be liable to taxation in the same manner and for the same purposes and to the same extent and subject to the same conditions and limitations as to the collection and return of taxes thereon, as is other real estate in the several townships or municipalities in which the same may be situate. The term company, corporation or association, wherever used in this act, shall apply to and be construed as referring respectively to any railroad company, union station and depot company, express company, car loaning company or refrigerator or fast freight line company, and any and all other corporations subject to taxation under this act. The term "property having a situs in this state" shall include all the property, real and personal, of the corporations enumerated in this act, owned, used and occupied by them within the limits of this state, and also such proportion of the rolling stock, cars and other property of such corporations as is used partly within and partly without this state, as herein provided to be determined.

*Corporation to file report with board.*

Sec. 6.[1] The several corporations enumerated in this act, doing business in this state, shall annually, between the first and thirtieth days of June in each year, under the oath of the president, secretary, treasurer, superintendent or chief officer of such company, make and file with the State Board of Assessors, in such form as said board may provide, upon blanks to be furnished by said board, a statement containing the following facts:

Railroad, Union Station and Depot Companies.

*Blanks, what to contain.*

The blanks furnished to railroad and union station and depot companies, shall provide for the following information:

*Name.*

First. The name of the company.

*Nature, etc.*

Second. The nature of the company, and under the laws of what state or country organized.

*Location.*

Third. The location of its principal office.

*Address of Officers.*

Fourth. The name and post office address of the president, secretary, auditor, treasurer and superintendent or general manager.

*Manager.*

Fifth. The name and post office address of the chief officer or managing agent of the company in Michigan.

*Number of shares.*

Sixth. The number of shares of capital stock.

*Value.*

Seventh. The par value and market value, or if there be no market value, the actual value, of the shares of stock on the second Monday of April of the year in which the report is made.

*Statement of real estate.*

Eighth. A detailed statement of the real estate owned by the company in Michigan, and where situate, and the value thereof.

*Personal property.*

Ninth. A detailed statement of the personal property, including moneys and credits owned by the company in Michigan, on the second Monday in April in the year in which the report is made, where situate, and the value thereof.

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[1] Amended by Act No. 45, p. 52, of 1903; given as previous to amendment.

*Value of real estate outside of state.*
Tenth. The total value of the real estate owned by the company situate outside of Michigan.
*Personal property.*
Eleventh. The total value of the personal property of the company situate outside of Michigan.
*Length of lines.*
Twelfth. The whole length of their lines, and the length of so much of their lines as is within or is without Michigan, which lines shall include what said railroad companies control and use as owners, lessees, or otherwise.
*Gross receipts.*
Thirteenth. A statement of the entire gross receipts of the companies, from whatever source derived, for the year ending the second Monday of April in the year for which the report is made.
*Such facts as board may require.*
Fourteenth. Such other facts and information as said board may require, in the form of the returns prescribed by it.

Express Companies.

*Blanks, what to contain.*
The blanks furnished to express companies shall provide for the following information:
*Name.*
First. The name of the company.
*Nature.*
Second. The nature of the company and under the laws of what state or country organized.
*Location.*
Third. The location of its principal office.
*Address of officers.*
Fourth. The name and post office address of the president, secretary, auditor, treasurer and superintendent or general manager.
*Manager.*
Fifth. The name and post office address of the chief officer or managing agent of the company in the state of Michigan.
*Number of shares.*
Sixth. The number of shares of capital stock, (a) authorized, (b) issued.
*Value.*
Seventh. The par value and market value, or if there be no market value, the actual value of the shares of stock, together with the total amount of bonded indebtedness, on the second Monday of April of the year for which the report is made.
*Value of real estate in state.*
Eighth. The situation, income and value in detail of its real estate in this state.
*Outside.*
Ninth. The total income from and cash value of all its real estate situated outside of this state.
*Personal property in state.*
Tenth. A full and correct inventory, at the true cash value, of its personal property, including moneys and credits, within this state.
*Outside.*
Eleventh. The true cash value of all its personal property, including money and credits without this state.
*Names, etc., of lines.*
Twelfth. The whole length and names of railroad lines and water and stage routes over which it did business, and separately, in detail, the portions of such lines and routes within this state, and the portion of such routes over navigable waters of the United States within this state.
*As board may require.*
Thirteenth. Such other facts and information as may be deemed necessary by the State Board of Assessors, or any member thereof, to the proper assessment of the property of such company.

Car Loaning, Stock Car, Refrigerator and Fast Freight Line Companies, and Other Car Companies.

*Blanks, what to contain.*

The blanks furnished to car loaning, stock car, refrigerator and fast freight line companies shall provide for the following information:

*Name.*

First. The corporate name of the company.

*Nature.*

Second. The nature of the business of said company, and under the laws of what state or country organized.

*Location.*

Third. The location of its principal office.

*Names of officers.*

Fourth. The name and post office address of the president, secretary, auditor, treasurer and superintendent or general manager.

*Location of principal office in state—Name of manager.*

Fifth. The location of its principal office in the state of Michigan, together with the name and address of the chief officer or managing agent of the company in Michigan.

*Number of cars.*

Sixth. The total number of cars and rolling stock of any such corporation run over or operated upon any line or lines of railroad within this state each day during the entire year preceding the date of making and filing such report.

*Cost of each.*

Seventh. The cost of construction of each of said cars.

*Time in service.*

Eighth. The length of time same has been in service.

*Cash value of each.*

Ninth. The cash value of each of said cars so operated and run in the state, at the time of making and filing such report.

*As board may require.*

Tenth. And such other and additional information as may be deemed necessary by said board, or any member thereof, to the proper assessment of the cars of such company in this state in accordance with the provisions of this act and to the performance of the duties imposed upon it hereby.

*Blanks, when furnished—Proviso—Procedure when company refuses to make statement—Penalty.*

Sec. 7. Blanks for making the statements provided for in section six shall be furnished to such companies on making application to said board: provided, that the reports hereby provided for shall not in any way relieve any of said companies from making the reports now required to be made to other state officers. In case any company fails or refuses to make the statement required by this act, or refuses to furnish any information requested, the board shall inform itself as best it may on the matters necessary to be known, in order to discharge its duties with respect to the assessment of the property of such company. Any company which shall refuse or neglect to make the report required by this act within the time specified, shall be subject to a penalty of five hundred dollars for each day of the continuance of such neglect or refusal to file said report, to be recovered in a proper action brought in the name of the people of the state of Michigan in any court of competent jurisdiction.

*When board to prepare assessment roll—Board may inspect property—True cash value, how determined—Of express companies—Actual—Assessment, how determined—Cash value of car loaning, etc., how obtained—Total valuation, how determined.*

Sec. 8.[2] Subsequent to the filing of the reports required in the preceding section, and prior to the fifteenth day of December in each year, it shall be the duty of the said State Board of Assessors, to prepare an assessment roll as provided in section four of this act, upon which they shall assess

[2] Amended by Act No. 45, p. 54, of 1903; given as previous to amendment.

at the true cash value on the second Monday of April of the year in which the assessment is made, all the property of the companies herein enumerated subject to taxation under this act, which said assessment shall not be final until reviewed as hereinafter provided. For the purpose of arriving at the amount and character and the true cash value of the property belonging to said companies as appearing upon the assessment roll for the purpose of assessment and taxation, the said board may personally inspect the property belonging to said companies, and may take into consideration the reports filed under this act, the reports and returns of such companies filed in the office of any officer of this state, and such other evidence as may be obtainable bearing thereon. In determining the true cash value of the property of railroad and union station and depot companies which own, lease or operate lines partly within and partly without this state, the said board shall be guided, in ascertaining the property subject to taxation in Michigan, by the relation which the number of miles of main track within the state of Michigan bears to the entire mileage of the main track of said companies both within and without this state. In determining the cash value of the property of express companies, they shall ascertain and determine the actual value in money of the entire amount of the capital stock and bonded indebtedness of such express company. From the amount so obtained and determined, said board shall deduct the actual value of all real estate owned by it as ascertained by said board, and the actual value of all its personal property which is not used in the express business of such express company. And the remainder thus obtained shall be used in determining the assessment of such express company in the following manner: The said board shall then divide the amount as obtained above by the total number of miles of railroad, stage, water and other routes over which the company did business, to obtain the value per mile, and shall then multiply the value per mile thus obtained by the total number of miles of such routes within this state, exclusive, however, of the number of miles of water routes over the navigable waters of the United States within this state, to which result shall be added the value of all real estate owned by such express company in this state, as determined by said board, and the sum so obtained shall be taken and considered as the actual value of the property of such express company subject to assessment and taxation in this state. In ascertaining the cash value of the property of car loaning, stock car, refrigerator, fast freight line and other car companies subject to taxation under this act, they shall ascertain the average number of cars used in this state during the year preceding the date of the filing of the report mentioned in the preceding section, such average to be determined by dividing the total number of cars so used or operated within this state during said year by the total number of days on which said cars were so used or operated within this state; and they shall also ascertain the average cash value of such average number of cars, and from said data the total valuation shall be determined and shall be the assessment against the property of said corporation.

*What descriptions roll to contain—Railroad companies, etc.—Car loaning companies, etc.—Express.*

Sec. 9. Upon said assessment roll, after the names of each of the companies assessed thereon, shall be placed a general description of the properties of said companies, which shall be deemed to include all of the properties of said companies liable to taxation under this act. In the case of railroad, union station and depot companies, such general description may be as follows: "Real estate, rolling stock, right of way and appurtenances thereto, and all other property used in carrying on the corporate business and subject to taxation by a State Board of Assessors." In the case of car loaning, stock car, refrigerator and fast freight line and other car companies, the following general description may be used: "Cars subject to taxation by a State Board of Assessors." In the case of express companies, the following general description may be used: "Property subject to taxation by a State Board of Assessors." In an appropriate column opposite the names of said corporations shall be extended the cash valuations of the properties of said companies so assessed.

*When board to be in session—May correct roll—May place omitted property on roll—Proviso—Final valuation—When board to certify to roll.*

Sec. 10.[3] On the third Monday of December in each year, it shall be the duty of the State Board of Assessors to meet at the state capitol at Lansing, and to continue in session from day to day for so long a period as may be necessary, not later than the fifteenth day of January next thereafter, for the purpose of reviewing said assessment roll, and any company or person interested shall have the right to appear during said period and be heard as to the valuation of the property of any company, and said State Board of Assessors may, on such application or on its own motion, correct the assessment or valuation of the property of such company in such manner as will, in its judgment, make the valuation thereof just and equal; and for the purpose of arriving at the true cash value of the properties assessed on said assessment roll, may subpœna witnesses as provided in section three of this act and have such hearing as may be deemed necessary. In case it shall appear or be made to appear to the members of said board, acting in review for assessment purposes, that the property of any corporation subject to taxation under the provisions of this act shall have been omitted from said assessment roll, it shall place the same thereon and make the assessment thereof as required in sections eight and nine of this act: provided, that any such assessment shall take place in time to allow five full days for the review of the same before the expiration of the time herein provided for the completion of the review. After said State Board of Assessors shall have completed the review of said rolls as herein provided, they shall place opposite each description of property in said roll, in a column provided for that purpose, the true cash value of the same as ascertained and determined by them, and such valuation so fixed by them shall be the final valuation upon which the tax upon said property shall be levied and spread as herein provided. After said board shall have completed the review of said roll, a majority thereof shall certify under their hands officially, and spread on said roll, a certificate to the effect that the same has been acted upon and reviewed in accordance with law, which certificate shall state all the alterations, changes, corrections and additions made in or to the assessment or valuation of the property appearing on said roll.

*County clerk to make report, what to contain—Assessors, etc., to make—In case officers fail to report—Penalty.*

Sec. 11.[4] It shall be the duty of the county clerk in each county in this state, as soon as possible after the equalization of the board of supervisors of his county of the assessment rolls of the several municipalities therein, and not later than the first day of November in each year, to make a report, duly certified, to the State Board of Assessors, of the record of such equalization and of the record required to be made under section thirty-seven of the general tax law, being section three thousand eight hundred sixty of the Compiled Laws of Eighteen Hundred Ninety-Seven, as appears upon the records of such board of supervisors, which report shall, among other things, contain a statement of the amount of ad valorem taxes to be raised in the several municipalities of such county for state, county, municipal, township, school and other purposes, and a statement of the aggregate valuation of the property in each of said several municipalities, as taken from the assessment rolls of said municipalities for the year in which such equalization is made. It shall be the duty of the supervisor or other assessing officer of cities and villages in this state governed by special charters, which provide for the collection of ad valorem taxes, which are not reported to the board of supervisors for the purposes of equalization or review, and the supervisors or other assessing officers of cities organized under general laws, to make, within the time above limited, a properly certified report to the State Board of Assessors of all ad valorem taxes raised in any of said municipalities, which have not been reported to the board of supervisors for the purposes of equalization and review. In case any county clerk or any

[3] Amended by Act No. 45, p. 55, of 1903; given as previous to amendment.

[4] Amended by Act No. 45, p. 56, of 1903; given as previous to amendment.

supervisor or assessing officer shall neglect or fail to make the report by this section required, within the time limited, the said State Board of Assessors shall inspect and examine, or cause an inspection and examination of the records of said board of supervisors, or in cities affected by this section, an examination of the records of the proper officer, for the purpose of procuring the information required for the purpose of arriving at the average rate of taxation in this state; and the said board, in addition thereto, may require such reports on blanks which it shall prepare and furnish therefor, from all county, state and municipal officers, as it shall deem necessary to the accomplishment of the purpose of this act. Any county clerk, supervisor or assessing officer who shall fail to make the report required by this section shall be subject to a penalty of one hundred dollars, to be recovered in a proper action in the name of the people of the state of Michigan, in any court of competent jurisdiction.

*Board to ascertain average tax.*

Sec. 12.[5] As soon as the reports required by the preceding section to be filed have been filed, or the information therein required to be procured shall have been procured, and not later than the fifteenth day of December in each year, the said State Board of Assessors shall ascertain and determine the average rate of taxation for the then current year levied upon other property upon which ad valorem taxes are assessed for state, county, township, school and municipal purposes, and shall enter the same upon its records forthwith, together with the method by which such average rate was ascertained and determined.

*Amount taxed to be extended on roll—Certificate to be attached—What to contain—To whom roll delivered—Taxes, when payable—When to bear interest, rate—To become lien—Lien, how enforced—Warrant to be annexed to roll—Collections by distress, etc., how authorized—Proviso.*

Sec. 13.[5] Said board shall tax the property of the several companies as assessed by it at the rate as determined by it, and the amount of tax to be paid by each of said companies shall be extended upon said assessment roll opposite the descriptions of their respective properties. After the completion of said tax roll, and prior to the first day of February in each year, the said board shall attach thereto a certificate signed by the members of the board, or a majority thereof, which shall be as follows: "We do hereby certify that we have set down in the above assessment roll all the property of railroad companies, express companies, union station and depot companies, car loaning, stock car, refrigerator and fast freight line and other car companies liable to be taxed in this state, according to our best information, and that we have estimated the same at what we believe to be the true cash value thereof, and that we have assessed the taxes thereon at the average rate of taxes for state, county, township, school, municipal and other purpurposes, levied through the state during the present year, as determined by us." The said tax roll shall thereupon be forthwith delivered to the Auditor General, who shall immediately notify by registered mail the several companies taxed thereon to pay the taxes extended thereon to the State Treasurer. The said taxes shall be payable on the first day of March following the assessment and levy thereof, and shall be in lieu of all taxes for state and local purposes, not including special assessments on property particularly benefited made in any county, city, village or township. All taxes not paid before the first day of April in the year in which the same are payable shall bear interest at the rate of one per cent. per month thereafter. The taxes so extended against said companies shall forthwith become a debt due from each of said companies to the state, and shall constitute a lien upon all the property of said companies, real, personal and mixed from the time of the extension until the payment thereof, which lien shall take precedence of all demands, judgments, assignments by warranty deed or otherwise, or decrees against said companies, which lien and debt may be enforced by seizure or sale of said property or such portion thereof as may be necessary to satisfy the same, as hereinbefore provided. The State Board of

[5]Amended by Act No. 45, p. 57, of 1903; given as previous to amendment.

Assessors shall, upon the completion of said roll and the correction hereinbefore provided for, annex to said roll a warrant signed by the state board, or a majority of them, commanding the Auditor General to collect the several sums mentioned in the last column of such roll, and being the sum for which the said company was assessed and was liable to pay for a tax upon its property under the provisions of this act for the purposes provided for in this act; and the said warrant shall authorize and command the auditor general, in case any corporation named in the assessment roll shall neglect or refuse to pay its tax, to levy the same by distress and sale of the properties of said corporation, or such portion thereof as shall be necessary to raise sufficient money to satisfy said tax and the expense of said sale, after giving the same notice of such sale as provided for in the general laws of this state for the sale of property seized for taxes and offered for sale: provided, he may bring an action in the name of the people of the state of Michigan in any court of competent jurisdiction in the state of Michigan, or in any other state, for the enforcement of said lien, and upon recovery of judgment or decree therein the same may be collected by execution, levy and sale, as in other cases, upon judgments in courts of record.

*Procedure when tax judged illegal—When certain payments applied on reassessment.*

Sec. 14. If any court of competent jurisdiction shall adjudge that any tax levied under the provisions of this act is illegal on account of any irregularity or informality in the determination of the average rate of taxation required to be ascertained and determined by said State Board of Assessors, or for the reason that such average rate has not been ascertained and determined according to law, it shall be the duty of said State Board of Assessors, whether any part of the taxes assessed and levied have been paid or not, to redetermine and reascertain the average rate of taxation throughout the state in accordance with law, and when such redetermination and reascertainment has been had, to make a duplicate of the original assessment roll and to extend the taxes thereon according to such redetermined and reascertained average rate, and when such duplicate roll has been made and the taxes extended thereon in the manner provided in this section, it shall be of the same force and effect as an original assessment made in accordance with law. All proceedings on the redetermination and reascertainment of such average rate and for the extension and collection of taxes upon said duplicate assessment roll shall be conducted in the method originally provided for, so far as may be. Whenever any sum or part thereof levied upon any property subject to taxation under this act so set aside has been paid and not refunded, the payment so made shall be applied upon the reassessment upon said property, and the reassessment to that extent shall be deemed to be satisfied.

*When tax not to be held invalid.*

Sec. 15. No tax assessed upon any property and no average rate determined by said State Board of Assessors as hereinbefore required, shall be held invalid by any court of this state on account of any irregularity in any assessment or on account of any assessment or tax roll not having been made or proceeding had within the time required by law, or on account of the property having been assessed without the name of the owner, or in the name of any corporation or person other than the owner, or on account of any other irregularity, informality or omission, if the method and manner of ascertaining and determining the average rate of taxation of property in this state is in accordance with the constitution and statutes of this state.

*Taxes, how applied—Proviso.*

Sec. 16. All taxes collected under this act shall be applied in paying the interest upon the primary school, university and other educational funds, and the interest and principal of the state debt, in the order herein recited, until the extinguishment of the state debt other than the amounts due to educational funds, when such taxes shall be added to and constitute a part of the primary school interest fund; and such taxes as are collected under the provisions of this act shall be treated and disbursed as specific taxes are now treated and disbursed: provided however, that if any of the corporations, companies or associations herein named were not paying specific taxes

to this state on November sixth, A. D. nineteen hundred, the tax collected from such corporations, companies or associations under this act shall be paid into and become a part of the general fund of the state.

*When first assessment to be made—Time existing laws to continue in force.*

Sec. 17. The first assessment under this act shall be made as herein required in the year nineteen hundred and two. Nothing herein contained shall be deemed a waiver or affect the collection of the specific taxes required to be paid by the companies hereby affected, on the first day of July in the year nineteen hundred and one, and on the first day of July in the year nineteen hundred and two, under the general laws upon the property or business of such companies operated within this state. The existing laws providing for the collection of such specific taxes shall be continued in force until the collection and payment of all taxes levied thereunder for the year nineteen hundred and one and previous years.

*Penalty for wilfully making wrong assessment.*

Sec. 18. If said board shall wilfully assess any property at more or less than what the members taking part in making such assessment believe to be its true cash value, the members voting in favor of such assessment shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in the county jail not exceeding one year, or by a fine not exceeding five thousand dollars each.

*Penalty for offering board gratuities, etc.*

Sec. 19. If any person, company, association or corporation whose property is subject to assessment under this act shall directly or indirectly promise, offer or give to any member of said board, during his term of office, or to any other person at his request, any gratuity of any kind whatever, such person or corporation shall forfeit to the state the sum of ten thousand dollars for each such offense, to be recovered in an action in the name of the people of the state of Michigan, in any court of competent jurisdiction. And the recovery of such fine under this act shall not constitute a bar to any prosecution of the person or corporation so offending under the criminal laws of this state.

*Repealing clause—Proviso.*

Sec. 20. All other acts or parts of acts whether contained in any acts for the incorporation of railroad companies, union station and depot companies, express companies, car loaning companies, stock car companies, refrigerator car companies, and fast freight line companies, or in any other law of this state, so far as such acts or parts of acts are inconsistent with this act, and no further, are hereby repealed, except as herein expressly stated: provided however, that all rights which the state now has under any of said acts, for taxes or penalties, shall not in any way be affected by this act, and shall not constitute a bar to any prosecution or recovery on account of such taxes or penalties.

Approved May 27, 1901.

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## LAKE SHORE & M. S. RY. CO. v. POWERS, Auditor General.

## DULUTH, S. S. & A. RY. CO. v. SAME.

(Circuit Court, W. D. Michigan, S. D. May 19, 1905.)

TAXATION OF RAILROADS—VALIDITY OF ASSESSMENT—MICHIGAN STATUTE.

Pub. Acts Mich. 1901, p. 241, No. 173, § 8, providing for the assessment and taxation of the property of railroad corporations by a state board of assessment, requires such board to prepare an assessment roll by December 15th, and thereafter to meet as a board of review, and continue in session for so long a period as may be necessary, not later than the 15th day of January following, during which time any company or person interested may appear before it and be heard. It further provides that on such application, or on its own motion, the board may correct the assessment of any company in such manner as, in its judg-

ment, will make the valuation just and equal, and that such valuation shall be the final one on which the tax shall be levied. During such session of the board complainant appeared, and was heard on an application to reduce its assessment. Subsequently the board increased its assessment, and extended the same as required by the statute. *Held* that, in the absence of any requirement therefor in the statute, complainant was not entitled to notice of such action of the board, being given no right to a rehearing, and that the validity of the final assessment was not affected by the failure to give such notice.

In Equity. Suit to enjoin the collection of taxes.

Angell, Boynton, McMillan & Bodman and F. J. Jerome (George C. Greene, of counsel), for Lake Shore & M. S. Ry. Co.

A. E. Miller (A. B. Eldredge, of counsel), for Duluth, S. S. & A. Ry. Co.

Charles A. Blair (Roger Irving Wykes, of counsel), for Auditor General.

WANTY, District Judge. The bills in these cases, besides raising all the questions disposed of in the opinion just filed in the Michigan Railroad Tax Cases, 138 Fed. 223, claim relief from excessive taxes on account of the raising of complainants' assessments by the state board of assessors without notice, and in violation of their rights. The statute (Acts 1901, p. 241, No. 173, § 8) provides that:

"Prior to the fifteenth day of December in each year, it shall be the duty of the board of assessors to prepare an assessment roll as provided in section 4 of this act, upon which they shall assess at the true cash value on the second Monday of April of the year in which the assessment is made all the property of the companies herein enumerated, subject to taxation under this act, which said assessment shall not be final until reviewed as hereinafter provided," and that "on the third Monday of December in each year, it shall be the duty of the state board of assessors to meet at the state capitol at Lansing, and to continue in session from day to day for so long a period as may be necessary, not later than the fifteenth day of January next thereafter, for the purpose of reviewing said assessment roll, and any company or person interested shall have the right to appear during said period and be heard as to the valuation of the property of any company, and said state board of assessors may, on such application or on its own motion, correct the assessment or valuation of the property of such company in such manner as will, in its judgment, make the valuation thereof just and equal; and for the purpose of arriving at the true cash value of the properties assessed on said assessment roll, may subpœna witnesses, as provided in section three of this act and have such hearing as may be deemed necessary. In case it shall appear or be made to appear to the members of said board, acting in review for assessment purposes, that the property of any corporation subject to taxation under the provisions of this act shall have been omitted from said assessment roll, it shall place the same thereon and make the assessment thereof, as required in sections eight and nine of this act. Provided, that any such assessment shall take place in time to allow five full days for the review of the same before the expiration of the time herein provided for the completion of the review. After said state board of assessors shall have completed the review of said rolls, as herein provided, they shall place opposite each description of property in said roll, in a column provided for that purpose, the true cash value of the same as ascertained and determined by them, and such valuation so fixed by them shall be the final valuation upon which the tax upon said property shall be levied and spread as herein provided. After said board shall have completed the review of said roll, a majority thereof shall certify under their hands

officially, and spread on said roll a certificate to the effect that the same has been acted upon and reviewed in accordance with the law, which certificate shall state all the alterations, changes, corrections and additions made in or to the assessment or valuation of the property appearing on said roll."

While the board was in session according to the requirements of the statute, and on January 12, 1903, the representatives of the complainants appeared, and applied for a reduction of their respective assessments. After the hearing, and in the absence of the representatives of the complainants, the assessment of the Lake Shore & Michigan Southern Railway Company was raised $1,020,000, and that of the Duluth, South Shore & Atlantic Railway Company was raised $1,250,000. No notice of this increase was given to the complainants, and they did not know of it until the publication of the assessments on January 16, 1903, after it was too late to make another application for their reduction. The claim of the bills is that, after having fixed, as required by statute, the valuation at certain figures before the review began, and having heard an application to reduce those figures, the board could not later increase them without notice to complainants. It is not suggested that the statute in terms requires this notice, or any special notice, nor that it gives any time during its sessions within which the board may, "on its own motion, correct the assessment or valuation of the property of such company in such manner as will, in its judgment, make the valuation thereof just and equal." It seems to contemplate that at some time between the third Monday of December and the 15th day of January every company interested shall have an opportunity to be heard in regard to its assessment; and that the statutory notice that the board is in session as a board of review is all that is contemplated is made certain by the provision that the property of any corporation subject to taxation under the act which has been omitted from the roll shall be placed thereon, but in time to allow five full days for the review of the same before the final sitting of the board. Unless the company is represented at the sessions of the board, it receives no notice of any changes made in the rolls. Under this statute, according to its terms, every company interested has an opportunity to be heard in regard to its assessment before the board has completed its review; but no company has a right to notice of what the board has done in regard to raising or reducing its assessment, or what it contemplates doing in that regard, either before or after its appearance before the board. The board, after hearing all the companies desiring to be heard on the question of their assessments, may form its judgment, and make all the changes in the roll required by the statute on the last day of its session, except that it cannot add property which has been omitted; and its action then is final. There is nothing in the statute requiring any different notice to companies whose assessments are raised after hearing than to companies whose assessments are raised without a hearing. All have the opportunity to be heard, and after hearing and judgment there is no right to a rehearing.

In Pittsburgh, C., C. & St. L. Ry. Co. v. Backus, 154 U. S. 421, 426, 427, 14 Sup. Ct. 1114, 38 L. Ed. 1031, the United States Su-

preme Court, it seems to us, has answered this contention of the complainants, when, speaking through Justice Brewer, after quoting with approval from State Railroad Tax Cases, that: "This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and in the business of assessing taxes this is all that can be reasonably asked"—it said:

"Again, it is said that the act does not require the state board to grant to the railroad companies any hearing or opportunity to be heard for the correction of errors at any time after the assessments have been agreed upon by the board, and before they are made final and absolute, or before the final adjournment of the board; and also that it gives to the board arbitrary power to deny to plaintiffs any hearing at any time. But the fact and law are both against this contention. The plaintiff did appear before the board, and was heard, by its counsel and through its officers, and the construction placed by the Supreme Court of the state on the act—a construction which is conclusive upon this court—is that the railroad companies are given the right to be present and to be heard. It is urged that the valuation as fixed was not announced until shortly before the adjournment of the board, and that no notice was given of such valuation in time to take any steps for the correction of the errors therein. If by this we are to understand counsel as claiming that there must be notice and a hearing after the determination by the assessing board as well as before, we are unable to concur with that view. A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect. It not infrequently happens in this as in all other courts that decisions are announced and judgments entered on the last day of the term, and too late for the presentation or consideration of any petitions for rehearing or motions for a new trial. Will any one seriously contend that a judgment thus entered is entered in defiance of the requirements of due process of law, and that a party, having been fully heard once upon the merits of his case, is deprived of the constitutional protection because he is not heard a second time?"

The Michigan cases upon which the complainants rely were under statutes differing from the one here under consideration; the facts were also different; and therefore the cases are not controlling. In Avery v. East Saginaw, 44 Mich. 587, 7 N. W. 177, the plaintiff's personal assessment was increased from $6,000 to $23,000 on the last day of the session of the board of review, without any notice to him, or any opportunity to be heard upon the increase. The city charter empowered the board "to correct any errors in the roll, and to reduce or to increase any valuation of property found on the rolls, and to add property omitted." "Any person might show to the board why his valuation should be changed." The court held that the increase spoken of was void, because the charter adopted the general law as furnishing the means and analogies of procedure, and "under the general tax law there can be no change made prejudicial to the taxpayer after the roll has been made up for review, and he may therefore rest upon it, if not excessive." The general law at that time provided for an alteration of an assessment only on "the request of any person, his agent or attorney, considering himself aggrieved, on sufficient cause being shown,"

and is entirely different from the provision of the statute here in question.

In Griswold v. Bay City, 24 Mich. 262, the plaintiff had appeared before the board, and applied to have his assessment reduced. The board reduced it, and then, without notice, it was raised, and the court held that the board had no power to subsequently raise the assessment without notice. In deciding the case Judge Cooley said:

"Their right to review a valuation of property only arises when an application is made for that purpose by the party concerned; and although they sit as a board for three days or more, yet each particular case is heard by itself, and, when once disposed of, the party concerned, who is the moving party therein, is no longer under obligation to watch their proceedings. The public notice which he has under the law to appear and be heard, if he desires to do so, has then, so far as he is concerned, spent its force, and there is no more occasion for his remaining in attendance upon the board afterwards, lest the action taken should be rescinded, than there is for a suitor in court, who has obtained a judgment, remaining constantly with the court so long as it remains in session, lest at some time the judgment should be vacated in his absence and without his knowledge."

The facts in the case of Phillips v. New Buffalo, 64 Mich. 683, 31 N. W. 581, were exactly like those in Griswold v. Bay City.

All that was held in Common Council v. Smith, 99 Mich. 507, 58 N. W. 481, was that the provisions of the general law making it applicable to villages when not inconsistent with their charters, and providing for the addition to the assessment roll by the board of review, during its first meeting, of personal property and real estate omitted from said roll, cannot be invoked to validate the action of the assessor of a village in making such addition of personal property on the last review day, where the charter, unlike the general tax law, does not provide for a second meeting of the board of review.

But, if the complainants were entitled to notice that the board, in its judgment, formed after the hearing, had decided that their assessments should not be reduced, but should be raised, it would be necessary for them to show that the action of the board in raising the assessments was prejudicial, in that the valuation of their property as shown by the assessment roll, after the change had been made, was above its true cash value, before they could obtain relief in a court of equity. This they have not attempted to do in their bills nor in the proof. The rule is that a court of equity cannot enjoin the collection of a tax on the ground that it was assessed without due notice to the complainant, unless it is also made to appear that it is greater than should have been assessed, so that upon a hearing he would have been entitled to a reduction of the amount. This was decided in Mercantile Nat. Bank v. Hubbard (C. C.) 98 Fed. 465–469, where Judge Taft said:

"This proceeding is a bill in equity to enjoin the collection of the tax on the ground that it was assessed without due notice to the complainant. If the tax assessed is no greater than ought to have been assessed, then the complainant is not in a position to ask the intervention of a court of equity, because, however irregular the action of the state board may have been, if the complainant cannot make it clear that by a hearing upon notice it would

have been entitled to an assessment less than that which was made, the bill must be dismissed."

The bills in these cases may, for the reasons set out in the opinion of the court in the Michigan Railroad Tax Cases and in this opinion, be dismissed.

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SAULT STE. MARIE BRIDGE CO. v. POWERS, Auditor General.

ST. CLAIR TUNNEL CO. v. SAME.

(Circuit Court, W. D. Michigan, S. D. May 19, 1905.)

TAXATION OF RAILROAD COMPANIES—SCOPE OF STATUTE—BRIDGE COMPANIES.

A corporation organized under the Michigan statute "providing for the incorporation of railroads," whose business was to build and own a bridge used solely for railroad purposes, and which has always reported to the Railroad Commissioner and paid taxes as a railroad company, is a railroad, within the provisions of Act No. 173, p. 236, Acts Mich. 1901, providing for the taxation of the property of railroad companies.

In Equity. Suit to enjoin collection of taxes.

A. E. Miller (A. B. Eldredge, of counsel), for Sault Ste. Marie Bridge Co.

E. W. Meddaugh and Harrison Geer (L. C. Stanley, of counsel), for St. Clair Tunnel Co.

Charles A. Blair (Roger Irving Wykes, of counsel), for Auditor General.

WANTY, District Judge. In addition to the objections which are made by the complainant in the Michigan Railroad Tax Cases (just decided) 138 Fed. 223, this complainant claims that Act No. 173, p. 236, of the Laws of Michigan of 1901, under which the taxes in dispute were levied, does not apply to it. That statute provides that:

"It shall be the duty of said board to make an annual assessment, upon an assessment roll to be prepared by said board, of the property having a situs in this state as hereinafter defined, of railroad companies, union station and depot companies, express companies, doing business within this state, car loaning companies, and refrigerator and fast freight line companies, and all other corporations owning, leasing, running or operating any freight, stock, refrigerator, or any other cars, not being exclusively the property of any railroad company paying taxes upon its rolling stock under the provisions of this act, over or upon the line or lines of any railroad or railroads in this state."

Complainant contends that, as railroad bridge companies and railroad tunnel companies are not mentioned in the act, they may not be taxed under its terms. The complainant was organized in 1887 under Act No. 198, p. 496, of the Laws of Michigan of 1873, entitled "An act to revise the laws providing for the incorporation of railroads, and to regulate the running and management, and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this state," a section of which act authorized "any number of persons not less than seven to organize themselves into a corporation for the purpose of construct-

ing, operating and maintaining a railroad, railroad bridge or railroad tunnel." Since its organization complainant has reported to the Railroad Commissioner, and been taxed, under the Michigan general railroad law, as owner of an international bridge crossing the St. Mary's river between the United States and Canada. The company owns and operates no cars or engines. Its entire stock is owned by the Canadian Pacific, Duluth, South Shore & Atlantic, and Minneapolis, St. Paul & Sault Ste. Marie Lines; and its bridge was built and is used solely for the purpose of carrying on the railroad business of these companies, which contribute to the bridge company only such sums as are necessary to maintain the bridge and eventually retire its bonds. Section 20 of article IV of the Constitution of Michigan says, "No law shall embrace more than one object, which shall be expressed in its title," and therefore, when the complainant was organized under the statute referred to, it was organized as a railroad company, for, although railroad bridge and tunnel companies were mentioned in the body of the act, under its title they must have been considered railroad companies, and complainant could not be organized under that statute as anything but a railroad company. The title to the act was changed in 1899, but that did not change the character of the corporations already organized under it. The complainant, in its dealing with the state, has always been treated as a railroad company, and taxed under the provisions of the law applying to such corporations. The railroad companies organizing the complainant organized it for the purpose of carrying on a railroad business, and, although it owns no engines or cars, it does no business except a railroad business. If any one of the companies which organized the complainant owned the bridge, and used it as it is now being used by each of them, there could be no question as to its being used exclusively as a part of the railroad belonging to the company operating it. It is unquestionably railroad property, and, the corporation operating it having been organized under a statute which could provide only for the incorporation of railroad companies, and it having been reported and taxed under the statutes applying to railroad corporations, the Legislature must have intended to include complainant in Act 173.

In the case of Railway Companies v. Keokuk Bridge Co., 131 U. S. 371–389, 9 Sup. Ct. 770, 33 L. Ed. 157, where it became a question whether a railroad bridge company came within a statute of Pennsylvania which authorized any railroad company to enter into a lease or any other contract with any railroad with which it is connecting, either directly or by means of intervening lines, to form a continuous route for the transportation of persons and property, Mr. Justice Gray, in delivering the opinion of the court, said:

"Nor can we have any doubt that the bridge company was a railroad company, and the bridge a railroad, within the meaning of these statutes. The principal purpose and use of the bridge was the passage of railroad trains. It was, in substance and effect, a railroad built over water, instead of upon land; and, strictly speaking, it was a railway viaduct, rather than a bridge. Bridge Proprietors v. Hoboken Co., 1 Wall. 116, 17 L. Ed. 571."

For the reasons stated in the opinion in the Michigan Railroad Tax Cases and in this opinion, the bill in this case and the bill in the case of St. Clair Tunnel Company v. Perry F. Powers, Auditor General, should be dismissed.

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DETROIT, G. H. & M. RY. CO. v. POWERS, Auditor General.

(Circuit Court, W. D. Michigan, S. D. May 19, 1905.)

TAXATION OF RAILROADS—CONTRACT IN CHARTER—VALIDITY.

In 1834 the territorial council of the territory of Michigan by special act chartered the Detroit & Pontiac Railroad Company. By Act No. 140, p. 305, Laws 1855, the Legislature of the state authorized such company to change its name to the Detroit & Milwaukee Railway Company, and to purchase the property and franchises of another company, and extend its line, which were done. Such act also provided that the company should pay to the state annually a tax of 1 per cent. on its capital stock, which should be in lieu of all other taxes. Act No. 96, p. 252, of 1859, provided that on the sale of the road of any railroad company in foreclosure proceedings the company might be reorganized under any name chosen by the purchasers, and continue under the original charter. Through foreclosure sales under such act, said company was twice reorganized, the last time under the name of complainant, the Detroit, Grand Haven & Milwaukee Railway Company. Subsequently, in an action brought by the state, the Supreme Court, in a decision binding on the federal courts, held that the acts of 1855 and 1859 were both within the powers of the Legislature under the state Constitution of 1850, and that neither the act of 1855 nor the reorganizations after foreclosure created a new corporation, but that the old one was continued. *Held*, that the provision of the act of 1855, with respect to taxation, created a contract between the state and the company, which remained in force, notwithstanding its reorganization and change of name and the subsequent action of the Legislature in passing an act purporting to repeal the same and the original charter, and that the ad valorem taxation of complainant's property under Act No. 173, p. 236, Acts 1901, was illegal, and the collection of the tax would be enjoined.

In Equity. Suit to enjoin collection of taxes.

In this case, in addition to the facts stated in the opinion in the Michigan Railroad Tax Cases (just decided) 138 Fed. 223, it appears that the charter of the Detroit & Pontiac Railroad Company was granted by the territorial council of the territory of Michigan on March 7, 1834, under which a railroad company was organized, and a railroad built from Detroit to Pontiac, and put in operation in the fall of 1844. By act of April 3, 1848 (Laws 1848, p. 351, No. 234), a charter was granted by the Legislature of the state of Michigan to the Oakland & Ottawa Railroad Company for the construction of a railroad from Pontiac by way of Fentonville to Lake Michigan, under which a line was located and construction of the road begun. The Legislature of Michigan, by an act approved February 13, 1855 (Laws 1855, p. 305, No. 140) authorized the Detroit & Pontiac Railroad to change its name to Detroit & Milwaukee Railway Company, and to purchase all the rights, property, and franchises of the Oakland & Ottawa Railroad Company for the purpose of building and operating a continuous line of road from Detroit to Lake Michigan by way of Pontiac and Fentonville, which was done. This act provided (page 307, § 9) that: "The said company shall, on or before the first day of July, pay the state treasurer an annual tax of one per cent. on the capital stock of said company paid in, which tax shall be in lieu of all other taxes, except for penalties imposed upon said company by its act of incorporation or any other law of this state;" and it was also provided (page

306, § 7) that said company might issue its corporate bonds or obligations for such sums as it might borrow, and might "secure the same by a mortgage of the road or other property of said company." Since 1850, the Michigan Constitution (article 15, § 1) has provided that: "Corporations may be formed under general laws but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed." And section 8 of the same article has since that time provided that: "The Legislature shall pass no law altering or amending any act of incorporation heretofore granted without the assent of two-thirds of the members elected to each house; nor shall any such act be renewed or extended." In 1860 certain mortgages on the road, given to secure the repayment of money borrowed in 1855, were foreclosed, and the company reorganized as the Detroit & Milwaukee Railway Company; and again, in 1878, the road, with its appurtenances and franchises, was sold upon mortgage foreclosure, and again reorganized as the Detroit, Grand Haven & Milwaukee Railway Company. These foreclosures and reorganizations both took place pursuant to Act No. 96, p. 252, of 1859, which provided (section 1): "That upon the foreclosure of any mortgage or pledge of the property and franchises of any railroad corporation, if the railway track and its appurtenances are sold at the sale thereunder, and if the purchaser or purchasers shall, either by purchase from said company or otherwise, provide suitable equipments for running said road, and performing in all respects the duties to the public by law incumbent upon said corporation, and shall transfer to said corporation again its railway track and appurtenances, and all and singular the equipments necessary to run the same, and perform all its duties to the public, and shall, under their hands and seals, and verified by their oaths, declare that he or they, having become such purchaser or purchasers, are desirous of continuing to perform the duties and enjoying the franchises and immunities of said corporation, and state in said declaration, under oath, that they have so provided the means for continuing the same, and set forth the name which he or they desire said corporation to be thereafter called, and shall file said declaration with the Secretary of State, together with a copy of the order confirming the sale to him or them, and notify the Attorney General, then such purchaser or purchasers shall be at liberty to issue, and themselves hold, new stock in said corporation to such an amount and of such denomination as they shall deem proper: provided, that unless additional stock shall be in good faith subscribed by persons able fully to pay up the same, new stock to a greater amount shall not be issued than sufficient at par to represent the fair value of all the property and rights then owned by said corporation. When said new stock shall be issued, and the holders thereof shall proceed as they are hereby authorized to do, to elect officers for said corporation, and said officers shall duly qualify for the same, as by the charter required, the old officers of said company shall be superseded, and the old stock in said corporation shall be deemed forfeited, and may be cancelled on the books of said corporation, and the new stockholders and officers shall, in the law, be deemed, and taken to be the stockholders and officers of said corporation, the charter and all laws appertaining thereto continuing to be the charter and laws regulating and governing said corporation, except that it may be known and called, and sue and be sued, and may contract, and do all acts which in the law it could have done in its old name, in and by the name set forth in the declaration aforesaid. And the said corporation shall not be liable for any debts or obligations except those by it thereafter contracted. But no prior mortgage or lien shall be in any way affected by such proceeding, and all property whatsoever, if any, that shall not be sold, shall remain liable for all the debts of such corporation, and no liability of any corporator, director or other person whatsoever, shall be in anywise lessened or affected by any proceeding or act authorized by this act." In 1891 (Pub. Acts 1891, p. 144, No. 123, § 49) the Michigan Legislature added a section to the railroad law, as follows: "Every railroad and railway company operating a railroad in whole or in part in this state which company may have been by means of a consolidation under any general or special law of this state, or by means of a mortgage foreclosure and sale and reorganization, under

any general law of this state, is hereby declared to be in all respects subject to the general laws of the state respecting railroads as now existing or as hereafter amended; and any franchise, right, power, privilege, immunity or exemption claimed by any such railroad or railway company of a kind which would not belong to a company organized under the general railroad laws of the state as now existing or as hereafter amended is hereby annulled and abrogated, and every such company shall be subject to all the restrictions and perform all the duties now imposed by the general laws or which may hereafter be imposed upon railroad companies." And in 1900 (Ex. Sess. Laws 1900, p. 10, No. 5) the Legislature passed an act providing: "That an act of the territorial legislative council of Michigan, of eighteen hundred thirty-four, entitled 'An act to incorporate the Detroit & Pontiac Railroad Company,' approved March seventh, eighteen hundred and thirty-four, and act number one hundred forty of the Session Laws of eighteen hundred fifty-five, entitled 'An act to authorize the consolidation of the Detroit & Pontiac and the Oakland & Ottawa Railroad Companies, so as to form a continuous line from Detroit to Lake Michigan, under the name of the Detroit & Milwaukee Railway Company,' and all acts amendatory or supplementary thereto, the same constituting the special charter under which the Detroit & Milwaukee Railway Company, now known as the Detroit, Grand Haven & Milwaukee Railway Company, was created, be and the same are hereby repealed, said repeal to take effect, and be in force from and after the thirty-first day of December, nineteen hundred one." The complainants, since 1898, have paid taxes pursuant to the general railroad law of the state, but have always duly protected themselves by a written protest against the exaction.

E. W. Meddaugh and Harrison Geer (L. C. Stanley, of counsel), for complainant.

Charles A. Blair (Roger Irving Wykes, of counsel), for defendant.

WANTY, District Judge, after making the foregoing statement, delivered the opinion of the court.

Besides urging all the grounds stated by the complainants in the Michigan Railroad Tax Cases, it is contended that by its charter a contract existed between the complainant and the state of Michigan, whereby the complainant should pay 1 per cent. on its capital stock in lieu of all other taxes, the impairment of which contract by the provisions of Act No. 173, p. 236, Acts 1901, is beyond the power of the state. That the provision in the act of 1855 for the payment of an annual tax of 1 per cent. of its capital stock in lieu of all other taxes constituted a contract between the state and the railroad company seems clear; but the defendant says that this provision was made by the Legislature after the Constitution provided that every such act might be amended, altered, or repealed, and therefore it presented no obstruction to the passage of Act No. 173. If that provision of the Constitution applied to the act of 1855, containing this provision, the right to alter, amend, or repeal it cannot be questioned, and each succeeding Legislature would have that power. The design of the provisions of the Constitution above quoted was evidently to prevent the creation of any more corporations in the state of Michigan by special acts, as had theretofore been done, and to prevent the altering or amending of any special act of incorporation theretofore granted without the assent of two-thirds of the members of the Legislature elected to each house, and to prevent

any such act from being renewed or extended. The provision in regard to amendment, alteration, or repeal applied only to corporations thereafter to be formed under the general laws of the state, and no corporations could thereafter be formed except under such general laws; but it had no reference to the corporations which had been theretofore formed under special acts. The only restrictions as to such corporations were that no change could be made in their special charters except by a vote of two-thirds of the members of the Legislature elected to each house, and the renewal or extension of those charters was prohibited absolutely. The Legislature could not create a new corporation, and give it any right or immunity which could not be taken away by a subsequent Legislature; but it does not follow that a subsequent Legislature could impair the obligation of a contract between the state and a corporation formed before the adoption of this clause in the Constitution, when the contract was made with all the formalities provided in the Constitution itself.

It is contended that under section 1 of article 15 the reserved right to alter, amend, or repeal acts of incorporation was designed to keep under control the corporate rights, privileges, and immunities, whether contained in an act of incorporation, an amending act, or an independent statute, and to prevent the Legislature from granting irrepealable exemptions and privileges to corporations existing previous to as well as after the reservation was placed in the Constitution. If that had been the intention of the people in adopting the Constitution, they would have used apt words, and provided that the Legislature should pass no law enlarging the powers of any act of incorporation theretofore granted; but instead the people adopted sections 1 and 8, above quoted, which provide that thereafter no corporation may be formed by special act except for municipal purposes, and that laws passed pursuant to that section may be amended, altered, or repealed; and in section 8 they provide that no law altering or amending any act of incorporation theretofore granted can be passed without the assent of two-thirds of the members elected to each house of the Legislature, and that no such act shall be renewed or extended. It seems clear that it was intended by the Constitution to provide for the enlargement of the powers of corporations already existing by a two-thirds vote of each house of the Legislature, and the Supreme Court of Michigan has held that by the act of 1855 no new corporation was formed, but the Detroit & Pontiac Railroad Company was continued under a new name. Attorney General v. Joy, 55 Mich. 94, 20 N. W. 806. The case of Northern Central Ry. Co. v. Maryland, 187 U. S. 258, 23 Sup. Ct. 62, 47 L. Ed. 167, upon which the defendant relies in claiming that section 1 of article 15 applies to the complainant, is not authority in this case, because the act of 1854 referred to in that opinion created a new corporation, while the Constitution of Maryland of 1850, then in force, provided that all corporations formed under general laws or special acts might be altered from time to time or repealed. The vital difference is that the case of Northern Central Ry. Co. v. Maryland, and all similar cases referred to by coun-

sel for the defendant, deals with corporations organized after the adoption of the Constitution providing that the laws under which they are created may be altered, amended, or repealed, while in this case the corporation was formed by a special act before the constitutional provision was adopted; and the amendment made in 1854 does not create a new corporation, and therefore the clause of the Constitution providing for the amendment, alteration, and repeal does not apply.

The defendant contends that previous to the enactment of the statute of 1891, above quoted, by which the Legislature endeavored to bring the complainant under the general railroad law of the state, and the enactment of 1900, by which the Legislature attempted to repeal the charter of the Detroit & Pontiac Railroad Company, and the statute of 1855, authorizing the consolidation of the Detroit & Pontiac and Oakland & Ottawa Railroad Companies, and all of the acts amendatory and supplementary thereto, the complainant became a new corporation through the two foreclosures of mortgages and reorganizations under the act of 1859, already referred to; and therefore became subject in all respects to legislative control, because the new corporation would have no vested right in the tax limitation claimed by the complainant which the Legislature under the alter, amend, or repeal clause of the Constitution could not control. To show that the necessary and inevitable result of the foreclosure and reorganization under Act No. 96, p. 252, of 1859, is that the existence of the Detroit & Pontiac Railroad Company did not vest and continue in the corporation upon reorganization, and that new corporations, whose existence date from reorganizations, and whose rights and powers are measured by laws then in force, resulted, many authorities are cited, which it would be interesting to review were it not for the fact that the whole matter has been disposed of by the Supreme Court of Michigan in the case of Attorney General v. Joy, 55 Mich. 94, 20 N. W. 806, which holds that the purpose of the statute of 1855 was to enable the Detroit & Pontiac Railroad Company to take a new name, and that the Legislature had the constitutional power to pass the act of February 10, 1859, above quoted; and its effect was not to allow the creation of new corporations, but to permit the creditors of chartered corporations to enforce their demands by a sale and transfer of the franchises, and to provide a method whereby those franchises might be kept alive. That decision, construing the Constitution and statute of the state, is binding upon this court. In that case the Attorney General filed an information against the directors of the complainant in this case, charging them with usurping corporate rights, and claiming to be organized and incorporated under acts of the territory of Michigan and the state of Michigan, before referred to. The defendants set up the charter of the Detroit & Pontiac Railroad Company and the charter of the Oakland & Ottawa Railroad Company, before referred to, and the act of the Legislature of February 13, 1855, and the mortgage and sales of the road and subsequent reorganization under the statute of 1859, whereby complainants became possessed of all the franchises and privileges of the Detroit

& Pontiac Railroad Company under the act of March 7, 1834 (Laws 1834–36, p. 40), and the act of February 13, 1855, hereinbefore referred to. In deciding the case Judge Cooley uses this language, which may have some significance regarding the consideration of the contract made by the act of 1855:

"The act of 1855 was not promoted exclusively in the interest of the railroad companies named in it, but the state itself was largely concerned, and expected to accomplish important public purposes by means of it. Twenty years before that time the state had planned for the construction of several parallel lines of railroad across the state from east to west, one of which was to be north of the line of the Michigan Central Railroad, and was expected to be of very high value, not only to all that part of the state through which it would run, but to the whole state. Much disappointment had come from the road not being constructed; and when the Detroit & Pontiac Railroad Company, which already had near thirty miles of road in successful operation, and could command means for the construction of more, proposed, on certain terms, which were expressed in the act of 1855, to purchase the rights and franchises of the Oakland & Ottawa Company, and to extend their own road to Lake Michigan, there is no reason for doubting that the people of the state at large looked upon this as a favorable opportunity for accomplishing a desire which twenty years before had found expression in the legislation of the state, and which ever since had been kept constantly in view."

In another part of the opinion he says:

"It has already been seen that the important public purpose which the state had in view in assenting to the act of 1855 has been accomplished. The railroad from Pontiac to Lake Michigan has been constructed, and for many years operated, and the state has reaped the benefits. But in order to accomplish this public purpose it seems to have become necessary to put the bonds and shares of the Detroit & Milwaukee Railway Company upon the market as well in Europe as in this country. The state recognized the necessity, and by its legislation provided for facilitating sales. The bonds and shares were sold to the amount of very many millions, and every purchaser of one of them made the purchase in reliance upon legislation of this state which appeared to sanction, if not to invite it."

And further in the opinion the court says:

"But another objection is made to the act of 1855, which goes to its substance. The act, it is said, is in conflict with that provision of the Constitution which declares that the Legislature shall pass no act renewing or extending a special act of incorporation. (Article 15, § 8.) The act of 1855, it is said, undertook to do this; and, as the Legislature could not do it originally, neither could it afterwards confirm and validate the void attempt. We think the relator misconceives the act. It does not purport or attempt to renew or extend any special act of incorporation. The general purpose is to enable the Detroit & Pontiac Railroad Company to take a new name, and under such new name to extend its road from Pontiac to Lake Michigan. There was nothing in this opposed to the Constitution either in letter or spirit. And this answers a further objection that the act of 1855 created a new corporation in violation of article 15, § 1, of the Constitution. We do not so understand it."

In regard to the reorganization under the act of February 10, 1859, it is said:

"It is further contended that an act approved February 10, 1859, under which the railroad company is supposed to have been reorganized after the sales on foreclosure, was without validity for that purpose for the two reasons: First, that it was without validity when passed; and, second, that it has since, by implication, been repealed. The act is entitled 'An act in relation to mortgages against preferred stock in, and the delivery of goods

by, railway companies.' Here it is said are two or more objects expressed, and therefore the act is invalid under the Constitution, art. 4, § 20. This is a somewhat technical objection, and we are not disposed to consider it after this great lapse of time. But it may be proper to remark that the act did not bring together subjects totally foreign to each other. The whole act concerned railways; and if it can be considered a technical disregard of the Constitution, it was probably inadvertent. The repeal of the act is supposed to have been accomplished either by the amendment of the general railroad law by an act passed in 1872 (Sess Laws, p. 83), or by the general revision of that law in 1873 (Pub. Acts, p. 496, No. 198), both of which covered the same general subject. But we do not agree in this. Those acts must be understood to refer to companies organized under the general railroad law, while the act of 1859 evidently had other companies in view. It speaks of railway companies—a term not made use of in the general law, but which the company succeeding the Detroit & Pontiac had taken as a part of its new name. It is suggested, rather than urged, that the Legislature had no constitutional power to pass the act of February 10, 1859, as applicable to chartered corporations, because the effect was to create new corporations with the old chartered powers. But the purpose of the act was to permit the creditors of chartered corporations to enforce their demands by a sale and transfer of the franchises; and this would be impossible if the sale were of itself to operate as a destruction of the franchises. The act merely gave a remedy for the enforcement of debts; and, as franchises were to be sold for the satisfaction of debts, it provided a method whereby they might be kept alive. We have now considered the questions raised, so far as seems necessary to a determination of the main question whether the defendants are guilty of the usurpation charged upon them, and are clearly of the opinion that they are not. It may be proper to refer to the case of Cook v. Detroit, Grand Haven & Milwaukee Railway Co., 43 Mich. 349, 5 N. W. 390, in which the validity of that corporation was indirectly recognized, though importance is not attached to it except as a part of the public history of the company."

The reasoning contained in the brief of the defendant and the numerous cases cited might have been very convincing before the judgment in the case of Attorney General v. Joy was rendered, but, whatever conclusion we might have come to if we were allowed to exercise an independent judgment is forestalled by that decision of the Michigan Supreme Court, and we therefore hold that the complainant is a corporation organized under the territorial act of 1834 as the Detroit & Pontiac Railroad Company, and that the act of 1855, giving it the tax limitation of 1 per cent. on its capital stock, is binding on the state, and may not be impaired by Act No. 173, p. 236, of 1901, and a permanent injunction should issue as prayed.

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## KINNEY v. MITCHELL.

(Circuit Court, E. D. Pennsylvania. June 15, 1905.)

No. 43.

JURISDICTION OF FEDERAL COURT—FEDERAL QUESTION.

A statement of claim which seeks to recover damages for acts of defendant done in his capacity as judge of a state court does not raise a federal question, and, where there is no diversity of citizenship, a circuit court of the United States is without jurisdiction, and it is its duty, on motion therefor, to dismiss the suit.

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

On Motion to Dismiss for Want of Jurisdiction.

Plaintiff brought suit in assumpsit to recover of the defendant certain sums, including consequential and exemplary damages, alleged to have been occasioned by defendant's action, as chief justice of the Supreme Court of Pennsylvania, in remitting a case to the superior court. A motion to dismiss the suit was filed on the grounds (1) that the circuit court had no jurisdiction; and (2) the alleged cause of action was frivolous.

Robert D. Kinney, for plaintiff.
Samuel Dickson, for defendant.

HOLLAND, District Judge. Both the plaintiff and defendant in this case are residents and citizens of the same state and district. The cause of action is ex delicto or of a mixed character of contract and tort arising under the laws of Pennsylvania. There is nothing in the subject-matter of the suit to give the federal court jurisdiction, and there is no diverse citizenship to bring it in this court, and, not having jurisdiction, it is the duty, as indicated by the Circuit Court of Appeals in this district in this particular case (136 Fed. 773), to proceed no further, but to dismiss the suit; and it is so ordered.

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## THE PAULINE.

## THE YOUNG AMERICA.

(District Court, S. D. New York. June 9, 1905.)

SEAMEN—LIEN FOR WAGES—MASTER OR PILOT.

Where it appears that persons are employed on vessels as pilots, and are not performing the duties of masters, but are engaged solely in the navigation of the vessels, they are entitled to liens for their wages.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, §§ 1–3.]

In Admiralty. On report of commissioner.

James J. Macklin and Le Roy S. Gove, for libellant.
Hyland & Zabriskie, for claimant.

ADAMS, District Judge. When this matter was formerly before the court (136 Fed. 815), it was remitted to the commissioner, March 31, 1905, to report the amount of wages due to the so-called pilots and whether they were employed in that capacity or as the actual masters of the boats. The report of the commissioner has now been returned. It is as follows:

"The court has referred these cases back to me for a rehearing, directing me to take proof as to the amount of wages paid by the libellant up to and including the time when he took possession of the boats, and also to determine whether or not Simons and Purnell were masters or pilots, and hence, whether or not they were entitled to liens.

As to the last question, the testimony before me shows that Corbett, the owner of the boats, had been in the saloon business and that he held no license either as master or pilot, nor had he any knowledge of navigation. The boats were excursion steamers and employed in running from Harlem River to Classon's Point, Long Island, where a summer resort was maintained

by one Cowan who had made a charter of the boats from Corbett. The boats did no freight business and all of the fares of the passengers were collected either on the boat or on the wharf through the sale of tickets by Cowan or his employees. Corbett, on the other hand, hired and discharged the crew and bought all supplies, coal, waste, oils, &c. for both boats, as well as attending to all business with Cowan. Simons and Purnell had no duties other than the navigation of the boats. Both held master's and pilot's licenses. Corbett appeared in the custom house papers as master of the 'Pauline' and one Kiernan whom Purnell succeeded as master of the 'Young America.'

In the case of The Atlas, 42 Fed. 793, Judge Brown in this District had before him the claim of one who asserted that he was a pilot of a tugboat, the owners of which, however, asserted that he was master. The facts in that case are so nearly identical with the facts in the case before me that I am constrained to follow it and to hold that Simons and Purnell were not masters but pilots. The case at bar is to be distinguished from the Vandercook Case (D. C.) 24 Fed. 472, inasmuch as in the last named case the intervenor, Littlefield, who claimed to be a mate, was shown to have appeared in the enrollment of the vessel as master, making the usual master's oath. It is also to be distinguished from the case of The Hattie Thomas (D. C.) 59 Fed. 297, where the libellant 'had the entire control of said vessel, securing freights, receiving and discharging cargoes, securing boats, collecting freight moneys, furnishing supplies for the vessel, hiring, discharging and paying seamen, having full authority to go anywhere he pleased, to take any load he could get, to run the vessel as he saw fit, and to do what he thought best with her.' Such duties and powers are not proven in the case at bar, but on the contrary it is shown that the only duties of Simons and Purnell were those relating to the navigation of the vessel. I therefore find that Simons and Purnell were not masters but were pilots and are therefore entitled to their lien.

Computing the advances paid by the libellant up to the time when he took possession of the vessel at 6 P. M. on July 21, 1904, I find that he is entitled to a lien for the wages so paid as follows:

| | |
|---|---|
| 'Young America': | |
| Purnell, July 15, to July 21 | $ 25 67 |
| Wilson, July 1st to July 15 | 55 00 |
| McKeon, July 15, to July 21 | 25 67 |
| Hines, July 8, to July 15 | 22 00 |
| Dempsey, June 19 to July 1 | 43 26 |
| Miller, July 1, to July 21 | 31 50 |
| Total | $203 10 |
| 'Pauline': | |
| Williamson, July 1st to July 21 | $ 28 00 |
| Erickson, July 1st to July 21 | 31 50 |
| Anderson, July 11, to July 21 | 18 33 |
| Dempsey, July 1st to July 21 | 77 00 |
| Simons, June 15 to July 21 | 135 67 |
| Mahoney, July 1st to July 11 | 11 27 |
| Total | $301 77 |

I have not computed interest on the above amounts."

It does not seem to be necessary to add anything to the report, which is confirmed.

Decree for the libellant for the amounts allowed by the commissioner, with interest.

## COOK v. PROSKEY.

(Circuit Court of Appeals, Second Circuit. April 12, 1905.)

No. 146.

1. MALICIOUS PROSECUTION—IDENTITY OF PROSECUTOR—EVIDENCE.
In an action for malicious prosecution, evidence *held* sufficient to warrant a finding that defendant was the prosecutor in a criminal proceeding against plaintiff for withholding property knowing the same to have been stolen, in violation of New York Pen. Code, § 550, that such proceedings resulted in plaintiff's arrest and indictment, and were terminated by a dismissal of such indictment.

2. SAME—MALICE—PRESUMPTIONS.
Where a prosecution was instituted by defendant applying to a magistrate for a summons, and defendant participated therein by making oath to the complaint, by employing counsel to conduct the hearing before the magistrate, and by appearing to "push the case," on a superseding indictment the jury was entitled to infer that the prosecution was malicious if without probable cause.

3. SAME—LEGAL ADVICE—DEFENSES.
Proof that defendant in a suit for malicious prosecution before beginning the same made a full and fair disclosure of the facts to a police magistrate, and acted in good faith on the magistrate's advice that it was defendant's duty to institute a criminal prosecution against plaintiff, was insufficient to rebut the inference of malice arising from want of probable cause, in the absence of evidence that the magistrate was an attorney learned in the law.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, §§ 45, 46.]

4. SAME—EVIDENCE.
Where, in an action for malicious prosecution in which a superseding indictment had been found and dismissed, the evidence previously introduced when the first indictment was offered in evidence authorized the presumption that it had been procured at defendant's instance, and testimony indicating that he may not have been responsible for the charge alleged therein had not then been offered, the admission of such indictment was not error.

5. FEDERAL COURTS—APPEAL—VERDICT—EXCESSIVENESS.
An objection that a verdict is excessive, being within the discretion of the trial court on a motion for a new trial, will not be reviewed by the Circuit Court of Appeals.

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

Writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury in an action for malicious prosecution.

J. L. Ward, for plaintiff in error.

A. I. Elkus, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. Error is assigned of the ruling of the trial judge in refusing to direct a verdict for the defendant. The grounds upon which the defendant asked that a verdict be directed in his favor were that the evidence failed to show (1) that the defendant had instituted any prosecution against the plaintiff

for the crime of receiving stolen goods; (2) that any such proceeding had been instituted by the defendant without probable cause therefor; (3) that any such proceeding had been instituted by the defendant maliciously; (4) that the prosecution had terminated in favor of the plaintiff.

The evidence tended to establish the following facts: The plaintiff, a dealer in coins, curios, antiques, etc., and having a place of business on the corner of Fourteenth street and Broadway, New York City, had purchased during the year 1899, in the course of his business and at various times, several badges issued by the Order of the Loyal Legion to its members, and on the 21st of December of that year had three of them unsold in his possession. Upon that day the defendant, who was a member of the order, and who had heard that some of the badges were for sale by the plaintiff, called at the plaintiff's place of business to see the badges, accompanied by one Berkley, a detective officer, and was shown the badges by the plaintiff. Upon examining the badges the defendant saw one that he said belonged to him, and which he said he had recently discovered to be missing. In the conversation that ensued the defendant offered the plaintiff $3 for it. This offer the plaintiff refused, telling defendant, as was the fact, that he had paid $7 for it. The defendant and Berkley then went before Police Magistrate Mayo, told him the circumstances which had taken place, and asked him to issue a summons against the plaintiff. Berkley served the summons upon the plaintiff, and the plaintiff went with him before the magistrate. Magistrate Mayo, after hearing the plaintiff's statement, adjourned the proceeding for a further hearing before Magistrate Pool. January 8th the defendant made a sworn complaint before Magistrate Pool, charging the plaintiff with withholding the badge, and praying that he be apprehended and bound to answer. The complaint, in substance, alleged that the badge had been stolen from the defendant's office; that he subsequently, and on December 21st, saw it at the premises of the plaintiff, and then and there informed him that the badge had been stolen from him, and demanded the badge; and that the plaintiff refused to give the defendant the badge unless for the sum of $11, which sum the defendant refused to pay. Thereupon Magistrate Pool issued a warrant against the plaintiff, charging him with withholding the badge in violation of section 550 of the Penal Code. The plaintiff was arrested upon that warrant, and a preliminary examination ensued, in the course of which testimony was given by the defendant, by Berkley, and by the plaintiff, and which resulted in the plaintiff's being held by the magistrate for trial before the court of special sessions. The defendant employed counsel, who appeared for him and assisted in conducting the examination. The court of special sessions transferred the case to the court of general sessions. Thereafter the defendant was summoned to appear as a witness before the grand jury in that court, and appeared and gave testimony; and the grand jury found an indictment charging the plaintiff with feloniously receiving the badge well knowing the same to have been stolen. The plaintiff employed counsel, interposed

a plea of not guilty to the indictment, and endeavored to have a trial. After several adjournments of the case the district attorney concluded to obtain a "superseding indictment." Thereafter the defendant was again summoned as a witness before the grand jury, appeared, and gave testimony, and the grand jury found a new indictment against the plaintiff. This indictment contained several counts—one for feloniously receiving the badge knowing the same to have been stolen, and another for withholding the badge knowing the same to have been feloniously stolen, against the form of the statute in such case made and provided. Thereafter, and in January, 1901, the court of general sessions, after an examination of the indictment and the record containing the testimony taken upon the examination before Magistrate Pool, dismissed the indictment, and an order to that effect was duly entered.

Before the second indictment was found the defendant, in an interview with the plaintiff's counsel in the criminal case, and in response to an inquiry why he had not gone to trial with the other indictment, stated that he was "not willing to stand" for that indictment; that he did not believe and never had believed that the plaintiff had received the badge knowing it to have been stolen; that the former indictment had been so drawn as to make him allege that, and he was not going to swear to what he did not believe; that he had been advised that a charge could be made under the same section of the Code by which, if it could be shown that the plaintiff withheld the badge when he demanded it of him, and it could also be shown that the badge had been stolen from him, the plaintiff would be held criminally liable; and if that was so, he was going to push the case.

The defendant testified that he reluctantly yielded to the instructions of Magistrate Pool in making the complaint of January 8th; that he explained to the magistrate the circumstances relating to the theft of the badge and concerning his interview with the plaintiff at his place of business; that the magistrate read to him section 550 of the Penal Code, and advised him that a crime had been committed, and that he was in duty bound to make a complaint against the plaintiff; and that he accordingly made the complaint. He also testified that he read the part of the warrant reciting that the plaintiff had violated the provisions of section 550 of the Penal Code.

The evidence thus offered was sufficient to warrant the jury in finding that the defendant was the prosecutor in the criminal proceedings against the plaintiff for the offense defined by section 550 of the Penal Code, and that these proceedings resulted in the arrest of the plaintiff and his indictment, and were terminated by the dismissal of the indictment. Assuming that he was not responsible for so much of the prosecution as charged the plaintiff with receiving the badge originally knowing it to be stolen, and that the first indictment and some of the counts in the second did not represent any charge which the defendant had ever formulated, he cannot escape responsibility for the rest of the prosecution. He initiated it by applying for the summons to Magistrate Mayo; he par-

ticipated in it by signing and making oath to the complaint before Magistrate Pool, and by employing counsel to conduct the hearing before that magistrate; and he persisted in it after he learned that the first indictment was not one which he was willing to prosecute, and when he appeared to "push" the case upon the superseding indictment. If this prosecution was instituted without probable cause, the jury were at liberty to infer that it was malicious. It is entirely plain, therefore, that the first and third grounds assigned by the defendant as the basis of the request for a direction of a verdict in his favor were untenable. The only fairly disputable question which is presented by the ruling complained of is whether the trial judge should have taken the case from the jury because the evidence did not show that the prosecution was without probable cause. Section 550 of the Penal Code reads as follows:

"A person who buys or receives any stolen property * * * knowing the same to have been stolen, or who corruptly, for any money, property, reward, or promise or agreement for the same, conceals, withholds, or aids in concealing or withholding, any property knowing the same to have been stolen, * * * is guilty of criminally receiving such property, and is punishable," etc.

An essential element of an offense under this section is that the person charged with its violation shall have received the property knowing the same to have been stolen. Consequently, unless the defendant has probable cause to believe that the plaintiff received the badge with knowledge that it had been stolen, the prosecution from its inception was without probable cause. "Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged." Sanders v. Palmer, 55 Fed. 217, 5 C. C. A. 77, 14 U. S. App. 298. There was no evidence whatever to authorize the defendant to entertain a reasonable ground of suspicion that the plaintiff when he received the badge originally did so with guilty knowledge. So far as appeared, the plaintiff had purchased it in the usual course of business; it had been exposed by him freely for inspection and sale to his customers; and he had not made any incriminating statements about it. The evidence authorized the conclusion that the defendant instituted the criminal proceedings solely upon the circumstances that the badge had been found in the plaintiff's possession, and the plaintiff, after being informed in substance that it belonged to defendant and had been stolen, had refused to surrender it without being paid the price which he asked for it.

To rebut the inference of malice arising from the want of probable cause, it is competent for a defendant in an action for malicious prosecution to show that he acted bona fide, upon legal advice, in instituting the criminal proceeding, and this, being proved, defeats the action. In Stewart v. Sonneborn, 98 U. S. 187, 25 L. Ed. 116, such proof was treated as establishing probable cause; but it would seem more strictly correct to view it as disproving malice. In either view, the requisite proof was not made upon the trial, be-

cause it was not shown that Magistrate Pool was an attorney or counselor at law. The rule which protects a party from the consequences of instituting a criminal proceeding, when he does so after a full and fair disclosure and acting in good faith upon the advice of counsel, is limited to the cases in which the advice has been given by counsel learned in the law. In many adjudications it has been held that the advice of a justice of the peace is not within the rule. It is sufficient to refer to Olmstead v. Partridge, 82 Mass. 383; Stanton v. Hart, 27 Mich. 539; Straus v. Young, 36 Md. 246; Finn v. Frink, 84 Me. 261, 24 Atl. 851, 30 Am. St. Rep. 348. In Sutton v. McConnell, 46 Wis. 269, 50 N. W. 414, it was decided that the advice of a police justice was not a protection. In Monaghan v. Cox, 155 Mass. 487, 30 N. E. 467, 31 Am. St. Rep. 555, it was held that the advice of a magistrate, who was at the same time a counselor at law, was within the rule. See, also, Turner v. Dinnegar, 20 Hun (N. Y.) 467.

If the evidence had gone no further than to show that the defendant's only participation in the criminal proceeding had consisted in his going before the magistrate and laying before him fairly and truthfully the facts which had come to his knowledge, and that the magistrate had thereupon, in the exercise of his own judgment, issued the warrant, it would have been the duty of the trial judge to direct a verdict for the defendant. Cooper v. Booth, 3 Esp. 144; Wyatt v. White, 5 H. & N. 371; McNeely v. Driscoll, 2 Blackf. 259; Bennett v. Black, 1 Stew. (Ala.) 495. In Dennis v. Ryan, 65 N. Y. 385, 22 Am. Rep. 635, an action for malicious prosecution, the court said that if the defendant's statement to the district attorney and grand jury had been true, and an indictment had been found and prosecuted upon its truthful statement, the action could not have been maintained. In such case, the defendant would not have been guilty of any wrong. "The oppression of the plaintiff would have been attributable alone to the erroneous legal conclusions of the district attorney and grand jury." In Thaule v. Krekeler, 81 N. Y. 432, an action for malicious prosecution of the plaintiff for larceny, the court said:

"It thus appears that, while the charge of larceny is made in technical terms, the facts and circumstances on which it stands are stated, and if they are true this action cannot be maintained. The affiant is responsible for those statements, but not for the legal conclusion drawn therefrom, either by the police magistrate or the district attorney or grand jury."

The evidence upon the trial in respect to what took place when the sworn complaint was made and the warrant was issued by Magistrate Pool did not consist merely of the testimony of the defendant. If it had, the jury would have been at liberty to disregard it as the uncorroborated testimony of a party in interest, and the trial judge could not properly have taken the case from their consideration. But the sworn complaint made by the defendant shows that the statement for which he was responsible, and upon which the magistrate issued the warrant, was a truthful statement of the facts except in one immaterial particular. This statement did not assert that the plaintiff had received the badge with guilty knowl-

edge, and though it did assert that the plaintiff had refused to give up the badge unless for the sum of $11, when the fact may have been that the plaintiff merely refused an offer of $3, this did not alter the legal character of the charge. It is obvious that the charge in the complaint was that the plaintiff had withheld the badge and refused to deliver it after he had been informed by the defendant that it had been stolen from him. The warrant issued by the justice in stating the charge recited it as consisting merely in withholding the badge and refusing to return the same when demanded by the defendant. The magistrate seems to have been of the opinion that this constituted an offense within the meaning of section 550 of the Penal Code. It is not open to fair doubt that the defendant made and prosecuted the charge upon that theory, and probably, as he testifies, upon the advice of the magistrate. His statement made after the first indictment had been superseded is consistent with this theory. Nevertheless, as there had been no legal offense, and no probable cause on his part for believing that there had been, notwithstanding the advice of the magistrate, the fact could not avail the defendant, and the trial judge properly denied the request to direct a verdict.

It has not been argued upon this writ of error that the trial judge erred in ruling that the prosecution had terminated in favor of the plaintiff. The court of general sessions dismissed the indictment in pursuance of section 671 of the Code of Criminal Procedure, which provides that "the court may at any time upon its own motion, and in furtherance of justice, order an action after indictment to be dismissed." In dismissing the judge observed:

"A careful examination of the entire record and all the facts and circumstances of the case convinces me that upon a trial no jury could convict, and, further, that, even if a conviction were had, no court ought to or would punish the accused."

Obviously the dismissal was upon the merits.

The assignment of error based upon the admission of the first indictment in evidence by the trial judge is without merit. When it was offered and received the evidence which had been previously introduced authorized the presumption that it had been procured at the instance of the defendant, and the testimony indicating that he may not have been responsible for the charge alleged in it had not been introduced. Apparently it was one of the concomitants of the prosecution engendered by the defendant by which the plaintiff had been subjected to contumely and expense. Assuming that upon the evidence subsequently introduced the defendant could properly have insisted that he was not responsible for this indictment, he could have raised the point by asking that it be eliminated from the case, or an instruction be given to the jury that it was not to be considered by them in awarding damages. He did not do this, and, as the indictment was clearly admissible in evidence at the stage of the trial at which it was received, he cannot now well urge the point that he has been prejudiced by its reception.

With the amount of the recovery this court has nothing to do. If it was excessive, it was the province of the court below, upon the motion for a new trial, to set aside or reduce it in the discretion of the trial judge, and this court cannot review the decision of such a motion. Manhattan Oil Co. v. Lubricating Co., 113 Fed. 923, 51 C. C. A. 553. The case in some respects is a hard one for the defendant; but it is one in which the plaintiff was subjected to a grievous wrong, because the defendant made the serious error of resorting to a prosecution under the criminal laws to exact the restitution of his property instead of the remedy by a civil action.

The judgment is affirmed.

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## BIG SIX DEVELOPMENT CO. v. MITCHELL.

(Circuit Court of Appeals, Eighth Circuit. April 22, 1905.)

No. 2,095.

1. TRESPASS—INJURY TO MINES—EQUITY JURISDICTION.

Complainant, after forfeiture of a mining lease, filed a bill to cancel the lease as a cloud on his title, to establish his right of possession, and to enjoin the lessee from mining ore on the leased premises; alleging the lessee's breach in failing to timber the drifts, subsidence of the surface, a forfeiture, a demand, and defendant's refusal to surrender possession, and its intent to continue mining operations on the land as before. *Held*, that the bill was not merely one to remove a cloud on plaintiff's title, but was sustainable as a bill to restrain a threatened and continuous injury, altering the character of the land, and tending to occasion irreparable loss and damage.

2. SAME—EXTENT OF JURISDICTION.

Where a bill in equity was maintainable to enjoin the lessee of a mine from committing waste and destroying the property as a mine, though plaintiff was not in possession, the court, for the purpose of preventing a multiplicity of suits, was entitled to retain the bill for further relief, and cancel the lease as a cloud on title, quiet the title, and determine the right of possession.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 104–114.]

3. SAME—FORFEITURE.

Where a bill to enjoin a lessee from committing waste on a mining property, and to cancel the lease as a cloud on title, etc., alleged that complainant had declared a forfeiture of the lease, before the bill was filed, for breach of conditions, the bill was not objectionable on the ground that its purpose was to enforce a forfeiture, which could not be done in equity.

4. SAME—WAIVER.

Where the ground of forfeiture of a mining lease was the continued failure of the lessee to work the mine in a workmanlike manner, and to support the ground so that it would not cave, and the defendant's violation of the covenants of the lease requiring such support, etc., continued up to the time a temporary injunction restraining the further operation of the mine was issued, the fact that the landlord accepted rent or royalties due under the lease after notice of forfeiture, or after suit brought to recover the property, did not constitute a waiver of the forfeiture.

5. SAME—ADEQUATE REMEDY AT LAW.

In a suit by a landlord to cancel a mining lease as a cloud on his title, to establish his right of possession in the premises, and to enjoin the

lessee from mining ore on the leased premises, because of its breach of the lease in operating the mine in an unworkmanlike manner, so as to cause the surface of the ground to cave, etc., the bill was not demurrable on the ground that complainant had a complete and adequate remedy at law by an action of forcible entry and detainer.

6. SAME—APPEAL—FINDINGS.

On appeal from a decree in chancery, it will be presumed that the findings of the trial judge on conflicting evidence are correct, unless an obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts.

Hook, Circuit Judge, dissenting.

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

John W. McAntire and John W. Halliburton (Heywood Scott, Samuel McReynolds, and Frank Hagerman, on the brief), for appellant.

Thomas Dolan and S. D. Mitchell, for appellee.

Before SANBORN and HOOK, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This was a bill in equity brought by S. Duffield Mitchell, a citizen of the state of Pennsylvania, against the Big Six Development Company, a corporation organized under the laws of the state of Missouri, to cancel a lease as a cloud upon plaintiff's title to certain lands, to establish his right of possession therein, and to enjoin the lessee from mining ore in the leased premises. The lease was dated May 31, 1898, and, by its terms, was to run 10 years from date. It provided that the parties of the second part should commence the work of sinking shafts within 10 days after the date of the lease—

"and shall keep and have on said tract of land, sufficient pumps and machinery to drain the same of water, so as to permit efficient mining thereof, and shall properly operate the same, and shall increase the capacity thereof from time to time as same becomes necessary."

"The said parties of the second part, their successors and assigns, shall mine said land in a good, thorough and workmanlike manner, shall keep all shafts and drifts well and securely timbered and supported, and shall not remove such timbers and supports so as to endanger the ground or to permit the same to cave or fall in. Mining shall be carried on in good faith continuously, and shall not be suspended at any time except on written permission of the party of the first part.

"All lead and zinc ores shall be cleaned and prepared for market on said land, and no rough or crush stuff shall be removed therefrom to be cleaned, nor shall minerals or crush stuff from other land be brought or cleaned on said land without the written permission of the said party of the first part."

"The said parties of the second part, their successors and assigns, shall keep in a book a correct account of all lead and zinc ores mined, the kinds and weights thereof, to whom sold, and the price received therefor, which book shall be open to the inspection of the party of the first part at all reasonable times."

"The said parties of the second part, their successors and assigns, shall pay to the party of the first part, at the Bank of Joplin, Missouri, on Monday of each and every week, as rent and royalty, twelve (12) per cent. of the market value of all ores mined and sold during the preceding week, and shall furnish at the time of said payment a written statement of all ores sold, to whom sold, and the price received therefor."

"The parties of the second part, their successors and assigns, shall have the right to erect all necessary buildings and machinery on said land for the purpose of mining and draining, crushing and cleaning ores thereon, and to remove the same at the expiration or forfeiture of this lease, except timbering and other materials necessary to support the ground, which timbering and improvements immediately on their being placed in the ground shall become the property of the party of the first part. All uses of the ground not inconsistent with thorough and proper mining, as herein required, are hereby reserved to the party of the first part."

"Any failure at any time on the part of the parties of the second part, their successors and assigns to comply with and perform in good faith the requirements of this lease shall end and determine the same, and said party of the first part, his heirs and assigns may declare an ouster and forfeiture of said lease and may re-enter and hold said demised premises without recourse to law in as full and complete a manner as if this lease had never been made.

"Nor shall the failure of the party of the first part, his heirs or assigns, to enter upon and take possession of said premises on account of the failure of the parties of the second part to keep and perform the conditions and agreements herein contained, be construed to be a waiver of the rights of the party of the first part to declare an ouster and re-enter and forfeit said demised premises for any other and subsequent breach of the requirements of this lease."

The bill alleges that the plaintiff was the owner in fee simple and in possession of a tract of land situate in Jasper county, Mo., and described as the north half of the northeast quarter, and the southeast quarter of the northeast quarter, of section 4, township 27, range 32, containing 120 acres, more or less; that on the 31st of May, 1898, plaintiff executed and delivered a mining lease upon the southeast quarter of the northeast quarter of section 4, containing 40 acres, the same being a part of the 120 acres above described; that, by deed of assignment duly executed and acknowledged by the parties of the second part to the lease, they conveyed all of their interest and title therein to defendant; that defendant subdivided the tract of land into mining lots, and subleased the same to miners and mining companies, who have been conducting mining operations thereon; that the defendant, by its mining rules and regulations, declared and posted according to law, imposed upon its several sublessees the duties and obligations imposed upon it by the lease with reference to sinking and driving shafts, timbering, supporting the surface of the land, preventing the surface from caving or falling in, pumping and draining water, cleaning and preparing for market all ores produced from the mine; that defendant performed none of these acts, nor did it own any machinery, pumps, or buildings located on the land; that the defendant kept an account of all lead and zinc ores mined, the kind and weight thereof, to whom the same was sold, and paid to the plaintiff the royalty due thereon, as provided by the terms of the lease. It is then alleged in the bill that:

"Defendant corporation, its sublessees and licensees, have failed to comply with and perform the conditions and requirements of said lease, in this: That it and they have failed and refused to keep the deeper drifts in said land drained of water, to permit efficient mining thereof, and have failed to mine said ground in a work-man-like manner; and have removed and caused to be removed a pillar or pillars in said ground, which, in mining said ground, had been left to support the surface and prevent the same from caving or falling in, and have failed to properly timber and secure the drifts of said

ground from caving, and have failed to timber certain shafts securely and properly, by reason of which failure the ground has subsided, caved, and fallen in, to the great detriment and damage to said land. That by reason of its failure to comply with the requirements and conditions of said lease, the defendant has forfeited the same, and the said lease, by its terms, has ended and determined; and the plaintiff, electing to enforce said forfeiture as against defendant, on account of said failure to comply with the conditions and requirements of said lease, did on the 7th day of July, 1903, declare said lease forfeited, and made re-entry on said described land, declared an ouster of the defendants therefrom, and posted upon said land a notice of forfeiture, * * * and duly served same on defendant on said 7th day of July, 1903, by delivering a true copy thereof to J. W. Allen, president of defendant. That notwithstanding the re-entry by plaintiff on said land by the terms of said lease, at his election, to re-enter and oust defendant from said land for forfeiture of said lease by reason of failure to comply with its conditions and requirements, defendant, its officers and agents, refused to surrender said lease, and claim and assert rights thereunder adverse to plaintiff, and threaten to continue to claim and assert said rights to the said land of plaintiff, and threaten to continue to mine or cause said land to be mined, and to take the ores, rock, and earth therefrom, to the irreparable damage of plaintiff."

It is then alleged that the defendant corporation was organized solely and only to take over and hold the title to the plaintiff's lands; that it has no other property or assets than the lease; that at the organization the defendant corporation received nothing but the lease as property, in full payment for its entire capital stock; that the defendant divides its royalty, earnings, or profits derived under said lease on plaintiff's land among its stockholders, when received; that the defendant is insolvent; and that plaintiff's remedy at law would be inadequate. The plaintiff then alleges that the lease creates a cloud upon his title to the land in controversy, and prays that the court may decree that the defendant has no interest in or title to the lease; that the title of the plaintiff to the land in controversy is unaffected by the lease or any claim of the defendant; that the lease be declared to be no longer in force and effect in favor of the defendant, and that it may be canceled, annulled, and surrendered into the possession of the plaintiff; and that the defendant, its officers, servants, and agents, be enjoined from asserting any claim under the lease, and from continuing in possession of the land in controversy. To this bill the defendant demurred, and the demurrer was overruled. It then filed an answer, the testimony was taken, and the case came on for final hearing, resulting in a decree declaring the lease a cloud upon plaintiff's title, establishing his right of possession in the property, and enjoining the lessee from mining ores in the leased premises.

It was insisted by appellant that a court of equity had no jurisdiction, upon the pleadings and evidence, to grant the relief given by the court in this case. And at the argument it was said that this bill should not be maintained: (1) Because a bill for an injunction can only be maintained, where the title is disputed, after a trial at law, or after an action at law has been commenced; (2) because a cloud upon the title cannot be removed unless the complainant is in possession; and (3) because it seeks to enforce a forfeiture.

The trespass here complained of, as disclosed by the record, is not an ordinary case of trespass upon lands, of temporary duration,

but, as we think the evidence shows, was a continuous trespass, which threatened to destroy the character of the property as a mine, and would render the plaintiff's interest therein valueless. Threatened and continuous injuries to mines, quarries, timber growing upon lands, buildings located thereon, or other improvements of a permanent character, are enjoined, because, as has been said, such acts "alter the character of the property, and also tend to destroy it, and occasion irreparable loss and damage." Courthope v. Mapplesden, 10 Ves. 290; Scully v. Rose, 61 Md. 408; Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; Jerome v. Ross, 7 Johns. Ch. 315, 11 Am. Dec. 484; Hammond v. Winchester, 82 Ala. 470, 2 South. 892; Snyder v. Hopkins, 31 Kan. 557, 3 Pac. 367. In such cases the threatened injuries are to the res, and diminish the value of the property itself, and an injunction will be granted to prevent the continuing waste or continuing trespass, although the plaintiff is not in possession, and although the legal title has not been settled or questioned by an action at law. Story's Eq. Jur. § 860; Union Pac. R. Co. v. Kansas Elevator Co. (C. C.) 17 Fed. 200; Earl Cupper v. Baker, 17 Ves. 128; Iron Co. v. Reymert, 45 N. Y. 703; Snyder v. Hopkins, 31 Kan. 559, 3 Pac. 367; Lacustrine Fer. Co. v. L. G. & Fer. Co. et al., 82 N. Y. 486; Oolagha Co. v. McCaleb, 68 Fed. 87, 15 C. C. A. 270; High on Inj. 736; Alleghany Oil Co. v. Snyder, 106 Fed. 764, 45 C. C. A. 604; Peck v. Ayres & Lord Tie Co., 116 Fed. 273, 53 C. C. A. 551; Logan Nat'l Gas Co. v. Great So. Gas & Oil Co., 126 Fed. 623, 61 C. C. A. 359.

If the only relief sought by the bill in this case was to remove the cloud upon plaintiff's title, it may well be doubted whether the bill could be sustained. Orton v. Smith, 18 How. 263, 15 L. Ed. 393; Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010. But the bill goes further, and seeks to enjoin the defendant from committing waste and destroying the property as a mining property. In such a case jurisdiction in equity attaches, even where the plaintiff is not in possession. And having obtained jurisdiction for that purpose, the court may, for the purpose of preventng a multiplicity of suits, retain it for further relief, and may remove a cloud upon the title, quiet the title, and determine the right of possession.

In the Elevator Case above cited, Mr. Justice Miller said:

"When either party, lessor or lessee, claims that acts have been done which render the continuing of the relation no longer proper, such party can go into a court of equity, on general principles, and ask to have that lease set aside, canceled, and annulled. In that case the court of equity sits, holding the scales of justice evenly between the parties, and may say that it believes that such acts have been done by the lessee, for instance, as ought to determine the agreement. * * * And the court will declare the agreement at an end, and set aside and annulled, and will make such orders as seem proper and right."

We think, both upon reason and authority, that in a case such as this, where the injury is to the res (that is to say, where irreparable mischief is being done or threatened, going to the very substance of the estate), a court of equity has jurisdiction, not only for the purpose of restraining waste or threatened trespass, but, having acquired jurisdiction for that purpose, it may also proceed to settle

the question of title and to remove the cloud; and this was the view taken by the Circuit Court.

While the bill in this case is not carefully drawn, yet we think sufficient is presented by the record to invoke the jurisdiction.

It is also urged that the bill cannot be maintained because it is a bill to enforce a forfeiture, and equity never lends its aid to enforce a forfeiture or penalty. But as we understand it, the theory of the bill is not that, but is that the forfeiture was complete before the bill was filed, that the lease was dead, and that the defendant was threatening and was guilty of a continuous trespass. We think the bill may well be maintained upon this ground. Met. Land Co. v. Manning, 98 Mo. App. 248, 71 S. W. 696. While the right of a lessor to determine, without recourse to the courts, a lease of real estate, as forfeited, and re-enter upon the premises, is limited to the most technical terms and conditions upon which the right is to be exercised, yet we think there can be no doubt but what the right exists in a case where the terms of a contract and the acts complained of justify such a course. He must, it is true, be able to point out specifically some clear act in violation of the terms of the lease, which will authorize the forfeiture. The Circuit Court found that the plaintiff had made a sufficient showing in this regard, and, from our examination of the record, we are not prepared to say that the conclusion reached was erroneous.

It is also urged that after the notice of forfeiture, and on the 5th day of October, 1903, the plaintiff received and accepted the rents or royalties due under the lease, and that this act upon his part constituted a waiver of the forfeiture. The ground of forfeiture, as we understand the record, was the continued failure of the defendant to mine in a workmanlike manner, and to support the ground so that it would not cave, and the defendant's violation of these covenants of the lease continued up to the time the temporary injunction was issued. We think the receipt of the rent or royalty was not a waiver of the forfeiture. A waiver rests upon an estoppel, and there was no estoppel here: (1) Because a continuing breach of the covenants of a lease is not waived by receipt of rent. Farewell v. Easton, 63 Mo. 446; Taylor's Landlord & Tenant, 500. And (2) because the receipt of rent after the institution of a suit to recover the property is not a waiver. 18 Am. & Eng. Enc. of Law, 387; Cleve v. Mazzoni (Ky.) 45 S. W. 88.

It is also insisted that the bill cannot be maintained because there was a complete remedy at law by an action for forcible entry and detainer. Our examination of the record leads us to the conclusion that this contention cannot be sustained. Such an action would not have prevented the extraction of the ore and removal of the earth, so that continuous cavings would have occurred, during the time spent in the various courts in reviewing the trial for forcible entry and detainer by successive appeals until a final decision was reached. On the other hand, we think it is a case where there would be no adequate remedy at law, because the law, as stated by the Supreme Court, in regard to the jurisdiction in suits in equity of courts of the United States, in view of the statute which declares

that there shall be no remedy in equity where there is a plain, adequate, and complete remedy at law, is that the remedy at law must be as efficient to the ends of justice and its complete and prompt administration as the remedy in equity, and we think the record clearly shows in this case all of the injuries that could be inflicted upon the property might well be inflicted before such a proceeding could have effect.

We have carefully examined the evidence set out in the record, and, while it is somewhat conflicting, we think it is entirely sufficient to sustain the findings of the Circuit Court. Applying the rule so well stated by Judge Sanborn, of this court, in the case of Manhattan Life Ins. Co. v. Wright, 126 Fed. 82, 61 C. C. A. 138, that "the legal presumption is that the finding and decree of a court of chancery are right, and they should not be disturbed or modified by an appellate court unless an obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts," we think it does not so clearly appear that the defendant was not violating the terms of the lease, in failing to properly support the surface of the ground and to properly conduct its mining operations, that the finding of the lower court should be reversed. The evidence, we think, not only permitted, but compelled, the conclusion reached by the Circuit Court, that the mining operations were carried on in disregard of the covenant in the lease that the land should be so supported that there would be no caving. Indeed, the evidence is strong that these mining operations were conducted in the most careless manner, and with a view to extracting the largest amount of ore with the least expense, in utter disregard of plaintiff's rights. In other words, if the defendant had been permitted to proceed with the work in the manner in which it was being done at the time the injunction issued, it would necessarily have resulted in great injury, if not in a total destruction of the property as a mining property.

Upon the whole record, the conclusion reached is that the decree of the Circuit Court must be affirmed.

HOOK, Circuit Judge (dissenting). One effect of the decision is that, whenever a court of equity may issue an injunction in aid of a cause of action that is purely legal, it may for that reason also draw to itself cognizance of the entire controversy. I think that this is an inadmissible enlargement of equitable jurisdiction. Kellar v. Craig, 126 Fed. 630, 61 C. C. A. 366. A lessor who claims that his lessees in possession have forfeited the lease by breach of condition subsequent has an adequate and efficient remedy at law by notice and action for wrongful detention. But if there is fear that, before the remedy can be made effectual, the leased property will be materially damaged by the lessees, he may apply to a court of equity to restrain the threatened damage pending his proceedings in the court of law; and thus may the rights of the lessor be fully secured, consistently with the preservation by the courts of their respective spheres of jurisdiction.

Again, this was a suit in equity to enforce a forfeiture. Kellar v. Craig, supra. It will not do to say that its purpose was to restrain trespass after a forfeiture had occurred through the acts of the lessees and the notice to quit. This would seem to be reasoning in a circle. The real issue in the case was whether in fact there was a forfeiture—whether the notice to quit amounted to anything. If the acts had not been committed, the lessees would have been entitled to remain in possession notwithstanding the notice. The case is not that of a trespass by a stranger to the title.

Nor can the suit be maintained as one to quiet title, the defendant being in actual possession. Boston, etc., Mining Co. v. Montana, etc., Co., 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626; Cosmos Exploration Co. v. Oil Co., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230.

NOTE.—The following is the opinion of Philips, District Judge, in the court below, here published by request of counsel:

PHILIPS, District Judge. Prior to the granting of the temporary injunction herein the defendant was fully heard in opposition thereto, as if on a demurrer to the bill. Its counsel vigorously insisted on the final hearing that the complainant has no standing in a court of equity, for the reason that it has a complete and adequate remedy, if any, at law, by resort to the action of ejectment.

In modern equity jurisprudence in the federal courts it has become a crystalized rule that "it is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." Boyce v. Grundy, 3 Pet. 216, 7 L. Ed. 655; Watson y. Sutherland, 5 Wall. 74, 18 L. Ed. 580; Preteca et al. v. Land Company, 50 Fed. 674, 1 C. C. A. 607; Empire, etc., Co. v. Bunker Hill, etc, Co., 121 Fed. 973, 58 C. C. A. 311. In the constantly developing complications growing out of new conditions and situations in our complex commercial and business affairs, the courts, in the very necessities of the occasions as they arise, must extend the protective, preservative hand of equity to meet the extraordinary demands of justice in the particular instance. The growth of mining industries of the country furnishes a striking illustration of the flexibility of equitable principles adaptable to the exigencies of the peculiar character and situation of such property. The owner of a tract of land chiefly valuable for its mineral deposits might have his property ruined if he were driven to the ordinary action at law for evicting the wrongdoer, burrowing beneath the comparatively worthless surface and extracting the ore. At the end of a tedious lawsuit he might find the under-surface despoiled of its riches, and his judgment for damages might be against an insolvent wrongdoer. In such instance a court of equity, on proper showing in the bill, would not hesitate to lay its restraining hand on the despoiler pendente lite, and at the end place the rightful owner in the peaceable and full possession of the property. It should make no difference that the wrongdoer has been admitted into the ground under a license contract to mine, if, after he enter, he so prosecute his explorations and excavations in disregard of the reversionary rights and interests of the owner of the fee as to threaten irreparable injury thereto, especially when such licensee is insolvent.

The contract of lease in question shows on its face that the lessor had in mind two considerations: First, to obtain as much royalty as was reasonably possible by having the mine speedily developed and diligently worked; and, in the second place, to safeguard his property against injury and ruin to the surface and the further successful prosecution of mining after the termination of the lease. To this end, the first paragraph of the contract provided that the lessees should commence the work of sinking shafts and mining the land in good faith within ten days, and should keep and have

on said lands sufficient pumps and machinery to drain the same of water, so as to permit efficient mining, and to properly operate the same and increase the capacity thereof from time to time as might become necessary. The second paragraph obligated the lessees, their successors and assigns, to mine the land "in a good, thorough and workmanlike manner, keep all shafts and drifts well and securely timbered and supported; and shall not remove such timbers and supports so as to endanger the ground or to permit the same to cave or fall in. Mining shall be carried on in good faith continuously, and shall not be suspended at any time except on written permission of the party of the first part." It is true that in case of default on the part of the lessees the contract provided for a re-entry by the lessor, on declaration of forfeiture and posting notice on the premises. But what relief did this furnish the complainant? He might stand on the surface of his freehold and proclaim, "I am lord and monarch of all I survey," but this would not stop the miners from burrowing beneath. With their machinery, picks, and giant powder, they stayed and continued to work. How was the complainant to stay the alleged increasing injury to his property? Should he resort to an action of eviction, and await the law's delay in such procedure against an insolvent, derelict lessee? Or shall he be permitted to appeal to a court of equity to stay the injurious work while the court hears and determines the controversy? In the latter case, if the complainant shall fail to make good his complaint, the defendant is protected by the injunction bond.

It does seem to me to be quite academic to discuss such questions as that a court of equity abhors forfeitures, and whether the interest of the lessees be that of a corporeal or incorporeal hereditament, or whether the landlord, by going onto the land and posting notice of forfeiture, is or is not so far in possession as to enable him to maintain a suit in equity to remove the recorded lease as a cloud on his title, and the like. The plain, practical fact obstinately remains that under color of the lease the defendant's sublessees continued to disregard the constructive re-entry; that they continued to mine, so that the work of injury to the interests of the landlord in his estate in remainder went on as theretofore.

It inheres in the powers of courts of equity, in the case of mines and collieries, to entertain bills in the nature of bills quia timet and bills of peace, and to remove, as a cloud on the title, recorded leases, where the mining property is exposed to irreparable injury, as where the lessee exceeds the limits imposed by the lease—especially where he is insolvent, and a continuation of his course and methods of mining in violation of the contract threatens great damage. Story's Equity Jurisprudence, pars. 860, 922; Pomeroy's Equity Jurisprudence, par. 1398, and notes; Bispham's Equity, par. 575; Iron Company v. Reymert, 45 N. Y. 703. In Alleghany Oil Co. v. Bradford Oil Company, 21 Hun, 26, 32, it is held that, where the condition absolutely avoids the license in case of breach, the estate lapses without any entry or notice. Citing Smith's Leading Cases, 109, notes to Dumpor's Case. So a court of equity in that case granted relief by injunction, annulled the lease, and restrained the defendants from boring for oil thereon. In Pendill v. Mining Company, 64 Mich. 172, 31 N. W. 100, upon failure of the lessee to pay rent, and while he had ceased to operate the mine, the lessor took possession under a provision of the lease for re-entry in case of nonperformance, and filed a bill to remove the cloud of the forfeited lease. The court decreed an injunction, notwithstanding the lessee had expended large sums of money in mining operations, and paid the landowner large royalties, and the lessee's machinery and tools were in the ground at the time of the forfeiture, just as is claimed in the case at bar. In Oolagah Coal Company v. McCaleb, 68 Fed. 87, 15 C. C. A. 270, the rights of the parties depended upon the legality of the license grant to each. The defendant being insolvent, Judge Thayer overruled the demurrer to the bill praying for an injunction to restrain the defendants from further mining coal and from obstructing the plaintiff in so doing, although the respective rights of the parties had not been determined in an action at law. So, in Preteca et al. v. Land Company, supra, and Dimick et al. v. Shaw, 94 Fed. 266, 36 C. C. A. 347, injunctions were sustained restraining mining operations, although the question of title between the parties had not been adjudicated at law. In Kentucky River

Nav. Co. v. Commonwealth, 75 Ky. 8, the court sustained a bill in equity in behalf of the state to determine and forfeit the navigation company's right under a lease from the state, on the ground of its failure to keep in repair the works and improvements along the river, where the company was insolvent. Mr. Justice Field, in Erhardt v. Boaro et al., 113 U. S. 539, 5 Sup. Ct. 566, 28 L. Ed. 1116, said: "It is now a common practice in cases, where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title." And it may be added, under the recognized practice in equity, that, where the court becomes possessed of the cause in equity, it will maintain jurisdiction to the end; determining the legal rights of the parties to the property by putting the rightful owner in peaceable possession. In Mehaffey's Appeal, 4 Penny. (Pa.) 502, the authorities are fully discussed, holding that a forfeited lease may be regarded as a paper, although functus officio, and is subject to cancellation by a court of equity. This should be so, for the reason that the lease in question runs for ten years from the 1st day of May, 1898. It was duly acknowledged and recorded in the recorder's office of Jasper county, Missouri, where the land is located; and as long as it remains uncanceled of record it constitutes a cloud on complainant's title. "In a case like this, equity follows the law, and will enforce the covenant of forfeiture, as essential to do justice. It is true, as a general statement, that equity abhors a forfeiture, but this is when it works loss that is contrary to equity, not when it works equity and protects the landlord against the indifference and laches of a lessee and prevents great mischief." Brown v. Vandergrift, 80 Pa. 142; Munroe v. Armstrong, 96 Pa. 307. So, Mr. Justice Miller, on the circuit in this court, in the case of Kansas City Elev. Co. v. Railroad Company, 17 Fed. 200, said "that the right of re-entry and forfeiture, in regard to the terms of the lease, is a right which the courts at common law dealt with very rigidly and strictly, while a court of equity very often sets aside and restores the parties to their former position, and refuses compensation for any damage done. There is, however, a different mode of proceeding to declare the lease forfeited. When either party—lessor or lessee—claims that acts have been done which render the continuing of the relation no longer proper, such party can go into a court of equity, on general principles, and ask to have that lease set aside, canceled, and annulled. In that case the court of equity sits, holding the scales of justice evenly between the parties, and may say that it believes that such acts have been done by the lessee, for instance, as ought to terminate the agreement, or that he shall account by compensation and by payment of damages. And the court will declare the agreement at an end, and set aside and annulled, and will make such orders as seem proper and right."

The complainant has filed exceptions to certain portions of the defendant's amended answer herein, and the defendant has asked leave to file a cross-bill tendered to the court. It being the desire of both parties, expressed at the hearing, to have a speedy disposition of the whole case on its merits, and all the evidence having been taken which either party desires to take, it was assented to that the court should consider all these questions, and the case be submitted for final determination.

Foremost among the matters of special defense excepted to is that of waiver or estoppel, predicated of the allegation that after the complainant was advised of the alleged grounds of forfeiture, and after formal declaration of forfeiture, he accepted rentals from the defendant. It may be conceded to the defendant that, as a general rule, the acceptance of the payment of rent constituted a waiver of antecedent forfeiture; but the rule is as firmly established that where the obligation of the defendant to do or to forbear doing certain acts is a continuing obligation, which the tenant persists in disregarding, it is a continuing cause of forfeiture, which "the landlord will not be precluded from taking advantage of by receiving rent which accrued after the breach was originally committed." Much less does it constitute a

waiver where the landlord simply stands by, with knowledge of the breaches of the lease, where they are continuing from day to day. Bleecker v. Smith, 13 Wend. 531; Taylor on Landlord & Tenant, § 500; Conger v. Duryee, 24 Hun, 617; Douglas v. Herms, 53 Minn. 209, 54 N. W. 1112; Gluck v. Elkan, 36 Minn. 80, 30 N. W. 446; Ainley v. Balden, 14 U. C. Q. B. 535; Farwell v. Easton, 63 Mo. 446; Mulligan v. Hollingsworth et al. (C. C.) 99 Fed. 220, 221. In Alexander v. Hodges, 41 Mich. 691, 694, 3 N. W. 187, 188, Campbell, C. J., said: "The desire of the landlord to avoid coming to extremities if the lessee would mend his ways cannot be regarded as a waiver, but was laudable and calculated to further the interests of both. Where there is such a continuous obligation, there is nothing to prevent the exercise of forbearance until it ceases to be desirable." The requirements imposed by the lease at bar were continuing obligations, and were violated up to the hour of the application for a temporary injunction herein, if the complainant's testimony is to prevail.

Other matters of special defense set up in the amended answer were substantially pleaded in the original answer, exceptions to which were sustained by the court. Their repetition in the amended answer adds no virtue to the error, nor force to the matter. They are statements to the effect that the defendant's subtenants, in their manner of working the mine, pursued the course approved by other mine operators in that locality, and that they worked the mine as they deemed most advantageous for the lessor, and as best they could under the circumstances of the local situation, and the like. Such special matters constitute no defense. The requirements of the contract, as its terms have received settled construction by courts of recognized authority, must control.

For instance, the gravamen of the complaint is that the defendant's sublessees were mining in such manner as to permanently injure the surface superstructure of the premises, and do irreparable injury to the mineral deposits. The law is appositely expressed by the court in Robertson v. Coal Company, 172 Pa. 566, 33 Atl. 706. There the defendant sought to prove that it was regarded as good mining to take out the coal in the manner pursued; that it was skillfully done, in respect of the depth of the surface and the condition of the rock over the coal; that the surface over this particular deposit was light, and the rock was rotten or broken, so that it would be impossible to take the coal without doing some injury to the surface; that the coal was mined according to approved methods of mining practiced through out that region, as approved by experienced mining engineers; and that the coal under such light surface could not be mined by any known method without doing some injury to the surface. This evidence was excluded. The court said: "The owner of the coal, though he has a right to take it out, must support the surface above. * * * This is a duty devolving upon the owner of the coal, who takes it out by virtue of the relations between the two parties. Therefore, if the coal is taken out, and the surface is injured in any way by reason of taking the coal out, the defendants are bound to make the injury good. * * * It does not make any difference whether the mining is done in the ordinary and usual way of mining coal, or whether there is negligence in the mining of the coal. It is an absolute right that the plaintiffs have to have their surface supported, and if that support is interfered with, intentionally, negligently, or otherwise, the plaintiffs are entitled to recover." So, Shearman & Redfield on Negligence (5th Ed. § 716) state the general rule to be that "where, as is often the case, the title to the surface of the land is in one person, and the title to the minerals underneath the surface is in another, together with the right to excavate for and remove them, * * * unless there is some particular law or contract affecting the rights of the parties the miner is in such case absolutely bound to leave sufficient support to the surface to prevent it, while in a natural state, from falling in." Indeed, in the absence of a special contract limiting the right, it is the well-settled rule in such mining contracts that "the owner of the surface is entitled to absolute support, not as an easement of right depending on a supposed grant, but as a proprietary right at common law. * * * The right of a surface owner has been likened to that of an owner of an upper story of a house, who holds his tenement with an implied right to support from

the owner of the lower story. * * * If the owner of the land grant a lease of minerals beneath the surface, with power to work and get them, in the most general terms, still the lessee must leave a reasonable support to the surface; and so, conversely, when the minerals are demised and the surface is retained by the lessor, there arises a prima facie inference at common law, upon such demise, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right of support." Snyder on Mines, § 1020. "The word 'surface' as used in the books, means not simply the geometrical superficies, without thickness, but includes whatever earth, soil, or land lies above and superincumbent on the mine." Section 1030. The rule is thus stated in Wood on Nuisances, § 192: "The person owning the minerals is bound at his peril not to cause a subsidence of the surface, even though he cannot work his mines at all without doing so, and no degree of care or skill exercised in the mining operations will shield him from liability to the owner of the surface for all damages sustained by reason of any subsidence thereof. A custom, as between the owner of the surface and the owner of the mines, entitling the owner of the mines to cause a subsidence of the surface if necessary to the working of the mines, will not be operative to shield the mine owner from liability, and such a custom has been held bad and wholly void." This rule is recognized and enforced in Brown v. Torrence, 88 Pa. 186. In Humphries v. Brogden, 12 Ad. & El. (N. S.) 739, it was held that notwithstanding the jury found that the defendant had worked faithfully according to the custom of the country, but without leaving sufficient pillars of support, the plaintiff was entitled to judgment. After discussing the question the court asserted the rule to be that, in the absence of any express reservation, the owner of the surface is entitled to protection, without any reference to the nature of the strata of mineral deposits or the difficulty of propping the surface, or the comparative value of the surface and the mineral. In Randolph v. Halden, 44 Iowa, 327, the defendant sought to show a custom among miners, when the coal is exhausted, to remove the supporting pillars. The court ruled that such custom was wholly inadmissible, for the reason that "it is made manifest if the pillars are removed the mine will not and cannot be left in good working condition at the expiration of the lease, and it is also manifest that the removal of coal will cause depressions on the surface of the ground." The Supreme Court of Ohio, where there is much coal mining pursued, recognizes this doctrine to its fullest extent. In Burgner v. Humphrey, 41 Ohio St. 340, after reviewing the authorities, the court said: "This obligation to protect the superincumbent soil exists, whether there is a conveyance of the surface, reserving the minerals, or a grant of the minerals without a conveyance of the surface. In either case the presumption arises that the owner of the minerals is not, by removing them wholly or in part, to injure the owner of the soil above. * * * The right which the surface has to support is a part of the freehold, and not an easement. It is a right independent of the nature of the strata, and the mine owner can only work so far as is consistent with this right, and is liable if he violates it. The highest care and skill in the working of the mine is no defense whatever, if injury results to the surface from a removal of the subjacent strata." See, also, Randolph v. Halden, 44 Iowa, 327; Consol. Coal Co. v. Schaefer, 135 Ill. 210, 25 N. E. 788; Yandes v. Wright, 66 Ind. 319, 32 Am. Rep. 109; Erickson v. Iron Co., 50 Mich. 604, 16 N. W. 161; Marvin v. Iron Co., 55 N. Y. 538, 14 Am. Rep. 322; Jones v. Wagner, 66 Pa. 429, 5 Am. Rep. 385; Carlin v. Chappel, 101 Pa. 348, 47 Am. Rep. 722; Zinc Co. v. Franklinite Co., 13 N. J. Eq. 322, 341.

The first thing done by defendant on notice of this suit, and on a Sunday morning, was to gather up a number of mining overseers and operators at Joplin, who were hurriedly conducted through the drifts of the mines in question, with the view of passing judgment upon the reasonableness of the methods pursued in running the drifts. It is difficult for the impartial mind to escape the impression that, from the time occupied, and manner of making this inspection, it was most superficial, largely speculative, and quite self-serving. Their conclusions were based much upon the methods which they had pursued in working out such properties. But as is frequently the case where there is a large mass of testimony, characterized by technical

quibbles and refinements, and contradictions among partisan witnesses, there are found in this evidence some unquestionable physical facts, which no reckless assertion can contradict, and no impartial mind can evade.

The court has already quoted the obligations of the lessee imposed in the second paragraph of the contract.

As shown by the plat in evidence of this mining company, there is a seam, an opening in the ground, extending along the west line of the property to the north, and then in a circle south, as if it had been done by a crack or an earthquake, described by the engineer, McKee, as a "fissure or crack in the ground on the surface, and as well defined. In some places it is a foot wide, in some places just a mark. And that line marked 'Crack' describes the outer edge of the piece of ground that is falling in. There has been some caving, of course, to break the ground and draw it that way." Another witness testified that that crack "would indicate that there was a cavern in the surface, and this portion of the ground has settled away from the other. * * * When I was there last Saturday and noticed it, it had widened out to about ten inches where it had not been disturbed. * * * The ground under which I refer to as having sunk was inside of that circle." The method of mining pursued was such as to show several large depressions and cavings in of the surface of the ground about where the drifts were run, on lots 25, 32, 39, 40, and 46. The large cave in the southwest corner of lot 46 of this property began in January, 1903. The next largest cave, between lots 39 and 46, occurred in July, 1903. The large cave designated on the map as "Fall," lot 40 (what is known as the "Red Bud Mill"), came through to the surface in July, 1903, which the subtenants undertook to fill up with tailings in order to prevent damage to the Red Bud mill. The large cave in southeast corner of lot 32 and the northeast corner of lot 39, extending over into lot 31, occurred on September 28, 1903. And a smaller cave in the southeast corner of lot 25 occurred in October, 1903. The cave on the line between lots 39 and 46 is in the tailing pile of the Red Bud Company, over a drift which the miners call the "Cañon." This cañon is described by the witness as a "large place cut out there, and no timbers in it." It was about 100 feet long and between 50 and 60 feet high, 10 feet wide at the bottom, and 35 or 40 feet at the top. It was not properly timbered. The witness testified that he was requested by the superintendent of the Red Bud Company to try to timber this cañon, but, to use his language, he "passed the job up, and would not undertake it at all." This cave over the cañon was described by the engineer, McKee, as "a hole about 60 feet across or in diameter, and nearly 70 feet across one way; nearly round. The hole appears to be even with the top of the ground." The cave in the southeast corner of lot 25 is 27 feet in width. The defendant's principal witness, Williams, in attempting to explain the cause of this cave, said: "About 40 or 60 feet north of the shaft, where we come in contact with some of the best ore in the roof, we made it fall by taking out the timbers." What is known in the testimony as the "Gulch," in the southwest corner of lot 40, extending southward, is an excavation of undue proportion. It is described by a witness as "a drift running from the mill shaft to shaft No. 2, 75 feet wide, at least, east and west, 40 feet high in the center, sloping off in all directions. It was not timbered. It came up in a dump shape in the center. It caved before I left—not to the top, but it had the drift filled up there 30 or 40 feet."

The expert witnesses and practical miners are generally agreed upon the proposition that in running drifts the proper method of timbering is by posts set in the mine, with cross-timbers laid or built up after the fashion of a rail pen, and that, in order to strengthen them, they should be penned by a sufficiently strong piece of timber to bind them together to keep them from spreading, and to sufficiently support the roof wall, and to prevent sagging and giving in of the surface, and that this should be keyed up closely to the wall, and these supports should be left in place. The evidence shows quite satisfactorily that in many of the shafts the timbering up of the mine was not properly or sufficiently done, and that in some cases the pillars were taken out as the work progressed, and the consequence would be a subsidence of the surface at such points. In some of the drifts—as in the Jupiter mine, for instance—there would be a place forty feet wide which was merely snow-

shedded to protect the miners from falling stones, and the like, but which did not perform the office of supporting and staying the roof. None of the timbers in that drift were pinned to the roof. In one place on the Jupiter side of the Fairview ground there was a place 75 feet in width containing good dirt, where they cut a hole from the upper ground to the lower, and rolled the dirt through a chute to the lower ground, causing the ground to settle very fast. So in the drifts from the Red Bud mine, going south, for a distance of more than 300 feet the drifts had caved in some places to the surface, due either to the improper method of mining and timbering, especially noticeable in what is called the "Cañon" and the "Gulch" drifts.

Much of the controversy in evidence among the witnesses was respecting the extraordinarily large cave-in in the southwest corner of lot 46, on the dividing line between that and what is known as the Royal Company, south. The evidence shows that where two mining claims, owned by different miners, come together, the custom among miners is that the miner who first reaches the boundary line seems to have the privilege of "shaving the line," and that the adjoining miner, in order to keep the surface of the ground supported, is to leave a pillar. Waiving any discussion of the legality of such custom, the evidence shows that the Royal Company, on the south, reached this dividing line first. When the Red Bud Company reached that locality with its drift, there was evidently much rivalry between the two companies as to which would first reach the large mineral deposits manifest in that locality. The Royal Company was in the advance. When the Red Bud Company came, it was driving a drift some 15 feet lower than the floor of the Royal drift, both carrying the roof at the same level. As the Red Bud Company went westward, its ore body seemed to incline upwards at an angle, fixed by the witnesses at about 25 degrees, so that when it reached a point near the center of the lot it was cutting a drift from thirty-five to forty feet high. It seems to have timbered fairly well the first part of the line drift, but contented itself in the latter portion of its work with snow-shedding, and in some places it had no timbers at all. The timbers used by it were 18 to 20 foot posts, of insufficient size, on which were placed caps and stringer poles 20 feet in height. On this, pens were built to support the roof, but without sufficiently tying them in the middle. It was not possible to wedge a 20-foot pen sufficiently to the roof of a drift to hold the weight. The result was that just after the Red Bud Company made its excavation to the southwest corner of lot 46 the surface of the ground at that point sunk and caved in, so that for a distance of over 120 feet, east and west, the line drift was filled; and the engineer, McKee, testified that "the break in the surface over the line drift is about 58 feet north and south at the widest point, and east and west about 120 feet along the line." The witnesses on the part of the Red Bud Company sought to throw the responsibility for this caving in on the Royal people, and the latter sought to place the responsibility on the Red Bud Company. It satisfactorily enough appears, however, that the Royal Company employés, entertaining the idea that they had a right to "shave the line," having reached it first, on discovering that the Red Bud employés did not intend to leave a pillar of support, protested against this act of omission; and it was proposed by the foreman of the Royal Company that each party should leave 6 feet of the pillar on each side of the line, making a support of 12 feet wide along the line. Had this been accepted and acted on, there would have been no cave-in, or, if the Red Bud Company had left the pillar on its lot along the line, it would have been sufficient. The defendant's principal witness on this branch of the case himself testified that "I proposed to him to leave one half the pillar if he would leave the other half," which he claims he was refused. There was also on this issue some evidence tending to show that the Red Bud ground boss had put a heavy shot under some timbers of the Royal Company on the south side of the Red Bud drift, and exploded small charges of powder in it to make it larger, and that after this shot the entire timbering of the Royal and Red Bud line drifts was knocked down and filled the Red Bud drift, and that some time after this the surface of the overhanging ground caved.

While it is to be conceded that there is much conflict between the witnesses respecting the greater responsibility for this immense caving in, it is perfect-

ly manifest that the foreman of the Red Bud Company, by his own admission, shows that he recognized the necessity of a pillar being left there to support the supersurface. Whether or not the failure, as between him and the foreman of the Royal Company, was that of the one or the other, can in no degree, in contemplation of law, absolve the defendant company from the obligation imposed upon it by the contract to see that the place was properly timbered and properly mined, so as to prevent caving in where it was in fact running its drift in order to reach the mineral deposit ahead of the other company. No matter what the situation of the ore deposit there was, or what the difficulties were under which it was placed to reach it in advance of the Royal Company, it had to observe the express provision of its contract, and the law of the land written into it, that it must so mine as not to permanently injure the supersurface estate. And if, as a matter of fact, the Royal Company, in shaving the line, failed to perform its duty in timbering up and leaving a sufficient pillar or support, and the like, this fact being known to the lessee, it was its duty to have enjoined the adjacent mine owner and operator, and to have protected itself against any derelictions on the part of its rival. On reading the testimony bearing on this controverted question, I am satisfied that in large measure the responsibility for the great subsidence and cave-in at this place was the failure of the defendant's sublessees, induced by their haste in the race with the Royal Company to reach the point of vantage ground first.

The defendant, in some of its testimony, undertook to extenuate the fact of the timbers of the Red Bud mine failing to hold firm the surface of the ground by showing that it resulted from some of the timbers employed by them having the "dry rot." Even if the dry rot did get into some of the timbers and cause them to fall, such fact would not relieve the defendant from its obligation to so excavate the mineral as not to injure the surface. As suggested by complainant's counsel in his brief, it is a little remarkable that if, as a matter of fact, the timbers were affected by the dry rot, there was not a physical presentation of this evidence. The examination made by the witness Denny shows that on an investigation of the drifts in the Red Bud mine he found no evidences of dry rot; but, on the contrary, the specimen taken from one of the down timbers, and presented as an exhibit in this case, shows that it was perfectly sound.

The effect of the subsidence and caving in of the surface of these mines, the imperfect manner of driving the drifts and the hunting about for pay ore, are so apparent to the common sense as hardly to require the assistance of expert testimony. The substance of this is that if the drift that runs through a body of ore is imperfectly timbered, where there is mineral between the top of the drift and the surface of the ground, the roof of the drift, as the witnesses term it, "chimneys up" toward the ground, so that the waste and pay ore settle in a mass on top of the timbers. And the mine operator afterwards finds it unprofitable to mill this dirt, so that the mineral is left in the ground, either on top of the timbers, or, if they break, the drift must be abandoned. Necessarily the owner of the land must lose his royalty on a large part of the ore, which he would receive in a careful system of mining. As one of the experts said, touching the impracticability of getting all of the ore left above in the Jupiter and Red Bud mine: "When you come to pulling your ground, you come in contact with your waste. That makes your dirt so thin that the mine operator will cease working it. In the next place, when you come to pulling your ground, your waste will come in and shut your ore and dirt off, and continue to run, and leaves your ore and dirt back there. If the waste will run before you ore, the dirt will run too." That, if there is any ore between the place where the ground is thrown and the surface, "it will have to be got out with individual or personal work. It is not ore that would pay a company to employ a force of men. It would be the work generally of individual men doing their own work." The defendant's principal witness, Wilson, conceded that, if the ground is thrown down so that the surface comes in, the ore in the upper levels "is in the crushed mass that lies there, and there is no way to get it, unless you can get in an upper level and run through and hold it with timbers and get it. After it is broken once, it is harder to hold; and after the ground is thus

thrown it is rarely bothered with." That this condition resulted from the improper method of timbering the drifts, or not timbering at all where it was required, I am satisfied the weight of evidence tends strongly to show.

It only remains to observe that, in respect of the cross-bill tendered by defendant, it is based upon what the defendant conceived would be the large amount of its loss resulting from the temporary injunction granted by the court, whereby the operations of its subtenants were stopped, and the defendant deprived of its royalty received pendente lite. When this cross-bill was presented by the defendant, with a request for leave to file the same, it was suggested by its counsel that the amount of the injunction bond would not be sufficient to indemnify the defendant in case the injunction should be dissolved. To meet this suggestion, the court increased the amount of the injunction bond three thousand dollars. Superadded to this is the conceded fact that the complainant is entirely solvent and amply able to respond to any possible damage the defendant might sustain, and the further fact that the entire amount of royalty received by complainant was placed by him in a bank at Joplin, and kept intact, to be applied to any judgment to which the defendant might be entitled. The cross-bill also contains the vice, found in the answer herein, of pleading matters in extenuation of its derelictions and of estoppel—the waiver hereinbefore discussed. The cross-bill, as does the answer, also makes statements about the machinery the sublessees have bought and placed in the mine for operation, and the outlays they have made with a view to the continued successful development of the mine. Such matters constitute no defense or ground of relief. If the defendant or its lessees have any machinery in these mines, they can take them out. The provisional restraining order granted by the court reserved to the subtenants the right of access to their machinery to care for and protect the same; and, by convention between the parties, for the better protection of the mine, in the interest of all the parties concerned, the complainant, through others, operated the same, depositing the amount of royalty, as hereinbefore stated, in the bank at Joplin, subject to the rights of the parties as they might appear in the end. The evidence clearly enough establishes the insolvency of the defendant corporation. It was organized solely by the lessees of the complainant for the purpose of subletting the mining rights it obtained under the lease. Practically it had no other property of any consequence. It results that the issues are found for the complainant, and the injunction is made perpetual, with a decree annulling the lease and setting aside the same as a cloud upon complainant's title.

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## UNITED STATES v. CLARK.

(Circuit Court of Appeals, Ninth Circuit. May 22, 1905.)

No. 1,070.

1. PUBLIC LAND—FRAUDULENT ENTRY—BONA FIDE PURCHASER.

While the United States is entitled to cancel fraudulent land entries as against the entrymen and innocent purchasers prior to the issuance of a patent to the land, during which time the legal title remains in the government, after the entry is confirmed and title vested by the issuance of a patent, the government cannot repudiate the same and recover the land for such fraud, as against an innocent purchaser for value.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, §§ 323–326, 332.]

2. SAME—EVIDENCE.

In an action by the United States to recover land alleged to have been entered under the stone and timber acts by the alleged fraud of the entrymen, evidence *held* to establish that defendant, who purchased the land after patent issued, was a bona fide purchaser for value.

Gilbert, Circuit Judge, dissenting.

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

For opinion below, see 125 Fed. 774. See, also, 129 Fed. 241.

This suit was brought by the United States to obtain a decree annulling 82 patents for timber lands in the state of Montana, theretofore issued under the act of Congress of June 3, 1878, c. 151, 20 Stat. 89, as amended August 4, 1892, c. 375, 27 Stat. 348 [U. S. Comp. St. 1901, p. 1545], and certain incidental relief.

By its bill the complainant alleged that on January 1, 1898, it was the owner in fee of the lands therein specifically described by government subdivisions, aggregating about 11,480 acres, alleged to be of the value of $10,000 and upwards; that they were of such character that the same might be sold to citizens of the United States, or persons who had declared their intention to become such, in quantities not exceeding 160 acres to any one person or association of persons, at the minimum price of $2.50 per acre, under and in pursuance of the provisions of the acts of Congress already mentioned, but that such citizens or persons, as a condition precedent to the purchase of the lands, were, by the terms of said acts of Congress, required to file a written statement in duplicate, to be verified by the oath of each applicant, setting forth, among other things, that he did not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; that he had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons, whomsoever, by which the title he might acquire from the government should inure, in whole or in part, to the benefit of any person except himself; that at some time subsequent to January 1, 1898, one R. M. Cobban, claiming to act for the use and benefit of the defendant in so doing, set about the business of procuring the titles to and possession of the lands described in the bill, and that, in pursuance of such avowed purpose, Cobban entered into a contract in writing with one C. L. Griswold, bearing date May 22, 1899, for the expressed purpose of obtaining lands from the complainant under the said acts of Congress, and which purpose could only be carried out and accomplished by procuring false and fraudulent statements in writing, and under oath, and false and fraudulent proofs to be reduced to writing, and sworn to and subscribed by the parties who should enter the lands in parcels not exceeding in the aggregate 160 acres to each; that Cobban associated with himself one John B. Catlin in and about the said business, and that Cobban, Griswold, and Catlin, by and through themselves and others, examined the lands, procured various persons of both sexes, for hire, to enter the same under said acts, paying their expenses and those of their witnesses, and paying the price required to be paid at the proper land offices of the United States within the jurisdiction of which such parcels of land were respectively situated; that after such sworn statements were made by the persons so employed, and the final proofs made, and the money paid for witnesses' expenses, entrymen and entrywomen's expenses, land office fees, and the price required by law, the several entrymen and entrywomen who had thus acted were paid compensation by Cobban, who, after the several parcels had been respectively entered, took deeds to himself covering the said respective parcels of land from the entrymen and entrywomen, and thereafter conveyed the same to the defendant, Clark; that the respective applications of the parties for the lands in question, and the proofs made in support of them, were all false and fraudulent, in that each of the applicants applied to purchase on speculation, and did not, in good faith, purchase the same for their own exclusive use and benefit, and in that each of them had made an agreement with another person by which the title acquired from the government should inure wholly to the benefit of another. The bill alleges that the defendant Clark "well knew, in a general way, if not in detail, at the time said conveyances of all of said lands were made to him by said Cobban, the facts hereinbefore stated, and well knew, and had good cause to know, that the said lands had been entered in violation of the laws of Congress under which said entries were made, and that the said several parties had entered the same for hire and upon speculation, and for the purpose of enabling him, the said defendant,

to procure title to the same by evasion and violation of said laws of Congress." The bill also shows that after the deeds from Cobban to the defendant had been executed, and prior to the commencement of the suit, the United States issued to the various entrymen and entrywomen its patents for the respective tracts of land so entered by them, and for which it had issued to them respectively its certificates of purchase prior to their respective deeds to Cobban. The prayer of the bill is for a decree canceling the respective patents, and adjudging the complainant the owner in fee of all of the lands covered by them, and of all timber and logs, if any, which may have been cut thereon or removed therefrom, and of all stone that may have been quarried or removed therefrom, and that the defendant be required to account to the complainant touching the value of any timber or stone which may have been cut or quarried or removed from the premises since such alleged fraudulent entry, and that the pretended title of the defendant to the lands be decreed to be void.

The answer of the defendant admitted the alleged ownership of the complainant on the 1st day of January, 1898, of all of the lands embraced by the bill, except one specified parcel, concerning which the defendant averred he had no knowledge or information, and as to which he disclaimed any right. All of the other land covered by the bill is admitted by the answer to be of such character that it was subject to entry under the acts of Congress mentioned, and under the conditions stated in the bill. The answer denies that Cobban ever claimed or pretended to act for the defendant's use or benefit, or that he ever did in fact so act, in the business of procuring the title to or the possession of any lands from the complainant or from any other person, and denies that, in pursuance of any agreement between Cobban and the defendant, any lands were ever bought or procured or purchased, except as specifically stated in the answer. In respect to the averments of the bill regarding the agreements between Cobban and Griswold, the answer avers on the information and belief of the defendant that those parties did enter into an agreement looking to the acquisition by Cobban of the title to the lands belonging to the complainant, but the answer denies, on the information and belief of the defendant, that such agreement could be accomplished only by procuring false or fraudulent statements in writing, under oath or otherwise, or false or fraudulent proofs. The answer further avers that at the time the defendant acquired title to the lands in question from Cobban he had no knowledge or notice of any contract or agreement between Cobban and Griswold, and that the knowledge of that agreement was only obtained long after he (defendant) had acquired title to the lands. The answer also denied, upon the information and belief of the defendant, all of the averments of the bill in respect to the alleged frauds of the respective entrymen and entrywomen, and, upon like information and belief, denied that any of the entrymen or entrywomen who made entries of the lands in question were compensated therefor by Cobban, and avers the fact to be that Cobban purchased such lands in the usual course of business, became the owner thereof, and thereafter, in the usual course of business, and after he had presented to the defendant an abstract of title duly certified, and after such abstract had been presented to the defendant's counsel and the same had been favorably reported on by such counsel, and only then, did defendant purchase or agree to purchase the lands or any part thereof. The answer further avers that, at the time the lands therein described were purchased by him, final proof had been made in respect to the same by each of the persons to whom a final receipt had been given by the government officers, and that each and all of the persons named in the bill as the entrymen and entrywomen had made final proof to the register and receiver of the Land Office in which such entries were made, had received their final receipts for the purchase price thereof, and that the defendant had no knowledge as to who the entrymen or entrywomen were, but relied on the good faith of the various persons who had made such entries, and upon the good faith, watchfulness, and care of the officers of the Land Office, and upon the final receipts issued by the register and receiver of those offices, and upon the abstract of title, the advice of his counsel, and the deeds showing the conveyances from the original entrymen and entrywomen to Cobban; and that the defendant became a bona fide purchaser of the lands specifically described in the answer for a valuable

consideration, and without notice or knowledge of any fraud, directly or indirectly, upon the part of any person or persons, and thereupon became and is the owner of the said lands. The answer then sets forth specifically, by government subdivisions, the lands purchased by the defendant from Cobban at different times, which includes all of the lands described in the bill, except the particular parcel as to which the defendant disclaimed any right, and excepting also certain described lands as to which the defendant avers that he did not purchase the land, but did purchase from the owner thereof the timber standing thereon, and which timber was purchased by the defendant from Cobban, who was then and there the owner of the lands upon which it stood, in good faith and for a valuable consideration, and without any notice whatever of any fraud upon the part of any one. The defendant by his answer also denies that he knew in any way whatever, general or otherwise, any fact mentioned in the bill, or any fact or circumstance at all to the effect that the entries in the bill mentioned were made in any other than the usual, legitimate, and lawful manner of such entries, or that he ever knew, or ever had any reason to know, that any of such entries had not been made in such legal and legitimate manner, and puts in issue each and every allegation of the bill wherein the defendant is charged with either the knowledge or the commission of any act of fraud, covin, or evasion, or of any violation of any law of the United States. And, as affirmative matter, the answer alleges that the defendant is a citizen of the United States, over the age of 21 years, and a resident of the state of Montana, and that on certain days between June 29, 1899, and June 15, 1900, he purchased from Cobban and his wife, Alice M. Cobban, certain tracts of land specifically described in the answer, which tracts included all of the lands described in the bill, other than those in the answer specifically excepted as above mentioned, and that at the time Cobban sold the same to the defendant he claimed to own the lands, and that he in fact did own them, was in their possession, and exhibited to the defendant good and sufficient abstracts of title to the same, showing him to be such owner, which abstracts the defendant submitted to his attorneys, and was by them advised that the title was in Cobban, whereupon, relying upon such representations of Cobban, upon the abstracts of title, and upon the advice of his attorneys, the defendant purchased the said lands, paying therefor a good and valuable consideration, being the full value thereof according to the market price of such lands in the vicinity of their location, which payments were in lawful money of the United States, and were accepted by Cobban as payment in full for the lands; that the defendant was, at the time of the respective purchases, an innocent purchaser of the said respective parcels of land, and for a valuable consideration, and that he had no information or knowledge of any fact or facts which would lead him to believe that the title to any of the lands was in question, and that he had no notice, either actual or constructive, of any fraud on the part of his grantor, or of any other person whomsoever; that the lands so purchased by the defendant from Cobban, and so deeded to him by Cobban and his wife, comprised all of the lands described in the bill, except the particular parcel as to which the defendant disclaimed any right, title, or interest.

A general replication having been filed by the complainant, a vast amount of testimony was taken upon the issues. The decision of the court below having been adverse to the government upon all of the points involved (125 Fed. 774), it brought the case here by appeal.

Philander C. Knox, Atty. Gen., Marsden C. Burch, Sp. U. S. Atty., Carl Rasch, U. S. Atty., and Fred A. Maynard, Sp. Asst. to U. S. Atty.

Walter M. Bickford and George F. Shelton, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

From the view we take of this case it becomes unnecessary to decide whether all, or any, of the various frauds alleged by the

government to have been committed by Cobban, Griswold, and Catlin, and the respective entrymen and entrywomen, in entering the respective parcels of land in suit and obtaining the government title thereto, were or were not committed. And as it is not, in our opinion, necessary to decide those questions in this case, we think it would be particularly improper to do so because of the fact, of which we are informed by counsel for the government, that there are now pending against those parties, in the United States District Court for the District of Montana, indictments charging them with the commission of the alleged frauds. We shall therefore, for the purposes of our present decision, assume, without deciding, that Cobban, Griswold, Catlin, and the various entrymen and entrywomen did commit the frauds alleged in the bill.

There are, then, but two questions presented by the record, both of which are simple and of easy solution, although they are made the subjects of most elaborate briefs by counsel. The first contention on the part of the government, and the one most strenuously insisted on, is that the appellee is not a bona fide purchaser of the lands in suit, for the reason that at the time of his respective purchases the legal title thereto remained in the government; that he got, at best, but an equitable title under the receiver's receipts issued to the various entrymen and entrywomen, and their conveyances to Cobban, and his conveyances to the appellee, which equitable title the appellee must be held to have known was subject to be defeated by the government, should it afterwards find that the lands were not the subject of disposition under the acts of Congress under which the title was undertaken to be acquired, or should it be found that there was fraud or error in the proceedings taken for the acquirement of such title.

So long as the appellee held the equitable title only, the contention on the part of the government is undoubtedly well founded, was not questioned by the court below, and is not questioned by the counsel for the appellee. Indeed, it could not be successfully questioned, for it is the well-established doctrine of the courts, both supreme and subordinate. Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157, and cases there cited. But in the present case the counsel for the government go further, and insist that the same right continues in the government after the issuance of its patent in confirmation of the sale, not only against the patentee, but also against an innocent purchaser for value of the equity, then possessed also of the legal title. And counsel for the government repeatedly ask in their briefs if it is possible that such a right exists in the government up to the time of the issuance of its patent and does not exist the very day after. We answer yes, for the reason that in the one case the innocent purchaser for value has not the legal title, and in the other case he has. Let us put the counsel's proposition in another way: If it exists the day after the patent is issued, it manifestly continues indefinitely, for neither the statute of limitations nor laches runs against the government. What, then, becomes of the security intended to be given by such an instrument? The innocent holder for value under such a patent

would have absolutely no security. He could never know what day, week, month, or year the government might bring him into court and take away the title, bought in good faith and for value, because of the sins of others, of which he knew nothing. The numerous cases which hold that the receiver's final receipt is but prima facie evidence of the right of the entryman to a patent, and that until the patent is issued the power is vested in the Land Department to set aside the receipt and cancel the entry it evidences, for fraud or error, after notice to the parties in interest, and in this way take away even from an innocent purchaser for value this prima facie evidence of title, do not at all support the proposition that this may be done by a court of equity, as against such innocent purchaser for value, after the Land Department, instead of avoiding, has confirmed the prima facie evidence of title by issuing the government patent, and thus vesting the innocent holder of the equitable title with the legal title as well. In the first place, it would not be equitable to do so. An innocent purchaser for value of an equitable title may always fortify that title by acquiring the legal title, and, when he does so, it is a complete answer in a court of equity to one who asserts only a prior equity. "Strong as a plaintiff's equity may be," said the Supreme Court in the case of Boone v. Chiles, 10 Pet. 177, 209, 9 L. Ed. 388, "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. 30–4), which a court of equity imparts liberally." See, also, Story's Eq. Jur. §§ 64c, 411, 436; 2 Pom. Eq. Jur. §§ 738–740; Sugden on Vendors (2d Am. Ed.) p. 519; Bassett v. Nosworthy, 2 Leading Cases in Equity, p. 1. As a matter of course, when the government comes as a suitor into a court of equity, its claims appeal to the chancellor with no greater force than do those of an individual under like circumstances. No case has been cited which sustains the proposition of the complainant now under discussion, and we will not be the first to announce it. On the contrary, the precise point here made was presented to the Circuit Court of Appeals for the Eighth Circuit, in the case of United States v. Detroit Timber & Lumber Company, 131 Fed. 668, and, in a well-considered opinion, was there decided against the contention of the government. Judge Sanborn, who delivered the opinion of the court, said:

"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."

These views seem to us to be entirely correct, and we think they sufficiently answer the main point of counsel for the appellant in the present case, which, of course, assumes that the appellee was an innocent purchaser for value of the equitable title to the lands in suit.

But it is also claimed on the part of the government that the appellee was not an innocent purchaser of the equitable title, but, on the contrary, knew or had good reason to know, at the time of his respective purchases, of the alleged frauds on the part of Cobban, Griswold, Catlin, and the respective entrymen and entrywomen. On this point the allegations of the bill are:

"And your orator charges that the said defendant, William A. Clark, well knew in a general way, if not in detail, at the time the said conveyances of all of said lands were made to him by said Cobban, the facts hereinbefore stated, and well knew, and had good cause to know, that the said lands had been entered in violation of the laws of Congress under which said entries were made, and that the several parties had entered the same for hire and upon speculation, and for the purpose of enabling him, the said defendant, to procure title to the same by evasion and violation of said laws of Congress."

In the opening brief of counsel for the appellant this contention is not very strongly urged, but in their brief filed in reply to that of the appellee it is much insisted on, and it is there in effect claimed that the appellee was in fact a party to those alleged frauds. We are of the opinion that the evidence does not sustain either of those contentions. In the first place, if the appellee had been willing to become a party, with Cobban and the others named, to the alleged frauds upon the government, or if Cobban had been acting as the agent of the appellee, as is alleged in the bill, it is passing strange that the appellee should have paid Cobban $217,571.25 for the timber and lands in question, as the counsel for the government admit that he did. Cobban, it is claimed, paid only the government price of $2.50 an acre for the lands, $100 to each of the entrymen and entrywomen, and the incidental fees and expenses, and it

is incredible that a man of brains and of large business affairs, as the record shows the appellee to be, would, if Cobban had been his agent, or if the appellee had been dishonest enough to have joined Cobban in the alleged fraudulent scheme to obtain lands from the government in violation of its laws, have paid him $217,571.25 for what Cobban, in pursuance of the same undertaking, paid but a mere trifle in comparison. It is, we think, incredible that the appellee would have permitted his partner in the fraud to profit so largely at his expense, if he had been a party to it. The evidence, in our opinion, fails to justify the contention of appellant's counsel that Cobban was at any time acting for the appellee, or that the latter was in any way a party to the alleged frauds, or ever heard anything of them until after he had made his purchases and paid his money. It shows that the appellee was a man of large business affairs, engaged in extensive mining operations requiring large quantities of timber, and also engaged in the lumber business on a large scale. He needed timber lands, or, at least, the timber growing upon them. Cobban claimed to own such timber and timber lands. The case shows that the appellee's operations were so extensive that it was necessary for him to operate largely through agents. A man named Wethey was his general manager, and one McLaughlin his timber agent. In their reply brief, counsel for the government contend that the appellee commenced negotiating for the lands in question before he made his purchases. We do not think that the fair conclusion to be drawn from the evidence. It seems that the appellee first authorized Wethey to buy 40,000,000 feet of lumber. Cobban representing that he owned lands containing the required timber, persons were sent by the respective parties to examine the lands and estimate the number of feet of lumber each tract contained. The price to be paid for the land was, according to the agreement between Cobban and the appellee, to be an amount equal to $1.25 for each thousand feet of lumber the land contained; and the method adopted by the parties was that when the respective estimates were made they were submitted to McLaughlin, who, when satisfied of the amount and quality of the timber, would submit an abstract of title to the lands, together with a deed from Cobban, to Mr. Bickford, the attorney of the appellee, and upon a favorable report in respect to the title by the attorney the money was paid over by Wethey, the general manager of the appellee, and the deed to the latter from Cobban delivered. The first two of such deeds were so delivered July 19, 1899, and the next two September 16, 1899. These, according to the evidence, were the only absolute sales, from their inception, by Cobban to the appellee. But subsequently Cobban and the appellee, through his agents, commenced negotiations for additional lumber and timber lands. Cobban wanted the appellee to loan him money, bearing interest, with which to carry on his operations and to acquire additional lands, and to take as security his (Cobban's) deeds covering the lands, the amount of such advances to be at the rate of 50 cents for every thousand feet of lumber on lands acquired by Cobban under scrip locations, and 75 cents a thousand feet for every thou-

sand feet of lumber on other lands, subject to like examination as to the quantity and quality of the timber by the appellee's agents, and to like approval of Cobban's title by the appellee's attorney. That arrangement was agreed to by Cobban and the appellee, and the first of those transactions was consummated November 11, 1899, the next November 13th of the same year, the next two January 9, 1900, the next June 15, 1900, and the last June 16, 1900. Subsequently, by agreement of the respective parties, these mortgages were, for a money consideration, converted into absolute sales. While it is true that the record shows that the appellee knew that some of the money he loaned Cobban was intended to be used by him in acquiring additional lands, it does not show that the appellee knew, or had any reason to know, that he expected to acquire them fraudulently or in any way unlawfully. United States patents cannot be annulled upon mere suspicion of fraud, even if it could be properly held that any such suspicion arises upon this record against the appellee. The rule upon that subject is thus stated by the Supreme Court in the Maxwell Land Grant Case, 121 U. S. 381, 7 Sup. Ct. 1015, 30 L. Ed. 949:

"We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition as thus laid down in the cases cited is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

The testimony of the appellee is positive and clear that he knew nothing of the circumstances attending the entries of the various tracts of land in question by the respective entrymen and entrywomen or the conveyances from them to Cobban, and that he never suspected that they were obtained by any fraudulent, unlawful, or irregular means, but that, on the contrary, he bought and paid for them in good faith, relying upon the advice of his attorney in respect to the regularity of the proceedings and the validity of the title, and upon his agents as to the quality and quantity of lumber they contained. In these respects the appellee's testimony is corroborated by that of his attorney, general manager, and timber agent. It may be added that the officers of the Land Office where

the entries in question were made testified that they knew of no fraud or irregularities in connection with them, and the entrymen and entrywomen who were examined as witnesses in this case testified to the effect that they had not made any agreement with any person or persons by which the title that they might acquire from the government would inure to the benefit of any other person, nor did they seek to buy the land applied for on speculation, but for their own individual use and benefit. However that may be—a question, as has been said, not necessary to be here determined—we think that the evidence in the present record falls far short of establishing that the appellee knew, or had reason to know, of any such frauds at the time of his respective purchases.

We are of the opinion that the judgment of the court below is right, and it is accordingly affirmed.

GILBERT, Circuit Judge (dissenting). I think there is enough in the record which is before us to show that facts came to the knowledge of the defendant in error and his agents sufficient to put them upon inquiry as to the manner in which the lands were obtained from the United States. The deeds from the various entrymen to Cobban showed that the latter was carrying out a large and comprehensive scheme to obtain the lands. Seventeen of those deeds were made on September 16, 1899, 29 were executed on November 11th, and 22 were executed on November 13th. The deeds also showed that the final receiver's receipts had been issued but a short time before the execution of the deeds. Some were issued but two days before the deeds. Others were issued at intervals of from one week to three or four weeks prior to the deeds. These are significant facts, and indicated a concert of action, of which Cobban was the engineer. The evidence shows, also, that the inspection of these lands by the defendant's agents was contemporaneous with the entries, and that large sums were loaned by the defendant in error to Cobban, to be used by him for the purpose of obtaining title to these lands. There are many other facts and circumstances in the evidence pointing to the conclusion that the defendant in error knew enough of the methods by which the lands were obtained to put him upon inquiry.

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## THE BEE.

## THE ALFRED W. BOOTH.

(Circuit Court of Appeals, Second Circuit. April 13, 1905.)

Nos. 184, 185.

1. COLLISION—TUGS AND TOWS MEETING—FAILURE TO ALLOW SUFFICIENT CLEARANCE FOR TOWS.

Under the rule that tugs with scows, having neither steering gear nor men to operate them, in tow on long hawsers, are bound to exercise the extremest care to prevent collisions with their tows, two tugs meeting in New York Bay, each with two scows in tow tandem, both *held* in fault

for a collision between the tows for failing to change their courses sufficiently to allow a safe clearance, and one also for straightening out on her course before the tows had passed.

2. SAME—NAVIGATION OF CHANNELS—APPLICATION OF RULE TO UPPER NEW YORK BAY.

In the case of a bay which is also a port or harbor, the entire body of navigable water is not to be considered a single narrow channel within article 25 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2883]), requiring a steam vessel, when safe and practicable, to keep to that side of the fairway which lies on its starboard side, where through such bay, as in upper New York Bay, there have been officially designated two or more channels running substantially parallel with each and in the same general direction as the main flow of the tide or current.

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

These two causes were heard together. They arose out of a collision between the scow Delaware, owned by the contracting company, in tow of the Booth, and the scow No. 20, in tow of the Bee, the last-named tug and tow being owned by the R. G. Packard Company. A decree was entered in the first suit in favor of the contracting company against both tugs for $1,983.66; both tugs appealed. In the second suit decree was entered in favor of No. 20 against the Booth for one-half damages, with interest and costs (to wit, $1,684.95); both sides appealed. The cause is reported below. 127 Fed. 453.

R. D. Benedict and Chas. C. Burlingham, for the Booth.
Le Roy S. Gove, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The collision is thus described by the District Judge:

"The collision occurred off Bay Ridge, in the upper bay of New York, on September 7, 1902, about 1:30 a. m. The tug Alfred W. Booth was coming in from sea, having in tow two scows, tandem, the first one on a hawser of about 150 fathoms, and the second one, the Delaware, astern of the first scow, on another hawser of about 80 fathoms. The tug Bee was coming down the bay, having in tow two scows, one of them No. 20, also tandem, but close together, on a hawser of about 200 fathoms. Each of the tugs, when they were about half a mile apart, saw the red light of the other, and each sounded one whistle to the other, indicating an intention to pass port to port. The Bee immediately ported and changed her course about four points to starboard, and held that course unchanged until the collision. The Booth also ported two or three points, and, when about abreast of the Bee, straightened and resumed her course up the bay. The tugs passed each other in safety, but the Delaware, at the end of the Booth's tow, came in collision with the scow No. 20, the head boat in the Bee's tow. The scow No. 20 was badly injured, and the scow Delaware shortly after sank.

"In my opinion, the Booth was at fault for not continuing to bear off to starboard until the tows had entirely cleared each other. The witnesses put the distance of the tugs apart when they passed each other at about 250 or 300 feet. Each had been bearing several points to starboard of her original course for the last half mile. The evidence shows that such tows on such long hawsers do not usually follow instantly a change of course of the tug, but drift on some distance in the original direction, or with only a slight change of direction. There was danger, therefore, when the tugs passed each other but 250 feet apart, that the scows might drift together, and the Booth should have anticipated that danger and kept bearing off to starboard until it was certain that the scows would pass each other in safety.

"I do not see that the Bee was in any fault in the manner of her navigation. Her pilot changed his course, as soon as he saw the Booth, about four points to starboard, and kept that course till the collision."

What the pilot of the Bee testified was that his total change of course from the time he blew a one-whistle signal until collision was four points. The extent to which his wheel was ported was apparently not any greater than was the case on the Booth, but he did not straighten up as the latter did. The District Court held the Bee in fault for "being on the wrong side of the channel, in violation of rule 25."

Upon the narratives given by both sides, it is difficult to see how the collision happened. If the tugs passed 250 to 300 feet from each other, even if one only was under a port helm, no ordinary sheering by the tows could be expected to bring them together. We wholly discredit a statement of the pilot of the Bee that after the Booth passed him she changed her course directly for his towing hawser. We have a very strong impression that all the witnesses have greatly overstated the distance between the tugs. However that may be, there was faulty navigation somewhere; the night was clear starlight, and they sighted each other far enough apart to avoid all risk of collision of their tows if they had left sufficient clearance between themselves. Manifestly they did not, and the damages thus occasioned to innocent tows should be made good by both, unless we can see that one of them was alone to blame. In criticising their navigation, it is to be remembered that each of them was towing scows, which had neither steering gear nor men to operate it, on very long hawsers. It is the custom to tow in that way in this harbor, and in The H. M. Whitney, 86 Fed. 697, 30 C. C. A. 343, we quoted with approval the opinion of the Circuit Court of Appeals, First Circuit (The Berkshire, 74 Fed. 906, 21 C. C. A. 169) that "it is beyond the province of the courts to condemn a practice so notorious and so long continued that it must be presumed to be known to Congress and to the supervising inspectors, and yet has not been condemned by either of them." But we held that "there is a wide difference between condemning such a practice altogether, and holding those who indulge in it to a degree of care commensurate with the increased risk which their indulgence in such practice entails;" and added, "We must hold tugs which navigate with such long and essentially hazardous fleets to the use of the extremest care in the interests of common safety." Tested by this criterion of "extremest care," we find both tugs in fault for not allowing sufficient clearance—the Booth for straightening up too soon, the Bee for not putting her wheel further to port when she whistled. She had come from a stakeboat on the Jersey Flats, and crossed over to the eastward just before she straightened out on her south by west course down the bay, and had reason to apprehend that her tow had not yet overcome their set towards the eastward, and needed a sharp pull to the westward to fetch them clear of the Booth's flotilla.

This finding would result in an affirmance, and would call for no further discussion, but we have been asked to express an opinion

on the decision of the District Court that the upper bay of New York is to be considered a narrow channel within rule 25—a propositon first advanced in the decision now under review. It seems proper that we should pass upon it, in the interests of navigation in this port. The District Judge in his original opinion, and in a second one filed upon a rehearing after hearing further testimony from pilots and others, has carefully discussed the question. His reference to the authorities bearing upon it is exhaustive. His final conclusion was that the question whether the entire upper bay is to be regarded as a narrow channel for vessels of light draft is doubtful, but that, upon consideration of the authorities, it should be held to be such. We do not think it necessary to discuss the authorities, none of which exactly cover the case, nor to undertake to lay down any rules of general application. It was wisely said in the Rhondà, 8 App. Cas. 552, that "their Lordships do not propose to define what is a narrow channel, or to lay down what particular width or length will constitute it." It will be sufficient briefly to indicate the reason why we cannot concur in the conclusion as to this particular locality.

The upper bay is a body of water connecting the mouths of the North and East rivers with the Narrows, or strait which connects the upper with the lower bay, and it is not wider than some waters which have been held to be narrow channels. It is a part of the harbor of New York; its surrounding shores are extensively built up, and on them are found docks, bulkheads, and other landing places. The government has made elaborate and careful special regulations as to navigation within its waters; a very large part of its area has been designated officially as anchorage grounds, some general, others special. By like authority various "channels" have been designated within such area, and special regulations as to those channels have been adopted. The exact weight to be given to any or all of these circumstances we do not now assign. We note, moreover, that, of those channels thus designated by authority and accepted by navigators, two, the "Main Ship Channel" and the "Bay Ridge Channel" (with its extension, the "Red Hook Channel"), run substantially parallel and in the same general direction between the mouths of the rivers and the Narrows. A similar state of affairs exists in the lower bay, and existed there when we decided The Sea King, 114 Fed. 535, 52 C. C. A. 349. It was held in that case that rule 25 applied to the Main Ship Channel, in which the Sea King was navigating; and the opinion indicates that the same rule would have been applied had she been navigating in either the Swash Channel or the East Channel, which run in the same general direction. Such application would seem to be in conflict with a rule which tested her proper location upon the theory that the entire body of water which includes these three channels was itself a narrow channel. Inextricable confusion would result if, under rule 25, an incoming vessel in the Main Ship Channel were to be justified in keeping close to its red buoys, and at the same time were to be held in fault because she did not keep hundreds of feet further east on the starboard side of the middle line of the entire body of water.

It is sufficient on this appeal to hold that in the case of a bay, which is also a port or harbor, the entire body of navigable water is not to be considered a single narrow channel within rule 25, where through such bay there have been officially designated a plurality of channels (i. e., more than one channel) running substantially parallel with each other and in the same general direction as the main flow of the tide or current.

In the second cause, error is asssigned that the amount of damages awarded is excessive. The Packard Company raised its scow No. 20 with its own appliances and men, work of that sort being part of its regular business. No objection is made to their doing so, but it is, quite properly, contended that they cannot be allowed more than a reasonable sum for doing the work. We are satisfied with the commissioner's reasoning and conclusion that the several items of charge for what was actually done were reasonable and proper. Claimant, however, called two expert wreckers to show that the scow might have been raised in some other way at a less expense. The difficulty with these suggestions is that both of them contemplated dumping the contents of the scow on the bottom of the channel where she lay. The owner was under no obligation to take the risk of prosecution under the federal statute against dumping in the harbor in order to save claimant from some part of the expense of raising the scow.

In the first cause the decree is affirmed, with interest, and one bill of costs against both tugs. In the second cause the decree is affirmed, but, since both sides appealed, without interest or costs.

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## CITY OF SEATTLE v. BOARD OF HOME MISSIONS OF METHODIST PROTESTANT CHURCH.

(Circuit Court of Appeals, Ninth Circuit. May 29, 1905.)

No. 1,161.

1. BILL OF EXCEPTIONS—CERTIFICATION—RULES—FAILURE TO COMPLY.
   Where the trial court settled a bill of exceptions and certified to its correctness, though it was not filed within the time, nor served as required by Cir. Ct. Rules 23, 26, it would be presumed on appeal that the court relaxed the rules for some good reason, and hence a motion to strike the bill would be denied.

2. MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE—DAMAGES—BENEFITS.
   Under Laws Wash. 1893, p. 194, c. 84, § 15, providing that when an ordinance authorizing a change of street grade does not provide for any assessment in whole or in part on property benefited, the compensation for land or property taken, and in all cases the damages found in respect to land or property not taken, shall be ascertained over and above any local and special benefit arising from such proposed improvement, etc., any local or special benefit that the particular property in question will derive by reason of the proposed improvement should be deducted from any damages it would sustain, and only the excess of damage be allowed to the owner.

   [Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 949–951.]

3. SAME—BENEFITS TO LOT APART FROM BUILDINGS.
In a proceeding to recover damages to property not taken by a change of street grade as authorized by Laws Wash. 1893, p. 194, c. 84, § 15, evidence as to benefits to the land part from the buildings thereon was inadmissible.

4. SAME.
Evidence that the market value of the lot and building thereon would be greater immediately after the change of grade without any adjustment of the buildings to the grade was admissible.

5. SAME—USE OF PROPERTY.
In a proceeding to determine the amount of damages sustained to abutting property by a change of street grade, the use to which the property is devoted or for which it is suitable is a proper element to be considered in ascertaining its market value.

6. SAME—ADJUSTMENT OF PROPERTY.
In a proceeding for assessment of damages to abutting property by a change of street grade, the cost of adjusting the property, including buildings thereon, to a new grade, and damages to trees, if any, should be considered.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 938, 939, 941.]

7. SAME—PARTICULAR USE.
Mere impairment of the use of abutting property by a change of street grade for a particular purpose would not necessarily entitle the owner to damages in case the market value of the property, including the use to which it might be devoted, would be enhanced by the improvement.

[Ed. Note. For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 943.]

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

Mitchell Gilliam and Hugh A. Tait, for plaintiff in error.

E. S. McCord and John Larrabee, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The questions of law arising in this case, relating as they do to rulings of the court below upon matters of evidence and instructions to the jury, were only presentable to this court by bill of exceptions. The verdict of the jury was returned July 30, 1904. Rules 23 and 26 of the Circuit Court for the District of Washington at the time provided:

"Rule 23. The party excepting to the charge of the court to the jury must specify distinctly the several matters of law to which he excepts. Such matters of law only will be inserted in the bill of exceptions, and allowed by the court. All exceptions to the charge of the court to the jury shall be in writing and handed to the court before the verdict. The bill of exceptions must be appropriate in form and presented to the judge within ten days after the verdict, and in default thereof the exceptions will be deemed waived."

"Rule 26. Where exceptions are taken or there is a demurrer to the evidence, the party shall have the right and shall not be required to prepare at the trial his bill of exceptions or demurrer and statement of evidence, but may merely reduce such exceptions to writing, or make a minute of the demurrer to the evidence, as the case may be, and deliver it to the judge. The bill or demurrer shall, within ten days after the termination of the trial, be drawn up, filed, and a copy served on the attorney of the adverse party, who, within five days thereafter may prepare, serve, and file amendments thereto, and in default thereof the right to propose amendments shall be deemed

waived, in which case, within five days thereafter, the proposed bill may be presented by the moving party to the judge for allowance. If amendments are served and filed within the time allowed, they shall be deemed assented to by the party proposing the bill, and may in like time and manner be presented to the judge for allowance, unless the said party within three days after receiving the copy of such amendments shall notify the opposing attorney of his dissent, and that at a time and place specified, not less than two nor more than five days distant, he will present the proposed bill and amendments for settlement, and in that case the bill shall be so presented. In all cases where a party proposing a bill of exceptions fails to present his bill and the proposed amendments to the judge for allowance or settlement within the time limited as aforesaid, his bill of exceptions shall be deemed abandoned and his right thereto waived."

The bill of exceptions found in the record was not filed until December 2, 1904. A motion is made on behalf of the defendant in error to strike the bill of exceptions from the record and affirm the judgment appealed from on the ground that the bill was not prepared or presented to the trial judge within the time fixed by the rules, nor was there any copy of it ever served upon counsel for the defendant in error until more than a month after it was filed, in consequence of which the defendant in error had no opportunity to suggest amendments thereto, and thereby secure a full and fair presentation of the points made by the plaintiff in error. The motion is supported by affidavits of the counsel for the defendant in error, and there is no counter showing. In the affidavits of the counsel for the defendant in error it is shown that the judgment appealed from was entered on the 30th day of July, 1904, and that the bill of exceptions was not presented to the trial judge until December 2d following, at which time it was signed by the judge without any opportunity on the part of the defendant in error to offer proposed amendments to the bill; and that the counsel for the defendant in error had no notice or knowledge that such bill of exceptions would be presented to the judge, nor that it had been in fact so presented and signed by him, until a copy thereof was served upon the counsel for the defendant in error on the 17th day of January, 1905. It is further stated in the affidavits of the counsel for the defendant in error that the bill of exceptions is not a fair statement of the facts which constitute the different purported errors as set forth in the assignment of errors of the plaintiff in the case, but, on the contrary, is incomplete, and prejudicial to the defendant in error, in that the bill recites only such evidence as is favorable to the plaintiff in error; that the extracts from the instructions of the court complained of are unfair and misleading in that they do not convey the full or correct meaning of the court as conveyed by the instructions as given in full; that, had the bill of exceptions been served upon the defendant to the case, as required by the law and the rules of the court quoted, the defendant would have filed and served and presented to the judge who tried the case proposed amendments, which would have made the bill of exceptions complete and prejudicial to neither party, and would have enabled this court to arrive at a full and correct understanding of the facts that were introduced in evidence, touching the purported errors as set forth in the plaintiff's assignment of errors. Notwithstanding the rules, the court

did, as a matter of fact, settle the bill of exceptions contained in the record, and certified to its correctness. We must, therefore, take it that for some good reason the court vacated, or at least relaxed, its rules, and, having certified to the bill, we must accept it as it is.

It appears therefrom that in the course of the proceedings in the court below, which were instituted for the purpose of ascertaining what, if any, damages would be suffered by certain property of the defendant in error by reason of a change in the grade of certain streets in the city of Seattle, counsel for the city, which was the plaintiff in the court below and is the plaintiff in error here, asked one of the witnesses this question: "Taking the lot at the corner of lot 1 of block 22, A. A. Denny's Addition, at the southeast corner of Pine and Third avenue, state whether or not the real property itself, not including the building, whether that would be benefited or not by this proposed regrade?"—the lot mentioned in the question being the lot owned by the defendant in error. The question was objected to by the defendant to the proceeding upon the ground that it was asking for the opinion of the witness in respect to the land, independent of the building thereon, which objection was sustained by the court, to which ruling the plaintiff reserved an exception. Further similar questions were also asked, objected to, and ruled out, whereupon, according to the bill of exceptions, the following proceedings occurred:

"The Court: I have already said you are spending time to no purpose in doing that. Mr. Gilliam (Counsel for the Plaintiff): I only desire to get the matter in such form, if the court please, that it can be squarely presented in case of an appeal, if we see fit to appeal from the verdict. The Court: You can make your offer. A very convenient way to do that is to make your offer of what you propose to prove. Mr. Gilliam: I will do that, if the court please. * * * Now, if the court please, I want to make the formal offer of evidence. Petitioner offers evidence to prove by this witness that the market value of this lot in controversy, lot 1 in block 22 of A. A. Denny's Addition to the city of Seattle, would be greater immediately after the regrade of this street, and without any adjustment of the buildings to that grade, than it was before the regrading of that street; and that this enhancement of value would be caused directly by reason of the regrading of the street. We offer to prove that. Mr. Larrabee (Counsel for the Defendant): Do you have reference to the lot only? Mr. Gilliam: The property—the lot and the building. I offer to prove that the lot as it now stands will sell for more with the streets graded than it would without. Mr. Larrabee: We object to any evidence introduced along that line. The objection was sustained by the court, to which ruling of the court the petitioner then and there duly excepted, and this exception was by the court allowed. No evidence was permitted by the court tending to establish the value of the property of the said respondent immediately prior to the regrade and immediately after the regrading of Pine street between First avenue and Fourth avenue, and Third avenue between Pike street and Pine street."

It is conceded that under the Constitution and statutes of the state of Washington its municipal corporations desiring to change the grade or otherwise improve their streets may offset benefits against damages. Section 15 of the statute of that state, under which this proceeding is brought, is as follows:

"When the ordinance providing for any such improvement provides that compensation therefor shall be paid, in whole or in part, by special assessment upon property benefited, the compensation found by the jury for any

land or property taken shall be irrespective of any benefit from the improvement proposed. When such ordinance does not provide for any assessment, in whole or in part, upon property benefited, the compensation found for land or property taken, and in all cases the damages found in respect to land or property not taken, shall be ascertained over and above any local and special benefit arising from such proposed improvement, except as provided in section 2 of this act as to streets, avenues, and boulevards established to a width greater than one hundred and fifty feet, in which class of cases no benefits shall be deducted as to such excess." Laws 1893, p. 194, c. 84.

As this is not a case of land or property taken, but only for the ascertainment of damages, if any, to property not taken, it is governed and controlled by that clause of the statute quoted providing that "in all cases the damages found in respect to land or property not taken, shall be ascertained over and above any local and special benefit arising from such proposed improvement"; that is to say, any local and special benefit that the particular property will derive by reason of the proposed improvement shall be deducted from any damages it will sustain thereby, and only such excess of damage be allowed the owner. If the particular property will derive no local or special benefit, there will, as a matter of course, be nothing to deduct from the damages, if any, sustained by the owner; and if the particular property is benefited as much as damaged, there can be no recovery, since pecuniary loss is the measure of damages in such cases. 2 Dillon on Municipal Corporations (4th Ed.) § 990, note, p. 1228. We are of the opinion that the court below was right in its rulings in respect to the questions propounded by counsel for the plaintiff seeking to obtain from the witnesses the benefits that it was claimed would result to the lot without regard to the building thereon. The land and building constituted but one piece of property, and both benefits and damages to accrue by reason of the improvement can only be properly estimated by considering the effect upon the property as a whole.

But the offer of proof made by counsel in response to the suggestion of the court did include the entire property, and we think the court was in error in rejecting it. If the proposed change in the grade of the streets would result in damage to the property in question, it would only be because it would depreciate its market value; for, as has been said, the pecuniary loss is the measure of damage in such cases. The use to which property is devoted, or for which it is suitable, having regard to the present or immediate future, is a proper element to be considered in ascertaining its market value. Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206. So, too, in determining whether or not, in cases like the present, a change in the grade of the street will result in damage, it is proper to consider the cost of adjusting the property (including, of course, the buildings thereon) to the new grade, the damage to trees, if any, as well as any benefit which will accrue to the property by the change. Lewis on Eminent Domain, §§ 217, 218g. But while the use to which the property is devoted is proper to be considered in estimating its market value, the mere impairment of its use for that particular purpose would not necessarily entitle the owner to damages; for if the market value of the property, ascertained by considering all of the ele-

ments entering into that value (including the use to which it is or may be devoted), will be enhanced by the improvement, there would, manifestly, be no pecuniary loss, and therefore no legal damage. The court below was therefore also in error in instructing the jury, as it did, that, if the expense necessary to make the church building conform to the new grade and make it accessible will exceed any advantage or benefit in the use of the property, such excess should be allowed the owner as compensation for changing the grade.

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

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## UNITED STATES v. BALLANTINE et al.

(Circuit Court of Appeals, Second Circuit. April 11, 1905.)

No. 170.

CONSULAR OFFICERS—LIABILITY ON BOND—OVERCHARGE OF FEES.

The surety on the bond of a consular officer cannot be held liable for the statutory penalty incurred by the principal under Rev. St. § 1723 [U. S. Comp. St. 1901, p. 1185], for charging excessive fees, where such fees, including the excess, have been charged against him in his account, and paid to the Treasury Department.

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

Henry A. Wise, for plaintiff in error.

A. B. Smith, for defendants in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The trial judge properly held that the plaintiff in error would not be entitled to recover $43 against the surety for the excessive fees which the principal collected, and which were charged against him in settlement of his accounts with the government, under section 1723, Rev. St. [U. S. Comp. St. 1901, p. 1185], if such principal had in fact paid over or accounted for the whole amount collected, including the excess. The condition of the bond was that the principal should faithfully perform his duties, and should account for, pay over, and deliver up all moneys which should come into his hands as vice consul. The obligation of the bond did not require the surety to respond for the special statutory penalty.

The court, however, seems to have erred in directing a dismissal of the complaint as to those two items. Apparently the trial judge was under the impression that plaintiff had put in its testimony and rested. This is not surprising, for the position of the respective parties was indicated by a somewhat informal discussion as to what they understood to be the law and the facts. The complaint averred that the principal had failed to account for, pay over, and deliver the moneys collected (for excessive fees), and the answer squarely denied this averment. If, under these circumstances, the plaintiff had closed its case without putting in any proof tending to show

failure to account for and pay over, defendant would be entitled to a dismissal; but when the record is examined it appears that the plaintiff did not put in its proof or rest its case. The narrative of transactions is somewhat involved, but it may fairly be gathered from it that the question was presented upon a motion to dismiss on the pleadings and opening. The brief statement which constitutes the opening contains no concession that the excess fees were accounted for or paid over. Therefore by his motion on pleadings and opening defendant practically conceded that the averment of the complaint to the effect that they had not been accounted for or paid over should be taken as true. That being so, the complaint could not be dismissed as to those items.

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

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## WRIGHT v. EAST RIVERSIDE IRR. DIST.

(Circuit Court of Appeals, Ninth Circuit. May 29, 1905.)

No. 1,159.

1. PUBLIC CORPORATIONS—IRRIGATION DISTRICTS—BONDS—BONA FIDE PURCHASERS—NOTICE.

Bona fide purchasers of public corporate bonds take with notice of the law under which the bonds were issued, and cannot recover thereon if the bonds show on their face that they were not issued in conformity thereto.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1968.]

2. SAME—DEFECTS—SIGNATURE—DATE.

Wright Act (St. Cal. 1887, p. 35, c. 34) § 15, authorized the issuance of bonds by an irrigation district pursuant to an election, payable in yearly installments after 11 years, with interest coupons attached, requiring that the bonds should be negotiable in form, signed by the president and secretary of the irrigation district, and that they should be numbered consecutively as issued, and bear date at the time of issue; that the interest coupons should also be attached to each bond, and be signed by the secretary. Bonds were prepared under this act dated December 30, 1890, the coupons containing the lithographed name of the secretary of the district in office at that time. The bonds were not delivered until 18 months after the date specified, but the date was not changed, and, the secretary whose name was lithographed on the coupons having died, the bonds were signed by his successor, who was secretary when the bonds were delivered, but the lithographed signature of the preceding secretary on the coupons was not changed. *Held* that, whether the bonds were treated as "issued" on the day they bore date or on the day they were delivered, they were void in the first case because they were not signed by the "then secretary," as required by the statute, and in the second case because they were antedated, the effect of which was to make them payable within a shorter time than that provided by law.

Gilbert, Circuit Judge, dissenting.

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

This was an action at law upon certain interest coupons held by the plaintiff in error, which were originally attached to bonds issued by the East Riverside Irrigation District, the defendant in error. The complaint alleges

that the defendant in error is, and was at all of the times therein mentioned, an irrigation district, organized and existing under and by virtue of an act of the Legislature of the state of California 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 for irrigation purposes," approved March 7, 1887 (St. Cal. 1887, p. 29, c. 34), commonly known as the "Wright Act," under which act, and the several acts amendatory thereof and supplemental thereto, the defendant in error issued certain bonds, specifically set out in the complaint, signed by Henry W. Robinson as president of the board of directors of the district, and by W. R. McCully as secretary; attached to each of which bonds at the time of the issuance thereof, according to the averments of the complaint, were the interest coupons sued upon, with the name "J. A. Van Arsdale, Secretary," at the end thereof. The complaint alleges that at the time of the issuance of the said respective bonds, with the coupons attached, Henry W. Robinson was the president of the defendant irrigation district, and W. R. McCully was its secretary, and that each of the said bonds was signed by the said Robinson and McCully as such president and secretary, respectively, and that the signature appearing upon each of the coupons sued upon is the signature of the secretary of the said irrigation district. All of the bonds and coupons set out in the complaint bear date December 30, 1890, and it is alleged in the complaint that subsequent to their issue, and prior to the 1st day of July, 1901, the plaintiff purchased the coupons sued upon, and ever since has been the owner thereof; that such interest coupons were presented to the treasurer of the district, and offered to be surrendered on payment of the sum of money mentioned therein, but that no payment thereon has been made, and that the whole thereof remains due and unpaid.

In its answer the defendant admits the issuance of the bonds with the interest coupons annexed, but denies that they were issued in pursuance of the provisions of the statute referred to, and alleges that they were issued in violation of that statute in these particulars: That the bonds had attached to them installment coupons in addition to the interest coupons, which installment coupons provided that the installments of principal should be paid as provided therein, and only upon the surrender of the respective installment coupons, and that by the terms of such installment coupons the time of payment for every such installment was extended beyond the time prescribed by the statute; that none of the coupons, either of installments or of interest, were signed by the person who was secretary at the time the bonds were issued or at the time the bonds were signed or executed; that none of the bonds or coupons bore the date of their issue, but that all of them bear date more than one year previous to the time of their issue, and to such extent are made payable in a shorter time than is prescribed by the statute under which they purport to be issued; that none of the bonds had affixed thereto the seal of the board of directors of the defendant corporation, and that they were not negotiable in form, and that all of them were disposed of illegally, and for an illegal consideration; that the plaintiff took the coupons sued upon with notice of all of the alleged defects; and that such coupons, as well as the bonds to which they were attached, were and are void for the reasons stated in the answer.

No question is made in respect to the organization of the defendant under the statute referred to, nor as to the regularity of the election authorizing an issue of bonds.

The cause was submitted to the court below upon an agreed statement of facts, upon which the court made findings of fact in accordance therewith, and, holding the coupons sued upon void and of no effect, gave judgment for the defendant. The findings are to the effect:

(1) That the plaintiff is a subject of Edward VII, King of Great Britain and Ireland, and is, and has been since a time prior to July 1, 1901, the owner and holder of the coupons particularly described in the complaint, and numbered 13, 14, 15, 16, 17, 18, 19, and 20, and belonging to bond No. 305, issued by the defendant corporation, and of the coupons bearing the same numbers, but belonging, respectively, to bonds issued by the defendant, and numbered 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321,

322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 334, and 335; making in all 240 coupons, each for $15, or a total of $3,600. That the date of maturity of the coupons numbered 13 is July 1, 1897; of coupons numbered 14, January 1, 1898; of coupons numbered 15, July 1, 1898; of coupons numbered 16, January 1, 1899; of coupons numbered 17, July 1, 1899; of coupons numbered 18, January 1, 1900; of coupons numbered 19, July 1, 1900; and of coupons numbered 20, January 1, 1901.

(2) That each of the said interest coupons was, before the commencement of the action, duly and regularly presented to the treasurer of the defendant district, and offered to be surrendered on the payment of the sum of money therein mentioned, no part of which has been paid.

(3) That the defendant is, and at all of the times mentioned in the record was, an irrigation district, organized and existing under and by virtue of the act of March 7, 1887, and the several acts amendatory thereof and supplemental thereto. That the said East Riverside Irrigation District was formerly situated in San Bernardino county, but is now partly in that county and partly in the county of Riverside, Cal.

(4) That heretofore (date not stated) the defendant district issued a bond in the following words and figures:

"Bond No. 305.

"State of California. United States of America.

"$500. Bond of the $500.

"East Riverside Irrigation District.

"Total Issue, $250,000. Located in

"San Bernardino Co. Cal.

"For Value Received

"The East Riverside Irrigation District, a public corporation, duly organized and existing under and pursuant to the laws of the State of California, promises to pay to the bearer hereof, at the office of the treasurer of said district, the sum of ($500) five hundred dollars in gold coin of the United States, at the dates and upon installments as follows: at the expiration of eleven years from date five (5) per cent of said sum; at the expiration of twelve years from date six (6) per cent of said sum; at the expiration of thirteen years from date seven (7) per cent of said sum; at the expiration of fourteen years from date eight (8) per cent of said sum; at the expiration of fifteen years from date nine (9) per cent of said sum; at the expiration of sixteen years from date ten (10) per cent of said sum; at the expiration of seventeen years from date eleven (11) per cent of said sum; at the expiration of eighteen years from date thirteen (13) per cent of said sum; at the expiration of nineteen years from date fifteen (15) per cent of said sum; at the expiration of twenty years from date a percentage sufficient to pay off said sum in full.

"Said installments are to be paid as provided in and only upon the surrender of the respective installment coupons, hereto attached. And said district promises to pay interest on the said principal at the rate of six (6) per cent per annum, payable in gold coin of the United States at the office of the treasurer of said district semi-annually, on the first day of January and July of each year, upon the surrender of the respective interest coupons hereto attached. Both principal and interest are payable at par.

"This bond is one of a series of bonds amounting in the aggregate to two hundred and fifty thousand dollars caused to be issued by the board of directors of said East Riverside Irrigation District, and pursuant to a vote of the electors of said district at an election held for that purpose on the 24th day of December, 1890. The said series, of which this bond is one, is composed of five hundred bonds, each of the denomination of five hundred dollars, and said bonds are issued by the authority of, pursuant to, and after a full compliance with all the requirements of the act of the Legislature of the State of California, 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,' approved March 7th, 1887, and acts amendatory and supplementary thereto.

"All the said bonds and the interest thereon are to be paid by revenue derived from the annual tax upon the real property of the District, which tax is, and the said bonds are by said act of the Legislature made a lien upon all said real property.

"In witness whereof said East Riverside Irrigation District has caused these bonds to be issued and signed by its president and secretary, and its corporate seal to be hereunto affixed and the lithographed signature of its secretary to be affixed to each of said coupons at the office of the Board of Directors in said District this 30th day of December, A. D. 1890.

"East Riverside Irrigation District.

"By W. R. McCully, "Secretary of Said Board.

By Henry W. Robinson, President of Said Board.

"$500."

That said bond was and is indorsed as follows:

"No. 305. State of California. East Riverside Irrigation District. $500. Six per cent Gold Bond. December 30th, 1890. Interest payable semi-annually. January first and July first at the office of the Treasurer at East Riverside, San Bernardino County, Cal."

That attached to said bond at the time of the delivery thereof was a coupon for interest, numbered 13, which coupon was and is in the words and figures following:

"$15.00. Interest Coupon No. 13.

"East Riverside Irrigation District.

"Will pay to the bearer at the office of the Treasurer of said District in the County of San Bernardino, State of California, on the first day of July, 1897, on surrender of this coupon the sum of fifteen dollars in U. S. Gold Coin, being semi-annual interest on Bond

"No. 305. J. A. Van Arsdale, Secretary.

"Dated December 30th, 1890."

That at the time of the execution of the said bond and the delivery thereof, with the coupons attached thereto, as afterwards mentioned, Henry W. Robinson was the president of the said irrigation district, and W. R. McCully was its secretary, and that the signatures on said bond were and are the signatures of Henry W. Robinson as such president and said W. R. McCully as such secretary, but that the word "bond," as last above used, does not include "coupon." That each of the bonds referred to in the complaint were and are in the same form and of the same tenor and effect as the bond set out in the findings, with the exception of the number thereof; and that all of the coupons mentioned in the complaint and referred to in the findings were and are of the same form, tenor, and effect as the coupon last described, differing only in the date when the interest mentioned therein would become payable and in the number of the bond to which each of them was attached. That all of the coupons of the same number mature on the same date, and that the dates of their maturity are correctly set forth in finding 1.

(5) That in the year 1892 the board of directors of the defendant irrigation district entered into a contract with J. D. Hooker & Co., wherein and whereby that firm agreed to furnish to the defendant district 4,000 feet, more or less, of steel water pipe 24 inches in diameter, and that it would construct the pipe into a pipe line for the conveyance of water for the use of the irrigation district, and lay the same in trenches in the land of the defendant district; and that upon full completion of the pipe line by Hooker & Co. the irrigation district would pay to that firm $2.50 per lineal foot for each and every foot of pipe furnished, laid, and completed as aforesaid, such payments to be made as follows, to wit, one-half of the amount to be paid in gold coin of the United States, one-fourth in the bonds of the irrigation district at their par value, both of which payments to be made on the completion of the said pipe line, and the remaining one-fourth to be paid to Hooker & Co. 36 days after the completion of said pipe line in the bonds of the district at their par value. That the said Hooker & Co. duly performed all of the terms and conditions of the contract, and completed the pipe line as provided for, and delivered the same to the district; and that on the 27th day of June, 1892, the board of

directors of the district, having full knowledge of the fulfillment of the terms and conditions of the contract and the completion of the pipe line, and the delivery of the same, by resolution duly and regularly adopted declared that the said contract had been fully performed by Hooker & Co. And at the request of the district, and without waiving any of the terms and conditions of the contract, Hooker & Co. agreed to accept $5,000 in cash in lieu of one-half cash, and the balance of the amount due it, amounting to $15,642.94, in bonds of the district at their par value, as payment in full for the said pipe line so laid, delivered, and accepted; and that on the day last mentioned the defendant irrigation district, by resolution of its board of directors, after finding that the said contract had been duly performed by Hooker & Co., and that there was due it $20,642.94, directed its president and secretary to issue to the said Hooker & Co. a warrant on its treasurer for the sum of $5,000, and authorized the delivery to that firm of $15,642.94 in bonds of the district at their par value, in payment of the contract price of the said pipe line so completed, delivered, and accepted. That in pursuance of the said resolution said warrant was drawn on the treasurer of the irrigation district, and delivered to Hooker & Co., and was thereafter paid on presentation, and pursuant to the same resolution the defendant irrigation district on the 27th day of June, 1892, delivered to the firm of J. D. Hooker & Co. bonds of the district at their par value amounting to $15,642.94.

(6) That the said money and bonds were paid by the defendant irrigation district and accepted by the said J. D. Hooker & Co. in payment and fulfillment of the said contract, and that the bonds so received are those referred to in the complaint in this case, and the coupons sued upon were annexed to those bonds. That subsequent to the delivery of the said bonds, and in the latter part of the year 1892, Hooker & Co. sold and delivered, for a valuable consideration, the said bonds to C. G. Hooker, who purchased the same in good faith, and who had no knowledge of any of the alleged defects or illegalities in the bonds or coupons so purchased, except such as every purchaser of the bonds of said district is chargeable with by virtue of the law relating to said district, and thereafter, and prior to the 1st day of July, 1901, said C. G. Hooker sold and transferred, for a valuable consideration, the coupons sued upon to R. G. Hooker and C. G. Hooker, who purchased the same in good faith, and neither of whom had any knowledge of any alleged defect or illegalities in said coupons, except such as every purchaser of the bonds of said district is chargeable with by virtue of the law relating to the district; and thereafter, and prior to the 1st day of July, 1901, said R. G. and C. G. Hooker sold and delivered the said coupons sued upon, for a valuable consideration, to the plaintiff to the present action, who purchased them in good faith, and who had no knowledge of any alleged defects or illegalities in said coupons, except such as every purchaser of the bonds of the district is chargeable with by virtue of the law relating to the district. That the coupons sued upon and other interest coupons were annexed to the said bonds at the time of the issuance and delivery thereof by the defendant to the said J. D. Hooker & Co., and passed with said bonds to each subsequent purchaser thereof.

(7) That at the time the said contract between the defendant irrigation district and the said J. D. Hooker & Co. was made and at the time the said bonds were executed and delivered to the said J. D. Hooker & Co. said W. R. McCully was, and ever since has been, secretary of the board of directors of the defendant district. That J. A. Van Arsdale immediately preceded said W. R. McCully as such secretary, and during the incumbency of said J. A. Van Arsdale as such secretary the defendant district caused all of the said bonds and the coupons for interest and installments of principal attached thereto to be lithographed, and caused the name of the then secretary, the said J. A. Van Arsdale, to be lithographed on the said coupons. That no names were lithographed on said bonds otherwise than on the coupons attached thereto, but places were left for the signatures of the president and secretary to be affixed when the bonds should be delivered to a purchaser or purchasers. That after the said bonds and coupons were lithographed the said J. A. Van Arsdale died, and the said W. R. McCully succeeded him as such secretary of the defendant irrigation district.

(8) That attached to said bonds when delivered to said J. D. Hooker & Co.

were 10 installment coupons in addition to said interest coupons, which, except as to the amount of the installment payable, the number of the coupon, and the date when the same would become due and payable, were in words and figures following, to wit:

"Installment Coupon.

"$25.00. No. 1.

"East Riverside Irrigation District will pay to the bearer at the office of the treasurer of said District, in the County of San Bernardino, State of California, on the 1st day of July, 1902, on surrender of this coupon, the sum of twenty-five dollars, in U. S. gold coin, being the 1st installment of principal on bond of said District. Interest will cease after maturity.

"No. 335. J. A. Van Arsdale, Secretary.

"Dated December 30th, 1890."

That the first of said installment coupons is for the sum of $25, and is payable on the 1st day of January [July?], 1902, and the others on the 1st day of January [July?] for the following 10 years, the installments of principal increasing in the amount of $5 each year.

R. Percy Wright and William F. Humphrey, for plaintiff in error.

Henry Goodcell, F. A. Leonard, and Charles R. Gray, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

The law is well settled that bona fide purchasers of municipal bonds take with notice of the law under which such bonds are issued. The plaintiff in error must therefore be held to have known of the provisions of the act called the "Wright Act" (St. Cal. 1887, pp. 35, 36, 44, c. 34), sections 15, 16, and 42 of which are as follows:

"Sec. 15. 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 this act, the board of directors of any such district must, as soon after such district has been organized as may be practicable, estimate and determine the amount of money necessary to be raised, and shall immediately thereupon call a special election, at which shall be submitted to the electors of such district possessing the qualifications prescribed by this act, the question whether or not the bonds of said district shall be issued in the amount so determined. Notice of such election must be given by posting notices in three public places in each election precinct in said district for at least twenty days, and also by publication of such notice in some newspaper published in the county, where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks. Such notices must specify the time of holding the election, the amount of bonds proposed to be issued, and said election must be held and the result thereof determined and declared, in all respects as nearly as practicable, in conformity with the provisions of this act governing the election of officers: provided, that no informalities in conducting such an election shall invalidate the same, if the election shall have been otherwise fairly conducted. At such election the ballots shall contain the words 'Bonds —Yes' or 'Bonds—No,' or words equivalent thereto. If a majority of the votes cast are 'Bonds—Yes,' the board of directors shall immediately cause bonds in said amount to be issued; said bonds shall be payable in gold coin of the United States, in installments as follows, to wit: At the expiration of eleven years not less than five per cent of said bonds; at the expiration of twelve years not less than six per cent; at the expiration of thirteen years not less than seven per cent; at the expiration of fourteen years not

less than eight per cent; at the expiration of fifteen years not less than nine per cent; at the expiration of sixteen years not less than ten per cent; at the expiration of seventeen years not less than eleven per cent; at the expiration of eighteen years not less than thirteen per cent; at the expiration of nineteen years not less than fifteen per cent; and for the twentieth year a percentage sufficient to pay off said bonds; and shall bear interest at the rate of six per cent per annum, payable semi-annually on the first day of January and July of each year. The principal and interest shall be payable at the office of the treasury of the district. Said bonds shall be each of the denomination of not less than one hundred dollars, nor more than five hundred dollars, shall be negotiable in form, signed by the president and secretary, and the seal of the board of directors shall be affixed thereto. They shall be numbered consecutively as issued, and bear date at the time of their issue. Coupons for the interest shall be attached to each bond signed by the secretary. Said bonds shall express on their face that they were issued by authority of this act, stating its title and date of approval. The secretary shall keep a record of the bonds sold, their number, the date of sale, the price received, and the name of the purchaser.

"Sec. 16. The board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous, to raise money for the construction of said canals and works, the acquisition of said property and rights, and otherwise to fully carry out the objects and purposes of the act. Before making any sale the board shall, at a meeting by resolution, declare its intention to sell a specified amount of the bonds, and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given, by publication thereof at least twenty days, in a daily newspaper published in each of the cities of San Francisco, Sacramento, and Los Angeles, and in any other newspaper, at their discretion. The notice shall state that sealed proposals will be received by the board, at their office, for the purchase of the bonds, till the day and hour named in the resolution. At the time appointed the board shall open the proposals, and award the purchase of the bonds to the highest responsible bidder, and may reject all bids; but said board shall in no event sell any of the said bonds for less than ninety per cent of the face value thereof."

"Sec. 42. The board of directors, or other officers of the district, shall have no power to incur any debt or liability whatever, either by issuing bonds, or otherwise, in excess of the express provisions of this act, and any debt or liability incurred, in excess of such express provisions, shall be and remain absolutely void."

If it be conceded that certain of the foregoing statutory provisions may be regarded as merely directory, such as that "the seal of the board of directors shall be affixed" to the bonds, that they "shall be numbered consecutively as issued," and that the coupons attached to the bonds shall be "signed by the secretary," still there is no ground whatever for holding that the signatures of the officers designated by the statute, and which it declares shall be affixed to the bonds which constitute the principal obligation, are not essential to their execution. And this is not only not disputed, but is virtually admitted, in the reply brief for the plaintiff in error. At all events, the decision of the Supreme Court in the case of Anthony v. County of Jasper, 101 U. S. 693, 25 L. Ed. 1005, is conclusive upon that proposition. That was an action upon interest coupons originally attached to bonds issued under the township aid act of Missouri (Wagner's St. p. 243a, c. 22a, art. 3), section 4 of which is as follows:

"Before any bond hereafter issued by any county, city, or incorporated town, for any purpose whatever, shall obtain validity, or be negotiated, such bond shall first be presented to the State Auditor, who shall register the

same in a book or books provided for that purpose in the same manner as the state bonds are now registered, and who shall certify by indorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the auditor. But such certificate shall be prima facie evidence only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving the contrary in any suit or proceedings to test or determine the validity of such bonds or the power of any county court, city, or town-council, or board of trustees, or other authority to issue such bonds, and the remedy by injunction shall also lie at the instance of any tax-payer of the respective county, city, or incorporated town to prevent the registration of any bonds alleged to be illegally issued or founded under any provision of this act."

On the 4th of June, 1872, the county court ordered that $50,000 of the bonds which had been voted should be issued, that the clerk have them registered according to law, and, when registered, that they be deposited in escrow with some responsible banker in St. Louis. John Purcell was the presiding justice of the court in March. He continued in office until September, 1872, when he resigned, and R. S. Merwin was appointed in his place October 21, 1872. The bonds there in question were sealed with the seal of the court, affixed by the clerk, and signed by Merwin, as presiding justice, and by the clerk, in October, 1872, but antedated as of March 28th. Merwin delivered them during the same month, with the first two coupons cut off, to the Union Savings Bank of St. Louis, for the use of Edward Burgess, a contractor for building the road. In November Burgess sold them to one Wilson at 55 cents on the dollar, and the bank gave them up to the purchaser on his order. Neither the other justice of the county court nor the court as a court consented to what was done by Merwin, and the railroad company never fully complied with the conditions of the vote authorizing the issue of the bonds. No registry of the bonds was ever made as required by the act of March 30, 1872, and they did not have upon them the certificate of registration. Anthony, the plaintiff below, was a purchaser for value of the bonds from which the coupons sued on were cut, and without any notice that they had been antedated, or were in any respect irregular or invalid. In affirming the judgment against Anthony the Supreme Court said:

"There can be no doubt that it is within the power of a state to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed, they create no legal liability. Other circumstances may exist which will give the holder of them an equitable right to recover from the municipality the money which they represent; but he cannot enforce the payment, or put them on the market as commercial paper. The act now in question is, we think, of this character. It, in effect, provides that no bond issued by counties, cities, or incorporated towns shall be valid—that is to say, completely executed—until it has been countersigned or certified in a particular way by the State Auditor. For this purpose, after being executed by the corporate authorities, it must be presented to that officer, and he must inquire and determine whether all the requirements of the law authorizing its issue have been observed, and whether all the conditions of the contract in consideration of which it was to be put out have been complied with. To enable him to do this, evidence must be submitted, which he is required to file and preserve. If he is satisfied, the registry is made, and the requisite certificate indorsed on the bonds. This be-

ing done, the execution of the bond is complete, and, under the law, it may then be negotiated; that is to say, put on the market as valid commercial paper. When the certificate is found on the bond, the purchaser need not inquire whether what has been certified to is true. As against a bona fide holder, the public is bound by what its authorized agents have done and stated in the prescribed form. Dealers in municipal bonds are charged with notice of the laws of the state granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality, the bona fide holder is protected against mere irregularities in the manner of its execution; but, if there is a want of power, no legal liability can be created. When the bonds now in question were put out, the law required that, to be valid, they must be certified to by the Auditor of State. In other words, that officer was to certify them before their execution was complete, so as to bind the public for their payment. We had occasion to consider in McGarrahan v. Mining Company, 96 U. S. 316, 24 L. Ed. 630, the effect of statutory requirements as to the form of the execution of patents to pass the title of lands out of the United States, and there say: 'Each and every one of the integral parts of the execution is essential to the validity of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires.' The same rule applies here. The object to be accomplished is the complete execution of a valid instrument, such as the law authorizes public officers to put out and bind for the payment of money the public organization they represent. For this purpose the law has provided that the instrument must not only be signed and sealed on behalf of the county court of the county, but it must be certified to or countersigned by the Auditor of State. Of this law all who deal in the bonds are bound to take notice. In order to recover in this case it became necessary for the plaintiff to prove that the bonds from which the coupons sued on were cut had been executed according to law. He did prove that they were signed by the presiding justice and clerk of the court, and were sealed with the seal of the court. This, before the act of March 30, 1872, would have been enough; but after that more was necessary. The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted; and he cannot bind his principal under powers that have been taken away by simply antedating his contracts. Under such circumstances a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. After the power of an agent of a private person has been revoked, he cannot bind his principal by simply dating back what he does. A retiring partner, after due notice of dissolution, cannot charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder, by giving it a date within the period of the existence of the partnership. Antedating under such circumstances partakes of the character of a forgery, and is always open to inquiry, no matter who relies on it. The question is one of the authority of him who attempts to bind another. Every person who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. In Bayley v. Taber, 5 Mass. 286, 4 Am. Dec. 57, it was held that, when a statute provided that promissory notes of a certain kind, made or issued after a certain day, should be utterly void, evidence was admissible on behalf of the makers to prove that the notes were issued after that day, although they bore a previous date. It matters not that when the bonds were voted the registration law was not in force. Before they were issued it had gone into effect. It did not change in any way the contract with the railroad company. The company was just as much entitled to its bonds when it complied with the conditions under which they were voted after the law as it could have been before. All the Legislature attempted to do was to provide what should be a good bond when issued.

There was nothing changed but the form of the execution. Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it. This plaintiff is charged with notice of the fact that Merwin was not the presiding justice of the county court until October, 1872, and that he could not have signed the bonds in his official capacity until that time. Had he signed them in March, he could not have bound the township for their payment. This is equivalent to notice that they were not in fact issued before March 30th, and that, consequently, they were not valid, because not certified by the Auditor of State."

Accepting the contention of the plaintiff in error as correct, and treating the bonds to which the coupons sued upon in the present case were originally attached as having been issued the day they bear date, to wit, December 30, 1890—the day they were directed to be issued by the board of directors of the district—the difficulty in the way of sustaining them is that they were not signed by the then secretary, who was Van Arsdale. His lithographed signature was affixed to the coupons attached to the bonds, but he never signed the bonds, which, as has been said, was the principal obligation, and which the statute declares should be signed by the president and secretary of the board of directors of the district. The bonds in question were subsequently, and nearly two years after December 30, 1890, signed by McCully, as secretary, who had then succeeded Van Arsdale in that capacity; and with McCully's signature affixed to the bonds and Van Arsdale's lithographed signature affixed to the coupons attached thereto they were disposed of for value. Each bond, with the annexed coupons, constituted but one instrument; the bond being the principal obligation and the coupons merely incidental. City of Kenosha v. Lamson, 9 Wall. 477, 19 L. Ed. 725. As was said by the court below, both Van Arsdale and McCully could not be secretary at one and the same time, and each bond therefore showed upon its face that there was something wrong about it. As said by the Supreme Court in the case of Anthony v. County of Jasper, supra:

"Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it."

Proper inquiry by the purchaser would have disclosed to him that McCully was not the secretary of the board of directors on December 30, 1890; and therefore, treating the bonds in question as having been then issued, as is contended by the plaintiff in error should be done, they were void and of no effect, because not signed by the secretary, as required by section 15 of the Wright act. On the other hand, treating the bonds as having been issued at the time of their disposal, and when McCully was in fact secretary, they equally failed to conform to those other essential provisions of the statute declaring that they shall bear date at the time of their issue, and be payable in installments at the various times therein fixed. In that view they are antedated, the direct and necessary effect of which is to make them payable within a shorter time than is pro-

vided by the statute for their payment, which provision is, as a matter of course, of the essence of the law, and not a matter of mere form. In either event, and in both cases, the purchaser was apprised by the face of the bond itself and the law under which it purported to be issued of its invalidity.

The judgment is affirmed.

GILBERT, Circuit Judge (dissenting). The defects which are relied upon as rendering the bonds void are three. That which is principally urged is that they were not issued on the day they bore date, to wit, December 30, 1890, nor for more than one year thereafter, and did not bear date as at the time of their issuance. The statute provided as follows: "If a majority of the votes cast are 'Bonds—Yes,' the board of directors shall immediately cause bonds in such amount to be issued." It is admitted by counsel for the defendant in error that the word "issued" is in similar statutes used in two distinct senses; and this is undoubtedly true. Bonds are sometimes said to be issued when they are merely authorized. Again, they are said to be issued when they are actually executed and delivered for value. The word "issued" is used in the former sense in the statute above quoted. This is made clear by the language which follows:

"They shall be numbered as issued, and bear date at the time of their issue. * * * The board may sell said bonds from time to time in such quantities as may be necessary and most advantageous, to raise money for the construction of said canals and works, the acquisition of such property and rights, and otherwise to fully carry out the objects and purposes of the act."

It thus appears that there was no limit placed by law on the time when the bonds might be sold and delivered. They could lawfully be sold and delivered, as they were in this case, 18 months after the time when they were authorized. The issue of bonds referred to in the statute clearly means the authorization of the bonds, their preparation, and the date thereof from which they were to begin to run. It is not reasonable to hold that the power to execute the bonds expired during the period in which they might be sold. It was no violation of the statute to sign and seal them on the day when they were sold and delivered. At that time the contract was made, but made subject to the provision that the bonds should begin to run from December 30, 1890, the date when they were authorized. The law was therefore complied with. The bonds were issued and dated in the sense which the statute contemplated; that is, they were lithographed and were dated December 30, 1890. At that date, however, no obligation was assumed. The bonds were of no more effect than blank paper until they were sold and delivered and became a binding obligation upon the district. At that time they were signed and sealed. They were signed by the then president and secretary of the district, the officers who alone had the authority to execute them. The case of Coler v. Cleburne, 131 U. S. 162, 9 Sup. Ct. 720, 33 L. Ed. 146, is directly in point. In that case the ordinance authorizing the bonds was adopted September

13, 1883. The bonds on their face purported to have been executed on January 1, 1884. They were in fact executed on July 3, 1884, and were signed by the former mayor, who was such officer on January 1, 1884, but whose term had expired before July 3, 1884. Mr. Justice Blatchford, speaking for the court, said of those bonds, "They could not be issued until they were properly signed by a person who was the mayor at the time they were signed," and the bonds were held void, for the reason that they were not signed by the mayor who held that office on the date when they were actually executed. There are numerous cases holding that bonds executed at a date subsequent to the time when they are authorized may be executed by the officers who are at that time the proper officers to execute the same, and may be antedated as of the time when they were authorized to be issued. In the case of Marion County v. Clark, 94 U. S. 278, 24 L. Ed. 59, the court sustained bonds which bore date of September 3, 1872, but were not executed and delivered until November 4th following. In Morrill v. Smith County (Tex. Civ. App.) 33 S. W. 899, the right to issue the bonds became fixed on May 13, 1873. They were not executed until October 2, 1873. The court said:

"The right to have the bonds issued having become perfect on May 13th, we do not think it affects their validity to have antedated them after that date, or to have them run to maturity in twenty years after that time."

In State v. Moore, 46 Neb. 590, 65 N. W. 193, 50 Am. St. Rep. 626, the proposition submitted to the electors was the issuance of bonds to be dated January 2, 1895, and to run for 20 years from the date thereof. The bonds bore date January 2, 1895, but they were not executed until April, 1895. It was held that the fact that they were so antedated did not invalidate them. In Yesler v. Seattle, 1 Wash. 308, 25 Pac. 1014, the statute required that the bonds "bear the date of their issue," to run for 20 years. The bonds were prepared as of the date July 1, 1890. They were not delivered for many months thereafter. The court said:

"'Date of issue,' when applied to notes, bonds, etc., of a series, ordinarily means the arbitrary date fixed as the beginning of the term for which they run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery. * * * It was a fair contract. There can be no wrong done if the term of some of the bonds in the hands of the purchasers is something less than twenty years."

In Syracuse Township v. Rollins, 104 Fed. 958, 44 C. C. A. 277, the authorized bonds were to run 10 years. They bore date June 1, 1887. They were executed July 20, 1887, and made payable July 1, 1897. The court said of these bonds:

"They matured in a little less than ten years from the date of their issue, which is the date from which to compute the time they had to run. They became binding obligations on the township from the date of the issue only."

In Town Council of Lexington v. Union National Bank (Miss.) 22 South. 291, the legislative act authorized the city of Lexington to issue 20-year bonds to bear date May 1, 1884. The court said:

"The bonds were lithographed as of date May 1, 1884, according to the terms of the act. But, not being delivered until November 7, 1884, the offi-

cers issuing them inserted the true date, which in no way affected the obligations of Lexington, the rights of any party, nor in any way violated the spirit or direction of the act."

In Town of Solon v. Williamsburgh, 35 Hun, 1, the town commissioners were authorized to deliver bonds from time to time, as might be agreed upon between them, to the railroad company. The bonds were issued and dated September 1, 1870, and made payable 30 years from that date. Some were not delivered until two years thereafter. The court said:

"It was not intended that they should be dated at the time of their delivery. Such a construction would require the bonds to be payable at different dates."

The case of Anthony v. County of Jasper, 101 U. S. 693, 25 L. Ed. 1005, cited by the defendant in error as authority against the construction of the act contended for by the plaintiff in error, is, I submit, an authority in its support. In that case it appeared that it was ordered on June 4, 1872, that bonds should issue. In October, 1872, the bonds were issued and signed, but they were dated back as of March 28, 1872. The court said:

"In order to recover in this case, it became necessary for the plaintiff to prove that the bonds from which the coupons sued on were cut had been executed according to law. He did prove that they were signed by the presiding justice and clerk of the court, and were sealed with the seal of the court. This, before the act of March 30, 1872, would have been enough, but after that more was necessary."

And the court held that the bonds were void for the reason that they were antedated for the purpose of avoiding the act of March 30, 1872, which required their certification by the State Auditor. But the clear intimation of the decision is that, if there had been no wrongful purpose in antedating the bonds, they would have been held valid, for the court said of the method of their execution and the antedating, "This, before the act of March 30, 1872, would have been enough."

Again, it is said that the bonds are void for the reason that the first installment of the principal of each bond is to be paid January 1, 1902, and each succeeding installment on January 1st of each succeeding year, and thereby the time of payment is extended from the date of the bonds, which was December 3, 1890, in excess of the time provided by the statute. The contention is, in other words, that, because the bonds were payable in 30 years and 2 days from their date, they are void. Such a contention is directly against the uniform current of authority. In Township of Rock Creek v. Strong, 96 U. S. 271, 24 L. Ed. 815, the act authorized the issuance of bonds payable in not less than 5 nor more than 30 years. The bonds issued were dated September 10, 1872, and were made payable 30 years from October 17, 1872. The court said, "They were thus practically thirty-year bonds." In Dows v. Town of Elmwood (C. C.) 34 Fed. 114, the bonds were dated April 27, 1869, and were issued and delivered on that day. By their terms they ran 30 years from July 1, 1869, and drew interest from that date. The court held that they were issued in substantial com-

pliance with the law, which declared that they should run for 20 years. In South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449, 31 C. C. A. 585, it was urged that the bonds in question did not mature for more than 30 years after they were executed. The court said:

"The fact is, however, that the bonds did not begin to bear interest until June 1, 1894, and they were payable on that day thirty years after. This was a substantial compliance with the law."

In that case the bonds were executed on May 29, 1891. Substantially to the same effect are the cases of Flagg et al. v. City of Palmyra, 33 Mo. 440, and Board of Commissioners v. Vandriss, 115 Fed. 866, 53 C. C. A. 192. The bonds in the present case, it may be observed, do not call for the payment of interest for any period whatever in excess of 30 years.

The third defense is that each of the installment coupons and interest coupons bore the lithographed signature of J. A. Van Arsdale, secretary, and were not otherwise signed, and that at the time of the execution of the bonds on June 27, 1892, said Van Arsdale was not the secretary of the defendant in error. As to the installment coupons, it is a sufficient answer to this objection to say that the statute did not authorize or contemplate the execution of such coupons, and the fact that they were issued cannot in any way affect the questions involved on the present hearing. As to the interest coupons, the statute provided as follows: "Coupons for the interest shall be attached to each bond, signed by the secretary." The bonds themselves contain all the terms of the contract, including a specification of the rate of interest and the times of the payment thereof. The purpose of attaching interest coupons is thus stated in City of Kenosha v. Lamson, 9 Wall. 477, 19 L. Ed. 725:

"The coupon is not an independent instrument, like a promissory note for a sum of money, but is given for interest thereafter to become due upon the bond, which interest is parcel of the bond, and partakes of its nature. * * * The coupon is simply a mode agreed upon between the parties for the convenience of the holder in collecting the interest as it becomes due."

In Blair v. Cumming County, 111 U. S. 363, 368, 4 Sup. Ct. 449, 452, 28 L. Ed. 457, the court said:

"It was not necessary that all the commissioners should sign the bonds. What was done was not an issuing of the bonds by the chairman and clerk. The coupons, in the form in which they were issued, annexed to the bond, were adopted as coupons by the statement in the body of the bond; and the question as to any one of them, when detached, is only one of genuineness and identity."

In McCoy v. Washington County, 3 Wall. Jr. 381, Fed. Cas. No. 8,731, Mr. Justice Grier said:

"If the commissioners had power to bind the county for the payment of the principal and interest of a bond transferable by delivery, the coupons which are appended to them are the appointed evidence of the agreement of the parties, to show who is entitled, as holder of the bond, to receive the interest due at a particular date. They are attached to the bonds for the convenience of the officers of the county, and to facilitate their negotiation, and thereby add to their commercial value. The obligation to pay the interest is to be found in the bond, not in the coupon."

In Thayer v. Montgomery County, 3 Dill. 389, Fed. Cas. No. 13,870, Miller, Circuit Justice, said:

"The bond itself being duly signed by the officers of the county, and the coupons being part of the bond, it is no defense to the coupons that they are not signed by the chairman of the board as well as by the clerk."

Of similar import is Phelps v. Town of Lewiston, 15 Blatchf. 131, Fed. Cas. No. 11,076. Taking it to be true, then, as stated in these decisions, that the obligation of the defendant in error is to be found in the bonds, and that the question of the signatures to the coupons is only one of "genuineness and identity," it would seem that no difficulty should be encountered in reaching the conclusion that the lithographed signature of J. A. Van Arsdale, secretary, having been adopted by the officers who executed the bonds at the time when they were delivered, constitutes a sufficient compliance with the directory provision of the statute that the coupons be signed by the secretary. In Weyauwega v. Ayling, 99 U. S. 112, 25 L. Ed. 470, bonds bearing date June 1st, and purporting to be signed by the chairman of the board of supervisors and by the town clerk, were shown not to have been signed by the person signing as town clerk until July 13th, at which time he had ceased to be clerk. The court held the bonds good, on the presumption that they had been delivered with the consent of the clerk then in office. If that presumption could avail in aid of the execution of bonds, it certainly should apply to the execution of coupons, which are but an incident to the bonds.

I submit that the judgment of the Circuit Court should be reversed.

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## ILLINOIS CENT. R. CO. v. MISSISSIPPI RAILROAD COMMISSION et al.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1905.)

No. 1,395.

1. FEDERAL COURTS — JURISDICTION—UNITED STATES CONSTITUTION—SUITS AGAINST STATE—INTERSTATE COMMERCE.
   Const. U. S. Amend. 11, prohibiting the bringing of a suit against a state by a citizen of another state, cannot be construed to nullify the power conferred on Congress to regulate the commerce among the several states, nor prevent an action to restrain a state railroad commission from enforcing an order injuriously affecting interstate commerce.

2. SAME—INJUNCTION.
   It having been held by the Supreme Court of Mississippi that the Mississippi Railroad Commission was merely an administrative agency exercising quasi judicial powers, and that its findings were only prima facie evidence that its decision was proper, such commission was not a court within Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], providing that an injunction shall not be granted by any federal court to stay proceedings in any court of a state.

3. SAME—INTERSTATE TRAINS—STATE REGULATIONS—ORDERS TO STOP.
   Where complainant railroad company supplied a county seat with three south-bound trains per day, and the only objection thereto was that the equipment and time thereof was unsatisfactory, the State Railroad Commission had no power to order complainant to cause two of its fast south-bound trains, operated mainly for the transportation of interstate

through business on a fast schedule in order to comply with the United States mail contract and to make close connections at destination with other roads, to stop at such station under Code Miss. 1892, §§ 3550, 4302, empowering such commission to require all passenger trains to stop for passengers at all county seats, etc.

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

In April, 1903, 68 citizens of the town of Magnolia, the county seat of Pike county, Miss., presented a petition to the Mississippi Railroad Commission, as follows:

"We, the undersigned citizens of the town of Magnolia, respectfully petition your honorable body to issue an order making Magnolia a regular stop for passenger trains one, three, and four. Magnolia being one of the most progressive towns in the state, and the county site of this county, we believe that we are entitled to have these trains to make regular stops here. We believe it will be for the best interest of the public, as well as for our town, that your honorable body issue an order requiring the above passenger trains one, three, and four to make regular stops here."

By order of the commission, notice was given O. M. Dunn, assistant general superintendent of the Illinois Central Railroad Company. The petition coming on to be heard April 21, 1903, the commission ordered that "the prayer of petitioners be granted in part, as follows, to wit, that trains 1 and 3 be required to stop on flag, to be effective on and after the 1st day of May, 1903; and, in so far as the petition refers to No. 4, it is denied." The Railroad Commission acted under authority conferred on it by sections 3550 and 4302 of the Code of Mississippi (1892):

"3550. To Stop All Passenger Trains, if, etc., at County Seats.—Every railroad shall cause each and all of its passenger-trains to stop for passengers at all county seats at which it has a depot, at the discretion of the railroad commission."

"4302. Necessary Depots to be Maintained.—Every railroad shall establish and maintain such depots as shall be reasonably necessary for the public convenience, and shall stop such of the passenger and freight trains at any depot as the business and public convenience shall require; and the commission may cause all passenger-trains to permit passengers to get on and off in a city at any place other than at the depot, where it is for the convenience of the traveling public. And it shall be unlawful for any railroad to abolish or disuse any depot when once established, or to fail to keep up the same and to regularly stop the trains thereat, without the consent of the commission."

On May 6, 1903, the appellant, complainant below, filed its bill against the appellees, defendants below, seeking to enjoin the enforcement of the foregoing order of the Railroad Commission. The bill shows that: "The complainant is a corporation of the state of Illinois, and the defendants, the president and members of the Mississippi Railroad Commission, are citizens of the state of Mississippi. That complainant is operating an interstate line of railroad extending from the city of New Orleans, in the state of Louisiana, on the south, north through the said state of Louisiana and the state of Mississippi and the states of Kentucky and Tennessee and Indiana and Illinois, to the Great Lakes of the Northwest, connecting at various points with other interstate lines of railroads. That the line of railroad operated by it has been established by the Congress of the United States, and is now a national highway for the accommodation of interstate commerce and the mails of the United States, and has been recognized and promoted as such, as will appear by reference to an act of Congress of September 20, 1850, c. 61 (9 Stat. 466), granting a right of way and sections of land to the state of Illinois to aid in the construction of a railroad from the southern terminus of the Illinois and Michigan Canal to a point at or near the junction of the Mississippi and Ohio rivers, with branches to Chicago and Dubuque, to be and remain a public highway for the use of the government of the United States, free from all toll or other charges upon transportation of any property or troops of the United States, and on which mails of the United States

will at all times be transported; and in order to aid in the construction of said railroad made like grants to the states of Alabama and Mississippi, respectively, for the purpose of aiding in the construction of a railroad from the city of Mobile to a point at or near the mouth of the Ohio river; also by reference to an act of February 10th, 1850, of the state of Illinois, chartering the complainant under the name of the Illinois Central Railroad Company, and ceding to it the rights and lands granted to the state by the said act of Congress for the purpose of constructing and maintaining within the state such trunk lines and branches, describing the southern terminus as a point at the city of Cairo; and by reference to an act of Congress of June 15, 1866 (14 Stat. 66), entitled 'An act to facilitate commercial, postal, and military communication among the several states'; and also by reference to the acts of Congress of December 17, 1872 (17 Stat. 398, c. 4), and of February 14, 1883 (22 Stat. 414, c. 44). That heretofore the complainant leased from the Chicago, St. Louis & New Orleans Railroad Company a line of railroad extending from the south bank of the Ohio river opposite Cairo southward through the states of Kentucky, Tennessee, Mississippi, and Louisiana to the city of New Orleans, which said railroad had been previously formed by consolidations authorized by act of the Legislature of the several states mentioned, thus forming the line of interstate railroad heretofore mentioned. That, owing to the exigencies of its interstate business and the requirements of modern commerce and passenger transportation, as well as the freight and the United States mail, it has been from time to time required to shorten its schedules, and to maintain and operate certain fast through trains intended primarily and chiefly for the interstate transportation and interstate commerce. That two of its said trains doing its interstate business are two south-bound trains, one designated as train 'No. 1,' and one as train 'No. 3'; No. 1 being commonly known as the 'Fast Mail,' and No. 3 as the 'New Orleans and Chicago Limited.' That these two trains are run expressly for the purpose, as aforesaid, of carrying on an interstate business and for the transportation of the United States mail. That these two trains are run under special schedules for the purpose and of necessity to make close connections with other through trunk lines or railroad doing an interstate business connecting with complainant's line of railroad at New Orleans, in the state of Louisiana, and at Chicago, in the state of Illinois, and at various intermediate points. That in order to maintain the necessary schedules for the operation of these interstate trains it is impossible and wholly impracticable to stop at all stations, and, further, that these said trains, being south-bound trains, only stop regularly at junction points and all such points of importance in the state of Mississippi which are necessary and which justify said stops. That these trains each carry, in addition to interstate passengers and freights in the shape of express matter, the United States mail under a contract with the government of the United States, and that by virtue of this contract for carrying the United States mail complainant is compelled to maintain certain schedules in order to make certain and close connections with other important interstate lines, principally transcontinental lines and lines of railroad extending out of the United States. That in addition to the said fast through trains, it maintains certain other trains, which afford ample and all necessary and reasonable accommodations for all stations along its line. That the town of Magnolia is a town situated on the complainant's line in the state of Mississippi 98 miles north of the city of New Orleans, and is a place of about twelve hundred inhabitants, as shown by the recent census of the United States. That the following passenger trains south bound daily leave the town of Magnolia for the city of New Orleans, to wit: South: No. 5 leaves Magnolia 5:15 a. m., arrives N. O. 7:50 a. m.; No. 31 leaves Magnolia 6:00 a. m., arrives N. O. 9:35 a. m.; No. 23 leaves Magnolia 6:56 p. m., arrives N. O. 10:20 p. m. That No. 1 passes Magnolia 8:45 a. m., arrives N. O. 11:25 a. m.; No. 3 passes Magnolia 5:20 p. m., arrives N. O. 7:55 p. m. That compliance with said order will delay said trains Nos. 1 and 3, and imperil the ability of the complainants to comply with its contract with the United States mails, and embarrass its interstate traffic. That the said trains Nos. 1 and 3 make close connections with other lines of railroads at the city of New Orleans, and that the sched-

ules which are adopted for that purpose, and which are now maintained, are about as fast as can now be maintained under the present condition of complainant's roadbed and equipment. That under the contracts with the United States government for the carrying of mail it is subject to a penalty for failure to make connections with other lines of railroad to which the mails are to be delivered for further transportation. That on the 21st day of April, 1903, the Mississippi Railroad Commission promulgated an order requiring trains Nos. 1 and 3 to stop on flags at the said town of Magnolia. That in the issuance of this order the said Railroad Commission of the State of Mississippi were acting upon a supposed authority conferred upon it by certain statutes of the state of Mississippi giving to said Mississippi Railroad Commission the power, at its discretion, to cause all trains to stop at all county seats—Magnolia being the county seat. That your complainant protested against the issuing of the said order, and showed to the Railroad Commission that it furnished to the town of Magnolia all reasonable and necessary railroad facilities, and that the effect of this order would be to give to the town of Magnolia greater railroad facilities than are afforded by complainant to any other town in the state of Mississippi, including the city of Jackson, the capitol of the state, excepting only the town of McComb City, which, being a relay station on complainant's road, it is necessary for all trains to stop there to change the engine, and for fuel, water, etc. That the effect of said order would be to give to the town of Magnolia five daily trains to the city of New Orleans running within short intervals of each other. That by the statutory law of the state of Mississippi it is subject to the penalty of $50 for each and every time it fails to stop its said trains in obedience to the said order of the Railroad Commission above set forth. And that the said complainant would be compelled to comply with said order, or to be subject to a multitude of suits for penalties arising from each and every violation of said order, and the said defendants threaten by suit to enforce the observance of said order. That the order of the Railroad Commission of the State of Mississippi is a direct burden upon interstate commerce, and therefore a violation of and conflict with section 8 of article 1 of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several states; and, further, that said order is a direct and unnecessary interference with the speedy carriage of the mails of the United States." The bill concludes with a prayer for a temporary restraining order, a decree vacating the commission's order, for a permanent injunction, and for general relief.

On the hearing the court granted a temporary injunction as prayed for. The defendants answered the bill, denying that Magnolia has adequate accommodations for travel south, that the order is unreasonable, that it would embarrass complainant's interstate business or its mail contracts, that the order is a direct burden on interstate commerce or an unnecessary interference with the carriage of the mails. The answer also alleges that the Railroad Commission is a legally constitued tribunal, with full supervising jurisdiction of railroads; and that the order of the commission was legally made, and is valid and enforceable. And it is further alleged that this suit is one against the state, contrary to the eleventh amendment; that the Circuit Court has no jurisdiction to restrain orders of the commission; and that the injunction should be disallowed on the pleadings and proofs.

The complainant offered the evidence of two witnesses, by whom was proved the allegations of the bill as to the trains Nos. 1 and 3; that both trains were made up in Chicago, and run to New Orleans for the main purpose of carrying through passengers and the United States mail; that these trains made close connection with other lines of railway along the route, and with the Southern Pacific and other roads at New Orleans; that both were fast mail trains—as fast as they could be safely made; that it was necessary that they should be run as fast as possible to comply with contracts with the government to carry the mail, and to compete with other lines as carriers of passengers; that these trains stopped only at junction points and important places where there was considerable travel, and at least every 50 miles to get water for the engines. One witness said: "If we stopped our through trains at all stations between Jackson, Miss., and New Orleans,

of the size of Magnolia, we would make local trains of them. We would not only lose passenger business, but we would lose the mail contracts, and hurt the towns and country, too. If there were no through service, the people would go to the other lines, to our competitors, and avoid the road." It was shown that Magnolia was served by three passenger trains going south daily that left there and arrived in New Orleans at the times stated in the bill. The defendants examined three witnesses, by whom it was proved that trains 1 and 3 do not stop at Magnolia; that the accommodations on the three passenger trains that stop there daily were not good; that these trains were crowded by local travel, "workmen, dagos," and others; that the trains were not fast; that they stopped at all, or nearly all, stations; that they did not leave Magnolia at times convenient to the citizens, nor did they arrive at New Orleans at times as convenient at Nos. 1 and 3. The three witnesses testified to many circumstances showing the difficulty of getting tickets for through travel and getting baggage checked at Magnolia; that Magnolia has about 1,200 inhabitants, and "ships between 11,000 and 14,000 bales of cotton" and 5,000 to 6,000 tons of seed, and is a thriving and prosperous town, where there is much travel. It does not appear from the evidence that the trains that stop there going south are not sufficient for the travel, but the objection or complaint shown by the proof is that the trains are not well equipped, and that they leave at inconvenient times. For example, one witness said, "If a fellow is accustomed to getting up at seven, he didn't like to get up at five." Another said, when asked to give his reasons for wanting Nos. 1 and 3 to be required to stop: "In the winter season, especially, I am very busy, and always like to make as much time as possible. I do it on account of business and for the comfort there is in the travel. They are better trains than any other, and I think my business would be facilitated, and I think it would be to the general interest of the town to have them stop." There was no important conflict in the evidence on material points.

The court held the plaintiff not entitled to relief, dissolved the preliminary injunction, and dismissed the bill. The complainant brings the case here by appeal, and assigned that the court erred in dismissing the bill.

Edward Mayes (J. M. Dickinson, on the brief), for appellant.

Marcellus Green (William Williams, Atty. Gen., J. N. Flowers, Asst. Atty. Gen., and Garner Wynn Green, on the brief), for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

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

We are met at the threshold of the case with the proposition that this suit is forbidden by the eleventh amendment; that it is, in effect, a suit against a state by a citizen of another state. The Constitution, with its amendments, is construed as one instrument, and the eleventh amendment cannot be applied to nullify the power conferred on Congress to regulate commerce among the several states. It is not a barrier to judicial investigation to ascertain whether other provisions of the Constitution have been disregarded by state action. Prout v. Starr, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584; Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761.

It is also alleged in the answer that this court has no jurisdiction to enjoin the defendants, because of section 720 of the Revised Statutes [U. S. Comp. St. 1901, p. 581], which provides 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." The Railroad Com-

mission is not a court within the meaning of section 720. It has been held by the Supreme Court of Mississippi that the Railroad Commission of that state is only an administrative agency, which exercises quasi judicial powers, and its findings are only "prima facie evidence that such decision was right and proper." W. U. T. Co. v. Miss. R. R. Commission, 74 Miss. 80, 92, 21 South. 15.

The main question in the case relates to the validity of the order made by the Railroad Commission requiring the fast mail trains from Chicago to New Orleans to stop at Magnolia. In Cleveland, etc., Ry. v. Illinois, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868, the Supreme Court has collated and briefly commented on the cases showing the police power of the state over the vehicles of interstate commerce. The cases are quoted where state action is held valid which restricts and regulates common carriers, because "in none of these cases was it thought that the regulations were unreasonable, or operated in any just sense as a restriction upon interstate commerce." And another series of cases is quoted, in which the Supreme Court felt itself constrained to hold state statutes invalid as in conflict with the authority conferred on Congress to regulate commerce among the several states. These decisions show that, while the court fully recognizes the police power of the state as applicable to railroads, no unnecessary interference by state action with commerce among the states is permitted, and the paramount power of Congress is always kept in mind. The point decided in that case (Cleveland, etc., Ry. v. Illinois, supra) is that a state statute which required all regular passenger trains to stop at county seats was invalid as applied to an express train intended only for through passengers from St. Louis to New York, it appearing that the defendant company furnished four regular passenger trains daily that stopped at all county seats, and that they were sufficient to accommodate the travel. This case would unquestionably be controlling in the case at bar if the three passenger trains which stop at Magnolia going south are found to be sufficient on the evidence. As the Railroad Commission and the Circuit Court have made orders which indicate that they are not sufficient, and that the town of Magnolia should have five daily trains going south, we think it well to examine other questions.

The two sections of the Mississippi Code which we have quoted in the statement confer power on the Railroad Commission to (1) require all passenger trains to stop for passengers at all county seats; (2) to stop such of the passenger and freight trains at any depot as the business and public convenience shall require; (3) to stop trains for passengers to get on and off in a city at any place other than the depot, where it is for the convenience of the traveling public. In Cleveland, etc., Ry. Co. v. Illinois, supra, the state statute in question only required the trains to stop at "county seats," and Mr. Justice Brown observed:

"If such passenger trains may be compelled to stop at county seats, it is difficult to see why the Legislature may not compel them to stop at every station—a requirement which would be practically destructive of through travel where there were competing lines unhampered by such regulations."

It is clear that the Mississippi statutes may be so applied as to present the case suggested by this observation. If these statutes are valid when applied to trains made up and scheduled for rapid interstate travel, then a state Legislature has the power to prohibit such travel altogether. The exercise of the full power conferred by these statutes would paralyze the interstate road for the purposes of rapid travel from one end to the other, for it would be of no use to go fast in one state if delayed in another.

The Supreme Court, in the case just cited, repeats what it had theretofore held, that railways are bound primarily and adequately to provide for the accommodation of those to whom they are directly tributary, and who have granted to them their franchise, and contributed to their construction. The state unquestionably has ample power to require the complainant company to furnish adequate facilities and accommodations to the town of Magnolia. The citizens of Magnolia have not asked for such relief as could be granted them without interfering with the rights of others. They ask only to have trains Nos. 1 and 3 to stop. These trains were designed and scheduled for through travel, and to comply with government contracts to carry the mails from Chicago to New Orleans. If the statutes may be applied to stop through trains at Magnolia, they may be stopped at all stations in Mississippi. To require these trains to stop at all at Magnolia seems unnecessary and unreasonable. If the accommodations afforded are not adequate, why single out the through mail trains, and seek to convert them into local trains? Why not, under existing statutes, or statutes to be enacted, exert the police power of the state to improve the service by having better equipments on the three passenger trains now in use from Magnolia, and, if they are insufficient, by requiring other trains? The citizens of Magnolia are entitled to sufficient accommodations, and the state has the power to enforce the right; but when such right can be enforced otherwise it is unreasonable to do so by interfering with the rights of others equally entitled to the protection of the law.

We are of opinion that the order of the Railroad Commission is invalid, and that the complainant is entitled to relief. The decree of the Circuit Court is reversed, and the case remanded, with instructions to enter a decree for the complainant.

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## COPPER RIVER MIN. CO. v. McCLELLAN et al.

(Circuit Court of Appeals, Ninth Circuit. May 15, 1905.)

No. 1,091.

1. APPEAL—PROCEDURE—FILING PETITION AND ASSIGNMENT OF ERRORS.

Rule 11 of the Circuit Court of Appeals (31 C. C. A. cxlvi, 90 Fed. cxlvi), which requires a plaintiff in error or appellant to file with the court below his petition and assignment of errors, and provides that no writ of error or appeal shall be allowed until such assignment of errors shall have been filed, is sufficiently complied with when the order allowing an appeal and the petition and assignment of errors are filed in the court

below at the same time, the order of allowance being considered as taking effect on that date.

2. SAME—APPEALS FROM DISTRICT COURT OF ALASKA—ALLOWANCE BY CIRCUIT JUDGE.
A member of the Circuit Court of Appeals for the Ninth Circuit has power to allow an appeal from the District Court of Alaska, under the general rules governing such procedure, which are made applicable by the Code of Alaska, there being no provision of such Code inconsistent with such allowance.

3. SAME—GROUNDS FOR DISMISSAL—SUBSEQUENT JUDGMENTS ON SAME ISSUES.
The fact that, after entering a decree on the merits dismissing a bill, other suits in the same court, brought by the same complainant against some of the same defendants, and involving the same matters, were dismissed by the court on the ground that the issues had been determined in the prior suit, from which decrees no appeal was taken, does not prevent a review of the first decree on the merits by the appellate court.

4. SAME—MATTERS REVIEWABLE—RULING ON MOTION FOR CONTINUANCE.
A motion for continuance is addressed to the sound discretion of the court, and its action thereon is not reviewable unless there has been an abuse of discretion.
[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3837.]

5. CONTINUANCE—DENIAL OF MOTION—DISCRETION OF COURT.
The denial of a motion for continuance on the ground of absence of counsel and witnesses was not an abuse of discretion, where no satisfactory showing of diligence was made.
[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Continuance, §§ 51, 74–93.]

6. REFERENCE BY CONSENT—COMPELLING ELECTION—DURESS.
Where a motion for continuance made by complainant was overruled for insufficiency, it was not error for the court to give complainant its election to proceed to trial or consent to a reference, and a consent to a reference so given cannot be said to have been made under duress.

7. SAME—FORM OF TAKING TESTIMONY.
Under the Code of Alaska, an order of reference need not require that the witnesses who testify before the referee shall read over and subscribe their testimony.

8. SAME—WAIVER OF OBJECTION.
An objection to the form in which testimony is taken before a referee or commissioner is waived unless the testimony is objected to when offered in evidence.

9. SAME—EXTENSION OF TIME—TIME FOR MAKING APPLICATION.
If an order of reference to take the testimony in a cause does not give a party sufficient time, he should apply for an extension before the time given has expired; and where no such application is made it is not error for the court to refuse to receive further testimony offered on the hearing.

Ross, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Third Division of the District of Alaska.

The Chittyna Exploration Company, a corporation, the predecessor in interest of the appellant, the Copper River Mining Company, brought a suit against the appellees to declare a trust, and to enforce a conveyance of certain mining claims, and to obtain an injunction and the appointment of a receiver. The property in controversy is situated about 180 miles from Valdex, Alaska, and consists of 12 mining claims, known as the "Bonanza Mines," located between July 4 and August 26, 1900, and all recorded on October 5, 1900. The complaint, in substance, alleged that the appellees Warner, E. A. Gates, Kain, Smith, McClellan, Fitch, Amy, Sweeney, Hamlin,

H. T. Gates, Abercrombie, Birch, and Millard were partners under the name of the McClellan Prospecting Party; that the Chittyna Exploration Company purchased from McClellan, Millard, Fitch, Warner, H. T. Gates, and E. A. Gates the Nicolai mines, the consideration being 300 shares of the capital stock of that corporation; that B. F. Millard and G. M. Perine, acting for the Chittyna Exploration Company, made an agreement with McClellan, whereby the latter was to superintend work for said corporation in the year 1900, and prospect and locate claims and engage men to prospect and locate claims for it, for the sum of $125 per month, and the corporation agreed to purchase from McClellan supplies, tools, etc., belonging to him for $354.76, and five horses for the sum of $200 each; that this contract was ratified by a meeting of the board of directors of said corporation on March 23, 1900; that McClellan entered into the performance of the contract, hired men, procured provisions, tools, etc., and the said corporation paid for provisions and horses procured by him $14,074.77, and for assessment work and for exploring and prospecting and recording certificates of location in all $14,429.53; that during the year 1900 McClellan hired Warner, Kain, Smith, E. A. Gates, informed them of his agreement with said corporation, and they, in consideration of their wages, engaged to prospect and locate mines in Alaska on its behalf; that McClellan provided the men with tools, supplies, stores, etc., belonging to said corporation, and they did prospect and explore for said corporation, and while in its employment they discovered the 12 mines in question; that the locations thereon were made by the locators with and by means of money, tools, supplies, etc., furnished by the said corporation, and for its use and benefit; that George M. Perine and Clinton L. Walker were at the mines, and McClellan admitted to them that the mines belonged to the said corporation, and were located for its use and benefit; that McClellan, Kain, Smith, E. A. Gates, and Warner conspired with Fitch, Amy, Sweeney, Hamlin, and H. T. Gates to cheat and defraud the said corporation out of said mines; that all of said parties are copartners under the name of the McClellan Prospecting Party; that they conveyed to W. R. Abercrombie an undivided one-eleventh of said mine; that said Abercrombie had knowledge of the facts above alleged; that McClellan transferred one-half of his interest to B. F. Millard, and that said Millard had full knowledge of said facts above alleged; that prior to January, 1901, Kain sold and assigned to Stephen Birch three-tenths of his interest, and J. E. Hamlin about the same time sold and assigned to Birch all or a portion of his pretended interest, but prior thereto Birch had full knowledge of all the foregoing facts; that in the latter part of 1901 or the first part of 1902 McClellan, Fitch, Kain, Smith, E. A. Gates, Amy, Sweeney, Warner, Hamlin, H. T. Gates, and Birch agreed to sell to William De L. Benedict their pretended undivided ten-elevenths for the sum of $1,000,000; that Benedict had full knowledge of all the facts above alleged; that Benedict made a pretended sale or assignment to the Alaska Copper Company, and the latter took with full knowledge of the facts above alleged; that McClellan, Fitch, Kain, Smith, E. A. Gates, Amy, Sweeney, Warner, Hamlin, H. T. Gates, and Birch gave deeds in escrow of the said mines, and also executed an assignment of their pretended interest; that in March, 1902, the said corporation sent two men to Alaska to take possession of the Bonanza mines, but they were prevented from going on the property by threats; that the appellees are extracting valuable ore from the said mines; that all the appellees have actual and constructive knowledge, and have conspired to cheat and defraud the said corporation; that said mines are worth $2,000,000, and that the Alaska Copper Company is now working the same. The complaint was filed on August 11, 1902. On October 8, 1902, the appellees Fitch, Smith, E. A. Gates, Amy, Kain, Sweeney, Warner, Birch, the Alaska Copper Company, and the McClellan Prospecting Company filed their answer to the bill. On January 30, 1903, the appellees McClellan, H. T. Gates, and Benedict filed their answer. The two answers are identical, except that certain matters in the first answer, which were denied on information and belief, were in the second answer denied by McClellan upon his own knowledge. The answers denied that Abercrombie and Millard were ever members of the McClellan Prospecting Party. They alleged that Warner, E. A. Gates, Kain, Smith, McClellan, Fitch, Amy, Sweeney, Hamlin, and H. T. Gates in the month of

October, 1899, entered into an agreement to prospect and acquire mining property in Alaska for a period of two years from date, and did, under said agreement, in the year 1900, acquire mining properties in Alaska, including the 12 claims in controversy; that on October 8, 1900, they entered into a written agreement to the same effect as their verbal agreement; that on the same day they made an agreement with Abercrombie, giving him an equal share in the venture; that on March 23, 1901, Hamlin sold his interest to Birch, reserving a $^{3}/_{44}$ interest in the property already discovered. They admitted that McClellan entered into the employment of the Chittyna Exploration Company as superintendent of the assessment work on the Nicolai mines, but denied that he ever agreed to prospect or locate mines for it, or to hire men to do so. They denied that any of the mines located by the appellees were located for or belonged to said corporation, and alleged that at the time when the said corporation employed McClellan it had full knowledge of the McClellan Party, and knew that said party would prospect and acquire mining claims during the year 1900 for its own benefit, and understood that McClellan's contract was not to interfere with the McClellan Party; that during the summer of 1900, McClellan, acting for the said corporation, being short of supplies and horses, obtained from the McClellan Party the use of horses and a large amount of supplies, and agreed to return the provisions later in the season, or to pay the reasonable value of the same; that he did return the provisions, and paid for the use of the horses. They admitted that McClellan employed men to work on the Nicolai mines, and that he was paid a salary and the proper expenses and wages of his men. They denied that McClellan, in the year 1900, employed either Warner or Smith, and they admitted that he employed E. A. Gates and Kain, but they denied that the latter had any knowledge of the terms of McClellan's contract with the said corporation, or ever prospected or agreed to prospect for it. They alleged that Kain and E. A. Gates never did any prospecting or locating for themselves or for any one else while they were so employed. They denied that the 12 Bonanza claims were discovered or located by McClellan, E. A. Gates, or Kain, but alleged that they were discovered and located by Smith and Warner for the McClellan Party, while subsisting on their own supplies. They denied that McClellan admitted that the mines in controversy belonged to the said corporation. They denied the allegations of conspiracy and fraud. They admitted the conveyances to Abercrombie and to Millard, and the agreement with Benedict, but denied that they had knowledge of the facts alleged in the bill, or that they knew of or participated in any fraud. They admitted the transfer of said mines to the Alaska Copper Company, and alleged that the said company did the assessment work thereon for the year 1901. For an affirmative defense the answers alleged that the mines were discovered by Smith and Warner, and were duly located by them pursuant to the prospecting agreement made by the members of the McClellan Party in October, 1899, for and on behalf of said McClellan Party, and alleged continuance of possession thereof subject to the rights of the Alaska Copper Company, and that none of the appellees ever had any knowledge of any claim against their title until the commencement of the present suit. On February 2, 1903, the Chittyna Exploration Company replied to both answers. On February 9, 1903, B. F. Millard filed his answer to the bill. He prayed that he be adjudged to be entitled to the interest in the Bonanza group as alleged and admitted in the separate answer of McClellan. Millard was not served with the summons and complaint for the reason that the marshal was instructed by the complainant's attorney not to serve him, on the reason that Millard would accept service at any time when requested to do so. It appears from the record, and is not disputed, that Millard was in Alaska at the time of the commencement of the suit, and that he paid the marshal for serving the other defendants. The case was noticed for trial for the February term, and on February 6, 1903, the complainant moved to continue the case. On the merits of the motion affidavits were submitted on behalf of both the Chittyna Exploration Company and the appellees. On February 9th the motion for continuance was denied. On February 13th the Chittyna Exploration Company moved to vacate the order which had been made denying the continuance, and moved again for a postponement of the trial. Affi-

davits for and against this motion were filed. On February 14th, after argument of counsel and consideration of the affidavits, the motion was denied. On February 16, 1903, all the parties to the suit stipulated to refer the cause to a referee "to take testimony and report the same to the above-entitled court under the order of said court, with such restrictions and limitations as the court in said order may direct." On the same day the court, in pursuance of the stipulation, made an order referring the cause to Richard H. Geohegan to take testimony. The order recites: "And in order that all parties hereto may have opportunity to introduce all their evidence, the parties hereto may take further testimony only under the following limitations." The order proceeded to prescribe that the complainant in the bill was given until May 1st to take depositions without the District of Alaska. The appellees were given the month of May and the complainant from May 31st until July 11th to take depositions in rebuttal. All testimony was to be filed with the clerk of the court on or before September 2, 1903, in accordance with the order. Depositions were taken at Valdez, Alaska, Minneapolis, San Francisco, New York, and in the Philippine Islands. On November 2, 1903, the Copper River Mining Company, the appellant, having acquired the interest of the Chittyna Exploration Company, was substituted as complainant in the place of that company. On November 3, 1903, the appellant moved for permission to introduce further testimony. Affidavits were filed for and against the motion. After argument of counsel, the court denied the motion. The case was thereupon heard on its merits, and it was adjudged that the appellant had no interest in the mines in controversy, and its bill was dismissed. On November 30, 1903, the appellant moved for a new trial, basing its application on the grounds which it had urged as reasons for continuance. Opposing affidavits were filed, and on December 1st the motion was overruled.

W. B. Heyburn, Andrew F. Burleigh, and Volney T. Hoggatt, for appellant.

R. T. Harding and George C. Sargent, for appellees.

Frank D. Arthur and John A. Carson, for all appellees except Millard.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

The appellees moved to dismiss the appeal on several grounds, the first of which is that the assignment of error and the petition for appeal had not been filed in the court below before the same were presented to a judge of this court for the allowance of the appeal. It is true that rule 11 of this court (31 C. C. A. cxlvi, 90 Fed. cxlvi) requires that the plaintiff in error or the appellant shall file with the court below his petition and assignment of error, and that no writ of error or appeal shall be allowed until such assignments of error have been filed. But we think the rule may be said to be sufficiently complied with when the order of allowance, together with the petition and the assignments of error, are filed in the court below. They were all filed in this case on the same date, and that is the date upon which it may be said that the order of allowance took effect.

The second ground of the motion is that the appeal could only be allowed by the judge of the trial court, and that a judge of this court was without jurisdiction to make such an order. The Code of Alaska (31 Stat. 414, c. 51) provides that this court shall have

jurisdiction to review by writ of error or appeal the final judgments and orders of the court below, and it further provides:

"That all provisions of law now in force regulating the procedure and practice in cases brought by appeal or writ of error to the Supreme Court of the United States or to the United States Circuit Court of Appeals for the Ninth Circuit, except in so far as the same may be inconsistent with any provision of this act, shall regulate the procedure and practice in cases brought to the courts respectively from the District Court for the District of Alaska."

In Brown v. McConnell, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495, the court said:

"As appeals from territorial courts are to be taken in the same manner and under the same regulations as from the Circuit Courts (Rev. St. § 703 [U. S. Comp. St. 1901, p. 572]), it follows that citations on such appeals may be signed by a judge or justice of the territorial court or by a justice of this court."

We find nothing in the provisions of the Alaskan Code which is inconsistent with the application of the rule so announced to the present case. In Re McKenzie, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. Ed. 657, the Supreme Court recognized the jurisdiction of this court to allow an appeal in a case where the judge of the District Court of Alaska had refused its allowance, and thereby must have affirmed the doctrine of Brown v. McConnell, and held it applicable to appeals from Alaska. It may be added that the order of allowance of the present appeal was made upon information that Judge Wickersham was at that time not within the District of Alaska. It is now asserted by the appellees that such was not the case, and that Judge Wickersham was in Alaska at that date, and remained there until some time in September, when he left for the Eastern States. The fact of the matter is not presented to the court except by these diverse statements of counsel, but, whatever may have been the fact, we think that a member of this court had the power to make the order allowing the appeal.

The third ground of the motion is that the appeal does not bring up any question of real controversy now existing between the parties. It appears from the transcripts filed in support of the motion that at the time when the decree was rendered in the present case there were pending in the court below two other suits, instituted after the present suit was begun, by the appellant herein as complainant against the Alaska Copper Company as defendant, in which suits the appellant sought substantially the same relief as against the Alaska Copper Company that was sought to be obtained in the present suit. The other appellees were not made parties defendant in those two suits. It further appears that after the final decree was entered in the present case decrees were entered in the two subsequent suits dismissing the respective bills of complaint. No testimony whatever was taken in those suits. They came on to be heard upon a motion of the Alaska Copper Company for a judgment on the pleadings on account of the default of the appellant in failing to plead to the supplemental answer of that company. The appellant, by its counsel, announced in open court that it did not desire to plead to the supplemental answer. The

defendant offered in evidence the judgment roll in the present suit. The decree in each case recited "that all the issues * * * have been determined and decided by this court in that certain other cause" (referring to the present suit), and it was ordered that the suits be dismissed. It is contended that by virtue of such decrees dismissing the appellant's bills in the two subsequent causes, which decrees were rendered after the entry of the final decree in the present case, two valid decrees unappealed from remain of record, substantially adjudicating in favor of the Alaska Copper Company and against the appellant the whole question of the right and title of the appellant to the mines in controversy in this suit. We do not so regard the records in the three cases. The present suit was the one, and the only one, in which the rights of the parties were tried and determined. The decrees in the two subsequent suits were entered as mere matters of form, and were rendered solely by reason of, and depended upon, the adjudication made in the present case. This is the suit in which the rights of the parties litigant were determined, and, if the decree in this case were reversed, nothing would remain upon which the decrees in the other suits could stand as a final adjudication of the rights involved. The motion to dismiss is denied.

It is assigned as error that the trial court denied the appellant's motion for a continuance of the cause. A continuance is not a matter of right, but it rests in the sound judicial discretion of the trial court, whose ruling thereon is not subject to review in an appellate court unless there has been abuse of discretion. Drexell v. True, 74 Fed. 12, 20 C. C. A. 265; Deitz v. Lymer, 61 Fed. 792, 10 C. C. A. 71. The ground of the motion for continuance in this case was the absence of some of the appellant's witnesses and the absence of two of its associate counsel. The motion for a continuance was made on February 6, 1903. The suit had been commenced on August 11, 1902. Service of process had been made on September 8, 1902, on all the appellees residing in the District of Alaska. They answered on October 8th. All the other defendants in the suit except Abercrombie answered on January 30, 1903. The motion for a continuance was accompanied by the affidavit of George M. Perine. It was made by him on August 2, 1902, nine days before the suit was commenced. It stated no ground for a continuance. It merely set forth substantially the facts alleged in the bill. The motion, however, specified as grounds of continuance that the defendants McClellan, Hamlin, H. T. Gates, and Benedict had not been served with process, but had voluntarily answered on January 30, 1903, and that their answer was filed without notice to the appellant that the same would be filed, or that the said defendants would submit themselves to the jurisdiction of the court without service; that said answer cannot reasonably be replied to without first submitting the same to the officers of the appellant in San Francisco; that two of the principal attorneys of the appellant, Hon. W. B. Heyburn and E. L. Campbell, were in Idaho and San Francisco, respectively, and could not be brought to participate in the trial if had at that term of the court, and that said attorneys

did not know that McClellan, Hamlin, H. T. Gates, and Benedict had voluntarily answered; that their voluntary appearance had taken the appellant by surprise, and had found it unprepared for trial; that many of the appellant's material witnesses were without the District of Alaska, and the appellant could not safely go to trial in the absence of George M. Perine, a material witness. There was no affidavit of the truth of those facts so set forth in the motion. In opposition to the motion for a continuance the appellees filed the affidavit of one John F. Rice, who deposed that Major Abercrombie was the only appellee who had not answered; that the affiant had been chief clerk under Abercrombie in the construction of a military road from Valdez into the interior for three years preceding December, 1901, and that in that month Abercrombie was by the War Department transferred to Vancouver, Wash.; that he had not since returned to Alaska; and that all these facts were common knowledge known to all the residents of Valdez, Alaska. They filed also the affidavit of Stephen Birch, general manager of the Alaska Copper Company, who stated that, acting upon advice of counsel, that company, after the commencement of the suit, had taken depositions of its principal witnesses in New York City, at Seattle, at San Francisco, and at Florence, Ariz., and had secured the personal attendance of witnesses, had brought McClellan from Princeton, Minn., Smith from Phœnix, Ariz., Kain from Portland, Or., Warner from Seattle, Wash., Fitch from San Jose, Cal., and Amy from Stockton, Cal., and had procured the personal attendance of its general counsel, Frank D. Arthur, from New York, and its counsel W. H. Gorham from Seattle, and that in making these preparations for trial, it had expended over $9,000. The appellees filed also the affidavit of Fred M. Brown, their local attorney at Valdez, who stated that Millard, the vice president of the appellant, was in Valdez during the summer and fall of 1902, and had left for the States about December 7, 1902; that the affiant had, on or about the 1st of December, personally notified Mr. Hubbard, one of appellant's attorneys at Valdez, that the appellees would insist upon trial of the suit at that term; that Mr. Hubbard had told him that he had notified Mr. Campbell that the appellees would insist on the trial at the first term of the court; that at different times during December, 1902, and January, 1903, Mr. Hubbard had notified affiant that he had done all he could to notify the appellant and its officers and attorneys that the appellees would insist upon a trial as aforesaid; and that the appellees were going to large expense in bringing their witnesses and attorneys to Valdez. The appellant filed the counter affidavit of its attorney O. P. Hubbard, in which he stated that he was not familiar with the records and files of the appellant, the same being kept at its head office in San Francisco; that he believed that the appellant had receipts and vouchers and other instruments in writing to prove the allegations of the complaint; that Perine was a necessary and a material witness, whose personal attendance could not be secured at that term of the court; that Millard was a necessary witness, and had gone out of the District of Alaska. The affidavit made no showing of the testimony

that was expected of Millard further than that he had had conversations with some of the appellees. On February 9, 1903, the court denied the motion. We find in the record no sufficient ground for saying that in so doing the court abused judicial discretion. The affidavits in support of the motion for continuance failed to show diligence in procuring the attendance of the appellant's witnesses, nor was the absence of appellant's counsel, under the circumstances, necessarily a ground for a continuance. The appellant was represented by three of its attorneys at Valdez. Mr. Campbell had, according to the showing, been notified at San Francisco in December that the appellees would insist upon trial at the first term of the court. He had the opportunity to telegraph to Mr. Heyburn, in Idaho, at the time when he received his notice. On February 13, 1903, the appellant made a second motion for a continuance. The motion was supported by the affidavit of Volney T. Hoggatt, to which exhibits were attached, consisting of affidavits and copies of affidavits from others. One of the affidavits was that of a physician in Santa Clara, Cal., stating that Perine was a patient under his charge, "suffering from heart trouble, with constitutional disturbances," and that it would seriously impair his health and endanger his life to travel to Alaska at that time; but that, if Perine would follow his physician's treatment, and refrain from undue and unusual excitement, he might be cured of his illness in four or five months. Another affidavit was that of E. L. Campbell, who admitted that in November he had received notice that the appellees were taking depositions of their witnesses in Arizona, California, Washington, Oregon, and Minnesota; that it would be impossible for him (Campbell) to attend the trial on account of his professional business in France, England, and Mexico; "that the witnesses, by whom plaintiff will be able to establish the facts stated in its complaint, are widely scattered, and great difficulty has been experienced in locating such witnesses; that the plaintiff had used the utmost diligence during the months of December and January to obtain knowledge of the present residence of such witnesses, and has been unable to procure the depositions or attendance of some of said witnesses up to the present time." Another affidavit was that of Hon. W. H. Heyburn, in which he stated that it would be impossible for him to attend upon the trial during February or March, 1903, for the reason that on March 4th he was compelled to be in Washington as United States Senator from Idaho, and that in February he would be compelled to attend a term of this court in San Francisco. The appellant filed also the affidavit of James McCarthy, one of its stockholders. He deposed that he had spent Christmas in San Francisco with Perine, and that Perine had told him that the cause would probably be tried in February or March, 1903, and had asked him to ascertain the whereabouts of certain witnesses. The appellees filed counter affidavits, several of which it is not necessary now to review. One was that of George C. Sargent, an attorney of San Francisco, who stated that on January 22, 1903, he had called at Perine's office in San Francisco, and was informed that Perine was engaged in his private office; that two

days later he had conversed over the telephone with Perine on business. There were other affidavits tending to show that Perine was well on January 26th and 27th, and was traveling from place to place in Southern California on business. Upon the second application for a continuance, as upon the first, there was absence of showing of diligence, and we are unable to discover that there was abuse of discretion in the action of the court in denying the motion.

But if, indeed, the appellant was placed at a disadvantage on account of surprise, and the absence of its material witnesses, its rights, we think, were fully conserved by the order of the court made on the stipulation of the parties to refer the cause to a referee to take the testimony. The stipulation was that the cause be referred to a referee to take testimony and report the same to the court under an order of the court, "with such restrictions and limitations as the court in said order may direct." The court, on February 16, 1903, made an order requiring that the testimony be taken and filed on or before September 2, 1903. A large amount of testimony was taken, and it is embodied in the very voluminous record which is before us. Testimony was taken before the referee at Valdez beginning on February 19, 1903, and continuing until March 11, 1903. Depositions were taken in San Francisco, in Minneapolis, in New York, and in the Philippine Islands. On October 13, 1903, the appellees moved the court to fix a date for the final hearing. The appellant then applied to the court for leave to introduce further testimony. The court required that the application be submitted in writing, which was done. In support of the application the appellant filed the affidavit of Volney T. Hoggatt, and the appellees filed affidavits in opposition thereto. The case was then called for argument. The appellant declared that it had not closed its testimony; that it did not rest its case. The appellees claimed that the appellant had rested its case upon the testimony taken under the stipulation and the order of the court, and that the taking of its testimony had closed on July 11, 1903, under that order. The court ruled in accordance with the appellees' contention, and denied the application of the appellant to introduce additional oral testimony, and proceeded with the final hearing.

It is assigned as error that the court compelled the appellant to stipulate to take depositions on open commissions, and it is contended that the stipulation was not voluntary, but was made under duress. This contention is not sustained by the record. The bill of exceptions shows that, after the motion for a continuance had been overruled, the court stated that, unless the appellant agreed to a reference, the case would be set down for immediate trial, and that the appellant was given two days in which to consider which course it would pursue. It chose to agree to the order of reference. There was no duress in this. Having failed to satisfy the court with the merit of its motion for a continuance, it was permitted to exercise its option between proceeding to trial at that term or consenting to take the testimony as suggested by the court. It exercised its own free choice in the matter. Having taken the benefit of the order of the court and submitted its testimony thereun-

der, it is in no attitude to assert that the court erred in the premises.

It is urged that the order of reference was illegal, for the reason that it did not require that the witnesses who were produced before the referee should read over and subscribe their testimony. There is no provision in the Alaska Code requiring that witnesses who are examined before a referee on such an order shall sign their testimony. Carter's Code of Alaska, p. 293, § 724, and the statutes of Oregon in force in Alaska before the Code, expressly permitted such an order of reference (section 827, B & C. Comp. Or.). But if there was error of the court in omitting to insert in the order a requirement of that nature, the appellant should thereafter have objected to the introduction of the evidence. As it was, the appellant, although it objected to the form of the order, took its testimony thereunder, and, so far as the record shows, made no further objection on the ground of the alleged defect of the order. If insufficient time to take all the evidence was allowed by the order of the court, it was the duty of the appellant to move for further time before the expiration of the time fixed in the order. It made no such application until more than two months after the expiration of the time.

It is assigned as error that the court, upon the evidence in the case, found in favor of the appellees on the merits of the controversy, and dismissed the bill. After a careful consideration of the evidence which is before us, and which we find it unnecessary to review at length, we think that the conclusion which was reached by the trial court as sustained by the very decided weight of the testimony.

The decree of the District Court is affirmed.

ROSS, Circuit Judge (dissenting). I am unable to agree to the judgment in this case. It appears from the record that the court below refused to hear the testimony of certain witnesses produced by the complainant on the trial, for the reason that the time fixed by the court for the taking of the evidence in the case in its order of reference had expired. That order of reference, it appears from the record, was based upon a so-called stipulation of the parties, which, in my judgment, cannot be properly regarded as a voluntary one. It appears that the cause only came to issue on the 9th day of February, 1903. It involved controverted questions of fact upon which, as the record shows, a large amount of testimony was taken; the record comprising eight large volumes of printed matter. It seems to me that each party to such a suit is legally entitled to a reasonable time after issue joined within which to prepare for trial. Yet the record contains this bill of exceptions:

"On February 14, 1903 [only five days after the case had come to issue], this cause coming on for hearing after application [for] continuance had been overruled, over objections and exceptions of plaintiff the court announced in open court that the case would be referred for the purpose of taking the testimony, and attorneys for plaintiff objected to such reference; whereupon the court stated that, if plaintiff did not agree to such reference, that the case would be set down for immediate trial; and the hearing was then continued till the 16th of February, at 10 o'clock a. m., at which time the attorneys for plaintiff signed an agreement to refer the case, for the reason they were compelled so to do or at once go to trial. The above and foregoing bill

of exceptions is allowed the 16th day of February, 1903. James Wickersham, District Judge."

It was upon that so-called stipulation that the order of reference was based, which was held by the court below to preclude the complainant from introducing testimony of witnesses that it produced in court at the time of trial. I am unable to regard the so-called stipulation as a voluntary one, or to give my sanction to such proceedings. I therefore respectfully dissent from the judgment given here.

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## GRAY v. GRAND FORKS MERCANTILE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1905.)

No. 2,032.

1. BANKRUPTCY—APPEAL FROM ALLOWANCE OF CLAIMS—PARTIES—TRUSTEE.
   On an appeal by a trustee in bankruptcy from a judgment of the bankrupt court allowing claims for expenses and costs of administration, the question whether the judgment shall stand or be reversed is of such direct interest to those whose claims are sustained by it that no determination thereof can be had without affording them an opportunity to be heard in defense of the judgment. On such an appeal the trustee represents the general creditors of the estate, and not those the allowance of whose claims is challenged by him.

2. SAME—ALIAS CITATION.
   Where an appeal to which necessary parties are omitted is seasonably docketed, but no application for the issuance of an alias citation to them is made before the expiration of the first term at which the case can be heard, the appeal becomes inoperative, in so far as it challenges rights of the omitted parties.

3. SAME—AMOUNT IN CONTROVERSY.
   Bankr. Act July 1, 1898, c. 541, par. 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], declares that appeals as in equity cases may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals from a judgment "allowing or rejecting a debt or claim of five hundred dollars or over." *Held*, that the restriction plainly has reference to the amount, not of the original claim, but of the allowance or rejection, and therefore to the amount which will be put in controversy by the appeal.

Appeal from the District Court of the United States for the District of North Dakota.

The appellant is the trustee, and the appellees are creditors, of the estate of one O. H. Johnson, who was adjudged a bankrupt on his voluntary petition. In his final report and account the trustee claimed credit for three items of $56.80, $9.75, and $2.50, paid to C. J. Murphy, C. E. McNamara, and Alice Blair, respectively, for legal and stenographic services rendered at the instance of the trustee in connection with objections made by him to the bankrupt's application for a discharge. In his final report and account the trustee also reported that, among others, there were "unpaid bills against said estate" as follows: Alice Blair, reporting testimony in connection with the hearing upon the bankrupt's application for a discharge, $5. John Lynch, clerk of court, fees connected with that hearing, $15; W. J. Carroll, sheriff, expenses incurred in an attachment of the goods of the bankrupt prior to the filing of the petition in bankruptcy, $143.40; George F. Porter, services as attorney for the trustee, $500; A. W. Gray, the trustee, expenses incurred and special services rendered in the administration of the estate, $272.22. The appellees, as general creditors, objected to the claim of the trustee's

attorney, Porter, as excessive, and to the trustee's claim for special services as without foundation in fact and without authority in law. Other creditors, not parties to this appeal, objected to the items shown to have been paid to Murphy, McNamara, and Blair, and to the unpaid claims of Blair and Lynch, as not proper charges against the estate, and to the unpaid claim of Carroll as excessive, and not a preferred claim. Upon the hearing had upon these objections the referee made an order approving the payments made to Murphy, McNamara, and Blair, directing the payment of the unpaid claims of Blair, Lynch, and Carroll, allowing $75 for Porter's services and disallowing the balance of his claim, and allowing $122.22 to the trustee for traveling and other expenses incurred by him and disallowing his claim for special services amounting to $150. The trustee, Porter, and some of the creditors excepted to the order of the referee, and upon their petition the referee certified to the District Court the questions presented in respect of each of these claims, together with the evidence and his findings and order. In the District Court a decree was entered sustaining the action of the referee, and to obtain a reversal of that decree the present appeal was taken by the trustee within 10 days thereafter. The assignments of error challenge the allowance of the claims of Murphy, McNamara, Blair, Lynch, and Carroll, and the partial disallowance of the claims of Porter and the trustee. The appellant asks that the decree of reversal include a direction that Murphy, McNamara, and Blair be required to return to the trustee the moneys paid to them upon their claims. Porter did not appeal, but he procured the allowance of the trustee's appeal, and has participated in its prosecution. No citation or other notice of the appeal was issued or given to Murphy, McNamara, Blair, Lynch, or Carroll, and no appearance on behalf of any of them has been entered in this court.

Sydney Anderson (George F. Porter, on the brief), for appellant.

Daniel B. Holt (John D. Benton and Verner R. Lovell, on the brief), for appellees.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

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

The principle that a court cannot directly adjudicate the rights of a person who is not before it is fundamental (Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792), and is as applicable to courts exercising appellate jurisdiction as to those whose jurisdiction is original (Terry v. Abraham, 93 U. S. 38, 23 L. Ed. 794; Davis v. Mercantile Co., 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563; Dodson v. Fletcher, 24 C. C. A. 69, 78 Fed. 214; American Loan & Trust Co. v. Clark, 27 C. C. A. 522, 83 Fed. 230; Grand Island & W. C. R. Co. v. Sweeney, 43 C. C. A. 255, 103 Fed. 342; Marshall, Field & Co. v. Wolf Bro. Dry Goods Co., 57 C. C. A. 326, 120 Fed. 815). But one may be before a court so as to enable it to adjudicate his rights, and yet not be an actual party to the proceeding; as when he is represented by a receiver or trustee who is an actual party, and whose duty it is to protect his interests. He is then what is termed a quasi party, and is bound by the judgment or decree, unless there be fraud or collusion between his representative and the adverse party. Kerrison, Assignee, v. Stewart, 93 U. S. 155, 23 L. Ed. 843; Atlantic Trust Co. v. Dana, 62 C. C. A. 657, 670, 128 Fed. 209, 222; Chatfield v. O'Dwyer, 42 C. C. A. 30, 101 Fed. 797; In re Utt, 45 C. C. A. 32, 105 Fed. 754; Foreman v. Burleigh, 48 C.

C. A. 376, 109 Fed. 313; In re Lewensohn, 57 C. C. A. 600, 121 Fed. 538. By the decree challenged by this appeal it was adjudged that the claims of Murphy, McNamara, Blair, and Lynch represent legitimate expenses and costs of administration; that the claim of Carroll, while not of this character, is yet a lawful one, and entitled to priority; and that each of these claims is properly payable out of the bankrupt's estate. The question whether the decree shall stand or be reversed is obviously of direct interest to the claimants whose claims are sustained by it, and because of this interest the question cannot be determined without affording these claimants an opportunity to be heard in defense of the decree. That this is so is made plain in Terry v. Abraham, supra, where the court, while doubting the existence of any good reason for the decree challenged by the appeal in that case, said:

"But there may have been a good reason for it; and, if the creditors who shared in the distribution were here as parties, they might be able to sustain the action of the court below. At all events, as no order on the subject could now be made without disturbing their rights under the decree, and as appellant has not thought proper to bring them here, the decree cannot be changed on that subject."

The only parties respondent to this appeal are two general creditors. The citation is directed to them only. The reason for their presence lies in the fact that it was upon their objections that the claims of Porter and the trustee were partially disallowed. Murphy, McNamara, Blair, Lynch, and Carroll are not before this court as actual parties, and are not represented by any one who is an actual party. The trustee is not their representative. He is seeking to strike down the allowance of their claims, and in this is the representative of the general creditors of the estate. Chatfield v. O'Dwyer, supra. Of course he cannot represent or speak for both sides to the controversy. In this situation no change can be made in the decree that will disturb the rights of Murphy, McNamara, Blair, Lynch, or Carrol thereunder.

As the appeal was seasonably taken, and was seasonably docketed here, it would have been within the power of this court to direct the issuance of an alias citation to the omitted parties, and to have allowed time for its service, had application therefor been made before the expiration of the first term at which the case could have been heard. Lockman v. Lang, 65 C. C. A. 621, 132 Fed. 1. Such an application was not made, although the necessity therefor appears to have been brought to the attention of the appellant's counsel in ample time. Two full terms have now elapsed, and the appeal has become inoperative in so far as it challenges the claims of those who have not been brought into this court. Jacobs v. George, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127; Altenberg v. Grant, 28 C. C. A. 244, 83 Fed. 980; Railroad Equipment Co. v. Southern Ry. Co., 34 C. C. A. 519, 92 Fed. 541. But, apart from the presence or absence of necessary parties, this court is without authority upon this appeal to review the action of the court below in allowing the claims last mentioned, or in partially rejecting the claims of Porter and the trustee. Bankr. Act July 1, 1898, c. 541, § 25a (30 Stat.

553 [U. S. Comp. St. 1901, p. 3432]), declares "that appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals * * * from a judgment allowing or rejecting a debt or claim of five hundred dollars or over." The decree complained of does not allow or reject a debt or claim of $500 or over. Only one debt or claim of that amount was acted upon. It was partially allowed and partially rejected, but neither the allowance nor the rejection reaches the prescribed amount. The appeal does not put in controversy the entire claim, but only what was rejected. The partial allowance will stand, even if the appeal is not successful. It is not easily believable that the Congress would grant a right of appeal to one whose claim for $500 or over is rejected to the extent of $425, the balance being allowed, and would at the same time deny a right of appeal to one whose claim for $425 is rejected in its entirety. The amount put in controversy by the appeal would be the same in either instance. So, also, the injury to the claimant would be the same in either case if the rejection were wrongful. The purpose of the Congress in restricting the right of appeal was evidently to avoid inconvenience, delay, and expense to claimants and bankrupt estates which would be disproportionate to the amount in controversy. When read with due regard to this purpose, the restriction plainly has reference, not to the amount of the original claim, but to the amount of the allowance or rejection; that is, to the amount which will be put in controversy by the appeal. Hilton v. Dickinson, 108 U. S. 165, 2 Sup. Ct. 424, 27 L. Ed. 688; Dows v. Johnson, 110 U. S. 223, 3 Sup. Ct. 640, 28 L. Ed. 128. As the decree below did not allow or reject any debt or claim of $500 or over, there was no right of appeal therefrom.

Counsel have proceeded upon the assumption that a claim which represents expenses or costs of administration is a "debt or claim" within the meaning of the provision before quoted granting and restricting the right of appeal. The assumption appears to be sustained by the bankruptcy act, notably by section 64b; but, if it were not, that would be another reason why there would be no right of appeal from the allowance or rejection of any of the claims other than that of Carroll, which is not of that character.

To avoid any misunderstanding as to what is here decided, it may be well to observe that this case is clearly distinguishable from one where the trustee is given or refused credit for different payments aggregating $500 or over, claimed to have been actually made by him in the due administration of the estate. In such a case he would be the creditor or claimant, and the different payments would be only items of a single debt or claim.

As there is no authority of law for this appeal, it is dismissed.

THOMAS v. PROVIDENT LIFE & TRUST CO. et al.

WICKHAM v. SAME.

(Circuit Court of Appeals, Ninth Circuit. May 22, 1905.)

No. 1,094.

1. EXECUTORS—MORTGAGES—POWERS—REPAYMENT OF INDEBTEDNESS.
Where executors applied the proceeds of a loan raised by a mortgage of real estate belonging to the testator to pay debts of the estate, the estate was bound, in equity, to repay the amount advanced, with interest, though the executors were not authorized by the terms of the will to execute the mortgage.

2. SAME—OBJECTIONS—PARTIES.
Where property charged with the payment of a legacy was sold, and the proceeds paid to the legatee in partial discharge of the legacy, neither she nor a judgment creditor of residuary devisees named in the will was entitled, in the absence of fraud on the part of the executors, to object to the validity of a mortgage executed by them on land belonging to the estate without express authority in the will; all of the proceeds of such mortgage having been applied to pay debts of the estate.

Ross, Circuit Judge, dissenting.

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

Charles S. Fogg and Frederick S. Fogg, for appellant Thomas.

Louis D. Campbell and Theodore D. Powell, for appellant Lucy L. Wickham.

John C. Stallcup and John A. Parker, for appellee Provident Life & Trust Co.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. As the facts of this case are fully stated in the dissenting opinion of Judge ROSS, they need not here be detailed.

The mortgages made to the Provident Life & Trust Company are in effect the mortgages of the executors. The trial court reached the conclusion that the executors and trustees under the will of Gen. Sprague had the power to mortgage the real property of the estate. While it is true that the very decided weight of authority sustains the proposition that a naked power given to executors to sell does not include the power to mortgage, there is authority for holding that where the purpose of the testator can better be answered by mortgaging than by selling, and such a course is not violative of that intention or of the terms of the will, the power to sell may include the power to mortgage. Mills v. Banks, 3 P. W. 1; Ball v. Harris, 4 M. & Cr. 264; Loebenthal v. Raleigh, 36 N. J. Eq. 169; Starr v. Moulton, 97 Ill. 525. The will gave the executors full power to manage the estate and sell it, either at public or private sale, on terms which accorded with their best judgment and discretion, without the supervision or control of any court, and without requiring the purchaser to see to the proper application of the proceeds. It contained the following general provision: "In all other respects I will and direct my executors and trustees to settle my estate in such manner as to them shall seem best." The

evidence indicates that a sale of the property immediately succeeding the death of the testator would have resulted in its sacrifice. But even if the mortgage were not authorized by the terms of the will, the estate, having received the benefit of the money, ought, in equity, to repay it, with interest. Said the Supreme Court of Iowa in such a case: "The estate has received the benefit of the money which was advanced by the defendant. It ought, in good conscience, to repay it, with legal interest." Deery v. Hamilton, 41 Iowa, 16.

The trust company undoubtedly loaned its money in good faith. It could have had no object or purpose in doing otherwise. The borrowed money was used by the executors in discharging legal incumbrances on the estate, and in paying the debts of the estate. Afterwards, in consideration of their obligation to repay the money so advanced, the executors executed a quitclaim deed to the trust company. Who of the parties to this record was in a position to attack that conveyance? It is unnecessary to say that the executors themselves were in no such position. Nor was Mrs. Cox. She was no creditor of the estate. At the time of the execution of the quitclaim deed it is true that she had a judgment lien against any real property standing in the name of Otis or Charles Sprague. But she had no lien on their interest in the estate. There was no fraud, therefore, in their act of transferring the real estate to the trust company in discharge of the debt owing to it. No property of Charles or Otis Sprague was thereby covered up. No resulting trust was created for their benefit. The bill of Mrs. Cox is purely a creditors' bill, seeking to discover property wherewith to satisfy her judgment. On what theory can she demand that the conveyance to the trust company be set aside? The trust company got no more than the satisfaction of its claim. That is made apparent by the failure of the executors to redeem. Their failure resulted from their inability to find during the period of three years a purchaser to take the property at a price in advance of that at which it was taken over by the trust company. But if the property had been of much greater value than the debt then owing the trust company, that fact would furnish Mrs. Cox no ground to impeach the conveyance. She had no remedy against an improvident sale by the executors. The will left them free to sell according to their judgment. The most that she could say would be that they mismanaged the estate, and thereby failed to realize any benefit from the will, either for themselves or for their individual creditors. She could only attack the conveyance on the ground of actual fraud participated in by the trust company, and the evidence shows no such fraud. In permitting her assignee to redeem the property from that conveyance, the trial court went as far in her relief as the principles of equity permitted it to go.

Mrs. Wickham was in no better position than Mrs. Cox. A specific portion of the real estate was charged with the payment of her legacy, and all the remainder was expressly relieved therefrom. The property charged with the burden of her legacy was sold, and she received the proceeds. The remainder of her legacy was not

paid, for the reason that there were no funds wherewith to pay it. The debts of the estate were a first charge on the estate. The whole property went to pay those debts. Of the $55,000 first borrowed from the trust company, on which interest was made payable at 7 per cent., $40,000 was used to pay the principal of the prior mortgage which incumbered the business block, and was drawing interest at 8 per cent. per annum; $15,000 was used to pay the debt due the widow, and on which was a fixed charge of $200 per month until paid. Of the $30,000 subsequently borrowed, the evidence is convincing that all of it was used for the benefit of the estate. Said the trial court, "Every dollar of it was applied and used for the benefit of the estate." It is contended by the appellant that the evidence does not account for more than $13,602.49, and does not positively and satisfactorily account for more than $6,300, of the $30,000 so borrowed. Otis Sprague testified, however, that it was used in paying taxes, insurance, street improvements, and notes of the estate in the bank. "We left some small amount on hand to dispose of afterwards, but it was all used in the interest of the estate." Longstreth testified that it was paid out for taxes, street assessments, and interest on the first mortgage. It was objected that the trust company failed to produce vouchers to show the disbursement of the $30,000 in the manner indicated by this evidence, but it was shown that the vouchers had been lost, and a detailed statement of the account of the disbursements was produced under the oath of one of the executors, and was filed, showing that for taxes, insurance, and interest becoming due and payable in the years 1894, 1895, and 1896, the executors had paid in the aggregate more than $32,000. The dates of these payments, it is true, are not shown, but the fact that the $30,000 was not borrowed until September 9, 1895, does not contradict the testimony that the items so mentioned were paid out of this particular fund. The taxes, for instance, were overdue when paid, and there was evidence that money had been borrowed upon notes of the executors for other items of that account. The trust company had nothing to do with these disbursements, and had not the custody of the vouchers. It bought the property and paid for it. It was not required to see to the application of the purchase money, and it is under no obligation now to pay the balance due on Mrs. Wickham's legacy. If she has a remedy, it is against the executors.

We find no error for which the decree of the Circuit Court should be reversed. It is accordingly affirmed.

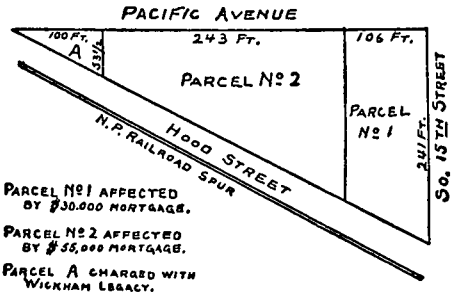
ROSS, Circuit Judge (dissenting). I dissent. This suit was commenced in one of the courts of the state of Washington by a judgment creditor of certain of the residuary devisees named in the will of the late Gen. John W. Sprague, and was, on motion of the defendant company, transferred to the United States Circuit Court for the District of Washington, where the bill was amended. The original complainant having died, and having, previous to her death, assigned all of her interest to the appellant Jesse Thomas, the suit was revived in his name. In the Circuit Court a cross-bill

was filed, by leave of the court, by the appellant Lucy L. Wickham, and upon issues raised by answers to those pleadings the cause was tried and decided by the court below.

The case shows that Gen. Sprague died in the city of Tacoma, state of Washington, on the 24th day of December, 1893, leaving what is designated by section 955 of 2 Hill's Ann. St. Codes Wash. a "nonintervention will"; that section being as follows:

"Sec. 955. In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that letters testamentary or of administration shall not be required, it shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will in the manner required by existing laws; and after the probate of such will, all such estates may be managed and settled without the intervention of the court, if the said last will and testament so provides: provided, however, in all such cases, if the party named in such will as executor shall decline to execute the trust, or shall die, or be otherwise disabled from any cause from acting as such executor, then letters testamentary or of administration shall issue as in other cases: and provided further, if the party named in the will shall fail to execute the trust faithfully and to take care and promote the interests of all parties taking under the will, then, upon petition of any creditor of such estate, or of any of the heirs, or of any person on behalf of any minor heirs, it shall be the duty of the superior court of the county wherein such estate is situated to cite such person having the management of such estate to appear before such court, and if, upon hearing of such petition, it shall appear that the trust in such will is not faithfully discharged, and that the parties interested, or any of them, have been or are about to be damaged by such acts or doings of the executor, then letters testamentary or of administration shall be had and required in such cases, and all other matters and proceedings shall be had and required as are now required in the administration of estates, and in such cases the costs of the citation and hearing shall be charged against the party failing and neglecting to execute the trust as required in such will."

The deceased left surviving him a wife, four sons, and one daughter, and a considerable estate, consisting chiefly of a residence and an improved block of business property in Tacoma known as the "Sprague Block," a diagram of which is here inserted:




The deceased also left a last will and testament, and a codicil thereto, which will and codicil were duly admitted to probate by the proper probate court. Those provisions of the will and codicil important to be considered in the present case are as follows:

"First. I give and bequeath to my sister, Lucy M. Skinner, widow of Holly Skinner, now of Berlin Heights, Ohio, the sum of one thousand dollars. In

the event my said sister shall die before my decease leaving no lineal descendants her surviving, then I do give and bequeath said sum of one thousand dollars to the heirs at law of my said sister.

"Second. I give and bequeath to my daughter, Lucy L. Wickham, wife of John W. Wickham, Jr., of Huron, Ohio, the sum of Thirty Thousand Dollars, payable in three installments as follows: Ten thousand dollars three years after the date of my decease, ten thousand dollars four years after the date of my decease, and ten thousand dollars five years after the date of my decease, with interest on each of said deferred payments, at the rate of six per cent. per annum from the date of my decease until paid, and I expressly charge the payment of said legacy upon the following described real estate situate in the City of Tacoma, County of Pierce, and State of Washington, and more particularly described as follows: Beginning at a point on the easterly line of Pacific Avenue, formed by the intersection of said easterly line of Pacific Avenue with the westerly line of Hood Street; running thence northerly along the easterly line of Pacific Avenue one hundred feet; thence easterly on a line drawn at right angles to the easterly line of Pacific Avenue, to its point of intersection with the westerly line of Hood Street, and thence southerly along the westerly line of Hood Street to the point of beginning; and I do expressly release and discharge all the remainder of my real estate from the lien of said legacy. * * *"

"Fourth. Whereas, on or about the 11th day of October, eighteen hundred ninety, and preceding my marriage with my present wife, I entered into a certain agreement with her in words and figures following:

" 'Memorandum of an agreement made and concluded this eleventh day of October, 1890, between John W. Sprague of Tacoma, Washington, of the first part, and Abby W. Vance, of Meadeville, Pennsylvania, of the second part.

" 'Whereas, the parties to this agreement intend to marry, and wish now to settle the claim that the survivor might or could have in the estate of the other, by virtue of statute or otherwise: It is agreed for and in consideration of one dollar and other valuable considerations passing from one to the other, that should first party survive second party, he is to have no right, title or claim in or to the estate, real, personal or mixed property of second party, and this agreement is a release or satisfaction of any right or claim in the estate, real, personal or mixed property of second party that she may die possessed of. That should second party survive first party, second party to receive out of estate of first party the sum of fifteen thousand dollars to be paid to second party by the executors of first party's last will and testament, out of his estate, in one year after his decease, and in addition thereto the sum of two hundred dollars a month, until said sum of fifteen thousand dollars is paid. On the payment of said sum of fifteen thousand dollars and monthly payments this agreement is a release and satisfaction of any further right or claim said second party might or could have in the estate, real, personal, or mixed property of first party, that he may die possessed of.

" 'Witness our hands and seals this the day and year above written

" '[Signed] John W. Sprague. [Seal.]

" 'Abby W. Sprague. [Seal.]

" 'In presence of:

" 'W. Fraser.

" 'Louis D. Campbell.

" 'T. B. Wallace.

" 'Theo. D. Powell.

" 'J. N. McClosky.

" 'Hiram S. Richmond.'

"[Certificate of acknowledgment by notary public here omitted.]

"Now, therefore, I hereby ratify and confirm said agreement and I do also give, devise and bequeath to my wife, Abby W. Sprague, for and during such period of her natural life as she shall continue to occupy the same as a home, all those certain parcels of land and the improvements thereon erected and being situate in the city of Tacoma, county of Pierce and state of Washington, and more particularly described as follows: Lots number

seven, eight, nine, ten, eleven and twelve in block number two hundred twelve, as known and designated on a certain map, entitled 'The Tacoma Land Company's Third Addition to Tacoma, W. T.,' which map was filed for record in the office of the auditor of the said Pierce County on the twenty-first day of July, eighteen hundred eighty-five, free from all taxes and assessments, ordinary and extraordinary, levied or assessed thereon during said time, which taxes and assessments and the insurance premiums against fire on said premises I charge to my personal estate, and from and after her decease I give, devise and bequeath said premises to my sons Otis Sprague, Winthrop Wright Sprague, Clark Woodard Sprague and Charles Sprague as tenants in common, to be equally divided between them, share and share alike, and to their heirs and assigns forever; and in the event my said wife shall cease to occupy said premises as a home, then from and after the time she shall so cease to occupy said premises I give, devise and bequeath said premises to my sons Otis Sprague, Winthrop Wright Sprague, Clark Woodard Sprague and Charles Sprague, as tenants in common, to be equally divided between them, share and share alike, and to their heirs and assigns forever; and, in the event of my son Otis, Winthrop Wright, Clark Woodard or Charles Sprague shall die before the termination of the estate in said premises devised to my wife, leaving no lawful issue him or them surviving, then I do will and direct that the share or portion of said premises hereinabove devised and bequeathed to him or them shall be divided equally, share and share alike, among such of my five children, Otis, Winthrop Wright, Clark Woodard, Charles Sprague and Lucy L. Wickham, who shall then survive, and the lawful issue then surviving of any of said five children Otis, Winthrop Wright, Clark Woodard, Charles Sprague and Lucy L. Wickham, then deceased, such issue taking by representation. I do also give and bequeath to my said wife all the household and kitchen furniture of every description [here follows an enumeration of various articles of personal property not necessary to be mentioned]; and in the event my executors and trustees hereinafter named shall not deem it to the best interest of my estate to pay said sum of fifteen thousand dollars when it falls due, and my wife, Abby W. Sprague, shall consent to defer the payment thereof, then I do give and bequeath to my said wife, Abby W. Sprague, in lieu of interest on said sum of fifteen thousand dollars, the sum of two hundred dollars per month, payable monthly, from the date beginning one year after my decease and ending when my said executors and trustees shall pay my said wife the said sum of fifteen thousand dollars. And I do expressly charge the payment of the said sum of fifteen thousand dollars upon the real estate described in this paragraph of my will and in which I have devised to my wife, Abby W. Sprague, an estate during such portion of her life as she shall occupy the same as a home, and I do expressly release and discharge all the remainder of my real estate from the lien of said sum of fifteen thousand dollars.

"Fifth. All the rest, residue, and remainder of my estate, real, personal and mixed of every nature and description whatsoever and wherever situate of which I shall be seised, possessed or entitled to, or have any estate or interest in, at the time of my decease, I give, devise and bequeath to my four sons, Otis Sprague, Winthrop Wright Sprague, Clark Woodard Sprague, and Charles Sprague, as tenants in common, to be equally divided between them, share and share alike, and to their heirs and assigns forever.

"Sixth. In the event of my son Otis, Winthrop Wright, Clark Woodard, or Charles Sprague shall die before my decease, leaving no lawful issue him or them surviving, then I do will and direct that the share or portion of my estate herein devised and bequeathed to him or them shall be divided equally, share and share alike, among such of my five children, Otis, Winthrop Wright, Clark Woodard, and Charles Sprague, and Lucy L. Wickham, who shall then survive, and the lawful issue so surviving of any of said five children then deceased, such issue taking by representation.

"Seventh. I give, devise, and bequeath to my said executors and trustees full power and authority to sell any or all of my real or personal property, except such personal property as is hereinbefore specifically bequeathed

and excepting the parcel of real estate hereinbefore expressly charged with the payment of the legacy to my daughter, Lucy L. Wickham, and excepting the parcel of real estate expressly charged with the money due my wife, Abby W. Sprague, under the marriage agreement hereinbefore referred to, with or without notice, and upon such terms, either for credit or cash, as my said executors and trustees shall deem best, and free and discharged of any and all liens, expressed or implied, created by this will, and I expressly will that the receipt for the purchase money of my executors and trustees, or the survivor of them, shall be a sufficient discharge of the purchase money, and that it shall not be necessary to obtain a confirmation by any officer or court of any sale or sales made as aforesaid by my executors and trustees or the survivor of them in order to vest in their or his grantee the fee simple of said real estate.

"Eighth. I will and expressly direct that no bonds or obligations, of any nature whatsoever shall be required of any of the persons hereinafter named by me as executors or as trustees or as guardians of the estate of infant legatees, and that my executors shall not return an inventory of my estate to the probate or to any court.

"Ninth. I will and expressly direct that my estate shall be settled in the manner herein provided and that none of my executors or trustees shall be required to take out letters testamentary except to admit to probate this my last will in the manner required by existing laws and that after the probate thereof my estate shall be settled without the intervention of the superior or any court or officer in any manner whatsoever. I further will and expressly direct that none of the persons named by me as guardians of the estate of infant legatees shall be required to take out letters of guardianship.

"Tenth. I will and direct my executors and trustees as soon as they conveniently can, and within six months after the date of my decease, to make an appraisement and inventory of my estate for their guidance in the management of the same, said inventory to be retained in their custody for their own use and to be always open to the inspection of the legatees and devisees under this my last will.

"Eleventh. I further will and direct my executors and trustees within two month[s] after this my last will shall be admitted to probate to cause to be published in some newspaper printed in the county of Pierce, at last [least] once a week for four successive weeks, a notice to my creditors requiring all persons having claims against my said estate to present them with the necessary vouchers within one year from the date of such notice to my executors at their place of residence or place of transacting business to be specified in said notice.

"Twelfth. I will and direct my said executors and trustees to pay the legacy herein made by me to Lucy M. Skinner as soon as may be found convenient after my decease. In all other respects I will and direct my executors and trustees to settle my estate in such manner as to them shall seem best. * * *"

"Fourteenth. I hereby nominate, constitute and appoint my son Otis Sprague and my friend James R. Hayden, executors and trustees of this my last will and testament and guardians of the estate of infant legatees hereunder.

"In the event of the death of either of them or their incapacity or refusal to act, then I nominate and appoint Winthrop Wright Sprague executor and trustee hereof and guardian of the estate of infant legatees hereunder to act with the other or survivor. In the event of the death of either of them or their incapacity or refusal to act, then I nominate and appoint Clark Woodard Sprague executor and trustee hereof and guardian of the estate of infant legatees hereunder to act with the other or survivor. In the event of the death of either of them or their incapacity or refusal to act, then I nominate and appoint Charles Sprague executor and trustee hereof, and guardian of the estate of infant legatees hereof to act with the other or survivor.

"In the event of the death of either of them, or their incapacity or refusal to act, then the other or survivor to be sole executor and trustee thereof and guardian of the estate of infant legatees hereunder."

At the time of the death of the testator there was an existing mortgage to secure the payment of the sum of $40,000 on the Sprague Block, in favor of the German Savings & Loan Society of San Francisco. That mortgage covered the entire block. The hypothenuse of the triangle of the block, marked "A" on the diagram, is the piece upon which the legacy to Mrs. Wickham was by the will made a charge. In August, 1894, Otis Sprague applied to the Provident Life & Trust Company, appellee here, for a loan to the executors and trustees of $55,000, offering as security therefor a mortgage by them upon that portion of the Sprague Block marked upon the diagram "Parcel No. 2." The application to the trust company was made through its resident agent at Tacoma, Mr. Henry Longstreth, who examined the property, was satisfied with the security, and replied that the loan would be made if the title should prove satisfactory, which question of title was submitted to the appellee's attorney at Tacoma, Mr. D. K. Stevens. The latter, after examination, reported that under the will the executors and trustees had no authority to borrow money or to mortgage the property of the estate, and the loan was refused for that reason. Subsequently Stevens suggested to Otis Sprague that, as the executors and trustees had power to sell, but not to mortgage, they could get around that provision of the will by conveying the property to Charles Sprague, one of the residuary legatees, who could thereupon borrow the money, executing a mortgage upon the property to secure its repayment, and then reconveying the property to the executors and trustees. Thereupon, to wit, August 28, 1894, the executors and trustees executed to Charles Sprague a deed covering parcel No. 2 of the Sprague Block, expressing a consideration of $120,000, which deed was recorded in the proper records at the request of the appellee on the 28th day of August, 1894, on which day it loaned to Charles Sprague $55,000, taking at the same time as security therefor a mortgage from him covering the said Parcel No. 2. On the same day—August 28, 1894—Charles Sprague executed to the executors and trustees his note for $65,000, payable on or before five years after date, and as security therefor a second mortgage covering parcel No. 2 of the Sprague Block. A few weeks later Charles Sprague executed to the executors and trustees a deed expressing a consideration of $120,000, and covering the same premises. All of these papers were witnessed by Mr. Stevens, who, as notary public, also took the acknowledgments thereof. In September, 1895, the executors and trustees applied to the appellee for a further loan of $30,000 upon parcel No. 1 of the Sprague Block, when substantially the same performance was gone through, except that in that instance there was no note given by Charles Sprague to the executors and trustees, and no second mortgage executed by him to them. On September 5, 1895, a deed was executed by the executors and trustees to Charles Sprague, expressing a consideration of $90,000, and covering parcel No. 1 of the Sprague Block, and thereupon the appellee loaned to Charles Sprague $30,000, taking as security therefor a mortgage from him covering the said parcel No. 1. In February, 1896, Charles Sprague executed to

the executors and trustees a deed expressing a consideration of $90,000, and covering parcel No. 1 of the Sprague Block.

Charles Sprague never paid anything for any of those purported conveyances, and the evidence in the cause makes it perfectly plain that it never was intended by any of the parties to the transactions that he should. He never entered into possession of any of the property, nor exercised any act of ownership over any part of it; but, on the contrary, the executors remained in possession, and continued to collect the rents and issues thereof, of all of which the appellee, through its agent, had full knowledge. In truth, the method pursued by the parties was a scheme devised to accomplish indirectly what they considered the provisions of the will prohibited; and the court below so found the fact to be, although it was there held that there was no fraud in the transactions, and that they were valid in law.

The evidence shows that the $55,000 loaned by the appellee to Charles Sprague was not turned over to him, but went directly to the executors and trustees, and was used by them in paying and discharging the $40,000 mortgage upon the Sprague Block theretofore held by the German Savings & Loan Society of San Francisco, and in paying to the widow of the testator the $15,000 bequeathed to her. The $30,000 loaned by the appellee to Charles Sprague was also turned over by the appellee to the executors and trustees, a small part of which, but only a part, is also shown by the evidence to have been used by them in paying taxes, assessment liens, and other obligations of the estate of the deceased.

In October, 1896, Mrs. Sidney Cox, the complainant in the original bill in the present suit, recovered a judgment in one of the courts of the state of Washington against Otis Sprague and Charles Sprague, two of the residuary devisees named in the will of Gen. Sprague, for $17,883.75, for money theretofore loaned to them, only a small part of which was or could be collected upon execution.

In April, 1897, the present appellee, the Provident Life & Trust Company, commenced two actions in the superior court of Pierce county, Wash., numbered respectively 16,084 and 16,085, to foreclose the $55,000 and $30,000 mortgages respectively executed to it by Charles Sprague; making defendants thereto the executors and trustees of the will in question, and also Charles, Otis, Winthrop Wright, and Clark W. Sprague, Lucy L. Wickham, and Mrs. Sidney Cox. In each of those actions a receiver was appointed to collect the rents, issues, and profits of the property involved pending the litigation. Lucy L. Wickham, the cross-complainant in the present suit, appeared separately in each of those foreclosure suits, and filed a separate answer and defense in each of them. Her answers were substantially the same, and set up the will of Gen. Sprague and her rights thereunder, and also set up, in substance, the proceedings already detailed respecting the loans made by the appellee in 1894 and 1895, and alleged that they were mere devices adopted to effectuate the loan of money to the executors, and to secure the repayment thereof by mortgage upon property of the estate, and that they were void; that at that time there were and

continued to be unpaid debts of the estate; that her legacy then remained wholly unpaid, together with such other interests as were devised to her; that on or about the 20th of June, 1896, she recovered a judgment in the superior court of Pierce county, Wash., against the executors of the estate in question, for the sum of $1,825, no part of which had been paid; that the personal property of the estate was insufficient to pay its debts, which were a proper charge upon its real estate; and the prayer of the answers of Mrs. Wickham was that the mortgages be decreed void and of no effect in so far as concerned her rights or interests. The Provident Life & Trust Company demurred to each of those answers on the ground that they did not state facts sufficient to constitute a defense or counterclaim, which demurrers were, after argument on behalf of the respective parties, overruled by the said court. Thereupon the following stipulation in writing, to which neither Mrs. Cox nor Mrs. Wickham was a party, was entered into:

"In the Superior Court of Pierce County, Washington.

"The Provident Life and Trust Co., Plaintiff, vs. Charles Sprague et al., Defendants. (No. 16,084.)

"The Provident Life and Trust Co., Plaintiff, vs. Charles Sprague et al., Defendants. (No. 16,085.)

"Stipulation.

"Whereas the above entitled actions brought by the above-named plaintiff against the above-named defendants for the foreclosure of two certain mortgages upon real property hereinafter described, are now pending in said court, upon the pleadings of the respective parties, and are set for trial in said court; and

"Whereas the parties to this stipulation, to wit, the Provident Life and Trust Company the plaintiff, and the defendants Charles Sprague, Otis Sprague, Winthrop Wright Sprague, and Clark Woodard Sprague, and Otis Sprague and James R. Hayden as executors of the last will and testament of John W. Sprague, deceased, are desirous of settling and determining the said actions without further litigation:

"Now, therefore, it is hereby stipulated by and between the said parties as follows, to wit:

"(1) The plaintiff shall dismiss said actions and cause the receiver, A. C. Smith, to account for and pay the net proceeds of said receivership to the stipulating defendants herein, who shall forthwith pay the same to the plaintiff.

"(2) The stipulating defendants herein shall at the earliest practicable date convey to the plaintiff by proper quitclaim deed the mortgaged premises described in plaintiff's complaints herein.

"(3) The plaintiff shall forthwith be entitled to the possession of the premises upon the discharge of said receiver, and shall be entitled to have and receive all unpaid rents due from the tenants of said premises or any part thereof.

"(4) Plaintiff shall keep an accurate account of its receipts from rents of said premises, and of its expenditures thereon or in connection therewith during the lifetime of this stipulation, and shall give to the stipulating defendants, or either of them, or their attorneys, reasonable opportunity, on request, to inspect said accounts.

"(5) Whenever, during the lifetime of this stipulation, the plaintiff shall be able to sell either of the parcels of real property hereinafter described for a sum sufficient to repay to it the full sum of one hundred and seven thousand, two hundred and fifteen and sixty-five one-hundredths dollars ($107,215.65), with interest thereon at the rate of seven per cent. per annum

from the date hereof, it shall be free to make sale notwithstanding this stipulation.

"(6) The plaintiff shall forthwith pay to the stipulating defendants the sum of $1,075.00.

"(7) Whenever within three years from the date of this stipulation, the stipulating defendants, Otis Sprague, Winthrop Wright Sprague, Charles Sprague, and Clark Woodard Sprague, or either of them, or either of their heirs or assigns, shall pay or cause to be paid to the plaintiff at its office in the city of Philadelphia, Penna., the said sum of one hundred and seven thousand, two hundred and fifteen and sixty-five one-hundredths dollars, with interest thereon at seven per cent. per annum from the date hereof, the plaintiff shall forthwith execute and deliver proper quitclaim deeds for the same, with warranty against its own acts, to the said Otis, Clark Woodard, Charles, and Winthrop Wright Sprague, or to their heirs or assigns as the case may be. In making the above-mentioned payment to plaintiff, said defendants shall be entitled to have set off against the same sum to be paid and interest, any net rents or receipts or proceeds of, or insurance upon, said premises which said plaintiff may have received, over and above the cost of maintenance, improvements, repairs, taxes, and insurance and costs of any or all suits at law or in equity which the plaintiff may be advised to be necessary to assert the priority of the said mortgages or to clear the title to said premises, and five per cent. of the gross rents collected as fees for the collection thereof.

"(8) Whenever, as provided in the foregoing paragraph five (5) the plaintiff shall have sold one of the parcels, it shall forthwith execute a conveyance of the other parcel in the same manner as is provided to be done in the case of a repurchase in the last preceding paragraph.

"(9) The object of this stipulation is declared to be to settle the points in dispute between the parties hereto, in said causes, and to enable said defendants to repurchase said mortgaged premises for the sums above mentioned at any time within three years from the date hereof.

"(10) It is expressly agreed that in no case and under no circumstances shall the stipulating defendants or either of them, or their successors, heirs or assigns, set up or maintain that this stipulation is to be taken or considered as continuing said mortgages or either of them, so that their rights under this stipulation can be terminated by foreclosure only; but this stipulation shall be construed only as an agreement on the part of the plaintiff to sell said premises at any time within said three years, and upon the expiration of said three years, this agreement to sell shall cease and determine without any act or declaration on the part of the plaintiff, and thereafter the title to said premises, both legal and equitable, shall be absolutely in the plaintiff and its right to sell and dispose of the same free of all claims on the part of the stipulating defendants shall be unquestioned.

"(11) Notwithstanding the terms of this stipulation and of the deed to be executed by the stipulating defendants to the plaintiff, the plaintiff shall have the right to maintain and assert said mortgages as valid, existing, and unsatisfied mortgages against all other persons claiming any interest in or lien upon said mortgaged premises or any part thereof, and to maintain and defend any and all suits at law or in equity, which it may be advised to be necessary to assert the priority of said mortgages over any such claims, or to clear the title to said premises of the same.

"(12) Should said premises or either of them be redeemed from said mortgages by any person other than defendants, such person being a lawful redemptione., then plaintiff shall be relieved from the terms of this stipulation, as to the premises redeemed and the redemption money shall be credited to these defendants as a payment of the repurchase herein provided for.

"(13) Should the building on said premises be injured or destroyed by fire, the plaintiff may either credit the money received by it from insurance on the amount to be paid by said defendants for said repurchase or it may use the same in rebuilding.

"(14) The real property hereinbefore mentioned and intended to be effected is described as follows, to wit:

"First Parcel, Cause Number 16,084.

"Beginning at a point on the easterly line of Pacific avenue in the city of Tacoma, one hundred and six (106) feet southerly from a point formed by the intersection of the southerly boundary of South Fifteenth street, in said city of Tacoma, with the easterly boundary of said Pacific Avenue; running thence in a southerly direction along and on said easterly line of Pacific avenue, a distance of two hundred and forty-three and one hundred and fifty-eight one-thousandths ($243^{158}/_{1000}$) feet; running thence in an easterly direction on a line drawn at right angles with the easterly line of said Pacific avenue, a distance of fifty-three and eighty-three one-hundredths ($53^{83}/_{100}$) feet; to its point of intersection with the westerly line of Hood street in said city of Tacoma; running thence in a northeasterly direction along and on the westerly line of said Hood street, a distance of two hundred and seventy-five and five-tenths ($275^{5}/_{10}$) feet; running thence in a westerly direction on a line parallel with the southerly line of said South Fifteenth street, a distance of one hundred and eighty-four (184) feet to the point of beginning on said easterly line of Pacific Avenue.

"Second Parcel—Cause Number 16,085.

"Beginning at a point formed by the intersection of the southerly line of South Fifteenth street, with the easterly boundary of Pacific avenue, in the city of Tacoma; running thence in a southerly direction along and on said easterly line of said Pacific avenue, a distance of one hundred and six (106) feet; running thence in an easterly direction on a line drawn at right angles to the easterly line of said Pacific avenue a distance of one hundred and eighty-five (185) feet more or less to its point of intersection with the westerly line of Hood street in the city of Tacoma; running thence in a northeasterly direction along and on the westerly line of said Hood street, a distance of one hundred and nineteen (119) feet, more or less, to a point formed by the intersection of the southerly boundary of said South Fifteenth street with the westerly boundary of said Hood street; running thence in a westerly direction along and on the southerly line of said South Fifteenth street and at right angles to the easterly line of said Pacific avenue, a distance of two hundred and forty-one and one hundred and twenty-seven one-thousandths ($241^{127}/_{1000}$) feet, more or less, to the point of beginning.

"Dated at Tacoma, December 1, 1897.

"P. Tillinghast,
"Attorney for Plaintiff.
"T. L. Stiles,
"Attorney for defendants, Charles Sprague, Otis Sprague, Winthrop Wright Sprague, Clark Woodard Sprague, and Otis Sprague and James R. Hayden, executors, etc."

In pursuance of the stipulation the executors and trustees and the residuary devisees executed to the appellee a quitclaim deed covering parcel No. 1 and parcel No. 2 of the Sprague Block, which deed was accepted by the appellee in satisfaction of the mortgages to it, and of the indebtedness purported to be secured thereby.

The amended bill of Mrs. Cox, filed in the present suit against Otis Sprague, Mave H. Sprague, his wife, Charles Sprague, the Provident Life & Trust Company, a corporation, Winthrop Wright Sprague, Clark Woodard Sprague, Lucy L. Wickham, Winthrop Wright Sprague, and Clark Woodard Sprague, as the executors and trustees of the last will and testament of John W. Sprague, deceased, alleges, among other things, that on the 24th day of October, 1896, she recovered a judgment in the superior court of Pierce county, Wash., against Otis, Mave H., and Charles Sprague for the sum of $17,883.75, bearing interest at the rate of 7 per cent. per annum until paid, upon which judgment execution was issued and returned

partly unsatisfied, and that a balance of $16,500 remains due and unpaid thereon, and that no property belonging to her said judgment debtors, or either of them, can be found, upon which execution can be levied. The amended bill of Mrs. Cox then alleges, in substance, the matters already stated in respect to the death, will, and property of Gen. Sprague, and respecting the debts and mortgages in question. It alleges, upon the information and belief of the complainant, that the debts and claims against the estate of the deceased, other than the debts secured by the mortgage upon this real estate, did not exceed the sum of $5,000, and that the money and personal property belonging to the estate, and which came into the hands of the executors and trustees, were more than sufficient to discharge all of those debts, and that, as a matter of fact, they were paid. The amended bill alleges that the indebtedness and mortgages in satisfaction of which the quitclaim deed covering parcel No. 1 and parcel No. 2 of the Sprague Block was executed to and accepted by the appellee constituted the individual indebtedness of Charles Sprague, and that neither the testator nor the executors of his will was a party to that indebtedness or those mortgages, and that the latter never constituted any lien upon any of the property of the estate, and that the said quitclaim deed to the appellee was wholly without consideration, illegal, and void; that the pretended conveyances by the executors to Charles Sprague were wholly without consideration, simulated, and an attempted misappropriation by the executors and trustees of property of the trust estate; that the appellee, at the time it took the mortgages from Charles Sprague, and for a long time prior thereto, had full knowledge that the property covered by them constituted a part of the property of the deceased, and that his estate was in process of administration, and knew that the executors had no power to make any conveyance thereof to any one, except in consummation of an actual sale, made upon sufficient consideration, and knew that Charles Sprague paid nothing for either of the deeds to him, and that it was not intended that he should, and that both of the deeds were simulated conveyances, and made solely that Charles Sprague might mortgage the property covered thereby; that the pretended conveyances to Charles Sprague and the mortgages by him to the appellee were made at the instigation of Otis and Charles Sprague for the purpose of converting the assets of the estate into cash, and to avoid the distribution of the property to the beneficiaries of the estate, in order thereby to defeat the complainant's judgment.

The amended bill also set up the commencement of the two actions by the Provident Life & Trust Company in the superior court of the state of Washington, the only notice or knowledge of which, complainant alleged, was derived from a copy of the summons and complaint in each of the cases, which she received through the mails; that during their pendency, and until on or about May 1, 1899, the complainant was ignorant of, and did not discover, the manner of the execution of either of the mortgages for the foreclosure of which those suits were brought, and had no knowledge or information of any character concerning the facts and circumstances

surrounding and leading up to the execution of those mortgages; that at different times in the months of May, June, and August, 1897, Winthrop Wright, Clark Woodard, and Charles Sprague, and Lucy L. Wickham, also Otis Sprague and James R. Hayden as executors of the will of the deceased Sprague, made, verified, and filed, as the complainant has since discovered, separate, verified answers in each of the aforesaid foreclosure suits in the state court of Washington, setting forth the facts surrounding and leading up to the execution of each of the said mortgages as alleged in the amended bill, and alleging and showing the want of consideration therefor, and the want of power in the executors to mortgage the said real estate, and alleging the illegality of each of them. The amended bill then set up the demurrers of the trust company to the answers of Mrs. Wickham in the foreclosure suits in the state court, the ruling of that court thereon after argument and due consideration, and the subsequent making of the stipulation already set out. The amended bill also alleges that on or about November 29, 1898, Winthrop Wright Sprague was appointed executor and trustee of the will of the deceased Sprague in place of James R. Hayden, whose resignation as such had been presented to and accepted by the probate court of Pierce county, and that on or about February 14, 1899, Clark Woodard Sprague received a like appointment in place of Otis Sprague; that Winthrop Wright and Clark Woodard Sprague have ever since their respective appointments been the duly appointed and acting executors and trustees of the estate; that complainant, having in the early part of 1899 for the first time learned of the facts and circumstances alleged, presented to the probate court of Pierce county, Wash., on the 16th day of May of that year, a petition setting up the alleged sham and fraudulent proceedings and misappropriation of the property of the estate, and praying that court to require the executors to render a full and true inventory of all of the assets and all of the liabilities of the estate, together with a full and true account of their acts as such executors; that the said probate court held, after hearing and due consideration, that under the provisions of the will in question, and the above-quoted provisions of the statute of the state of Washington, the court was without jurisdiction in the premises, and accordingly dismissed the petition; that thereupon the complainant applied to the Supreme Court of the state for a writ of mandate commanding the said superior court and the judge thereof to hear the said petition, and to grant whatever relief, if any, the petitioner might show herself entitled to, which application was, after argument, denied by the Supreme Court of the state in a written opinion sustaining the action of the said probate court, and the ground upon which it was based. The amended bill further alleged that neither of the complainant's said judgment debtors has any property out of which her judgment can be satisfied, except their interests in the property of the deceased Sprague; that the executors and trustees have failed and refused to bring suit or to take any steps to recover the property of the estate; and that the complainant, having no remedy in probate or at law, will be entirely de-

feated and defrauded of her rights unless assisted by a court of equity.

The prayer of the bill is for a decree adjudging the deeds and mortgages complained of void; restoring the property described in the aforesaid quitclaim deed to the appellee to the estate in question; adjudging it free and clear of any lien on the part of the appellee; requiring the latter to account for the rents collected by it from the property; commanding the executors and trustees of the estate to bring their administration thereof to a close; to distribute the property to those entitled to it; and adjudging that the shares and interests of Otis and Charles Sprague therein, or so much thereof as may be necessary to satisfy the complainant's judgment, be sold at public sale to satisfy the same; and for such other and further or different relief as to the court may seem just and equitable.

Mrs. Wickham was made a party defendant to the bill of Mrs. Cox, and appeared and answered the bill. And as she contends that the residuary devisees take no interest in the estate until her legacy is paid and satisfied in full, and also contends that the mortgages to the appellee were void and of no effect, she filed a cross-bill in the cause, making defendants thereto the complainant and the defendants to the bill. In her cross-bill Mrs. Wickham alleges that her legacy has not been paid, and that the deeds from the executors and trustees to Charles Sprague, the mortgages by the latter to the appellee, the reconveyance by Charles Sprague to the executors and trustees, the foreclosure proceedings instituted by the appellee in the state court of Washington, the stipulation entered into therein, and the quitclaim deed made pursuant thereto, were each and all void and in fraud of her rights; and her prayer is that they be so adjudged, and that the property covered by them be decreed to be still a part of the estate of the deceased, and be restored to the executors and trustees thereof; that the trust company be required to account to them for the rents collected by it, and that the executors and trustees be required to sell the property and pay the cross-complainant the amount due on her legacy; and, as alternative relief, the cross-bill prays that she be allowed to redeem the property; that it be adjudged that she is entitled to be paid the amounts due on her legacy before any of the defendants to the cross-bill are entitled to receive anything; and for general relief.

None of the residuary devisees answered the cross-bill of Mrs. Wickham, and a decree pro confesso was taken as to them. Mrs. Cox answered, and admitted the truth of the allegations thereof concerning the deeds, mortgages, and proceedings assailed in her bill. The appellee answered both the amended bill and the cross-bill, and in each of its answers put in issue the allegations respecting the fictitious and fraudulent character of the deeds, mortgages, and other proceedings assailed in the bill and cross-bill, denied any notice on its part of a lack of consideration for any of those instruments, or that either of them was made for any other purpose than indicated on its face, and specifically set up that in the month of August, 1895, Otis Sprague applied to the appellee for a loan of $55,000, to be secured by a mortgage to be made by the executors

and trustees of the estate upon parcel No. 2 of the Sprague Block, but that the appellee then and at all times refused to make any loan of money to the executors, or to take as security therefor a mortgage upon any part of the property of the estate; that thereafter Otis Sprague informed the appellee that the executors and trustees were about to sell or had sold said parcel No. 2 of the Sprague Block to Charles Sprague, and that Charles Sprague desired to make a loan from the appellee of $55,000, to be secured by his promissory note and mortgage upon the said parcel No. 2; that the appellee then informed Otis Sprague that it could not loan any money upon security of that character unless the sale thereof to Charles Sprague was an absolute and bona fide sale, and an absolute transfer of a fee-simple title to him; that the appellee was then informed by Otis Sprague and Charles Sprague that the sale of that parcel of land to Charles Sprague was an absolute and bona fide sale and transfer of the title in fee to Charles Sprague for a consideration paid to the executors and trustees by Charles Sprague of $120,000, and that Charles Sprague would pay to the executors and trustees the amount of the proposed loan as a part of the consideration for that sale; that the appellee believed and relied upon such representations so made to it, and would not have loaned any money upon the security of the mortgage from Charles Sprague, had it not been so informed and believed; that on or about August 20, 1894, the executors and trustees, under and by virtue of the powers vested in them by the terms of the will of the deceased Sprague, and for a consideration of $120,000 paid to them by Charles Sprague, sold and by their deed conveyed to Charles Sprague parcel No. 2 of the Sprague Block; that said deed was executed and acknowledged by Otis Sprague and James R. Hayden, executors and trustees, and by Otis Sprague, Winthrop Wright Sprague, and Clark Woodard Sprague as grantors therein; that the appellee, believing that such deed was made in good faith and in all respects pursuant to the powers given to the executors and trustees by the terms of the will of the deceased, Sprague, and without any knowledge, information, or notice of any violation of or deviation from their powers and duties as such executors and trustees, and believing that the deed conveyed to and vested in Charles Sprague an absolute fee, free and clear of all incumbrances, to the premises therein described, and relying on the recitals in and the record of said deed, loaned and paid to Charles Sprague $55,000 in gold coin, and, to secure the repayment thereof, took from him his promissory note and his mortgage upon the said premises; that thereafter and on or about the 5th day of September, 1895, Otis Sprague and James R. Hayden, as executors and trustees of the will of the deceased, Sprague, and for a consideration of $90,000 paid to them by Charles Sprague, sold and by their warranty deed conveyed parcel No. 1 of the Sprague Block to Charles Sprague; that thereafter, and on September 7, 1895, believing and relying upon the representations made to it by Charles Sprague and by the said executors and trustees that the said deed to Charles Sprague was made in good faith, and in all respects pursuant to and in accordance with the powers given to the

executors and trustees by the terms of the will in question, and without any knowledge or notice of any variation from or violation of their powers or duties as such executors and trustees, and believing that said last-mentioned deed conveyed to and vested in said Charles Sprague an absolute title in fee simple, free and clear of all incumbrances, to the said parcel No. 1, therein described, and relying upon the recitals in and the record of the said deed, the appellee loaned and paid to Charles Sprague the sum of $30,000 in gold coin, and, to secure the repayment thereof, took from him his promissory note and his mortgage upon said parcel No. 1 to secure the same; that each of the loans so made by the appellee to Charles Sprague was paid over by him to the executors and trustees as a part of the purchase price of the property, and was wholly used and applied by them for the benefit, use, and preservation of the estate of the deceased Sprague.

The answers of the appellee also alleged that at the times of the execution of the deeds by the executors and trustees to Charles Sprague covering parcel No. 1 and parcel No. 2 of the Sprague Block, and of the execution of the two mortgages thereon by Charles Sprague to the appellee, all of the heirs, devisees, legatees, and creditors of the estate of the deceased Sprague, and all other persons having any interest, claim, or lien, present or prospective, in or upon the property so deeded and mortgaged, were fully advised by the executors and trustees of all the facts and circumstances connected therewith, and were fully informed of the disposition made by Charles Sprague of the moneys received by him upon these mortgages, and of the disposition made by the executors and trustees of the money so received by them in consideration of their conveyance to Charles Sprague, and that each and all of the said heirs, devisees, legatees, and creditors, and all other parties interested therein, consented to and acquiesced in those transactions; that thereafter, in the year 1897, each of those mortgages so executed by Charles Sprague to the appellee became due and unpaid, and that thereafter, in satisfaction of those mortgages and the indebtedness thereby secured, and in consideration of the sum of $1 and other good and valuable considerations to them paid, Charles, Otis, Winthrop Wright, and Clark Woodard Sprague, and Otis Sprague and James R. Hayden as executors and trustees of the will of the deceased Sprague, executed to the appellee their deed of conveyance of parcel No. 1 and parcel No. 2 of the Sprague Block, which latter deed was duly recorded, and by which the appellee acquired and now holds a fee-simple title to each of said parcels of land, free and clear of all claims and liens, and under which it entered into the possession of those parcels of land on or about the 1st day of December, 1897, and has ever since remained in such possession; that the appellee was—

"An innocent purchaser for value of said two parcels of land described in said deeds and mortgages, for the amount and value of the sums by it loaned and advanced upon, and secured to be paid by, said two several mortgages, according to the terms of said two mortgages, for the reason that this defendant loaned and paid said sums of money upon said mortgages, and took

said mortgages as security therefor, in good faith, and relying upon the terms and provisions of said will of John W. Sprague, and believing and relying upon the representations made to it, and upon the recitals and record of said deeds to Charles Sprague, as herein alleged, and without any knowledge or notice of any charge or lien claimed by said Lucy L. Wickham upon the said property, and this defendant thereafter acquired title to said property by deed in satisfaction of said mortgages, as herein alleged."

The prayer of the answers of the appellee is as follows:

"First. That it may be hence dismissed, with its costs.

"Second. In case the relief above prayed be not granted, then that it may be decreed to be the owner and entitled to the possession of the real estate and property described in clauses 1 and 2 of paragraph 3 of the amended bill herein, free and clear of any title, incumbrance, lien, or claim thereto of the plaintiff or of the defendants herein, and that the title of this defendant thereto be quieted, and for its costs.

"Third. In case the relief above prayed be not granted, then that this defendant may be decreed to be the owner of the two several notes and mortgages herein referred to, and that said mortgages are valid liens upon the real estate and property described in clauses 1 and 2 of paragraph 3 of the amended bill herein, prior and superior to any title, interest, lien, or claim of the plaintiff or any defendant in this cause, and that this defendant may enforce and foreclose said notes and mortgages, and sell said property to satisfy the same, and for its costs.

"Fourth. In case the relief above prayed be not granted, then that this defendant may have an accounting of all moneys loaned and paid by it upon said two notes and mortgages, and of the indebtedness now existing to it for principal and interest upon said notes and mortgages, and for taxes and other disbursements in the maintenance of said property, and that said indebtedness be decreed to be the first lien and charge upon the real estate and property last above referred to, and that said property may be sold to satisfy the same, and for its costs.

"Fifth. And this defendant further prays for such other and further relief in the premises as to the court may appear just and equitable."

The court below denied Mrs. Wickham any relief, and dismissed her cross-bill. It denied the principal relief asked by the complainant; holding that although the deeds to Charles Sprague were colorable only, and made for the purpose of satisfying the lender, the executors and trustees did have power under the will to mortgage the trust property, and that the mortgages to the appellee were in reality mortgages by the executors and trustees, and created valid liens upon the trust property described therein, and that the quitclaim deed to the appellee in satisfaction of those mortgages and the deeds secured thereby extinguished the title of the estate of Gen. Sprague. The court further held that the complainant was entitled to be subrogated to the rights of Otis and Charles Sprague, her judgment debtors, under the stipulation made at the time of the execution of the quitclaim deed, whereby they reserved to themselves, their heirs or assigns, or either of them, the right to repurchase the premises at any time within three years from December 1, 1897, and to have the net rentals received by the company applied upon the purchase price. But the court required the complainant to deposit the sum of $10,000 in the registry of the court within 30 days, as a condition precedent to an accounting by the appellee, and before the complainant would be permitted to know what sum would be required to complete the purchase under the terms of the stipulation. The $10,000 not having been deposited

within the 30 days allowed the original complainant, nor within the further time allowed her assignee, the present appellant, the bill also was dismissed, with costs to the defendants thereto, from which decree the present appeals were taken.

The court below held that the deeds from the executors to Charles Sprague were merely colorable transfers of title for the purpose of making mortgages in the form demanded by the lender, and that those deeds and the mortgages executed by Charles Sprague to the appellee constituted but one transaction, and was neither fraudulent nor illegal; that they were, in legal effect, mortgages by the executors; that the stipulation entered into in the foreclosure suits in the state court of Washington was a lawful contract, based upon a lawful and sufficient consideration, and without any taint of fraud; and that the quitclaim deed executed to the appellee in pursuance of that stipulation passed a valid title to the property covered by it. The court below further held that the executors under the will possessed the power to borrow money, and to mortgage the property of the estate to secure the repayment of the same. Except in one respect, I am unable to agree with those conclusions of the court below.

There can be no sort of doubt of the correctness of the conclusion of the trial court that the pretended deeds from the executors to Charles Sprague were merely colorable. The record shows beyond question that those deeds and the mortgages executed by Charles Sprague to the appellee constituted a mere scheme devised by the respective parties to them for the purpose of accomplishing indirectly what they considered the provisions of the will prohibited. Charles Sprague never paid anything for the purported conveyances to him, and the evidence in the case makes it perfectly plain that it was never intended by any of the parties to the transactions that he should. He never entered into possession of any of the property, nor exercised any act of ownership over any part of it. But on the contrary, the executors remained in possession, and continued to collect the rents and issues thereof, of all of which the appellee, through its agents, had full knowledge. And the court below, in effect, so found. It in effect, therefore, found, and correctly, against the defense set up by the appellee, that it was a bona fide purchaser of the property in question, without notice. The record shows with perfect clearness that the appellee, through its agents, was a party to the entire scheme, and therefore took whatever it got with full notice of all of the transactions. Did the law authorize or sanction any such disposition of the property of the decedent's estate? I am clearly of the opinion that it did not. A statute of Washington, as has been seen, authorizes any person to provide in and by his will the manner in which his estate shall be settled, and declares that, after the probate of such a will, "all such estates may be managed and settled without the intervention of the [probate] court, if the said last will and testament so provides." In the case in hand the testator did so provide. He was possessed of a small amount of personal property, and a very considerable amount of real estate, consisting mainly, if not entirely, of the Sprague Block, upon which

there was an existing mortgage of $40,000 in favor of the German Savings & Loan Society of San Francisco; lot 6, block 904, in the city of Tacoma, upon which there was a mortgage of $15,000 in favor of the New York Life Insurance Company; and the lots of land upon which the decedent resided. It was stipulated at the trial that the $15,000 mortgage held by the New York Life Insurance Company was foreclosed by the mortgagee on November 20, 1897, for the amount of the judgment, with interest and costs, amounting to $18,203.11, leaving no deficiency, and that no redemption was made. That lot is therefore eliminated from the case.

Gen. Sprague, having entered into an antenuptial contract with Abby W. Vance, whom he afterwards married, by which, upon his death, she should receive out of his estate the sum of $15,000, to be paid to her by the executors of his will within one year after his decease, and, in addition thereto, $200 a month until the $15,000 should be paid, ratified and confirmed that agreement in and by his will, and also devised and bequeathed to her, for and during such period of her natural life as she should continue to occupy the same as a home, the lots of land which constituted his residence, and certain articles of personal property; adding therein that:

"In the event my executors and trustees hereinafter named shall not deem it to the best interest of my estate to pay said sum of fifteen thousand dollars when it falls due, and my wife, Abby W. Sprague, shall consent to defer the payment thereof, then I do give and bequeath to my said wife, Abby W. Sprague, in lieu of interest on said sum of fifteen thousand dollars, the sum of two hundred dollars per month, payable monthly, from the date beginning one year after my decease and ending when my said executors and trustees shall pay my said wife the said sum of fifteen thousand dollars. And I do expressly charge the payment of the said sum of $15,000 upon the real estate [constituting their residence] described in this paragraph of my will and in which I have devised to my wife, Abby W. Sprague, an estate during such portion of her life as she shall occupy the same as a home, and I do expressly release and discharge all the remainder of my real estate from the lien of said sum of fifteen thousand dollars."

The will contained but two legacies—that of $1,000 to Lucy M. Skinner, a sister of the deceased, and the $30,000 (subsequently reduced by codicil to $15,000) devised to his daughter, Lucy L. Wickham, the payment of which latter legacy the testator expressly charged upon that part of the Sprague Block marked "A" upon the diagram, and expressly released and discharged all the remainder of his real estate from the lien of that legacy. All the rest, residue, and remainder of his estate, real, personal, and mixed, the testator bequeathed to his four sons, Otis, Winthrop Wright, Clark Woodard, and Charles Sprague, as tenants in common, and in equal parts.

The testator expressly conferred upon the executors and trustees appointed by him full power and authority to sell any or all of his real estate or personal property, except such of the latter as was specifically bequeathed by him, and excepting the parcel of real estate which he expressly charged with the payment of the legacy to his daughter, Mrs. Wickham, and the parcel expressly charged by him with the payment of the money due his wife under the marriage agreement, with or without notice, and upon such terms as

they should deem best, and free and discharged of any and all liens, expressed or implied, created by his will, and expressly declaring—

"That the receipt for the purchase money of my executors and trustees, or the survivor of them, shall be a sufficient discharge of the purchase money, and that it shall not be necessary to obtain a confirmation by any officer or court of any sale or sales made as aforesaid by my executors and trustees or the survivor of them in order to vest in their or his grantees the fee simple of said real estate."

And also expressly directing that his estate should be settled in the manner therein provided, and that none of his executors or trustees should be required to take out letters testamentary, except to admit the will to probate in the manner required by existing laws, after which the estate should be settled without the intervention of the superior or any court or officer in any manner whatsoever.

The conclusion of the court below to the effect that the mortgages executed by Charles Sprague to the appellee were in fact, and should be held to be, the mortgages of the executors, cannot, in my opinion, be supported, in view of the facts or upon principle.

In the first place, the appellee, in its answers, in more than one place expressly alleged that it at all times refused to loan any money to the executors, or to take as security therefor a mortgage upon any part of the property of the estate. There is nothing to the contrary in the appellee's answers. And those averments are fortified by the further allegations thereof to the effect that the deeds from the executors to Charles Sprague were absolute conveyances, made in consideration of the payment by him to them of the expressed consideration thereof; that he thereby became the owner in fee of the property covered by the deeds, after which the appellee in good faith made the $55,000 and $30,000 loans, respectively, to Charles Sprague, taking from him as security for the repayment thereof his notes, secured by his mortgages upon the property. A party is and should be held bound by such statement of facts made in its pleadings. And on principle it is and should be so. Courts of equity cannot, any more than courts of law, make contracts for parties. In the case of Hunt v. Rousmaniere, 1 Pet. 1, 16, 7 L. Ed. 27, the Supreme Court held that where parties, "upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension and the insufficiency of such security, in consequence of a subsequent event, not foreseen, perhaps, or thought of, direct a new security of a different character to be given, or decree that to be done which the parties supposed would have been effected by the instrument which was finally agreed upon."

In Ferry v. Laible, 31 N. J. Eq. 566, which, in respect to the point now under consideration, was quite similar to the present case, the chancellor said:

"It was plausibly argued by the counsel for the complainant that the power to sell conferred by the will embraced also a power to mortgage, and that, if he was right in this contention, the mortgage should be upheld as within the power, for, although not executed by the executors themselves,

yet, having been executed by their grantee, to whom they conveyed the mortgaged premises for the purpose of having them mortgaged to the complainants, it should, in a court which deals mainly with the substance of transactions, regardless of mere questions of form, be treated as the deed of the executors. My judgment rejects both propositions as thoroughly unsound. The last is much too devious, and too strongly marked by false suggestions, if not actual falsehood, ever to be recognized as a fit foundation for a judicial conclusion."

See, also, Moore v. American L. & T. Co., 115 N. Y. 65, 21 N. E. 681.

But I am also of the opinion that under the terms of the will the executors had no power to borrow money, and to secure the same by mortgage upon property of the estate. A mortgage upon real property in the state of Washington does not convey to the mortgagee any title thereto, either before or after condition broken, but is only a lien, which is extinguished by the payment of the money for which it is given as security. Dane v. Daniel, 23 Wash. 379, 63 Pac. 268.

In Allen v. St. L. National Bank, 120 U. S. 32, 7 Sup Ct. 462, 30 L. Ed. 573, the Supreme Court said:

"The essential difference between a power to sell and a power to pledge is well brought out in a recent case in the House of Lords, by Lord Chancellor Selborne, who said: 'It is manifest that, when a man is dealing with other people's goods, the difference between an authority to sell and an authority to mortgage or pledge is one which may go to the root of all the motives and purposes of the transaction. The object of a person who has goods to sell is to turn them into money, but, when those goods are deposited by way of security for money borrowed, it is a transaction of a totally different character. If the owner of the goods does not get the money, his object and purpose are simply defeated; and if, on the other hand, he does get the money, a different object and different purpose are substituted for the first, namely, that of borrowing money and contracting the relation of debtor with a creditor, while retaining a redeemable title to the goods, instead of exchanging the title to the goods for a title, unaccompanied by any indebtedness, to their full and equivalent in money.'"

In Ventress v. Smith, 10 Pet. 161, 9 L. Ed. 382, the same court said:

"Authority given to executors and administrators to sell is a personal trust, and must be strictly pursued. And if they transcend their authority in any essential particular, their act is void."

In the case of Bloomer v. Waldron, 3 Hill, 361, Judge Cowen, in holding that a power of sale conferred upon an executor did not authorize him to make a mortgage, said:

"When a man contracts a sale of his land, whether his object be to raise money or not, he means to put it in the market for what it will fetch at the time, and avoid the fluctuations of prices. An absolute title and delivery of possession will fetch more than a mere pledge. At any rate, there is a substantial difference between raising money upon mortgage and sale, and it is enough to say that a power to raise it by one of these methods puts a negative upon the other."

Not only is there nothing in the will here in question to indicate any intention on the part of the testator that his executors might mortgage and remortgage his property, but the whole frame of it indicates that he used the words "to sell" in their natural and or-

dinary signification. He excluded from the power of sale the personal property specifically bequeathed, the parcel of land upon which he fixed a lien as security for the payment of his legacy to his daughter, and the lots constituting the residence, upon which he fixed a lien to secure the payment of the money due his widow under the provisions of the antenuptial contract as well as the will. Knowing that this money as well as his legacies and debts must be paid, he conferred upon his executors and trustees full power and authority to sell all of his other property; expressly declaring that their receipt for the "purchase money" should be a sufficient discharge of the "purchase money," and expressly declaring that "it shall not be necessary to obtain a confirmation by any officer or court of any sale or sales made as aforesaid by my executors and trustees, or the survivor of them, in order to vest in their or his grantee the fee simple of said real estate." I am of the opinion that under such a will the power to borrow money and secure its repayment by mortgage upon the property of the estate does not exist in the executors and trustees. If they may exercise that power once, they may do so over and over again, and thus prolong the trust indefinitely. No such intention on the part of the testator can be discerned from the provisions of the will in question. See, also, Parkhurst v. Trumbull, 130 Mich. 408, 90 N. W. 25; Taylor v. Galloway, 1 Ohio, 232, 13 Am. Dec. 605; Hoyt v. Jaques, 129 Mass. 286; Allen v. Ruddell, 51 S. C. 366, 29 S. E. 198; Rutherford L. & I. Co. v. Sanntrock, 60 N. J. Eq. 471, 46 Atl. 648.

Nor am I able, in view of the facts disclosed by the record, to see how the appellee can be subrogated to the rights of the German Savings & Loan Society under its mortgage, notwithstanding the fact that that mortgage was paid with money loaned by the appellee to Charles Sprague. This court, as well as the Supreme Court of the state of Washington, has recently held fraudulent and void a similar manipulation of the real property of minor children by the guardian and others interested in evading and circumventing the provisions of a state statute authorizing a guardian to sell the real property of his ward, under orders of the probate court, but making no provision for mortgaging it. Lombard v. La Dow, 126 Fed. 119, 60 C. C. A. 667; Dormitzer v. German Savings & Loan Society, 23 Wash. 132, 62 Pac. 862; German Savings & Loan Society v. Tull et al. (decided here March 6, 1905) 136 Fed. 1. The same principle, in my opinion, applies to fictitious dealings with the estate of a decedent, and it has been so held. Moore v. The American L. & T. Co., 115 N. Y. 65, 21 N. E. 681.

Subrogation, as was said in German Savings & Loan Society v. Tull et al., supra, is founded on the facts and circumstances of each particular case, and on the principles of natural justice. In general, it will be applied—

"Whenever any person, other than a mere volunteer, pays a debt or demand which in equity or good conscience should have been satisfied by another, or where a liability of one person is discharged out of a fund belonging to another, or where one person is compelled, for his own protection, or that of some interest which he represents, to pay a debt for which another is prima-

rily liable, or wherever the denial of the right would be contrary to equity and good conscience. Subrogation being the creature of equity, it will not be permitted where it would work injustice to the rights of those having equal or superior equities. Thus, it will not be enforced against a bona fide purchaser for value without notice, or in favor of a person guilty of fraud, or for the benefit of one who would thereby be enabled to derive an advantage from, or to establish his claim through, his own wrong or negligence or inequitable or illegal conduct. Nor will it be enforced at the expense of a legal right, or where resort to a usurious agreement or security would be necessary for its establishment." 27 Am. & Eng. Encyc. of Law (2d Ed.) 203, 204, and authorities there cited.

With full knowledge of the provisions of the will and of the powers of the executors, the appellee, through its agents, became a party to the wrongful manipulation of the property of the estate already detailed; and after the superior court of the state of Washington had overruled its demurrers to the answers of Mrs. Wickham to the complaints there filed for the foreclosure of the appellee's mortgages, in which she set up in defense the facts here relied upon by her and the cross-complainant, the appellee entered into the stipulation, to which neither Mrs. Wickham nor Mrs. Cox was a party, under which it received the quitclaim deed purporting to convey to it the property involved in those suits, and dismissed them. I am of the opinion that those proceedings, from their commencement to their end, whether so intended or not, were wrongful, and constituted a legal fraud upon all persons legally entitled to look to the property of the estate for the payment of money due them, for which reason, as well as because there is no foundation for it in the appellee's pleadings, I am of the opinion that the appellee is not entitled to be subrogated to anybody's rights. Authorities supra, and German Bank v. United States, 148 U. S. 573, 13 Sup. Ct. 702, 37 L. Ed. 564; Huse v. Den (Cal.) 24 Pac. 790, 20 Am. St. Rep. 232.

The appellee occupies the position of a mere volunteer who has parted with its money on worthless security, and is not relievable by a court of equity out of another's property. Railroad Company v. Soutter, 13 Wall. 517, 20 L. Ed. 543; Patterson v. Brown, 32 N. Y. 81. The case shows that the money due the widow was paid by the executors out of the $55,000 loaned by the appellee, and that the parcel of land charged by the testator with the lien to secure the payment of the legacy to Mrs. Wickham was sold by the executors and trustees and the residuary legatees, subject to certain taxes and assessments against it, for $8,866; such sale being made with Mrs. Wickham's consent; she receiving the purchase money, and releasing the property from the lien in her favor. The balance of her legacy has not been paid. If it continued, as I think it undoubtedly did, an obligation of the estate, I think there can be no doubt that she is entitled to have the trust property restored to the estate; to have an accounting by the executors, and the balance of her legacy paid, if there be sufficient money remaining in the estate to do so. Mollan v. Griffith, 3 Paige, 403; Boyer v. Robinson, 26 Wash. 121, 66 Pac. 119.

So, too, is the judgment creditor of the residuary legatees, Otis and Charles Sprague, entitled to like relief. Mrs. Cox's judgment

against them was rendered prior to their attempted conveyance of their interest in the property to the appellee by the quitclaim deed executed in pursuance of the stipulation, from which both Mrs. Cox and Mrs. Wickham were omitted, although parties to the suits in which the stipulation was entered. That deed, being the final link in the tortious and illegal proceedings, was, like the rest of them, void and of no effect as against the complainant and cross-complainant, and left the residuary interests of the judgment debtors still in them. Those interests the judgment creditor is equitably entitled to have applied to the satisfaction of the judgment, and, as the necessary means to the attainment of that end, is likewise entitled to have the trust property restored to the estate, to have an accounting by the executors, and the residuary interests of the judgment debtors applied, so far as they may go, to the satisfaction of the balance due upon that judgment.

The judgment appealed from should, in my opinion, be reversed, and the cause remanded to the court below for further proceedings not inconsistent with this opinion.

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## WARD v. BOARD OF REGENTS OF KANSAS STATE AGRICULTURAL COLLEGE.

(Circuit Court of Appeals, Eighth Circuit. May 23, 1905.)

No. 2,047.

1. CORPORATIONS—KANSAS AGRICULTURAL COLLEGE—LIABILITY TO BE SUED.
Under a statute creating the Kansas Agricultural College, and vesting the government in a board of regents, which was constituted a body corporate with the right as such to sue and be sued, and to use a common seal, the board was subject to suit for breach of contract, though no legislative appropriation of funds had been made to meet the claim on which the action was based, the board being entitled to satisfy a judgment against it, if rendered out of any funds not otherwise specifically appropriated.

2. SAME—TEACHER'S CONTRACT—TIME—REASONABLENESS.
The statute incorporating the board of regents of the Kansas Agricultural College having authorized it to fix, increase, and diminish the regular number of professors, to appoint the same, and diminish their salaries, without limitation as to time, a contract employing a professor for two and one-half years was not void as made for an unreasonable period, though the personnel of the board was changed from year to year.

3. SAME—DISCHARGE OF PROFESSORS—BREACH OF CONTRACT—LIABILITY.
Where a statute incorporating the board of regents of the Kansas Agricultural College authorized such board to remove any professor whenever the interests of the college required, such provision became a condition of a contract for the employment of a professor for a specified time; and hence, in the absence of fraud or bad faith, regents in discharging a professor before the termination of such contract were not liable in their corporate capacity for damages for a breach of such contract.

4. SAME—JUDICIAL INVESTIGATION.
Where the board of regents of an agricultural college were authorized by statute to remove professors employed whenever the interests of the

college should require, the ground on which a professor was removed prior to the expiration of the period covered by his contract of employment, in the absence of fraud or bad faith, was not a proper subject for judicial investigation.

Sanborn, Circuit Judge, dissenting.

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

George E. Stoker, for plaintiff in error.

R. J. Brock, N. H. Loomis, R. W. Blair, and H. A. Scandrett, for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. In the summer of 1898 the defendant employed the plaintiff as professor of English language and literature for the college year commencing September 1, 1898, and ending June 30, 1899, at a salary of $1,450 per year. At the time of his engagement plaintiff was a resident of New Hampshire. He immediately removed to Kansas with his family, and entered upon the duties of his professorship, and continued to discharge the same until the end of the contract. On the 1st of April, 1899, a change was to occur in the board of regents of the college by the retirement of three of its members through the expiration of their term and the appointment of others in their stead. Fourteen days before this change occurred, namely, March 18, 1899, and while plaintiff's original employment still had several months to run, the board entered into a new contract with him, in writing, whereby he was employed in the same professorship from that date for nearly two and a half years—that is, until the close of the school year ending June 30, 1901—at a salary of $1,450 per annum, payable in equal monthly installments. On June 10, 1899, after the new members had been admitted, the board, by resolution, revoked and canceled said contract, specifying that the best interests of the college required such action. Having waited for the expiration of the term of his employment, the plaintiff brings this suit to recover damages which he claims to have suffered by reason of the violation of his contract, and for other damages which he claims to have suffered in his profession on account of the wrongful discharge. The defendant interposed a demurrer to this complaint upon the ground that it did not state facts sufficient to constitute a cause of action, which was sustained by the trial court. This ruling is the only matter brought under review by the present writ of error.

The action of the trial court is justified upon three grounds: (1) It is contended that because the board of regents is simply a governing body, without property or the power of taxation, and receives all its funds by legislative appropriation, it cannot be sued unless a fund has been placed in its hands to meet the claim upon which the action is based (which is not alleged in the present complaint), and that in the absence of such a fund the plaintiff's only legal redress is by petition to the state Legislature. (2) That the

contract with the plaintiff was for an unreasonable period, and therefore void. (3) If the contract was valid, still the statute which grants to the board of regents the right to "remove any professor or teacher whenever the interests of the college shall require" vests in the board an absolute right to make such removal, and no action can grow out of the exercise of that right.

The statute of Kansas establishing the Agricultural College vests the government of that institution in a board of regents, which by the act is constituted a body corporate, with the right, as such, to sue and be sued and to use a common seal. It is given power, among other things, "to elect a president; to fix, increase, and diminish the regular number of professors and teachers; and to appoint the same and determine the amount of their salaries. They shall have power to remove the president and any professor or teacher whenever the interests of the college shall require."

The first contention of defendant finds its complete answer in this statute. The board is given full control of the Agricultural College. It may enter into contracts not only for the employment of the faculty, but also for maintaining the institution and for erecting such buildings as may be necessary from time to time. It is expressly given the power to sue and be sued in respect of any of these matters. When a judgment is recovered against the board, it may lawfully apply to its discharge any funds in its hands not otherwise specifically appropriated, and, in case no fund exists for the purpose, it will be presumed that the Legislature will discharge its duty by providing a fund to meet any liability of the board that is thus judicially established.

No sound reason is advanced to support the contention that the contract was void because for an unreasonable period. The statute establishing the board imposes no limit upon the term for which the various members of the college faculty may be employed. Such an occasion calls for the exercise of a sound discretion rather than the application of any hard and fast rule. What would be a reasonable term in one case would be unreasonable in another. An engagement such as is usual in other like educational institutions would be necessary in order to obtain the services of competent and self-respecting scholars. Such a contract, though subject to revocation, affords a professor a moral right, which is the only tenure that can be of practical benefit in such a relationship. These considerations have received the express approval of the Supreme Court of Kansas in the case of Board of Regents v. Mudge, 21 Kan. 223. Though the statute imposes no express limitation, it is sought to raise a limitation by implication from the fact that the membership of the board of regents is changed from year to year by the retirement of a portion of its members and the appointment of others to fill the vacancy, and it is urged that the new board ought not to be hampered by the contracts of the old. This fact does not seem to us to justify such an implication. The weight of authority is clearly against such a holding. Caldwell v. School District No. 7 (C. C.) 55 Fed. 372; Gates v. School District, 53 Ark. 468, 14 S. W. 656, 10 L. R. A. 186; Reubelt v. Noblesville School Town, 106

Ind. 480, 7 N. E. 206; Tappan v. Carrollton School District, 44 Mich. 500, 7 N. W. 73. The Legislature has granted the power in unrestricted terms. It is the proper department to determine whether a sound public policy requires the power to be restricted or not. It would be an exceptional case indeed in which the courts would be justified in raising a limitation solely out of considerations of public policy when the Legislature has seen fit to grant an unlimited power. Furthermore, as many considerations of public policy can be brought forward to justify a grant of unlimited power as can be adduced in favor of the limitation for which defendant contends. Gates v. School District, 53 Ark. 468, 14 S. W. 656, 10 L. R. A. 186. There are decisions in Illinois which hold that in the case of teachers in the common schools the local boards have not authority to contract beyond the year for which they are elected. These decisions rest mainly upon peculiar statutory provisions. They also find support in the fact that the management of public schools has always been from term to term. The reason which would justify such a limitation in their case has no application to a great educational institution like the Agricultural College of Kansas, whose administration should be controlled by a permanent and settled policy.

The principal question presented by this writ of error is whether the present case is ruled by the decision of the Supreme Court of Kansas in Board of Regents v. Mudge, 21 Kan. 223, above referred to. The defendant there was the same as in the present case. The statute fixing the powers and duties of the board of regents then was the same as now. Prof. Mudge was employed as professor of geology and related sciences, but no formal contract was entered into. His salary, however, was fixed at $1,600 per annum, and the professor was given a house, rent free. From these facts and the nature of the service an implied contract would be raised that the employment was for a term of one year. Kellogg v. Citizens' Insurance Co., 94 Wis. 558, 69 N. W. 362. No doubt can exist that unless the statute authorized the board to discharge the professor during the term of the contract he would have been entitled to recover the full year's salary in case no facts existed justifying the discharge. He, however, did not sue upon the contract. The board of regents, pursuant to a power vested in it to enact ordinances, by-laws, and regulations for the government of the college, had passed a resolution "that each professor should give and receive three months' notice of resignation or discharge, except in case of gross misconduct." This resolution was in force when Prof. Mudge was employed and discharged. He was discharged without notice and upon the avowed ground of gross misconduct. Now, the matter of primary importance to be noticed is that Prof. Mudge did not sue upon his contract of employment to recover his salary for the unexpired portion of the year, but based his action upon the resolution, and asked to recover only for the three-months period therein mentioned. The Mudge Case can be explained upon the ground that the statute giving the power to remove a professor whenever the interests of the college require is not incompatible

with a regulation made pursuant to another section of the same statute, that a professor should be entitled to three months' notice of removal except in case of gross misconduct. It was decided by the court that, while such a regulation was in force, a discharge without notice, in the absence of misconduct, would render the board liable for the professor's salary for the period covered by the regulation. That was the only question before the court, and the language of the opinion must be confined to that question.

The present case is controlled by entirely different considerations. The plaintiff's contract is itself extraordinary, and was entered into under circumstances such as justify the belief that both parties to it were aware that it would not meet with the approval of the board of regents as it was soon to be reconstructed. The plaintiff sues to recover compensation for the entire period embraced in this contract, and squarely challenges the right of the board of regents to discharge him, although in their opinion, honestly entertained and without fraud on their part, the best interests of the college required such action. We cannot sustain this contention without nullifying the statute. Its language is too plain to require construction. It says: "The board shall have power to remove any professor whenever the interests of the college shall require." By this law the interest of the college is committed to the sound discretion of the board of regents. Considerations which should move them, both in employing and in discharging a professor, rest upon grounds that are not a proper subject of judicial investigation. There is no charge in the petition that the regents acted fraudulently or in bad faith. If we allow the plaintiff to recover, we must, therefore, adopt either one of two propositions: (1) That the regents, in their corporate capacity, are to be held liable in damages for discharging a teacher because the welfare of the college so required; or (2) that the question of the welfare of the college is in every case one ultimately for judicial determination. If we adopt the former proposition, there would obviously be a judicial repeal of the statute; for if damages are recoverable for the exercise of a plain statutory power it would be as though the statute were not in existence. This, however, is the main argument urged to sustain the right of recovery. It is said that though the statute empowers the board of regents to discharge a professor whenever in their judgment the best interests of the college require such action, still, if the discharge is wrongful, the board would be liable in damages. This is a vicious reasoning in a circle. If the regents are vested with the right to discharge a professor whenever in their judgment the best interests of the college require such action, then, if they act in good faith, the discharge cannot be "wrongful." To hold at one moment that the board had the legal right to discharge and at the next moment to impose full damages for the exercise of that right amounts to a destruction of the right itself. It is elementary knowledge that the law which is in force at the time a contract is made becomes a part of the contract. Under this rule the clause of the statute giving the right to remove a professor whenever in the honest judgment of the regents the interests of the

college required was as much a part of the contract of employment as if the language had been expressly embodied among its provisions. If that be the case, it is difficult to see how an exercise of the right can give rise to a legal cause of action. It is further urged in the brief of counsel for the plaintiff in error that the Legislature never intended by the statute that the right of removal should be exercised during the term of an employment fixed by contract. We are, however, unable to give any effect to the statute unless it be held to cover that precise situation. If it be assumed that a professor is engaged without contract, and that his tenure is at will, then either party would be at liberty to terminate such a relationship without the aid of the statute. There would be no legal obligation to hold either the board or the professor to a continuance of the employment. To terminate it would constitute no legal wrong. On the other hand, the statute was necessary to give to the board authority to discharge a professor in case his contract was for a fixed period. It was because the Legislature thought it wise that all such contracts should be made subject to this right of revocation that the statute was passed. Any other holding simply nullifies the law.

To accept the second of the above alternatives is no less plainly violative of elementary principles of law. Questions concerning the efficiency of a teacher in an institution of learning, his usefulness, his relations to the student body and to the other members of the faculty, are so complicated and delicate that they are peculiarly for the consideration of the governing authorities of the institution. It may be perfectly apparent to them that the presence of a teacher is prejudicial to the welfare and discipline of the college, although it would be difficult, if not impossible, to make it so appear to a jury by the production of evidence in court. It would certainly be unusual to submit to a jury the question, "Will the interests of an institution of learning be promoted by dispensing with the services of a particular professor?" And yet if we assume that the statute of the state is of any virtue, it is just such a question that the plaintiff in error sought to have determined in the Circuit Court. It is a question which, in our opinion, the Legislature intended to commit to the sound judgment of the regents who are selected because of an especial fitness for the performance of such duties, and who, by their experience and their intimate familiarity with the institution, are qualified to exercise that discretion in a far sounder manner than any court or jury could be qualified by evidence adduced through witnesses. It is elementary that no cause of action can arise from the lawful exercise of a statutory power in the absence of an express provision conferring it. It is also a principle of law as securely founded that an exercise of a power by an administrative board or officer to whose judgment and discretion it is committed is not a proper subject of review by the courts when fraud or conditions equivalent thereto do not exist. Head v. University, 19 Wall. 530, 22 L. Ed. 160; Board of Education v. Stotlar, 95 Ill. App. 250; Gillan v. Board of Regents, 88 Wis. 7, 58 N. W. 1042, 24 L. R. A. 336; Queen v. Darlington School, 6 Q. B. 682; U. S. v.

Arredondo, 6 Pet. 729, 8 L. Ed. 547; In re Hennen, 13 Pet. 230, 10 L. Ed. 138; State v. Hawkins, 44 Ohio St. 98, 5 N. E. 228; Farrelly v. Cole, 60 Kan. 356, 372, 56 Pac. 492, 44 L. R. A. 464; City of Emporia v. Gilchrist, 37 Kan. 532, 15 Pac. 532. The language of the Supreme Court of Wisconsin in the case above cited (Gillan v. Board of Regents, 88 Wis. 7, 58 N. W. 1042, 24 L. R. A. 336) seems to us entirely sound:

"The trial of a teacher in a normal school on charges of misconduct, with its delays and publicity, and the excitement it would produce and the feelings it would engender, would be very injurious to the school, and it would most likely make heated partisans of the other teachers and the scholars in the contest, and the evil consequences would be great, if not endless. There is no other way in which the character of a teacher can be saved except by silent removal. An ill-disposed and perverse teacher might prefer to have charges against him made public, and to rally his forces of teachers and scholars and outside friends, and have a battle with the board, no matter how much the school might be injured by it. Such a hearing, however, would seem to defeat the wise purpose that the Legislature had in view in giving the board this power of removal at pleasure."

Being satisfied, as we are, that the Mudge Case did not present the questions that are controlling in the present case, we feel at liberty to deal with the present case upon general principles of law, giving to the general language in the Mudge Case only such weight as we believe it entitled to as a matter of reason, and not as a matter of authority. Treating it thus, we find no error in the action of the trial court justifying a reversal of its judgment. It is therefore affirmed.

SANBORN, Circuit Judge (dissenting). I agree with the majority of the court that on March 18, 1899, the board of regents of the Kansas State Agricultural College made a lawful agreement with the plaintiff, Ward, that they would employ him as a professor at a salary of $1,450 per annum until the close of the school year ending June 30, 1901, and that the provision of the statute that "they shall have the power to remove the president and any professor or teacher whenever the interest of the college shall require" entered into and became a part of the contract. But I am unable to bring my mind to the conclusion that this provision authorized the board of regents by their act of removal to violate their contract of employment or to deprive the plaintiff of his salary in the absence of some sound reason for his discharge. The only effect of this provision, in my opinion, was that the board of regents might remove the professor, subject always to his right to enforce his contract and recover damages for its breach in case he was removed without just cause. Any other construction disables the board from making any contract of employment for a term, or for a time certain; for a pretended contract for a time certain, which one of the parties may terminate at will at any time, is no contract for a term. The question has, it seems to me, been decided by the Supreme Court of Kansas, and its decision upon this issue should control in this court. The national courts uniformly follow the construction of the Constitution and statutes of a state given by its

highest judicial tribunal in all cases that involve no question of general or commercial law and no question of right under the federal Constitution or laws. Madden v. Lancaster County, 65 Fed. 188, 192, 12 C. C. A. 566, 570; Illinois Trust & Sav. Bank v. City of Arkansas City, 76 Fed. 271, 279, 22 C. C. A. 171, 179, 34 L. R. A. 518; Detroit v. Osborne, 135 U. S. 492, 499, 10 Sup. Ct. 1012, 34 L. Ed. 260.

In Board of Regents v. Mudge, 21 Kan. 223, 224, 228, 229, this board of regents made a contract on July 16, 1873, for the employment of Mudge for one year. On September 4, 1873, they adopted a resolution that each professor should give and receive three months' notice of resignation or discharge, except in case of gross misconduct. They discharged Mudge on February 6, 1874, without notice, although he was not guilty of misconduct. For three months thereafter he was out of employment, and he sued the board for compensation for these three months. He recovered. The counsel of the board of regents urged two reasons for the reversal of the judgment. The first was stated in these words:

"The plaintiff below was subject to any resolution the board of regents might pass terminating the relation between the parties whenever in the opinion of the board the interest of the college required the passage of such a resolution. The Legislature has vested the government of this college in the plaintiff in error, and made it, and no other tribunal, the judge of what is for the interest of the institution; and the relation existing between the plaintiff and defendant does not result from any contract made and entered into by them, but from the laws existing at the time for the government of the agricultural college, creating professorships, fixing, increasing, and diminishing the regular number of professors and teachers, and providing for the removal of the president, and any professor or teacher, whenever the interest of the college required it. Head v. University, 19 Wall. 526, 22 L. Ed. 160."

The second reason was that the resolution regarding the three-months notice of resignation or discharge was immaterial and ineffective in any event. The court considered both propositions, and decided that neither of them was tenable. The portion of the opinion pertinent to the first proposition reads in this way:

"(1) The act relating to the agricultural college (Gen. St. 1868, p. 75, c. 3) provides, among other things, as follows:

" 'Sec. 2. The government of such college is vested in a board of regents,' etc.

" 'Sec. 3. The board of regents shall constitute a body corporate, with the right, as such, to sue and be sued, to use a common seal, and to alter the same at pleasure.'

" 'Sec. 4. The regents shall have power to enact ordinances, by-laws, and regulations for the government of said college; to elect a president; to fix, increase, and diminish the regular number of professors and teachers; and to appoint the same, and to determine the amount of their salaries. They shall have power to remove the president and any professor or teacher whenever the interest of the college shall require.'

" 'Sec. 12. The board of regents shall have the general supervision of the college and direction and control of all expenditures.'

"It will be seen from the foregoing sections of the statute that the power reposed in the board of regents is very extensive. They are a corporation having the entire control of all departments of the college—educational, financial, and administrative. They have the power to appoint and discharge the president, and all the professors and teachers, and to fix and increase

or diminish their several salaries. But with all these powers, they are not supreme, nor irresponsible. They may 'sue and be sued,' just as the managing officers of other public corporations, such as cities, towns, counties, townships, and school districts, may. While their powers are extensive, still they may render their board liable by the wrongful exercise of such power. Thus they have the unquestioned and the continuing power of employing a president and professors and teachers whenever they may choose, and of discharging any of them whenever they may choose; but if they agree to employ a president or professor or teacher for a period of three months, and then wrongfully discharge him before the three months has elapsed, they will leave their board responsible for the whole amount of the salary for such three months, notwithstanding such discharge. While the Legislature unquestionably intended to confer upon the board of regents extensive powers, yet it did not intend to confer upon them the irresponsible power of trifling with other men's rights with impunity. And making the regents responsible for their acts does not in the least abridge their powers. It only tends to make them more cautious and circumspect in the exercise of their powers."

This opinion seems to me to be a plain and authoritative ruling that if the board of regents agreed to employ a professor or teacher for a period of two or three years, and then wrongfully discharged him before this time has elapsed, they left their board responsible for the whole amount of the salary for the length of time for which he was lawfully employed notwithstanding his discharge. And this seems to me to be a just and rational ruling.

This ruling is not less effective or binding upon the federal court because the decision of the case is placed upon two propositions which were pertinent to the issue, to wit, the effect of the statute and the effect of the rule, instead of upon one. Where a court places its decision of the ultimate legal issue before it upon its decision of two legal questions which were pertinent to the issue, were debated at the bar, and were considered and determined in the opinion, the decision of each of the two questions, and of every pertinent legal question decided in reaching either decision, has the binding force of an adjudication, and is not mere obiter dictum. Union Pac. Ry. Co. v. Mason City & Ft. Dodge R. Co., 64 C. C. A. 348, 354, 355, 128 Fed. 230, 236, 237.

In Board of Education of City of Ottawa v. Cook, 45 Pac. 119, the Court of Appeals of Kansas has reached the conclusion announced by the Supreme Court in the Mudge Case in the consideration of a similar issue. In that case the board of education employed a teacher for the term of one year, commencing in September, 1890, under a rule which read in this way:

"At the regular meeting in June or as soon thereafter as practicable the board shall elect the teachers of the public schools to hold their positions for one year unless sooner removed by vote of the board."

On March 18, 1891, the teacher was removed by a vote of the board. She sued to recover her salary for the remainder of the year. The court held that the clause, "unless sooner removed by vote of the board," did not mean that the board might remove her without cause at its pleasure or caprice, and that notwithstanding she was removed by a vote of the board that removal left the board liable for her salary throughout the year, and the court affirmed a judgment in her favor for her compensation.

Both because a construction of the Kansas statute which gives the board of regents the power to remove its employés without cause at any time seems to me to be unreasonable and inconsistent with the existence of any contract for a term, and because the courts of Kansas have so decided this question in construing this statute, I am of the opinion that the judgment below should be reversed, and that the case should be remanded for answer and trial.

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## TOWNSEND v. BEATRICE CEMETERY ASS'N.

(Circuit Court of Appeals, Eighth Circuit. May 2, 1905.)

No. 2,090.

APPEAL—REVIEW—ABSENCE OF EVIDENCE FROM RECORD.

On appeal in an equity case, recourse cannot be had to an opinion filed by the court below to ascertain the facts, where there is no evidence in the record; and, where the case was decided on issues of fact, it cannot be reviewed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2967.]

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

Richard S. Horton, for appellant.

Ernest O. Kretsinger, for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The appellee, Beatrice Cemetery Association, a corporation of the state of Nebraska, filed its bill in equity against appellant, W. J. Townsend, alleging, in substance, that it owned certain lands described, platted into blocks and lots for the sole purpose of being used as a cemetery, and not with a view to profit; that a large number of bodies had been buried therein; and that it was improving and beautifying the whole premises, to be used for the purpose of the burial of the dead. The bill alleged that in March, 1899, the defendant therein recovered a judgment in the United States Circuit Court at Omaha, Neb., against said association for the sum of $5,082.66, and $64.40 costs; that the defendant had filed a certified transcript of said judgment in the office of the clerk of the district court of Gage county, Neb., in which the cemetery lots are situated; that the defendant claims to have a judgment lien upon the unsold lots and blocks in said cemetery grounds, and was threatening to cause execution to issue upon said judgment against said lots, to sell them to satisfy said judgment. The bill alleges that said property, under the laws of the state of Nebraska, is exempt from sale under execution to collect said judgment, and that the action of the defendant in filing said judgment, and threatening to enforce the same as a lien on said land, casts a cloud upon the title. The bill prays to have said cloud removed,

and for all proper relief. The defendant below made answer to this bill, which is not material to be recited, as the case on appeal depends upon the cross-bill hereinafter mentioned. In its cross-bill the defendant alleged the ownership by the cemetery association of the real estate described in the bill of complaint; that only a part of said property is used as a burying ground, and a portion thereof is leased by the complainant for agricultural purposes. It then sets out the recovery of the judgment against the association, and alleges that it is a lien upon the property aforesaid. The cross-bill further alleges that it was adjudicated by the said court in the action in which the said judgment was recovered that the indebtedness represented by the judgment grew out of a loan of money by said defendant, Townsend, to said association, which said sum of money was obtained and used by said association to pay an indebtedness which it created in the purchase of said land. The cross-bill prayed that said judgment be declared to be a lien upon certain portions of said lands, and that the said association be enjoined from selling and disposing of any part of the same. It further prayed that a receiver be appointed to collect the proceeds from the sale of all lots in the west 40 acres of said property, and for other proper relief. To this cross-bill the complainant below made answer, putting in issue the material allegation in the cross-bill; specifically denying that the land on which the lien is sought to be enforced is used for agricultural purposes, further than to allow the sexton, who is employed by the association at a salary of $200 per year, to use the grass and crops which he raises thereon in part payment of his salary; alleging that such cultivation of the ground is only intended for its better preparation for the use of a cemetery. It then set out the number of persons buried in said cemetery, and the probability of the use in the near future of the whole of said property for such burial purposes; that a portion of the land on which the said lien is sought to be enforced is already occupied by graves of the dead buried therein. It denied that the said judgment was a lien on any of the property in question, and denied that the cross-complainant was entitled to the appointment of a receiver, as prayed. The formal replication was filed to this answer. The Circuit Court entered a decree dismissing the bill of complaint, and also the cross-bill of complaint. From the action of the court in dismissing said cross-bill the said Townsend took an appeal to this court, assigning for error that the Circuit Court erred in dismissing the cross-bill; that it erred in denying the prayer of respondent for the appointment of a receiver, and in not rendering a decree for respondent upon his cross-bill.

The only question, therefore, before this court for review, is the action of the Circuit Court in dismissing the cross-bill. The only records respecting the proceedings on the cross-bill before this court are the cross-bill, answer, reply, and decree of the court dismissing the bill. There is not one word of evidence preserved in this record. Counsel seem to have assumed that the memorandum opinion filed by the trial judge during the pendency of the case, which is sent up with the record, can be referred to on this appeal for the ascertain-

ment of the essential facts in evidence. This is a fatal misconception. Recourse cannot be had to such opinion to ascertain the facts. Dickinson v. Planters' Bank, 16 Wall. 250, 21 L. Ed. 278; Saltonstall v. Birtwell, 150 U. S. 417, 14 Sup. Ct. 169, 37 L. Ed. 1128; England v. Gebhardt, 112 U. S. 502, 5 Sup. Ct. 287, 28 L. Ed. 811; Kentucky Life & Acc. Ins. Co. v. Hamilton, 63 Fed. 93, 11 C. C. A. 42; Hinkley et al. v. City of Arkansas City, 69 Fed. 768, 16 C. C. A. 395; Adkins v. Sloane, 60 Fed. 344, 8 C. C. A. 656; Id., 61 Fed. 791, 10 C. C. A. 69.

The appellant sought by his bill one of two things—either to have the unsold lots of the cemetery association sold under execution to satisfy his judgment, or, if that could not be done, then "that a receiver may be appointed to collect the proceeds of the sale of all lots in the west forty acres of said property." In either case his right to invoke the aid of a court of equity is predicated of the allegation in the bill that the indebtedness for which the said judgment was rendered grew out of a loan of money by appellant to said cemetery association, and which was used in purchasing said property. This allegation is put in issue by the answer. As already stated, the record before us does not present the evidence, either in the form of depositions or ore tenus, to establish this important issue. As, under the statute of the state of Nebraska, such property, platted and designated for use as a burial ground, is not subject to sale on execution (section 53, c. 16, Comp. St. 1903), the cross-complainant recognized that, if he had any ground of relief whatever for the collection of his judgment debt, it was predicable of the existence of the fact that the consideration of the judgment was money loaned by him to the association, with which the said property was purchased. Without proof of this fact, his case would fail, without the court considering and determining whether or not equity could afford him the assistance he asks if the fact of such use of the money were proven.

As the decree shows that the cause was heard upon the cross-bill, answer, and reply, "and the proofs in the case," the dismissal of the cross-bill was therefore predicated upon proofs for want of equity. The proofs not being before the court, it results that the decree of the Circuit Court must be affirmed.

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## NORTHERN COMMERCIAL CO. v. NESTOR.

(Circuit Court of Appeals, Ninth Circuit. May 22, 1905.)

No. 1,071.

1. SHIPPING—CARRIERS OF PASSENGERS—DUTY TO PROTECT FROM INJURY.

A carrier of passengers by water is bound to exercise the utmost vigilance and care in maintaining order on its vessel and to protect its passengers against injury by the careless use of firearms or other violence from whatever source arising, which could reasonably have been anticipated in view of all the existing circumstances and the number and character of the persons on board; and where the officers permitted

passengers to discharge firearms on board in a reckless manner the owner is liable to a passenger injured thereby without his fault or negligence.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 538, 544.]

2. DAMAGES—PERSONAL INJURY—INSTRUCTION.

The charge of the court as to the measure of damages recoverable in an action for a personal injury considered and approved.

3. SHIPPING—INJURY OF PASSENGER—DUTY OF SHIP TO GIVE MEDICAL CARE.

A passenger on a vessel, injured, while on a voyage, without his fault, through the negligence of the officers, is entitled to no less care from the ship than a seaman, and its duty is not fulfilled by giving him such care as an ordinary unskilled person could afford him.

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

The defendant in error was plaintiff below in this action, which was brought to recover from the plaintiff in error (defendant below) $50,600 as damages growing out of the wounding of the plaintiff to the action while a passenger on the defendant's steamer Sadie on one of her trips between Nome and Keewalik, in the District of Alaska, the complaint alleging that on June 29, 1902, the defendant received the plaintiff on board its steamer in the roadstead off Nome, for the purpose of safely carrying him as a passenger from Nome to Keewalik for the first-class fare of $30, paid to the defendant by the plaintiff therefor; that the defendant, its servants, agents, and employés, so negligently, carelessly, and unskillfully operated and managed the steamer on the trip that divers passengers (other than the plaintiff) and employés were allowed and permitted to and did fire off guns and firearms at random on the steamer, and that, notwithstanding the apparent danger from such reckless shooting, the defendant, by and through its servants and employés, negligently permitted the same and participated therein, and so misbehaved in the management of the steamer that through its negligence and carelessness the plaintiff, without any negligence or carelessness on his part, and while using ordinary care to avoid the danger of such firearms, was, on July 1, 1902, shot through the left leg, near the ankle, by a bullet from one of the guns discharged on board the steamer in the hands of one of the said persons aboard; that the defendant negligently and carelessly allowed the plaintiff to remain on the steamer without medical or surgical aid or attention for several days thereafter, and upon returning to the port of Nome from the trip to Keewalik the defendant negligently kept the plaintiff on the steamer for two days before removing him to the shore, where he procured medical and surgical aid and attention; that, owing to the injuries so received, and in consequence of the defendant's neglect of him, the plaintiff was made sick, lame, and permanently disabled; that the bones of his left leg were shattered and weakened, thereby causing him great bodily pain and mental anguish, and permanently impairing and disfiguring him; that by reason of said injuries the plaintiff suffered the loss of his time from his business, and continued to be unable to attend to his business in the future; that in consequence of such injuries the plaintiff was compelled to and did expend $50 for medicine, $250 for medical and surgical aid, and $300 for hospital treatment and nursing, and will be compelled to expend in the future other moneys for medicine, medical and hospital treatment and nursing. By reason of all which the plaintiff has been damaged in the further sum of $50,000. The defendant, by its answer, admitted that it was the owner of the steamer Sadie, and a carrier of passengers for hire between Nome and Keewalik, and that the plaintiff was a passenger on the steamer at the time of his injury; but put in issue the other material averments of the complaint. The case was tried with a jury, which returned a verdict in the plaintiff's favor for $4,600, upon which judgment was entered against the defendant corporation. The case is brought here by it.

Thomas, Gerstle & Frick, Charles S. Johnson, and A. J. Daly, for plaintiff in error.

William A. Gilmore, James E. Fenton, and T. M. Reed, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

It is contended on the part of the plaintiff in error that the court below should have instructed the jury to return a verdict in its favor. The refusal of the court to do so was, in our opinion, clearly right. The evidence showed without conflict that the defendant in error was at the time that he was shot sitting on the upper deck of the steamer, near the captain's cabin, reading. There was testimony going to show that on the day of the accident—which was July 1, 1902—as well as the day before there had been much shooting by the passengers and others on board, with pistols, guns, and rifles, some of them running from one side of the boat to the other with their weapons, and there was testimony tending to show that during the time such shooting was going on the rifle with which the defendant in error was shot had been carelessly left loaded on some grating on the deck of the steamer by a passenger called "The Lucky Swede," after which it was picked up by a man named Quinn, who handled it so recklessly as to shoot the defendant in error, inflicting upon him a painful and serious injury. The case further shows that several of the passengers—the defendant in error among them—had complained to the master of the vessel of the danger of such use and handling of the firearms on board, the defendant in error testifying, among other things, as follows:

"The shooting began in the morning, and continued off and on through the day, away along until midnight of June 30th, after midnight. I saw the 'Lucky Swede' and saw Mr. Donahue and Frank Harker shooting. There were several others. A rifle, double-barrel hammerless shotgun, and several revolvers were used that day. A passenger on board by the name of Frank Harker was using the double-barrel shotgun. On June 30th, a great number of shots were fired. I had a conversation with the captain on June 30th. The captain was on the pilot house, walking back and forth. It was in the morning some time. There had been shooting. I asked the captain to not allow that reckless shooting, and people running across the boat with his gun; that somebody was liable to be hurt. I do not recollect what the captain said, but it was to the effect that guns were allowed on the boat. There was shooting prior to my conversation."

In the testimony of the witness Riese that witness said, among other things:

"I saw Mr. Quinn handling that gun on the morning of June 30th. I don't know whether he was shooting it or not. I mean the twenty-two rifle. He was handling it just a little aft of the paddle wheels—between there and the stern of the boat. I could not be positive whether he handled the gun on the first day or not. I know he did on the second. That was the next day after we left Nome, the 30th of June. On the morning of the 1st day of July he was on the aft part of the boat, and he wanted this little rifle. He was handling this rifle, but he was too reckless with it, that I took it away from him, and gave it to some one else. I forget now who it was. I

had a conversation with the captain of the Sadie prior to the time Mr. Nestor was shot. He was standing at the corner of the pilot house, on the left-hand side, and looking towards the forward end of the boat. I had this conversation on the 1st day of July, a little while before lunch, about eleven o'clock a. m."

The witness being asked to state that conversation, the question was objected to, and, the objection being overruled, he answered:

"I went to the captain, and told him that I did not think it right to allow people to handle guns on board the steamer in such a careless manner; that it endangers the lives of our fellow passengers. I don't just exactly remember now what the captain did say. He made some kind of a sharp remark to me, as much as to say that he was running the ship, or something to that effect. I didn't get any satisfaction from him. After I conversed with the captain, he did not take any steps to stop the shooting. There was shooting after that."

On cross-examination this witness testified:

"I went once to the captain. I am positive that was on July 1st, and not on June 30th. I remember the incident that occurred at that time because it was the day that this man Quinn handled the gun in such a reckless manner, and this incident occurred shortly afterward. I guess I did make the answer to the question in the taking of my deposition, 'When was it you spoke to the captain?' the answer, 'It was the first morning out after we left here;' and in answer to the question, 'About what time; do you remember?' I guess I did make the answer, 'It was about nine or ten o'clock in the morning.'"

It is surprising, in view of such testimony, to find it seriously contended that the court should have taken the case from the jury by directing a verdict for the defendant. The defendant was bound to exercise the utmost vigilance and care in maintaining order and guarding its passengers against the negligent and careless use of firearms and other violence, from whatever source arising, which might reasonably have been anticipated, or naturally expected to occur, in view of all the existing circumstances, and of the number and character of the persons on board. Flint v. Norwich, etc., Trans. Co., 34 Conn. 554, Fed. Cas. No. 4,873; Norwich & N. Y. Transp. Co. v. Flint, 13 Wall. 3, 20 L. Ed. 556; West Memphis Packet Co. v. White, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427. The charge of the court below, taken as a whole, was in substantial accord with this rule. It is not, as has been often decided, permissible to take and consider isolated sentences of a charge, regardless of their context. We are of opinion that the charge of the court below covered the law applicable to the case (except in respect to an omission, favorable to the plaintiff in error, hereinafter noticed), and that there was therefore no prejudicial error in refusing such of the plaintiff in error's instructions as stated the law correctly.

It is urged on behalf of the plaintiff in error that the jury was not properly instructed in regard to the assessment of damages. This is the instruction given by the court on that subject:

"I further instruct you that if you find from a preponderance of the evidence all of the issues in this case in favor of the plaintiff, and that he is entitled to recover, the measure of his recovery should be limited strictly to what is termed 'compensatory damages,' not exceeding the sum of fifty thousand six hundred dollars. In assessing such damages the jury may consider the award: (1) Such sum as will compensate him for the reason-

able value of the services for medical attendance, for medicines, nursing and hospital fees paid or incurred, if any such expenses have been proven, in attempting to effect a cure, and for nursing him during the period that he was disabled by his injury. (2) The value of his time during the period that he was disabled by such injury, if it has been shown by the evidence. (3) If the injury is of a permanent nature, and has impaired the plaintiff's power to earn money in the future, such sum as will compensate him for such loss of power. And, finally, the jury may consider the pain and suffering, both mental and physical, to which plaintiff has been subjected, if any; the loss of time and loss of wages which has resulted from his injury, if any; the nature and extent of his physical injuries; the effect upon his ability to earn his living since the injury occurred, as compared with his ability to do so before; and the probable effect of those injuries upon his future health and strength. Under all these circumstances, and in view of all these facts, if you find plaintiff is entitled to recover, you should award him such damages as you, in your dispassionate judgment, believe will be a reasonable and just compensation for the injuries, if any, he has sustained, not exceeding the sum of fifty thousand six hundred dollars."

The first objection made to these instructions is that the jury was first directed to take into account the value of the plaintiff's time during the period he was disabled by the injury, and was again told to consider the loss of wages sustained by the injury; that this was authorizing a double recovery for the same thing. We do not think the jury could have been misled in the particular indicated by the instructions given. The plaintiff in error had testified to the amount of wages he was accustomed to receive, and the value of his time was therefore the amount of the wages, which was evidently what the court meant, and what the jury must have understood by the instructions in question.

It is also contended on the part of the plaintiff in error that there was no testimony tending to show that the plaintiff's power to earn money was lessened by the accident, and therefore that the instructions in respect to damages were erroneous. But we think the testimony of the plaintiff himself and of the witness Dr. Rininger constituted a sufficient basis for the giving of the instruction complained of.

Another objection, contained in the ninety-second and ninety-third assignments of error, is that the court erred in refusing to charge the jury that, if it should be found that the defendant attended the plaintiff after he was shot with the reasonable care that an ordinary person would have bestowed upon him under the circumstances, they should return a verdict for the defendant. Such would not have been the degree of care required of the defendant towards one of the members of its crew. The Iroquois, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955; Id., 118 Fed. 1003, 55 C. C. A. 497; The Troop, 128 Fed. 856, 63 C. C. A. 584; Whitney v. Olsen, 108 Fed. 292, 47 C. C. A. 331. Certainly a passenger is entitled to none the less care. Although one of the alleged grounds of the plaintiff's action was the defendant's neglect of him after he was wounded, and although the plaintiff's testimony tended to show such neglect, yet the attention of the jury was not called to that phase of the case in the instructions that were given. This, manifestly, was in favor of the defendant to the action, and not to its prejudice.

The judgment is affirmed, subject to the stipulation of the respective parties to the suit filed in this court, agreeing that the judgment shall not bear interest after April 1, 1905.

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SOUTHERN PAC. CO. v. GLOYD.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1905.)

No. 1,946.

1. MASTER AND SERVANT—SAFE PLACE TO WORK—CARE REQUIRED OF RAILROAD COMPANIES.

The care which the law requires of a railroad company respecting the safety of the place where work is to be performed by its employés is ordinary care, such as prudent, intelligent, experienced men usually use under like circumstances to guard against dangers reasonably to be anticipated. It is not bound to use the best and safest guards or appliances, but, if it uses such as are customarily used under like circumstances, it discharges its duty.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 173, 174, 183, 184, 188–190.]

2. SAME—INJURY OF BRAKEMAN—MAINTAINING OPEN CULVERT.

Where a railroad company had for 30 years maintained open culverts on its line at all points remote from stations, without any injury having resulted therefrom to employés, or any fires having occurred on such culverts, while several had occurred on its planked culverts, near stations, caused by coals dropped from engines on the planking, it was not chargeable with negligence in maintaining such open culverts on a grade where it was frequently necessary to cut trains in two and double in going up the grade, and was not liable for an injury to a brakeman accustomed to the road by falling through such a culvert while so cutting a train in the night; the risk therefrom, in view of the custom of such road and all others in the region to use open culverts, being one which the brakeman assumed.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 555.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

3. SAME—ACTION FOR INJURY—INSTRUCTIONS.

An instruction, in an action against a railroad company to recover for an injury to a brakeman by falling through an open culvert, which stated that the degree of care required from defendant in the construction of the culvert was such as a master would ordinarily use if the danger to be guarded against was a personal danger to the master himself, is erroneous, as stating an incorrect measure of care, as well as misleading, in that there could be no evidence to make it applicable to a railroad company.

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

The defendant in error (plaintiff below), after three years' service as locomotive fireman on a Wisconsin railroad, entered defendant's service as freight brakeman March 5, 1902, upon the division of defendant's railroad between Carlin and Wadsworth, a distance of 256 miles. He made one trip over that division in March; four or five in April; and from July 1st, worked steadily, except one day, until July 21st, when he was injured. Up to his last trip he had been head brakeman, but on that trip he was rear brakeman. On this division was Rokeby Hill, ascending eastward from Cressid to

Rokeby, a distance of two miles, on a grade so steep that more than three-fourths of the east-bound freight trains had to be "doubled" on that hill. The engine would haul the whole train up the hill until it could no no farther, when the train would stop, and be separated near the middle, and the rear section left with brakes set, to hold it while the engine went on with the forward section to a siding at the top of the hill, whence it would return and take up the rear section, when the train would be united, and go on. Some freight trains went over the hill without "doubling," and all others, before being separated, were taken as far up the hill as the engine could haul the whole train; and thus the stopping of the train and the necessity of dividing it might occur at any place from near the bottom to near the top of this long hill. At Cressid there was a switch siding, and at a short distance east of that was a culvert, crossing the roadbed under the tracks for the passage of water. This culvert was covered with plank at least for a space of four feet outside of each rail. At long distances from this culvert and from each other two other culverts, to allow the passage of water, crossed the grade of the railroad at different places on the slope of this hill. These two culverts were each eight feet or more in width, of varying depth, and without covering, except the stringers, ties, and rails. On that division of said railroad over which the plaintiff was constantly passing were 168 similar open culverts. On July 21, 1902, the freight train on which plaintiff was rear brakeman left Wadsworth, going east, with 20 loaded and 2 empty cars. On reaching Rokeby Hill after midnight, plaintiff, by direction of the conductor, went ahead over the cars to about 10 cars from the engine, to be ready to "double"; and, when the train stopped, plaintiff passed to the ground with a lantern, turned the air cock, uncoupled the hose, and released some air to set the air brakes in the rear section, and signaled the engineer for slack, which being responded to, he pulled the coupling pin, and signaled the engineer to go forward. But the backward movement had started the rear section, and plaintiff, observing that he had not released air enough to cause the brakes to hold that section, followed its backward movement to correct this. He followed it about 10 feet, reaching over the drawhead for the hose cock to release more air, when he stumbled into one of these open culverts, falling partly down, sidewise, when, the forward section of the train being still moving backward, his arm was caught between the drawheads of the cars, and so injured as to make necessary amputation near the shoulder. Other facts will be mentioned in the opinion. In this action the negligence charged against the defendant was the leaving this culvert open and uncovered. The verdict was for the plaintiff.

Henry G. Herbel (Martin L. Clardy, on the brief), for plaintiff in error.

W. L. Maginnis (Charles Stout, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

The evidence shows that the culvert where the accident occurred was not in the vicinity of any yard, and was about one-half mile distant from the nearest switch, and passed through and across the fill under the track on the main line of the defendant's railroad. So far as appears, it was in good repair and without defect. But it was not covered with plank, and was therefore open between the ties. This mode of construction is alleged to be negligent, and lacking in that ordinary care which a railroad company is bound to exercise in providing a safe place for the performance of their work by its employés. The places where employés on a railroad must per-

form their work, whether upon trains when moving, or about trains upon tracks, culverts, bridges, or switches, are usually unsafe, unless intelligent care for his own safety is exercised by the employé. The care which the law requires of the railroad company respecting the safety of the place where the work is to be performed is ordinary care—such care as prudent, intelligent, experienced men usually employ under like circumstances to guard against dangers reasonably to be anticipated. It is not bound to use what the court or jury may regard as the best and safest guards or appliances. If it uses such as are customarily used under like circumstances, it discharges its duty. Following the custom of all railroads in that regard, the defendant railroad company had covered its culverts at stations, yards, and switches, where men were habitually working on the ground about trains, and generally present to protect such covered culverts from fires caused by coals dropped from engines on the plank covering, but left all its culverts on its main line, distant from stations, yards, and switches, uncovered, as less exposed to danger from fire which might cause wreckage of trains, and also from danger of weakening from decay caused by moisture held between planks and timbers. On the division upon which plaintiff had worked as brakeman during the time stated, there were, and had been since the year 1868, 168 such open culverts, including those on Rokeby Hill, and, though the practice of "doubling" freight trains had been the same during all this time, no such accident had ever before happened, while many fires upon the covered culverts had occurred. It was the duty of the railroad company to use care to guard against all probable dangers to its trains laden with passengers and freight, and surely against so serious a danger as the weakening or destruction by fire of culverts on its main line, away from yards or stations where such fire would be observed. It had, in view of the dangers to be apprehended, and of the universal usage of railroads in that region, to use its discretion as to whether it was safer, all things considered, to maintain this particular culvert covered or uncovered, under the rule, which has been applied to unblocked frogs (Gilbert v. Burlington, etc., R. Co., 128 Fed. 533, 63 C. C. A. 27), double deadwoods (Northern Pacific R. Co. v. Blake, 63 Fed. 45, 11 C. C. A. 93), sharp curves (Tuttle v. Ry. Co., 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). And as fires had started in the covering of culverts on that division, that was a danger of which the defendant company was warned and should guard against, while, as no harm to an employé had happened during all that time from the many uncovered culverts on the same division, such danger would be less likely to be anticipated.

The company would hardly expect that a brakeman would have passed as many times as plaintiff did over that division of its railroad, with its 168 open culverts, without, as plaintiff testified, having observed any of them, or anticipate that descending from a car, with a lighted lantern, 10 feet from such large, open culvert, which must have been plainly visible at the side of the track, he would there, just above the culvert, go between two cars and separate

them, failing to release sufficient air to set the brakes of the rear cars, and follow those cars, with the lantern in his hands, into the open culvert, in his tardy attempt to release more air. The pretense that, in releasing air to set the brakes in the first instance, there was need of caution not to release too much, and set the brakes too hard, lest a jerk should endanger the drawheads, is palpable. The train had stopped still for lack of power, when being drawn up an ascent. Between each car the "slack was out" when the train stopped, and no excess of brakes could have caused any jerk.

The evidence made it clear that open culverts between stations and away from switches were in common use upon all railroads in that part of the country. The use of this open culvert was therefore not negligent on the part of the defendant, and any danger from such culvert was a risk assumed by plaintiff—an ordinary risk of his employment. Titus v. Bradford, B. & K. R. Co. (Pa.) 20 Atl. 517, 20 Am. St. Rep. 944. The motion for a directed verdict for the defendant should have been granted.

Respecting the degree of care which the defendant should exercise in providing a safe place for its employés when performing their work, the court charged the jury as follows:

"The particular amount of care that was required of the defendant was just that care that an ordinary, prudent man, under those particular circumstances, in conducting that business, would use if the danger resulting from a want of care was his personal danger. If the defendant measured up to that standard, it was not guilty of negligence; if it fell below that standard, it was."

The instruction assumes that greater care will be exercised where the danger to be guarded against is danger to the person of the master. An exception taken by defendant covers this portion of the charge. It is not specified as error in the assignment of errors, but was the subject of argument in the briefs and at the hearing; and, as there must be another trial, which will raise the same question as to the degree of care incumbent on the defendant, the correctness or inaccuracy of this instruction should be now determined. The instruction, as given, is erroneous. The law requires that a master shall use ordinary care to provide for his servants a safe place in which to do their work. Ordinary care, as before stated, is that degree of care which prudent, intelligent, and experienced men usually employ under like circumstances to guard against dangers which are obvious or reasonably to be anticipated. This rule is plain, reasonable, and easily understood; and whether or not a master has in a particular case used ordinary care is readily determined by proof of the care which is usually employed by other prudent, intelligent men, engaged in like business under like circumstances, and in view of like hazards. The vice in the instruction given in this case is not only that it is not in accord with the well-settled law on the subject, but, in stating to the jury that the degree of care required was such as the master would ordinarily use if the danger to be guarded against was personal danger to the master himself, the court gave to the jury a rule which could not be

applied to the evidence in the case on trial, as there was no evidence as to what care or precaution was ever taken as to culverts or like structures on any railroad, when the conditions made the danger arising from want of care the personal danger of the master. Upon no railroad that ever existed did its principal managing officers (who, in the aggregate, may be regarded as the master, so far as the master's personality can be considered susceptible of danger) form the operating crews of trainmen on the trains, or become liable to the hazards of such an accident as happened in this case. Hence there was no evidence before the jury, and none could have been adduced, tending to show what different or additional precautions were, in the exercise of ordinary care, usually taken by prudent and intelligent principal officers and mangers of a railroad in respect to the construction of culverts on their main line, where such officers and managers were also the brakemen on the trains, and personally subjected to whatever perils to brakemen might arise from the culverts along the line. Such an instruction, applicable to no evidence in the case, could only leave the jury to conjecture what care or precaution would be taken under such fanciful conditions, if by the exercise of their imaginations they could bring themselves to contemplate as real such visionary unreality. The object of stating a rule of law to a jury is to afford them a safe, practical guide, which can be comprehended, and which is applicable to the evidence they are to consider, and which, if observed, will lead them to right conclusions from that evidence. To give the jury a rule that is not applicable to any evidence in the case, or that can be produced, can only mislead them, and is manifest error. The exact question, arising upon a similar instruction, has just been considered in this court in Southern Pacific v. Hetzer (C. C. A.) 135 Fed. 272, wherein Judge Sanborn reviews the authorities, and so clearly demonstrates the error in the instruction that further comment is needless here.

Judgment is reversed, and the cause remanded, with directions to grant a new trial.

HOOK, Circuit Judge, concurred in the reversal, but not in all of the grounds as stated.

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## AMERICAN ALKALI CO., to Use of BROWN, v. KURTZ.

(Circuit Court of Appeals, Third Circuit. May 24, 1905.)

No. 13.

CORPORATIONS—STOCKHOLDERS—LIABILITY FOR ASSESSMENT.

One who, acting as agent for the owners of stock of a corporation in which he himself had no interest, caused the same to be transferred on the books of the company to a third person, who was an employé of the company, and without interest in the stock, the actual ownership of which remained as before, did not thereby render himself liable for an assessment thereafter made by the directors, where no fraud or deception was practiced on the company.

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

For opinion below, see 134 Fed. 663.

Malcolm Lloyd, Jr., for plaintiff in error.

R. M. Schick, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This was an action at law brought by the American Alkali Company, a corporation of the state of New Jersey, to the use of its receiver, Arthur K. Brown, against W. Wesley Kurtz, trading as a banker and broker under the name of W. W. Kurtz & Co. to recover an assessment made on September 16, 1901, by the board of dirctors of the company upon 3,700 shares of the preferred stock of the company, of which on that date H. C. Magee was the holder of record on the books of the company. The case stated, submitted to the court for decision, contains the following recital of facts in respect to the 3,700 shares of stock:

"On and prior to November 17, 1900, certificates therefor in the names of various persons, other than the defendant, had been duly issued by the American Alkali Company, and were registered on the books of the company in the name of said various persons. On the said November 17, 1900, the said certificates were in the possession of the defendant, each accompanied with a power of attorney to transfer the same, duly executed by the various persons in whose names they were registered, but in blank as to the name of the attorney who was to execute the transfers. The stock represented by the said certificates was not, however, nor was any part of it, the property of the defendant, but the said stock all belonged to various other persons, and the defendant was in possession of said certificates therefor as agent for the various persons who were the owners thereof. On the said November 17, 1900, the defendant, acting therein as the agent for and on behalf of the various persons who owned the said stock, delivered to the officers of the said American Alkali Company the said certificates for thirty-seven hundred shares of stock, together with the said powers of attorney to transfer the same, and requested that they be transferred to, and that new certificates therefor be issued to, the said H. C. Magee, and the said transfers were on the same day made, and new certificates issued in his name; and the said shares stood of record on the books of the company in his name, and so continued, from the said November 17, 1900, to September 16, 1901, as aforesaid. At the time the said shares were transferred the said defendant did not inform the said American Alkali Company of the names of the various persons to whom the said stock belonged, and for whom the defendant acted on requesting the transfer, and he was not asked to so inform them. The said H. C. Magee, in becoming the holder of record of said shares of stock, acted at the request of the defendant, and had no ownership, interest, or property in the said shares. The said Magee was on the said November 17, 1900, the clerk of the said company for the transfer of its stock. The plaintiff subsequently made demand upon the defendant to pay the assessment on the said shares so standing in the name of the said Magee, and the defendant refused to make payment."

The foregoing statement discloses all the grounds of alleged liability on the part of the defendant to pay the stock assessment here sued for.

Now, it is not pretended that the defendant subscribed for this stock, or that he entered into any express contract to pay assessments thereon. It is admitted that the stock was not owned by

the defendant, but that it actually belonged to other persons, for whom the defendant acted as agent. The defendant's possession of the stock certificates was as agent for the owners. The case shows that whatever the defendant did in this entire business was done by him as agent of the owners of the stock. Nothing at all appears tending to impeach the good faith of the defendant. He practiced no deception upon the alkali company, and did nothing to mislead the company. The stock never stood on the company's books in the name of the defendant. At the time of the assessment the registered holder was Magee. He was not the defendant's clerk, but was the transfer clerk of the alkali company. The case stated does not show that Magee held the stock in trust for or as agent of the defendant. To the contrary, upon the agreed facts it is evident that Magee was the registered holder of the stock for the defendant's principals—the real owners. Therefore, as the defendant is not liable by virtue of any express contract to pay the assessment, and as he was not the owner of the stock, nor the holder of record thereof, when the assessment was made, the court below was right in giving judgment in his favor upon the case stated.

It does not appear that the defendant has refused to disclose his principals, but, if he should do so, it is open to the plaintiff to file a bill of discovery, if necessary. Brown v. McDonald (C. C. A.) 133 Fed. 897.

The judgment of the Circuit Court is affirmed.

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## WALKER v. McLOUD et al.

(Circuit Court of Appeals, Eighth Circuit. May 23, 1905.)

No. 2,178.

1. INDIANS—SALE OF IMPROVEMENTS OF NONCITIZEN BY SHERIFF—VALIDITY.
   Act Oct. 30, 1888, of the Choctaw Nation (Laws 1894, p. 248), which directs sheriffs to advertise for sale improvements owned by noncitizens of the nation who fail to sell the same as required by the act, and to "sell the same at the appointed time to the highest Choctaw citizen bidder for cash," does not authorize a sheriff to make a sale of such improvements on credit, and such a sale is void and conveys no right or title to the purchaser.

2. SAME—RECOVERY OF IMPROVEMENTS FROM INTRUDER.
   That a defendant is an intruder in possession of improvements in the Indian Territory, in violation of the law of the Indian nation, affords no ground for the recovery of such improvements by a plaintiff who shows no title thereto.

Appeal from the United States Court of Appeals in the Indian Territory.

For opinion below, see 82 S. W. 908.

W. N. Redwine, Preslie B. Cole, and W. H. Jones, for appellant.

C. B. Stuart, for appellees.

Before VAN DEVANTER and HOOK, Circuit Judges, and ADAMS, District Judge.

PER CURIAM. This appeal challenges a decree of the United States court for the Central District of the Indian Territory dismissing upon the merits the complaint in equity of the appellant's testator whereby the latter, as plaintiff, sought to obtain the possession of certain lots in the town of South McAlester, in the Choctaw Nation, and to be quieted in such possession and in the title to the improvements on such lots, and to enjoin a sale thereof under a trust deed. The decree was affirmed by the appellate court in the Indian Territory (82 S. W. 908). The plaintiff's claim rests upon a sale made by the sheriff of Tobucksey county, Choctaw Nation, April 24, 1894, under an act of the Choctaw Legislature approved October 30, 1888 (Laws Choctaw Nation 1894, p. 248), which reads as follows:

"All noncitizens not in the employ of a citizen of the Choctaw Nation and not authorized to live in the Choctaw Nation under the provisions of existing treaty stipulations who have made or bought improvements in said nation, are hereby notified that they are allowed to sell their so-called improvements to citizens, and if such noncitizens fail to comply with this section, then it shall be the duty of the sheriffs of the counties in which such improvements may be located to advertise the same for sale in thirty days; and sell the same at the appointed time to the highest Choctaw citizen bidder for cash; one half of which shall be paid into their respective treasuries, and the other half into the national treasury. Provided, however, that if any such noncitizen fail or refuse to deliver the possession of such an improvement he shall be reported by the sheriff of that county to the principal chief and by said chief to the United States Indian agent, to take proper steps for the removal and prosecution of such offender under section 2118 of the Revised Statutes of the United States. Provided, further, that a notice of sale shall be posted by the sheriff in three public places in his county, which shall be legal notice to all persons against whom this law may operate."

At the sale the plaintiff and two other Choctaw citizens purchased the improvements upon a bid somewhat in excess of $270, for which the sheriff accepted their promissory notes payable to himself and his successor in office when the purchasers should be put in possession by the Choctaw Nation or should obtain possession otherwise. Possession was not obtained by the purchasers and the notes have not been paid. The interest of the other two purchasers was conveyed to the plaintiff. The reasonable value of the improvements at the time of the sale was $60,000, and their reasonable rental value was $300 per month. The defendants and those whom they represent, as is claimed, were at and before the time of the sale noncitizens of the Choctaw Nation, not in the employ of a citizen of the nation, and not authorized to live in the nation, and yet at that time they were, and ever since then they have continued to be, in the possession of the improvements under a claim of right thereto.

Several objections are made to the plaintiff's title or right of recovery. But one of them will be considered. The act of the Choctaw Legislature under which the plaintiff claims did not purport to transfer the title or right to improvements made or bought by a noncitizen, except upon a sale by the sheriff "to the highest Choctaw citizen bidder for cash." An officer making a sale under such a statute must yield obedience to its directions. He cannot sell up-

on credit or accept any other than an unconditional cash bid. So, also, a purchaser whose bid is made and accepted in disregard of the directions of the statute, or who does not pay the purchase price, acquires no interest in or right to the property. Hooper v. Castetter, 45 Neb. 67, 76, 63 N. W. 135; Phelps v. Jackson, 31 Ark. 272, 278; People ex rel. v. Hays, 5 Cal. 66; Negley v. Stewart, 10 Serg. & R. 207; Robins v. Bellas, 2 Watts, 359; Wheatley v. Tutt, 4 Kan. 195; Swope v. Andery, 5 Ind. 313; Reynolds v. Wilson, 15 Ill. 394, 60 Am. Dec. 753. The sale under which the plaintiff claims was so obviously and so grossly in violation of the directions of the statute that it was and is of no effect.

It is not necessary to consider whether the defendants are intruders in the Choctaw Nation and are holding these improvements in violation of its law, because if they are the plaintiff has no right to disturb them. Hockett v. Alston, 49 C. C. A. 180, 110 Fed. 910. The duty of enforcing the Choctaw laws in this respect, and of removing intruders from the Choctaw Nation, is by law confided to others. Morris v. Hitchcock, 194 U. S. 384, 24 Sup. Ct. 712, 48 L. Ed. 1030; Buster v. Wright (C. C. A.) 135 Fed. 947.

The decree is affirmed.

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## INTERNATIONAL MFG. CO. et al. v. H. F. BRAMMER MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. April 5, 1905.)

No. 2,118.

1. PATENTS—INFRINGEMENT—MECHANICAL EQUIVALENTS.

In determining the question of infringement of a patent covering a new combination of elements the form of the several parts has but little weight; the correct rule being that parts which perform substantially the same function, in substantially the same way, and produce the same results, are mechanical equivalents.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 372–374.]

2. SAME—INFRINGEMENT—MECHANICAL MOVEMENT.

The Plagman patent, No. 608,220, for a mechanical movement for use in washing machines, the purpose of which is the translation of the continuous rotary motion of a horizontal shaft in the same direction into the reciprocating rotary motion of a vertical shaft in opposite directions, covers a new combination, and is entitled to a fairly liberal construction and application of the doctrine of equivalents, and as so construed is infringed by the device of the Martin patent, No. 736,285.

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

Hiram A. Sturges and Ed P. Smith (C. J. Smyth, on the brief), for appellants.

Taylor E. Brown (Clarence Poole, on the brief), for appellee.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

RINER, District Judge. This was a bill in equity charging the defendants with the infringement of letters patent No. 608,220,

granted to Adolph Plagman, August 2, 1898, for an improvement in mechanical movements adapted for use in washing machines. The prayer of the bill was for an injunction and an accounting. The answer is in the usual form, denies infringement, and sets forth that the defendants had constructed all of the alleged infringing machines strictly within the limits of their own letters patent, No. 736,285, dated August 11, 1903, issued to J. W. Martin for improvements in mechanical movements. It is also further averred in the answer that in view of certain patents and prior uses by others the patent of complainant is void for the reason that, in view of the well-known state of the art at and before the date of the alleged invention of complainant, the same did not involve invention, and was and is without patentable novelty. The Circuit Court found complainant's patent valid and infringed, and entered a decree directing that an injunction should issue and for an accounting.

The validity of complainant's patent is expressly admitted. On page 112 of the record we find the following admission made by defendants' counsel:

"Counsel for the defendants states in the record that the defendants have not by their pleadings nor by their evidence claimed that the Plagman patent is illegal. They merely assert and insist that in view of the Schroeder and other patents issued by the government prior to the issuance of the Plagman patent, that the latter is limited in its scope to the specific points or improvements pointed out and claimed in the Plagman diagrams and claims, namely, the two extended teeth on the cylinder and the cams or guideways on the frame as located opposite the driving pinion; that Plagman is not entitled to a broad construction of his patent, but is necessarily limited to these particular points."

In view of this admission, the only question which we are called upon to decide is whether the decision of the Circuit Court in holding that there was an infringement of the complainant's patent was correct; or, as suggested by appellants in their brief, "Have the appellants, by the manufacture and sale of washing machines made strictly in accordance with the Martin patent, infringed upon the rights of appellees under the Plagman patent?"

The subject of both inventions is the translation of the continuous rotary motion of a horizontal shaft in the same direction into the reciprocating rotary motion of the vertical shaft in opposite directions; and the question which the inventors were endeavoring to solve was the most efficient means by which this result could be accomplished, and each used a combination of mechanical devices.

We will first notice the Plagman patent. The patentee thus describes in the specifications of his patent his alleged invention:

"(1) A shaft which revolves continuously in one direction, and is provided upon its inner end with a gear or pinion, combined with a vertically-moving cylinder provided with pins or projections between its ends, and which pins or projections mesh with the teeth of the pinion or gear, a vertical shaft upon which the cylinder is splined, and stop-guides with which two of the teeth upon the cylinder engage, substantially as shown.

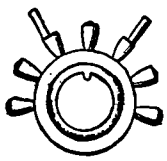
"(2) A suitable frame, a horizontal driving-shaft journaled therein, provided with a pinion or gear at its inner end, a vertical shaft provided with a suitable device at its lower end, and a cylinder having a rising-and-falling movement upon its upper portion, and which cylinder is provided with teeth of unequal lengths, combined with suitable stop-guides with which the long

teeth upon the cylinder engage, and which cylinder has a vertical rotary reciprocating motion with the vertical shaft, substantially as described.

"(3) A mechanical movement composed of a suitable framework, two shafts placed at right angles to each other, the driving-shaft being provided with a gear or pinion upon its inner end, and a vertically-moving cylinder splined upon the vertical shaft, and which cylinder is provided with teeth or projections of unequal length, combined with a stop-guide, having two curved surfaces which extend in opposite directions, and with which curved surfaces the pins upon the cylinder engage, the cylinder being raised and lowered and made to reverse its rotary movement by the teeth of the pinion catching under the pins or projections upon the cylinder, while first raising the cylinder and then lowering it, substantially as set forth."

The main elements of a washing machine constructed under this patent are (1) a power shaft, which must be adapted for being driven continuously in one direction; (2) a gear or driving pinion upon the inner end of the power shaft; (3) a dasher shaft, at right angles with the power shaft; (4) a frame, in which both shafts may be suitably supported; (5) a cylinder, sleeve, or head, slidable on the dasher shaft, but splined thereto to rotate the shaft; (6) a segmental set of teeth or pins upon the cylinder or head, midway of its ends, radially projecting in the arc of a circle partially around the head, and uniformly spaced to engage the gear; (7) curved stop-guides, stationary with respect to the cylinder and positioned on the frame, either integrally or removably by means of bolts; (8) and a movable arm or part on the cylinder or head, and positioned anywhere thereon so that it will cross the curved stop-guides, and contact with them when the cylinder or head is rotated.

The following drawing is a plan view of the cylinder, showing the teeth or pins which engage the gear or driving pinion and the two projecting pins, that come in contact with the stop-guides when the motion of the cylinder is to be reversed.



The patent does not set forth the location of the projecting arms which contact with the stationary cams or curved guide surfaces, neither does it refer to the angular distance between the movable contacting arms, nor is the location of the stationary cams or curved guides prescribed in the patent, and there is no reason why if they are moved to any other location on the frame, but still in the path of the movable contacting arms of the cylinder, they will not perform the same function in precisely the same manner, provided the position of the extensions co-operating with the guides is correspondingly changed.

There are no express disclaimers or limitations in the complainant's patent, and we think the patentee is entitled to a liberal application of the doctrine of mechanical equivalents unless the prior art, as disclosed by the evidence, imposes restrictions. Western Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294; Ives v. Hamilton, 92 U. S. 426, 22 L. Ed. 494; Miller v. Manufacturing Co., 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 45 C. C. A. 544.

In the case last cited, Judge Sanborn of this court, in discussing the subject of mechanical equivalents, after stating that the term when applied to the interpretation of a pioneer patent has a broad and generous signification, while its meaning is very narrow and limited when it conditions the construction of a patent for a slight and almost immaterial improvement, said:

"But the great majority of patents falls between these two extremes. They are neither for pioneer inventions nor for improvements so slight as to be almost immaterial. While they do not evidence the first or the last step in the progress of the art to which they relate, they often mark signal advances and protect useful improvements. The doctrine of mechanical equivalents conditions the construction of all these patents, and in determining questions concerning them the breadth of the signification of the term is proportioned in each case to the character of the advance or invention evidenced by the patent under consideration, and is so interpreted by the courts as to protect the inventor against piracy and the public against unauthorized monopoly."

And in the same case it is said:

"The doctrine of mechanical equivalents is governed by the same rules and has the same application when the infringement of a patent for a combination is in question as when the issue is over the infringement of a patent for any other invention."

Several patents were offered in evidence, but none of them except the Schroeder patent, No. 535,465, and the defendants' patent so closely resembled the Plagman as to require particular notice.

Claim 1 of the Schroeder patent is as follows:

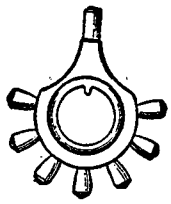
"An (1) operating shaft having a rotary reciprocating motion, (2) a cylinder placed upon the shaft and having a sliding movement thereon, and through which cylinder motion is alone communicated to the shaft, and (3) a double row of teeth or cogs upon the cylinder extending at an angle to the shaft, combined with a (4) driving shaft having means for revolving it attached to one end, and a (5) wheel for engaging the teeth on the cylinder at the other, the driving shaft being driven continuously in one direction. * * *"

It will thus be seen that the Plagman patent contains the five elements set out in the Schroeder claim, but it also contains two additional elements and has a combination entirely new. The first of these additional elements is the stationary cams or curved stop-guides, and the second the movable arms to contact therewith; while in the Schroeder patent there are no stationary cams or stop-guides, and hence no use for any movable arms. We think, therefore, that the Plagman patent discloses for the first time in the art a new construction, comprising a driving shaft, a driving pinion, a driven dasher shaft, and a slidable cylinder having cogs or teeth engaged by the driving gear, in combination with stationary cams or stop-guides and movable arms connected with the cylinder and adapted to engage the cams.

The movable arms being located on the sliding rotatable cylinder, there is only one limitation as to them, and that is that the part of each arm which engages with the stationary cam or stop-guide shall extend outwardly from its support a distance sufficient to actually contact with the stationary cam, and therefore cannot be in the same orbit or path occupied by the cylinder cogs or teeth.

This combination was one, we think, not only involving two new elements, but was a new combination, even if it can be said that the elements are old. We conclude, therefore, that there is no limitation of the Plagman claims required by reason of the prior state of the art.

We come now to a consideration of the defendants' patent. This patent, like the Plagman, contains the five elements of the Schroeder patent already described, together with the two additional elements of the Plagman patent. It is contended, however, that it differs from the Plagman in that the curved guideways are located upon the same side as the driving pinion, whereas in the Plagman patent they are located upon the opposite side, and instead of the two long teeth upon the occupied part of the mutilated gear, as in complainant's patent, the defendants used a single long arm or spindle, mounted upon the toothless portion of the mutilated gear, for the purpose of engaging the guideways, as shown in the following drawing:



While these parts of the Martin patent are not identical with the corresponding elements of the Plagman patent, yet we think that the single long arm or spindle, mounted on the toothless portion of the mutilated gear in the Martin, has the operative effect of the two long pins or projections in the occupied portion of the gear in the Plagman, without making any other change in the mechanism except that of correspondingly increasing the horizontal width of the guide plate; in other words, the single long pin has precisely the same operation as the two pins, in that one of the side faces of the single long pin engages one curved guide, and the other side face engages the other curved guide, the space between the guides being widened to correspond with the reduced angular or horizontal width of a single long pin, as compared with the corresponding width of the two long pins of the complainant's machine, including the space between them, the width being measured from the outer face of the one pin to the outer face of the other.

In our judgment, this device of the defendants performs no different function, neither does it produce a result different from that of complainant's device. The difference between the two devices is simply one of form.

In Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935, Mr. Justice Clifford said:

"Except where form is of the essence of the invention, it has but little weight in the decision of such an issue, the correct rule being that, in determining the question of infringement, the court or the jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function, in substantially the same way, to obtain the same result."

In disposing of this case in the Circuit Court, Judge Carland said:

"While the Plagman patent is not a pioneer, in view of the patent to Schroeder, No. 535,465, dated March 12, 1895, still it marked a sufficient advance in in the art of translating the continuous rotary motion of the horizontal shaft in the same direction into the reciprocating rotary motion of the vertical shaft in opposite directions, as to entitle it to the benefit of the doctrine of mechanical equivalents, proportioned to the amount of advance made; and this proportion entitles the Plagman patent to invoke, as against the Martin patent, the doctrine of mechanical equivalents. The court is unable to come to any other conclusion, from the arguments and proofs, than that the device in the Martin patent is a mechanical equivalent of that used in the Plagman patent, so far as the translation of the rotary motion of the horizontal shaft in the same direction into the reciprocating rotary motion of a vertical shaft in an opposite direction is concerned."

In this view of the case we fully concur. If no one can be held to infringe a patent for a combination unless he uses all the parts of the combination and the same identical machinery as that of the patentee, then will no patent for a combination ever be infringed; for certainly no one capable of operating a machine could be incapable of adopting some formal alteration in the machine or of substituting mechanical equivalents. It is true, no one infringes a patent for a combination who does not employ all the ingredients of the combination; but if he employs all the ingredients, or adopts mere formal alterations, or substitutes for one ingredient another which performs substantially the same function as the one withdrawn, he does infringe.

The decree of the Circuit Court is affirmed.

NOTE.—The following is the opinion of CARLAND, District Judge, in the court below:

The above case has been heard upon pleadings and proofs. It would serve no useful purpose for this court to enter into a lengthy discussion of the principles of law which should govern this case, or the facts and opinions which have been introduced in evidence for the enlightenment of the court. It is sufficient for the purposes of a trial court to state briefly the conclusions reached.

After a careful consideration of the arguments of counsel and of the proofs submitted, this court is of the opinion that the device of the defendant, as contained in the Martin patent, No. 736,285, issued August 11, 1903, performs substantially the same function, in substantially the same manner, and obtains the same result, as the device contained in the Plagman patent, No. 608,220, dated August 2, 1898. The subject of both these inventions is the translation of the continuous rotary motion of a horizontal shaft in the same direction into the reciprocating rotary motion of the vertical shaft in opposite directions. The problem which the inventors were seeking to solve was to provide the simplest and most efficient means to accomplish this translation. Each used a combination of mechanical devices to solve this question, and the serious issue in this case is whether or not the combination in the Martin patent is an infringement upon that claimed and secured by the grant to Plagman. The court is of the opinion that, while the Plagman patent is not a pioneer, in view of the patent to Schroeder, No. 535,465, dated March 12, 1895, still it marked a sufficient advance in the art of translating the continuous rotary motion of the horizontal shaft in the same direction into the reciprocating rotary motion of the vertical shaft in opposite directions as to entitle it to the benefit of the doctrine of mechanical equivalents, proportioned to the amount of advance made; and this proportion entitles the Plagman patent to invoke, as against the Martin patent, the doctrine of mechanical equivalents. The court is unable to come to any other conclusion, from the argu-

ments and proofs, than that the device in the Martin patent is a mechanical equivalent of that used in the Plagman patent, so far as the translation of the rotary motion of a horizontal shaft in the same direction into the reciprocating rotary motion of a vertical shaft in an opposite direction is concerned. The device in the Martin patent performs no different function. Neither does it produce any different result. The difference between the two devices is simply one of form, in the way the result is produced. The court is not of the opinion that the law of mechanical equivalents or the claims of Plagman restrict the Plagman patent to the exact form described in his specifications and claims. The court understands that it is only where the form or way of performing a function is inseparably connected with the principle or function itself that the court will hold a patentee to the strict form stated in his claim.

It results from the foregoing that the complainant is entitled to a decree holding complainant's patent valid and infringed as to its three claims, for an accounting, and the issuance of an injunction as usual in such cases.

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## MOORE v. MEYER-SNIFFEN CO.

(Circuit Court of Appeals, Second Circuit. April 4, 1905.)

No. 66.

PATENTS—INFRINGEMENT—OVERFLOW FOR WASH BASINS.

The Moore patent No. 379,973 for an overflow device for wash basins, bath tubs, etc., is of doubtful validity in view of the prior art, and, if conceded to show patentable invention, is entitled to only a very narrow construction, which limits it to the precise structure shown. As so construed, *held* not infringed.

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

For opinion below, see 126 Fed. 191.

This cause comes here upon appeal from a decree of the Circuit Court, Southern District of New York, dismissing a bill. The suit is for alleged infringement of letters patent 379,973, issued March 27, 1888, to complainant, for bath tub, sink, or wash basin.

W. P. Preble, Jr., for appellant.

M. B. Phillipp, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. Inasmuch as the defendant's devices are wash basins only, it will be sufficient to consider such parts of the patent as deal particularly with wash basins. The object of the invention is stated to be to provide an improved overflow. The specification sets forth:

"In the ordinary concave-shaped earthenware wash hand basins, where the overflow pipe proceeds from the side, strainer holes have heretofore been made through the body of the earthenware into the overflow pipe. * * * The result is that the foul matter that accumulates in the overflow pipe cannot be removed, and continually emits a disagreeable odor through the overflow holes into the room, which is often mistaken for sewer gas, and is quite as injurious to health. Another objection to * * * strainer as at present constructed is that there is no means of ascertaining if the overflow pipe is operative, and of cleaning it if it becomes clogged, without disconnecting the overflow pipe. * * * Now in my invention these objections are removed,

as the strainer can be taken off from time to time, and the overflow pipe kept clean and free. A represents a basin, * * * and B shows an unbroken inlet into the overflow pipe, and it is made large enough to insert a swab through it into the said overflow pipe, so that the latter can be cleaned when it becomes foul."

This statement of invention is perspicuous, and, if the patentee's summary of the prior art were accurate, there would be ground for holding that his improvement was of a patentable character, in which case the claims sued upon could no doubt be sustained, although by their phraseology they are confined to specific mechanical details—a combination of old devices for attaching the overflow strainer to the basin and allowing it to be shifted on and off the overflow outlet. But his statement—or, perhaps, it is more correct to say the implication from his statement—that all prior wash basins had only the small strainer holes, so that it was not possible to pass a swab through and clean the overflow pipe, is inaccurate. The patent to Tuttle (257,906; May 16, 1882) proposes to "substitute for the perforations commonly made through the side of the basin a horizontally broad * * * opening, located near the top of the basin, and arranged to obtain the necessary capacity of opening." A recess for the soap tray is arranged "over the overflow passage, if preferred." The bottom of the soap tray is perforated, so that the drip may fall directly into the overflow pipe, and the tray is removable, not being fastened in any way, for facility in cleaning. When the soap tray is removed, the overflow passage is as free as in complainant's basin, and it may be as readily cleaned with a swab, or otherwise. In Tuttle the overflow runs through the large opening without being strained, but the art with which the patent in suit is concerned shows outlet apertures provided with strainers which may be slipped aside when desired. The claims relied on are:

"(4) The combination, with a basin, bath tub, or sink, of a bolt or bushing, 3, made separate from and secured permanently to the body of the basin, and having the end inside of the basin prepared to receive a fitting to hold the strainer, 5, in position over the mouth of the overflow; the fitting which holds the strainer, 5, being arranged to admit of the said strainer, 5, being removed from the mouth of the overflow without loosening or removing the fitting, 3, from the body of the basin.

"(5) In an earthenware wash basin having an overflow-pipe, and an aperture, 6, made in the earthenware, the combination, with the fitting, 2, and bolt or bushing, 3, secured permanently to the basin of the fitting, 4, screwed to the bolt or bushing, 3, and the strainer, 5, held in position by the fitting, 4; the said fitting, 4, and strainer, 5, being arranged to be removed from the basin without removing the fitting, 2, or bolt or bushing, 3."

As was said before, it is doubtful whether, in view of the state of the art, there is sufficient invention in this combination to sustain a patent; but certainly, if those claims can be sustained, they must be restricted to the precise combination of elements set forth. Complainant contends that an equivalent of the fitting, 4, is found in a horizontal screw, to which in defendant's device the strainer is attached. The specification sets forth that the—

"Strainer is made flexible, so as to conform itself more readily to the shape of the surface of the basin. I purpose making them of thin metal, and of a

thin material of a fibrous composition, such as zylonite or celluloid. * * * This strainer has a hole made in the margin of it for the bolt, * * * 4, and when the strainer is placed in position over the inlet, B, the bolt, 4, is inserted through the hole in the strainer, and is screwed into the nut, 3, until the flange on it presses against the surface of the strainer sufficient to keep said strainer rigid over the overflow inlet."

When the strainer is to be moved off the outlet, so as to allow the overflow pipe to be cleaned, the bolt or fitting, 4, is partially unscrewed, so as to relax pressure, and thus leave the strainer loose, instead of rigid. The horizontal screw of defendant's device is merely a pin which passes through holes made in the ears of the strainer and of the pintle, which is fixed to the basin thus with the ears making a hinge on which the strainer can be rocked up and down by the hand. It presses against nothing, and is not screwed in or out to secure rigidity or looseness of the strainer. In so narrow a patent as this, the variation is sufficient to avoid infringement.

The decree of the Circuit Court is affirmed, with costs.

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## MAHONEY v. JENKINS et al.

(Circuit Court of Appeals, Third Circuit. May 17, 1905.)

No. 21.

PATENTS—INFRINGEMENT—MULTIPLYING CAMERA.

The Jenkins patent, No. 620,036, for a multiplying camera, consisting of a cellular box, the rear end of the cells being closed by a plate holder, and having a sliding front on which the lens is mounted and moved both horizontally and vertically, registering successively in front of each cell, is not infringed by a camera in which the box is not cellular, but which has a single tube fastened to the slide back of the lens and moving with it to successive positions; such device, while accomplishing the same result, having no mechanical equivalent for the cellular box, which is the fundamental element in the patented combination.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 380.]

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

For opinion below, see 135 Fed. 550.

Lowrie C. Barton, for appellant.

C. M. Clarke, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The Circuit Court held that the defendant below (appellant here) had infringed the first claim of patent No. 620,036, dated February 21, 1899, which was granted to the plaintiffs below (appellees here) for a multiplying camera. That claim is as follows:

"(1) In a photographic camera the combination of a cellular box, a plate holder seating against and closing the rear end of the cells, a sliding front closing the front end of the cells, and having stops by which it may be fixed in

relation to a particular set of cells, a lens-carrying slide moving in guides on the sliding front, and means for adjusting the slide to register the lens with each cell of the set with which the front is in relation, whereby a separate exposure may be made in each cell of the box without moving the plate, and with but once drawing the plate-holder slide, substantially as described."

"A cellular box"—a box containing several cells, in each of which a separate exposure may be made—is the fundamental element of the combination which this claim describes, and such a box the appellant does not use. Therefore, though he accomplishes the object of the patentees, he does not do so in substantially the same way. He has devised an organism by which the desired result can be attained without the employment of this essential constituent of the patented construction; and to deny him the right to make, use, or vend that organism would be to accord to the appellees a monopoly, not only of the means which they described and claimed, but also of the end which they effected, even when achieved by means materially different. Such a monopoly, of course, is not obtainable under the patent law.

The appellant employs a lens which is carried on a slide moving in guides, and which is adapted to move horizontally and vertically; but as his box contains no cells, he certainly does not have a plate holder closing the rear end of cells, nor a slide front closing the front end of cells, nor means for adjusting the slide to register the lens with any particular cell. These patentees purposed to exclude light from any portion of a plate employed in a multiphotographic camera other than the portion thereof intended to be immediately affected. To this end their cells no doubt are efficacious. But the appellant has absolutely discarded them, and has substituted a totally different contrivance. He has attached to his slide a tube or funnel-like device, which, though it performs the same light-confining service as the cells of the patent, is essentially unlike them, and is not, in the sense of the patent law, their mechanical equivalent.

We are of opinion that the court below erred in its finding of infringement, and therefore its decree is reversed.

## DOTEN v. CITY OF BOSTON.

(Circuit Court of Appeals, First Circuit. June 2, 1905.)

No. 559.

PATENTS—DAMAGES RECOVERABLE FOR INFRINGEMENT—PROFITS.

The owner of a patent may recover from the user of an infringing device as profits the amount saved by defendant by the substitution of such device for one previously used, although the saving resulted from the fact that the devices previously used were frequently broken through accident or the carelessness or miscalculation of employés or others having to do with their use, while the patented device was not subject to such breakage, where the accident and carelessness are recognized to be appreciable sources of danger to employers in like case, and where there is evidence from which the amount of the saving can be estimated with reasonable accuracy.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 566–576.

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

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

Norman F. Hesseltine, for appellant.
Thomas M. Babson, for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. This was a bill in equity to restrain the infringement of letters patent No. 308,308. There was a decree for the complainant, and a reference to a master to take an account of profits. The master found that the defendant had realized a profit of not less than $6,000, and reported that the complainant was entitled to recover that sum. The learned judge entered a decree for nominal damages only, for reasons which will appear hereafter. The complainant appealed.

The invention concerns an improved gangway, loosely hinged or pivoted at its inner or shore end to a ferryboat drop, and having its opposite or outer end adapted to be raised or lowered by means of a wheel and axle and chain connection, the said gangway being also provided with a counter balance tending to keep it always longitudinally moved outward as far as the loose hinge would permit. This replaced the combination of a fixed nonprojecting drop and a platform movable by hand, the latter used to compensate for inequalities of level between the drop and the boat at various times of tide. This platform also bridged the gap between the drop and the boat when the two were nearly at the same level. The patented gangway, being pivoted, was adjustable to the tide, and by extending longitudinally beyond the drop it bridged the horizontal gap. Both the uses of the platform were thus met, and it has been dispensed with. The evidence showed that a very considerable saving in labor and in the cost of construction and repairs, particularly in the case

of platforms, had resulted to the defendant by the substitution of the patented device; but a pivoted drop or platform was old in the art, and the master found that the saving to the city in time and labor by dispensing with the use of the platform was not due appreciably to the defendant's use of the patent in suit (a pivoted gangway provided with a longitudinally yielding movement) as distinguished from a pivoted drop or way not so provided. If, however, the pivoted drop be used with neither the old platform nor the patented extensible gangway, a gap is left between the drop and the boat dangerous to passengers. The master reported that the defendant did not deny that by reason of its use of ways having the defendant's longitudinally yielding joint the dangerous gap had, in fact, been kept automatically closed, thereby preventing the danger of injury to passengers which might otherwise have existed. But he also found that no evidence was offered of pecuniary demand upon or recoverable from the defendant by reason of such injuries to passengers, and so he awarded nothing to the complainant by reason of the greater safety realized from the patented device. The master found, however (so we interpret his report), that the defendant had always recognized the desirability of some injury-preventing device. The dangerous gap could be closed only by the old platform or by the patent in suit, and this whether the drop was pivoted or not. While, therefore, the master allowed nothing for the pivoting of the patented gangway, and nothing directly for the greater safety of passengers, yet he recognized that this greater safety was reasonably sought by the city, and that, if the patented device which secured safety was less expensive than the movable platform which it replaced, the profit could be recovered by the patentee. The defendant might not be bound to use any injury-preventing device. The evidence might show that the patented device was not more profitable or less costly to the defendant than an open gap between the drop and the boat. But if the defendant saw fit to use the patent, he should pay for the saving which arose from its use as compared with the use of any other injury-preventing device. The master found testimony that when the old system of platforms was in use they were continually placed out beyond the line or front of the drop, and that the boats coming in were continually breaking these platforms by coming into collision with them. He found that the immunity from damage by collision which the defendant had enjoyed by reason of the adoption of the patented device might be measured directly by the saving of the expenditure for labor and materials, and that no prior device was open to the defendant to use by which such saving could have been accomplished.

The master stated the question as follows: "The question then arises how frequently, owing to carelessness, improper operation, or miscalculation, owing to the varying heights of the boats, the gangway or supplemental drop would be left down." He then found that the saving in repairs due to the injury to each drop by being struck by the boat, if accidentally left down, would certainly be not

less than $1,000 per annum, and upon this he based his total finding of $6,000.

The learned judge in his opinion said:

"In this case the finding or estimate of savings to the city is, as it seems to me, necessarily contingent upon probable negligence or miscalculation. The finding is based upon destruction or waste which would have probably resulted from negligence and miscalculation if the use of the old system with movable platforms had been continued. This, I think, throws the question of savings or profits so far into the field of conjecture and uncertainty that they cannot become the foundation for recoverable profits or savings. The situation here is not like one which involves the employment of a device which, without any contingencies, dispenses with men or power, and thus, with no uncertainty, at once curtails the expenditures of the user."

He therefore entered a decree for nominal damages only.

As we understand the question presented for our determination, it is this: Has the complainant shown substantial profit or saving arising to the defendant by reason of the lessened breakage from the use of the patented gangway? The master has found that the saving existed, and that it was due to the use of the patented device in place of any other then available to the defendant. He has further found that the defendant's saving and profit arose in large measure from the protection afforded the defendant by the patent against damage caused by the carelessness, improper operation, and miscalculation of its agents. Is the profit the less recoverable because it is caused as just stated? We find it impossible to distinguish the patent in suit from other labor-saving devices which are deemed patentable. If every employé invariably worked with perfect memory, accuracy, and good judgment, labor-saving devices would be fewer and less important than they now are. That the value of a labor-saving device is based largely, or even wholly, upon the fact that those who work are frail and imperfect human creatures, and not beings of perfect efficiency, wisdom, and honesty, does not lessen the value of the device or the profit arising therefrom. The cash register and the watchman's time clock, for example, are deemed patentable, yet they are used to protect an employer not only from the negligence, but from the dishonesty, of his employés. A labor-saving device is deemed patentable if the weakness or carelessness or dishonesty of the employé, against which the patented device is effective, is recognized as a common failing, and an appreciable source of danger to employers in like case. In the Cawood Patent, 94 U. S. 695, 24 L. Ed. 238; Id., 110 U. S. 301, 28 L. Ed. 154, the patentee was allowed to recover as profits the saving in repairing broken rails by the patented device; yet these rails had doubtless been damaged by improper operation as well as by ordinary wear and tear. Probably no sharp line can be drawn between the two causes. Giving the master's report its fair interpretation, his statement that the cause of the defendant's damage was based upon carelessness, imperfect operation, and miscalculation, amounts to a statement that it was based upon human frailty. Under the old system the damage was caused by ordinary wear and tear, sometimes the result of negligence or miscalculation, some-

times the result of wind, current, or tide, setting the ferryboat into an unexpected position or giving it unexpected speed. This damage was frequent and usual, and could most cheaply be prevented by the patent in suit. For these reasons we think that the saving thus made by the defendant was recoverable in this accounting. See Walker on Patents, §§ 725–734a; Robinson, § 1145.

It remains to be considered if the amount of the saving was shown with sufficient definiteness. Was there evidence of the defendant's actual profit? There is nothing in the record to show that the master could take an account in detail in the ordinary way in which accounts are taken, and so a general estimate was necessary. As was said in Suffolk Co. v. Hayden, 3 Wall. 315, 320, 18 L. Ed. 76:

"This question of damages, under the rule given in the statute, is always attended with difficulty and embarrassment both to the court and jury. There being no established patent or license fee in the case, in order to get at a fair measure of damages, or even an approximation to it, general evidence must necessarily be resorted to. And what evidence could be more appropriate and pertinent than that of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringer, a jury will be in possession of material and controlling facts that may enable them, in the exercise of a sound judgment, to ascertain the damages, or, in other words, the loss to the patentee or owner, by the piracy, instead of the purchase of the use of the invention."

Upon the whole, we think there is enough in the master's findings and in the evidence submitted by him to show that more than nominal damages should have been assessed. The master has found that there was "evidence as to the size and cost of the ways and of the amount which would be required to replace them if injured or destroyed"; and also "evidence, necessarily conjectural, as to how often accidents would occur to such ways by reason of their being negligently or accidentally left down in position to be struck by the incoming boat." (Record, p. 31.) On pages 32 and 33, the size of the foot gangway and the amount of lumber contained in it are specifically stated. The master himself examined the actual structures, and further found that by uncontradicted testimony it appeared "that an expense of about three dollars per day for labor and from fifty to seventy-five cents a day for stock was incurred by the defendant city in making good the damages caused by these collisions at the ferry where the patented structures were afterwards introduced." On recommittal, "in addition to the evidence, the substance of which has been reported," he found that the following testimony was true:

"Q. How did the amount of carpenter work and repairs under the Doten system compare with the amount of carpenter work and repairs under the old system? A. I should say it was considerably less. I could not say how much. Three-quarters, I should say.

"Q. What would be the saving in money? A. Three dollars a day."

It should be noticed that the recommittal order did not direct the master to report all the evidence upon which his findings of profit had been based, but directed him to report only that evidence

upon which were based any findings in the supplemental report more specific than those included in the report originally filed. Therefore the order of recommittal and the supplemental report leave untouched, for the most part, the findings and statement of evidence contained in the original report. Taking the reported evidence and findings together, there is enough to show substantial profit.

Having thus determined that the learned judge was in error in directing a decree for nominal damages only, this court, in its discretion may (1) send the case back to the Circuit Court for further instruction, or (2) itself proceed to the assignment of profits by dealing with the master's report as affected by the defendant's exceptions. See the Cawood Patent Case. These exceptions raise questions of importance, which, considering certain ambiguities in the master's report, can best be dealt with in the Circuit Court. We go no farther, therefore, than to indicate the principles which must govern that court in dealing with the exceptions. The defendant contended that the saving for which the complainant could recover should be limited to that which arose in connection with the footways giving access to the sides of the ferryboat, as distinguished from the trafficway giving access to the middle. The defendant sought to establish this limitation by the construction of the patent itself, and by pointing out that before the employment of the patented device there had been used with the trafficway no movable platform which received damage by collision with the incoming boat. Leaving entirely to the Circuit Court the consideration of the first of these two contentions, if it shall appear to be material (the record does not contain the patent), we find that, as we interpret the master's report, the second may have some foundation. If there was no evidence to show damage from collision to skid or platform formerly used in the trafficway, no profit from the use of the patented device in connection with the trafficway can be recovered by this bill, unless the complainant can show that there also the defendant would have adopted a movable platform likely to be damaged, even had the patented device never been invented. Moreover, it is not easy to ascertain in precise detail what was the master's method of computing profits. There was evidence of an expense of about $3 a day for labor, and from 50 to 75 cents a day for stock in making good the damage formerly caused at the ferry; and there was evidence that the carpenter work and repairs cost considerably less under the patented system than under the old system, a saving in money of about $3 a day. It was found also that the boats ran day and night, both Sundays and week days. If this computation of $3 a day was based upon a saving in regard of the footways only, as distinguished from the trafficway, then an allowance of $100 for each of the eight footways in the course of the year may not be excessive. Upon the whole, however, while enough appears in the master's report to show that the complainant is entitled to more than nominal damages, we are of opinion that the precise amount recoverable can best be determined by the Cir-

cuit Court proceeding in accordance with the principles laid down in this opinion.

The decree of the Circuit Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with our opinion passed down this day; and the appellant recovers costs of appeal.

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COUP v. McCONWAY & TORLEY CO. et al.

(Circuit Court of Appeals, Third Circuit. May 24, 1905.)

No. 1.

PATENTS—INFRINGEMENT—CAR COUPLERS.

The Coup patent, No. 401,775, for a car coupler, occupies a narrow field, and must be strictly limited in construction, being for an improvement on couplers of the well-known Janney type, designed to adapt the same after the coupling has been made to track curvature by means of a pivoted connection between the drawhead and drawbar which allows the drawhead to "swing freely laterally," and, since both free and nonfree joints were known in the prior art, the patentee must be held to have adopted the former, and the patent is not infringed by a coupler in which the drawhead, while pivotally connected, does not swing freely, but has its movement restricted by side bars, and controlled by springs, which hold it normally in a central position.

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

Wm. L. Pierce, for appellant.

Geo. H. Christy, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This appeal is from a decree dismissing a bill of the appellant, wherein the appellees were charged with infringement of patent No. 401,775, dated April 23, 1899, which was issued to John Coup for a car coupling. The claims involved are:

"(1) In a car coupler of the Janney type, a drawhead pivotally secured to the drawbar outside of the framing of the car, and a swinging hook secured to one of the lateral extensions of the head, in combination with a locking device, substantially as described.

"(2) In a car coupler of the Janney type, a drawbar having upper and lower projecting jaws at its front end, a drawhead having seats or recesses to receive said jaws, and a pin for securing said parts, in combination with a swinging hook secured to one of the lateral extensions of the head, and a locking device, substantially as described."

The learned judge of the court below thought that the validity of the patent was open to grave question, and in this we quite agree with him; but, as he rested his decision solely upon the ground of noninfringement, and on that ground satisfactorily vindicated it, no other point need now be determined, nor anything be added to his discussion of the case. (C. C.) 127 Fed. 351.

It plainly appears from the specification that the primary concep-

tion of the patentee was of a joint which would "allow the drawhead to swing freely laterally in the drawbar outside of the framing of the car, to accommodate the motion of a car in swinging around a curve in the road"; and that the joint actually claimed does in fact allow the drawhead to swing freely laterally has been indisputably shown. To such a joint these claims must be limited. The prior state of the art, if, indeed, it admits of their maintenance to any extent, at least precludes them from any breadth of construction; and this is conclusive of the question, for the joint of the appellees is designedly constituted and peculiarly adapted for restricting the lateral swing of the drawhead. The materiality of this difference between the two organisms could not be better indicated than has been already done by the Circuit Court as follows:

"In it [the alleged infringing device] we find a drawhead of the Janney type pivotally connected to a central drawbar. But the joint is one which, unlike Coup's, does not 'allow the drawhead to swing freely laterally in the drawbar.' Such free lateral swinging of the drawhead is restrained in both directions by auxiliary side bars, whose spiral spring attachments serve both to retard such limited movement, and, when pressure is removed, draw the head back to a central, normal position. The blow of coupling cars is distributed to all three stems, and is cushioned by their respective springs. We cannot hold the respondents to infringe in such construction. It is true both devices accomplish the same result in one respect—that is, adjustment to curve travel—but in doing so Coup made use of a combination composed of known elements, and one of those elements was a free joint. While the respondent uses a joint which is free to the extent of allowing adjustment to curve travel, it is, however, nonfree and self-centralizing, and this for functional purposes. In head centralizing it accomplishes an object which was recognized in the art before Coup, and which he did not see fit to point out or claim in his patent. When he chose to accomplish his object by the use of a free joint, and when a limited or nonfree joint had been used in the prior car-coupling art, it is quite clear that he could not cover every form of joint, and preclude the public from using any known form of a nonfree joint in combination to accomplish the same purpose. * * * The nonfree joint of the respondents is a development on different lines from the free joint of Coup, and is another and permissible means to obtain adjustment to track curvature."

The decree is affirmed.

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## GENERAL ELECTRIC CO. v. BULLOCK ELECTRIC MFG. CO.

(Circuit Court, D. New Jersey. May 29, 1905.)

1. EQUITY—PLEAS—SETTING DOWN FOR ARGUMENT.
When, upon pleas filed to a bill in equity, the complainant sets the cause down for hearing, he admits the facts, but not the conclusions pleaded; likewise the defendant admits to be true the facts alleged in the bill which are not denied by the plea.

2. PATENTS—SUIT FOR INFRINGEMENT—INJUNCTION.
To a bill alleging infringement of certain letters patent, the defendant filed a plea setting up that from a certain date, which was 15 days before the filing of the bill of complaint, it had not infringed the complainant's devices, and that it had on the day named leased and surrendered all its plant, tools, machinery, stock on hand, and good will to another, without stating to whom they were leased or the length of the demise, and further stating that on the day named it had in good faith ceased

the manufacture, sale, and use of the alleged infringing devices, and since that time had had no intention, "and now has no intention," of manufacturing, using, or selling the same. *Held*, that the plea was insufficient in view of the uncertainty of the lease, and of the fact that the defendant had infringed, and that the bill alleged that "the defendant now continues, and threatens to continue, to make, use, and sell" the alleged infringing devices. *Held*, further, that the complainant is entitled to greater security against a confessed infringer than the mere statement that it has no present intention of further infringement, or even the statement that it will not further infringe.

In Equity. Suit for infringement of letters patent No. 625,806, for operating dynamo-electric machines, granted to Edwin W. Rice, Jr., May 20, 1899; No. 661,049, for controlling end play of rotary machines, granted to Edward M. Hewlett November 6, 1900; and No. 671,287, for an end play device, granted to Alexander D. Lunt April 4, 1901. On bill of complaint and plea.

James R. Sheffield and William H. Davis, for complainant.

John R. Bennett and Clifton V. Edwards, for defendant.

CROSS, District Judge. The complainant has filed a bill in equity, on letters patent Nos. 625,806, 661,049, and 671,287, which is in the usual form, and asks the customary relief against the defendant. The bill alleges, among other things, that the defendant had made, advertised, and offered for sale, and had sold and used, within the United States, structures, machines, etc., each and all embodying the inventions and improvements contained in the complainant's said patents; and, further, that the defendant continues, and threatens to continue, to make, use, and sell said structures, machines, etc.

To the bill of complaint the following plea was filed:

"(1) That since March 1, 1904, it has not made, used, or sold any devices of the character alleged by said bill of complaint" to be infringements, nor has the defendant since that time had "on hand any orders, or taken any new orders," for the manufacture, "sale, use, or delivery of such devices, nor has it delivered or" contracted to deliver any such devices to others for use.

(2) That since said March 1, 1904, the defendant has not had, "and does not now have, any stock of such devices, or parts thereof, on hand, and has not been, and is not now, in any way prepared or ready to make, sell, use, furnish, or deliver to others to make, sell, or use, such devices or parts thereof.

"(3) That on said March 1, 1904, it leased and surrendered all its plant, tools, machinery, stock on hand, and good will to another, and since that time has not engaged in the manufacture or sale of any apparatus, or in any way made preparation for the manufacture or sale of any apparatus; and defendant, on said March 1, 1904, finally and in good faith ceased the manufacture, sale, or use of devices of the character alleged in the bill of complaint to be infringements, and since that time it has had no intention, and now has no intention, of manufacturing, using, or selling, or contracting to manufacture, use, or sell, any devices of the character alleged in said bill of complaint to be infringements."

The case was thereupon, on motion of the complainant's solicitors, set down for argument. By so doing, the complainant has admitted the facts, but not the conclusions pleaded. General Electric Company v. New England Electric Mfg. Co., 128 Fed. 738–

739, 63 C. C. A. 448. Likewise the defendant admits to be true the facts alleged in the bill which are not denied by the plea. Farley v. Kittson, 120 U. S. 317, 7 Sup. Ct. 534, 30 L. Ed. 684.

The substance of the plea is that since March 1, 1904, it has not infringed the complainant's patents; that it has not since that time made, used, or sold any alleged infringing devices, or taken or placed any new order, or delivered or contracted to deliver any such devices; that it has no stock on hand, and has not been since that date, and is not now, prepared to make, sell, etc., said devices or parts thereof; and then follows apparently the reason therefor, namely, that on March 1, 1904, 15 days before the bill of complaint was filed, "it leased and surrendered all its plant, tools, machinery, stock on hand, and good will to another," and that on that day it in good faith ceased the manufacture, sale, and use of the alleged infringing devices, and since that time has had no intention, "and now has no intention," of manufacturing, using, or selling the same.

An inspection of the plea will show that the name of the lessee is not divulged, or the length of the demise; for anything that appears, the lease may have expired the day after the plea was filed; likewise it may have been made to an officer or workman of the defendant corporation, absolutely under its direction and control; in other words, for all that is disclosed, the lease may have been a mere sham and pretense, and designed and intended as the basis of the plea subsequently made. True, there is an allegation that the defendant on March 1, 1904, finally and in good faith ceased the manufacture, sale, and use of the devices, and that since that time "it has had no intention, and now [at the date of the filing of the plea] has no intention," of manufacturing, etc., said devices; but there is no statement to the effect that it has no future intention of doing so, and the use of the word "now" raises a suspicion that it has such future intention. Certainly where, as in this case, the bill alleged that the "defendant now continues, and threatens to continue, to make, use, and sell" the alleged infringing devices, there is something more due from the defendant than the bare assertion that he has no present intention of so doing. The plea does not seem to be full, frank, and explicit, and, coming from the mouth of an admitted infringer, is naturally open to suspicion. We do not think it meets fully the equity of the bill.

"The fact that the defendant has ceased to infringe the patent, and says that he will not infringe it in the future, is no reason for refusing an injunction against him. Whatever tort a man has once committed, he is likely to commit again, unless restrained from so doing." Walker on Patents, § 701; Robinson on Patents, § 1191. In California Elec. Works v. Henzel (C. C.) 48 Fed. 377, the court says:

"In Woodworth v. Stone, 3 Story, 749, Fed. Cas. No. 18,021, it was decided that a bill for an injunction will lie, if the patent right is admitted or has been established, without an established breach, upon well-grounded proof of an apprehended intention on the part of the defendant to violate the plaintiff's right. A fortiori should an injunction issue where, as in the present case, the defendant has already infringed, and nothing but a mere promise

stands in the way of its doing so again. Celluloid Mfg. Co. v. Arlington Mfg. Co. (C. C.) 34 Fed. 324."

So, also, in the case of New York Filter Mfg. Co. v. Chemical Bldg. Co. (C. C.) 93 Fed. 827, the court says:

"The complainant is entitled, on the showing made, to greater security against a once existing infringement than the mere statement by defendant that it will not further infringe. This is supported by abundant authority"—citing cases.

Continuing, the court says:

"If the defendant intends in good faith to keep its promise, the injunction will not harm it; otherwise it will be a security for the complainants that their rights will not again be invaded."

A preliminary injunction was thereupon granted. To the same effect are Braddock Glass Co., Limited, et al. v. Macbeth et al., 64 Fed. 118–121, 12 C. C. A. 70; Winchester Repeating Arms Co. v. American Buckle & Cartridge Co. (C. C.) 54 Fed. 711; White v. Walbridge (C. C.) 46 Fed. 526.

It is true there are cases which hold, as was held in Kane v. Huggins Cracker & Candy Co. et al. (C. C.) 44 Fed. 287, that where the court is satisfied that the defendant, some time preceding the filing of the bill, had sold and conveyed all its stock, material, and plant to another, an injunction would not issue. Such a situation, however, is entirely different from the present. We are not satisfied with the sufficiency of the plea in this case. The defendant having infringed, the presumption is that it will infringe again, if an opportunity is afforded, and there is nothing in the plea to overcome such presumption.

For the reason above given, the plea will be overruled.

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## UNION WAXED & PARCHMENT PAPER CO. v. SEVIGNE BREAD WRAPPER CO. et al.

(Circuit Court, D. Vermont. May 22, 1905.)

JUDGMENT—SUIT TO SET ASIDE FOR COLLUSION—ACTION BY ONE NOT A PARTY.

That defendants are exploiting a collusive decree adjudging the validity of a patent which is in fact invalid does not entitle a third person, not a party to such decree, nor bound thereby, to have the same set aside, after several terms of court have elapsed, and be admitted to defend the suit, nor to injunctive relief against such exploitation.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 856.]

In Equity. On demurrer to bill.

Edward S. Beach, for plaintiff.
George Chandler Coit, for defendants.

WHEELER, District Judge. The bill alleges in substance that the plaintiff, its customers, and the public had a plain pre-existing right, "in law and equity, to preserve bread by baking it in an oven heated to a high temperature, removing the bread therefrom, and allowing it to cool until it is at a temperature of about ninety de-

grees Fahrenheit, wrapping each loaf in a practically airtight and waterproof wrapper before the temperature of the bread is reduced to the normal temperature of the atmosphere, lapping the edges of the wrapper therearound, and securing it upon the bread," and also to make, use, and sell bread so inclosed; that a patent (No. 628,859, dated July 11, 1899) was granted to the defendant Sevigne for that method of preserving bread, of which the defendant Sevigne Bread Wrapper Company became the owner, and upon which brought a collusive suit in this court, and several terms ago obtained a decree adjudging the patent valid, by consent, although a valid and known defense of anticipation was then existing; that the defendants are exploiting the decree as an adjudication of the validity of the patent—and prays for a discovery, for an injunction against representing the decree to be valid, that the decree be annulled, and the plaintiff allowed to intervene in the suit and make defense.

That the decree, however collusive, cannot now be set aside, and a defense, however meritorious, be now allowed to be made by the same defendant or another, after so many terms of court without appeal, seems very plain. Hatfield v. King, 184 U. S. 162, 22 Sup. Ct. 477, 46 L. Ed. 481, much relied upon by the plaintiff for condemning collusive suits and decrees, was the same suit on appeal; and so was Hatfield v. King (C. C.) 131 Fed. 791, where the collusion was inquired into, the same suit on remand. All of those proceedings were in the progress of the cause, while this suit is wholly subsequent to and separate from the cause in which the decree was made. The decree here is a fact, such as it is, and apparently cannot be disturbed. The only plausible ground of complaint in respect to it by this plaintiff is that it was not what these defendants represent it to be, as an actual decree of the court. But whatever it might be represented to be, it could not be binding or conclusive as to any one but the parties to it, nor affect any other rights. The decree does not and could not hinder any one from practicing the right, which the bill alleges the plaintiff and all others had, notwithstanding the patent, to wrap bread in this manner. Exploiting it does not seem to be any such invasion of the plaintiff's rights as to involve preventive relief.

Demurrer sustained.

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## THE ROYAL.

(District Court, S. D. New York. June 8, 1905.)

1. TOWAGE—LIABILITY OF TUG FOR GROUNDING OF TOW—MISREPRESENTATION OF DRAUGHT BY MASTER.

   A tug, on starting to tow a barge in a shallow stream, is entitled to rely on the statement of the master of the barge as to her draught, and is not bound to examine or to rely upon her draught marks where such statement is made.

2. SAME.

   A tug *held* not liable for the grounding of her tow in Newtown creek, on evidence showing that the master of the barge represented her draught to be seven feet, and that the depth of water at the place of grounding was over nine feet.

In Admiralty. Suit to recover from tug for grounding of tow.

James J. Macklin, for libellant.
Alexander & Ash, for claimant.

ADAMS, District Judge. This action was brought by James T. O'Donnell to recover the damages he sustained through the grounding of his barge Palestine, in Newtown Creek, on the 4th day of March, 1896, while in tow of the steamtug Royal. The barge was bound for Chapman's dock on the creek, near Grand Street, loaded with about 300 tons of sulphur. She was taken in tow by the tug in the morning about 8:40 o'clock, on the port side, and when a point opposite the Kings County Oil Works was reached, she grounded.

The libellant alleges that the barge was run on a ledge of rocks in the middle of the creek and her bottom stove in. He charges the tug with fault:

"(1) In that she did not tow said barge Palestine in safety.
(2) In that she did not tow said barge in such manner as to clear said ledge of rocks.
(3) In that she did not navigate said barge in a proper channel for said tow.
(4) In attempting to start to tow said barge at low water."

The answer alleges:

"On the fourth day of March, 1896, the steamtug Royal which was owned by this claimant approached the barge Palestine at the mouth of Newtown Creek for the purpose of towing her to the head of said Creek; that said Newtown Creek is not navigable to vessels of large draft at all stages of the tide; that at said time the tide was the commencement of the flood; that the master of said tug Royal asked the master of the Palestine what water his vessel was drawing and the latter replied seven feet. As the water in the Creek was sufficient for a vessel of said draft and relying upon the representations of the master of the Palestine, the said tug Royal took said barge in tow alongside and proceeded carefully up said Creek. That she proceeded up said Creek in safety until she reached a point in mid channel about abreast of the Queens County Oil Works when the said barge Palestine took the bottom and sustained some slight injury. That said barge Palestine was drawing at the time much more than her master stated to the master of the Royal and would not have grounded if her master's representations had been true."

It appears that the barge did not strike a ledge of rocks as claimed but grounded on the hard bottom of the creek, in the middle of the channel.

The disputed questions in the case on the facts are: (1) the state of the tide, the libellant contending that it was ebb tide and the claimant that it was flood, and (2) the draught of the boat, the libellant contending that it was between 7 and 8 feet and the claimant that it was fully 9 feet.

1. The testimony shows that on the day in question it was high water at Governor's Island at 11:43 o'clock A. M. At Newtown Creek the tide was 1 hour and 23 minutes later than Governor's Island, so that it was high at the place in question about 1:06 P. M. At Newtown Creek it was low water about 7:30 o'clock A. M. This accident happened at nearly 9 o'clock A. M. and there had at the time been more than an hour of the flood tide. This contention of the claimant is clearly sustained.

2. The draught of the boat is shown by the circumstances to have been in excess of 9 feet. The Royal drew 8½ feet and she passed over the place safely in going down the creek to meet the Palestine. In going up, she did not touch. At this time the tide had swollen several inches. Immediately after the grounding, soundings were made by the tug by means of a pole and over 9 feet were found in the immediate vicinity of the sunken boat. The necessary conclusion seems to be that there were over 9 feet in depth of navigable water where the boat struck. This is confirmed by a government chart in evidence, which shows not less than 10 feet in the place in the channel where the grounding took place.

It is sought by the libellant to overcome the latter facts by testimony from a tide expert, located at Fort Hamilton, who said on this day at that place the tide was unusually low, some 1.95 feet below the normal. Granting that to be the case, and assuming the height of the tide to have been the same at the place of grounding, it does not seem to change the situation. There was still plenty of water for the barge, if the draught had been as stated by her master, upon which the tug was entitled to rely. The Coney Island (D. C.) 115 Fed. 751.

Notwithstanding an unusually low tide, there was ample water for the barge on the draught as given by her master to the tug. It appears by a stipulation between the parties that if the tide expert were recalled, he would testify that the tide on the morning in question was .64 of a foot below the level of mean low water. Such being the case, the libellant's argument in this connection is materially weakened. On the whole, the testimony of this expert rather tends to sustain the claimant's contention than otherwise.

Considerable stress was laid in the argument of the libellant on the draught marks of the boat. The marks were intended for use on the canal and would not have given accurate information as to the draught of the boat in the more buoyant waters of New York. It does not seem that the tug's navigators were bound to examine the boat for marks after the master had stated what her draught was or to rely upon them if found. These marks are not apparently common to all boats of this character used about New York and are not relied upon here for information, when it is obtainable from the master.

Libel dismissed.

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## THE S. S. WYCKOFF.

## THE GERTRUDE.

(District Court, S. D. New York. June 2, 1905.)

COLLISION—STEAMBOAT AND TUG WITH TOW—FAILURE TO FULFILL PASSING AGREEMENT.

A tug having four light boats in tow on a hawser, three abreast in the first tier *held* solely in fault for a collision between the port boat in such tier and a meeting propeller in the channel at the lower end of Newark Bay, on the ground that, after having agreed by signal to pass

by keeping to the right, she failed to keep her tow to the right side of the channel, but proceeded until the collision, although for want of sufficient depth of water she was compelled to keep near the center.

In Admiralty. Cross-suits for collision.

Carpenter, Park & Symmers, for Thames Towboat Co. and tug Gertrude.

Wilcox & Green, for propeller S. S. Wyckoff and N. Y. & N. J. Steamboat Co.

ADAMS, District Judge. These actions arose out of a collision which occurred between the barge Hope, in tow of the tug Gertrude, and the steam propeller S. S. Wyckoff, in the dredged channel leading from the Kill Van Kull to the Arthur Kill, the 4th day of May, 1904. The Gertrude and tow were bound through the Kills to Elizabethport and Perth Amboy. The Wyckoff was a freight boat, plying between points in the Kills and New York. The weather was fair and the tide the last of the ebb but there was very little current running.

The Gertrude's tow was on a hawser and consisted of 4 light boats, one of which was to be dropped at Elizabethport and was alone in the last tier. The remaining three boats were made up in the leading tier, which had a width of about 90 feet. The hawser was about 25 fathoms in length and led from the tug to the outside boats of this tier.

The Wyckoff left Elizabethport at 5:30 o'clock and when approaching the Corner Stake Light observed the Gertrude and tow approaching from the eastward. The Wyckoff blew a signal of one whistle to which the Gertrude responded with one.

Just after the Wyckoff rounded the Corner Stake Light from a course of about East ½ North to an intended one of about South South-east, her port bow, near the stem, came in collision with the port bow, near the stem, of the barge Hope, the port boat in the leading tier of the tow of the Gertrude. Each vessel charges the other with fault in not keeping to the right hand side of the channel and the controversy turns upon the determination of the question whether the boats fulfilled their agreement and duty under the law to pass to the right.

It appears that the Wyckoff, drawing about 8 feet, was keeping along the starboard side of the channel, probably about 50 feet from its edge on that side, when the whistles were exchanged. The Gertrude owing to her draught, 13½ feet, was unable to keep to the right hand side because there was not enough water for her to navigate in far from the center of the channel, where there was a depth of 14 or 15 feet but it commenced to shoal up on the side, and as soon as she attempted to get further to the starboard, she stirred up the bottom and was obliged to give up the attempt after getting a short distance, estimated at 30 or 40 feet, from the center. This was a channel dredged by the Government in the lower part of Newark Bay, to connect the Arthur Kill and Kill Van Kull, and the chart gives but 14 feet. There was not enough water far from the

immediate center for the Gertrude to navigate in and she was obliged to keep near the center. The Wyckoff did not know, however, that the Gertrude could not keep well to the starboard and proceeded on the theory that she could and would do so. The result was that when the Wyckoff made, or attempted to make, her turn at the Light, she found the tow of the Gertrude ahead and not enough room to make the turn herself, as she was a boat of 135 feet in length. She therefore reversed but not in time to materially check her headway of about 8 miles. The Gertrude kept on at her speed of 3½ miles into the collision. The consequence was considerable damage to the Wyckoff and the Hope. The collision occurred somewhat to the southward and westward of the center of the channel.

A criticism is made upon the Wyckoff's navigation for not turning more sharply than she did around the Corner Stake. If she had gone further towards the center, for which there were 75 or 100 feet of room between her and the Gertrude, doubtless she could have made a better turn and perhaps avoided the collision, but that is light which comes after the event. The agreement was to keep to the right and she fulfilled her part, or would have done so if the Gertrude had left her the room she was entitled to, but the Gertrude failed to keep her tow away from the Wyckoff's waters, owing to her draught and the width of the tow. It seems to me that the Gertrude was solely in fault for the collision.

The libel of the Thames Towboat Company is dismissed. That of the New York & New Jersey Steamboat Company is sustained, with an order of reference.

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## NAPIER v. WESTERHOFF et al.

(Circuit Court, S. D. New York. March 8, 1905.)

PRELIMINARY INJUNCTION—INSUFFICIENCY OF SHOWING.

The granting of a preliminary injunction and the appointment of a receiver *held* not warranted, under the pleadings and the proofs on the motions therefor, where the insolvency of defendants was not alleged, and it appeared that the granting of such motions would disastrously affect their business.

On Motion for Preliminary Injunction and Receiver.

Olney & Comstock, for the motion.
Stern & Rushmore, opposed.

TOWNSEND, Circuit Judge. The allegations of complainant's moving and replying affidavits present a condition of affairs which, if proved, would call for the interposition of a court of equity. Some of these allegations are met by direct denials in the answering affidavits, but it is not satisfactorily shown by these denials alone that this court ought not to grant some relief. The complaint, however, comprises such a variety of inconsistent charges and prayers for relief that it is difficult to determine the measure of

complainant's rights, or the extent of the relief which should be afforded. Furthermore, it is clear that the granting of an injunction and appointment of a receiver would disastrously affect the business of the defendants, while, in the absence of allegation of their insolvency, it does not appear that the complainant will be irreparably damaged by the continuation of said business. For these reasons, it is thought that the questions involved should not be determined upon ex parte affidavits.

Motion denied.

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## In re PARK.

(Circuit Court, S. D. Ohio, W. D. May 27, 1905.)

SALES—FRAUD—REPLEVIN—CONSPIRACY—EVIDENCE—IRRELEVANCY—TRADE SECRETS.

Where plaintiff, a seller of a proprietary medicine, brought replevin to recover a car load thereof on the ground that it was purchased pursuant to a fraudulent conspiracy by the buyer to ultimately resell the same to defendants, P. & Sons Co., in violation of certain contracts between plaintiff and the buyer, and that P. & Sons Co. were not entitled to purchase such medicine, an officer of such concern was not entitled to refuse to answer whether the company ever purchased any of such medicine or had any interest therein, or to refuse to produce correspondence relating to the sale, on the ground that such questions were irrelevant, and tended to require disclosure of trade secrets, consisting of the names of the persons through whom such company obtained goods from plaintiff.

[Ed. Note.—Disclosure of trade secrets, see note to S. Jarvis Adams Co. v. Knapp, 58 C. C. A. 8.]

Action by Samuel B. Hartman against William O. Feenaughty and others to recover certain goods. On application for an order to compel Ambro R. Park to answer certain questions on his deposition taken before the clerk of the court in response to a subpœna duces tecum.

Samuel B. Hartman brought suit in the United States Circuit Court for the Western District of New York in replevin against William O. Feenaughty as an individual and as sheriff of Steuben county, N. Y., and others, to recover possession of a car load of Peruna manufactured and sold by plaintiff to McKesson & Robbins, New York City, and shipped and billed to that firm. They reshipped the same, without unloading, to one Charles H. Loveland, of Binghamton, N. Y., in alleged violation of a contract then existing between plaintiff and McKesson & Robbins, of which Loveland had notice; and also in violation of a contract existing between Loveland and plaintiff he reshipped said Peruna to one M. W. Chambers, of Dayton, Ohio, for John D. Park & Sons Company, who had no notice of said contracts, the delivery of which Peruna was prevented by the replevin proceedings. Plaintiff claimed that the order for said goods and the obtaining a delivery thereof from plaintiff was the result of a fraudulent conspiracy between McKesson & Robbins, Charles H. Loveland, and John D. Park & Sons Company, in violation of contracts subsisting between plaintiff and McKesson & Robbins and Charles H. Loveland, and that M. W. Chambers was simply an intermediary or cover for shipment to John D. Park & Sons Company, and that it was the intention of McKesson & Robbins, Charles H. Loveland, and John D. Park & Sons Company in this way to get the Peruna to John D. Park & Sons Company in vio-

lation of said contracts and of plaintiff's contract restrictions; and that, as soon as plaintiff discovered said fraudulent conspiracy, he repudiated the sale, tendered back the purchase price, and replevined the Peruna. In order to establish said fraudulent conspiracy, plaintiff sought to take the evidence of one Ambro R. Park, an officer of John D. Park & Sons Company, before the clerk, before trial of the action, in response to a subpœna duces tecum, and on such examination asked the said Park the following questions, which he refused to answer on the ground of immateriality, and on the claim of privilege, in that as the persons and firms from whom the firm of John D. Park & Sons Company purchased goods and to whom it sold goods was a trade secret, the divulgence of which would work irreparable damage to himself and John D. Park & Sons Company and to third parties: "(1) Has the John D. Park & Sons Company ever purchased any Peruna from Charles H. Loveland? (2) This suit that you are testifying in is about the ownership of a car load of Peruna, comprising six hundred and sixty cases, originally shipped by the plaintiff from Columbus, Ohio, to McKesson & Robbins, New York City, and by them rebilled to Charles H. Loveland of Binghamton, New York, and by Loveland rebilled to M. W. Chambers or N. W. Chambers, Dayton, Ohio. The car number is N. & W. No. 61,306. Do I understand you to testify that John D. Park & Sons Company never had any interest in that car or the Peruna? (3) I will ask you whether John D. Park & Sons Company has in its possession, and, if so, that you produce, copies of all letters, telegrams, orders, and communications sent by John D. Park & Sons Company or any other person in its behalf, during the month of December, 1904, and January, February, March, and April of 1905, to N. W. Chambers, or M. W. Chambers, McKesson & Robbins, or Charles H. Loveland, in any way concerning or relating to the article Peruna, or the purchase or sale thereof? What do you say as to such copies of letters, telegrams, and communications and their production? If you have any such, will you produce them? (4) What is the practice of the Park Company in reference to scratching off the serial numbers (on cases, wrappers, and bottles and labels of Peruna) before they ship the goods?"

Frank F. Reed, H. H. Hershey, and Frank W. Hinkle, for petitioners.

William J. Shroder, opposed.

THOMPSON, District Judge (orally). Samuel B. Hartman, who is the plaintiff in an action in replevin brought in the United States Circuit Court in the Western District of New York against William O. Feenaughty et al., moves the court for an order requiring Ambro R. Park, a witness whose deposition is now being taken in that cause before the clerk of this court, under section 863 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 661], to answer certain questions and produce certain documents. He refuses to answer the questions and to produce the documents upon the ground that they are not material or relevant to the matter in controversy, and on the further ground that the answers to the questions would disclose trade secrets. I have read the testimony, so far as it has been taken, and have in mind the questions that were asked, which the witness refused to answer.

In the first place, as to the relevancy of the testimony sought to be elicited by these questions. The case sought to be made in the replevin suit is this: That McKesson & Robbins and Charles H. Loveland and John D. Park & Sons Company, conspiring together for that purpose, fraudulently obtained a car load of Peruna from plaintiff, and that the plaintiff, when he discovered the fraud, promptly

repudiated the contract of sale, tendered back the purchase price, which had been paid, and replevined the goods. In order to maintain the suit, therefore, it is necessary to show that the possession of these goods was obtained by fraud practiced upon the plaintiff, which justified him in repudiating the contract. I do not care to discuss the question of the right to repudiate the contract. I think there can be no question about that if it be true that the goods were fraudulently obtained. McKesson & Robbins and Loveland both had contracts with Hartman to enable them to obtain Peruna, and the claim is that, in violation of these contracts, they entered into a conspiracy with John D. Park & Sons Company to obtain Peruna from Hartman, and ship it to that company; the company being engaged quite extensively in the business of selling Peruna, and having no relation or contract with Hartman which would enable it to obtain Peruna in any other way. But it is said the contracts with McKesson & Robbins and Loveland are executory, and that Hartman must look to them for damages for the wrongful disposition of the goods, and cannot attack the sale. The charge, however, as I understand it, is that this particular car load of Peruna was obtained by fraud practiced upon Hartman, and in furtherance of the scheme by which John D. Park & Sons Company sought to obtain Peruna when they could not have obtained it otherwise. The representation of McKesson & Robbins to Hartman was this: "Under our contract, we want to buy this Peruna, put it upon the market and sell it as your agents, as we have been doing heretofore," when in fact that was a misrepresentation. They did not want it for any such purpose, but wanted it for the purpose of selling it to John D. Park & Sons Company, in violation of their contracts with Hartman. Therefore, in the opinion of the court, the testimony sought to be elicited from this witness, Ambro R. Park, is relevant as tending to show this fraudulent scheme by which the Peruna was obtained from Hartman.

The witness repeats over and over again that the answers to the questions put to him will not incriminate him, or will not subject him to a penalty or forfeiture; but, as I have already stated, his sole ground for refusing to answer is that the questions are irrelevant to the issues in the case pending in the New York court, and that the answers thereto would disclose trade secrets. The court is of the opinion that the testimony is entirely relevant, and that no trade secrets will be disclosed.

There is a suggestion that this firm of John D. Park & Sons Company is fighting Hartman and the trust organizations, as they are called, which are engaged in this business; that this firm is outside and independent, but at the same time is trying to get these goods by indirect methods; and the trade secret set up here is that, if Park discloses the names of the men he uses to fraudulently obtain goods from Hartman, it will prevent him in the future from obtaining goods in that way. Well, that is hardly a trade secret that should be protected by the courts.

The line of examination, in the opinion of the court, was legiti-

mate, and counsel for the plaintiff in the case has stated to the court that it is his purpose and intention to keep within the rule of relevancy, and not to call out or seek to call out from this witness anything that would not be entirely relevant to the issues in the replevin suit.

It has been suggested that the court should instruct counsel as to the line of questions to which the examination should be confined. The court cannot do that. Counsel on both sides are able, the issue simple, and they know what is relevant; and the court expects them to keep within the rule, and not go outside of it, to ask impertinent questions which may be annoying to the witness, but would not throw light on the matter under investigation. I take it there will be no trouble on that score. What this witness knows relative to the transaction under investigation should be disclosed, and any documents or papers in his possession which may throw light on it should be produced. He should answer the questions and produce the papers and documents, if he has them, and the court will so order.

Mr. Reed: As to the subpœna—do you want us to issue a formal subpœna?

THE COURT: Well, I had forgotten that. I am in doubt as to whether it is necessary, but it seems to have been the practice, and I will conform to the practice, and make an order directing the clerk of this court to issue a subpœna duces tecum for the books and papers called for.

Mr. Shroder: I do not insist upon the issuing of the subpœna. I am satisfied with the order, your honor.

THE COURT: Very well, then.

Mr. Shroder: There is one line of questioning which I would like to have defined, so as to avoid any future controversy, if possible; and that is, those questions which relate to what John D. Park & Sons Company did with the goods after they received them. I submit that is plainly irrelevant to the issue, and immaterial.

THE COURT: Well, I do not see the relevancy of that.

Mr. Reed: I do not intend to pursue that, your honor, or to ask for any names.

THE COURT: There is one feature of the case that justifies counsel in going farther than he would otherwise be entitled to go. This is an unwilling witness, and in a measure might be dealt with as if upon cross-examination; but counsel should keep strictly within the line of relevancy, and not go into the private business of this firm, which has no reference to the matter under investigation.

Mr. Reed: I do not intend to examine as to the disposition of the goods at all, specifically.

THE COURT: As now advised, I cannot see what relevancy it would have to show what they did with the goods afterwards.

## EHRLICH v. WILLENSKI et al.

(Circuit Court, E. D. Pennsylvania. June 10, 1905.)

No. 4.

LABOR UNIONS—CONTRACTS—BREACH—ACTIONS.

Where plaintiff contracted with a labor union to furnish him union labels for cigar boxes by a contract signed, "Local Union No. 165, Cigar Makers' International Union of America, by W. C. Hahn, Business Agent and Label Secretary," and the union thereafter refused to furnish such labels, plaintiff was not entitled to sue four of the members of such union "individually and for themselves and others, officers and members of the unincorporated association known as Local Union No. 165 of Philadelphia of the Cigar Makers' International Union of America," but was only entitled to seek redress against such local union.

Motion to Take Off Compulsory Nonsuit.

Harry M. McCaughey and William S. Furst, for plaintiff.
Maxwell Stevenson and William W. Porter, for defendants.

J. B. McPHERSON, District Judge. Whatever relaxation of the rule that requires all persons interested to be made parties to a suit at law may have been permitted in the case of unincorporated societies, no decision can be found, I think, that allows an action to be brought in the form that has been adopted here. The facts are these: Edward Ehrlich, the legal plaintiff, made a written contract with Local Union No. 165 of the Cigar Makers' International Union of America, by which the local society undertook to furnish him with the union label, to be affixed to the boxes in which he proposed to pack the cigars that he was about to manufacture. For a short time the label was furnished, but was then refused, and this suit in assumpsit is to recover damages for the refusal. The contract was signed as follows:

"Local Union No. 165,
"Cigar Makers' International Union of America.
"By W. C. Hahn,
"Business Agent and Label Secretary."
"Edward Ehrlich. [L. S.]"

Instead, however, of bringing suit in a form that would indicate a purpose to seek redress merely from the local union, the plaintiff selected four of its members, namely, Charles Willenski, James Mahlon Barnes, William C. Hahn, and George H. Ullrich, and sued them, as the præcipe and the summons both set forth, "individually and for themselves and others, officers and members of the unincorporated association known as Local Union No. 165 of Philadelphia of the Cigar Makers' International Union of America." In my opinion, such an anomalous record cannot be sustained, and the nonsuit must therefore be upheld. This is a suit at law, where the judgment and execution must be sustained by the record, and nothing upon the record—or in the evidence, for that matter—would justify a judgment and a fi. fa. against the defendants in their individual character. The subject of suits by and against unincorporated societies has been considered in Ash v. Guie, 97 Pa. 493, 39 Am.

Rep. 818; Pain v. Sample, 158 Pa. 428, 27 Atl. 1107; Liederkranz Society v. Germania Turn Verein, 163 Pa. 265, 29 Atl. 918, 43 Am. St. Rep. 798; Sparks v. Husted, 5 Pa. Dist. R. 189; Virtue v. Ioka Tribe, Id. 634; Kurtz v. Eggert, 9 Wkly. Notes Cas. 126; McDowell v. Smith, 21 Wkly. Notes Cas. 558; Grayson on Social and Beneficial Associations in Pennsylvania, § 81; Fitzpatrick v. Rutter, 160 Ill. 282, 43 N. E. 392; and Gorman v. Russell, 14 Cal. 531.

The Pennsylvania act of 1876 (P. L. 53), relieving members of a beneficial society (to which class the Local Union seems to belong) from individual liability for claims against the society, is as follows:

"That members of lodges of the order of Odd Fellows, Knights of Pythias and other organizations paying periodical or funeral benefits, shall not be individually liable for the payment of periodical or funeral benefits or other liabilities of the lodge or other organization, but that the same shall be payable only out of the treasury of such lodges or organizations: provided, that the provisions of this act shall only apply to unincorporated associations: and provided, further, that this act shall not apply to any liability heretofore incurred."

In view of this statute, if it be true that the local union is properly to be classed as a beneficial society, it might be well for the plaintiff to consider whether an action at law is a suitable remedy for enforcing liability against the treasury of the association, or whether the more flexible remedy in equity is not better adapted for the purpose. If the action at law is not adequate, or is obviously unsuitable, equity may have jurisdiction on this ground alone: Bierbower's App., 107 Pa. 14; Brush Elec. Co's. App., 114 Pa. 574, 7 Atl. 794; Gas Co. v. Gas Co., 186 Pa. 443, 40 Atl. 1000, 65 Am. St. Rep. 865; Thompson v. Allen Co., 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472; McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005; Tyler v. Savage, 143 U. S. 95, 12 Sup. Ct. 340, 36 L. Ed. 82.

The motion to take off the nonsuit is refused.

Exception to the plaintiff.

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## WILDER et al. v. WATTS et al.

(District Court, D. South Carolina. May 31, 1905.)

1. EQUITABLE ASSIGNMENTS—INSURANCE POLICIES—COLLATERAL SECURITY.
   Where an alleged bankrupt before insolvency arranged to borrow money to purchase goods, under an agreement that he would have the goods insured, and assign the policies to the lenders as collateral security, and loans were made to him, the agreement operated as a valid equitable assignment of the policies, though they were not delivered when issued, nor actually assigned until after loss, when the borrower was insolvent.

2. SAME—ACTS OF BANKRUPTCY—PREFERENCES TO CREDITORS.
   Under Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], providing that liens given or accepted in good faith, and not in contemplation of, or fraud upon, the act, and for a present consideration, shall not be affected by it, where a debtor while solvent made an equitable assignment of insurance policies to be issued as security for certain loans then made to him, but failed to make an actual

delivery and assignment of the policies to the creditor until after loss, when he was insolvent, the assignment thereof at that time did not constitute an act of bankruptcy, within Bankr. Act July 1, 1898, c. 541, § 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], as a transfer of his property while insolvent with intent to prefer certain of his creditors.

3. SAME—PETITION—AMENDMENT.

Where a proposed amendment to an involuntary bankruptcy petition seeks to plead alleged acts of bankruptcy occurring subsequently to those stated in the original petition, which must have been known to some of the original petitioners at the time such original petition was filed, and the alleged amendment is not served on the bankrupt, and no excuse is offered why the acts sought to be so pleaded were omitted from the original petition, leave to file such amendment will be denied.

In Bankruptcy.

W. R. Richey, for petitioning creditors.
Geo. S. Mower and Johnstone & Cromer, for certain respondents.

BRAWLEY, District Judge. The above-named petitioners filed their petition January 16, 1905, against J. W. Watts, doing business under the name of Clinton Brokerage Co., Bailey & Son, and the National Bank of Newberry, alleging, among other things, indebtedness to the petitioning creditors; that the stock of goods and merchandise belonging to Watts was entirely destroyed by fire on December 2, 1904, and that said Watts had two policies of insurance on his said stock of goods (one for $500, and one for $1,000), and that on the ——— day of December, after the fire aforesaid occurred, he assigned said policies of insurance (the one for $1,000 to the National Bank of Newberry; the other, for $500 to Bailey & Son); that Watts was at that time insolvent, and these transfers were with intent to hinder, delay, and defraud the petitioners. The bank and Bailey & Son each filed demurrers on the ground that the petition was multifarious, in that the charge that they had received voidable preferences was improperly incorporated in the petition to have the defendant Watts adjudged a bankrupt. Watts filed an answer in which he stated as to the alleged preference of the National Bank of Newberry that:

"When he was about to establish the Clinton Brokerage Co., and needed funds with which to buy a stock of goods, he applied to the said National Bank of Newberry for a loan for that purpose, and agreed that he would have his store fixtures and the stock of goods insured, and assign the policy of insurance, to the amount of $1,000, as collateral to secure the money advanced by the said bank; that thereupon, and in pursuance of the agreement then made, the said National Bank of Newberry lent the money, aggregating more than $1,000, that he did procure a policy of insurance to be issued, as he had agreed to do, but that he failed to make the actual transfer in writing to the said bank until in December, 1904; that, however, from the date of the issuance of the said policy of insurance he regarded it as pledged to the said bank as above set forth, and the actual transfer in writing was made in pursuance of the agreement entered into before the loan was made; and that when the said agreement was made, and when the cash advances were made to him by the said National Bank of Newberry, the respondent was not insolvent."

A similar statement was made with respect to the assignment of the insurance policy to Bailey & Son. The answer further stated

that he was engaged in successful business when his stock of goods was destroyed by fire, and that he did not intend to delay, hinder, or defraud creditors, but that the transfer of these policies was made in good faith, and in pursuance of agreements entered into before the debts were contracted. This answer was filed February 3, 1905, and, without passing upon the question raised by the demurrer, the following special order of reference was made:

"Upon reading and filing the petition in the above-stated case, and of the answer of J. E. Watts, the alleged bankrupt, it is ordered that the same be referred to Julius H. Heyward, Esq., referee, to inquire and report whether the alleged bankrupt has committed an act of bankruptcy, within the intent and meaning of the bankruptcy act, and upon said hearing the National Bank of Newberry and M. S. Bailey & Son, who have filed demurrers to said petition on the ground that the same is multifarious, shall be allowed to appear, if they be so advised; the court being of opinion that the said demurrer furnished no good reason why the inquiry herein directed should not be made."

The referee filed his report February 27, 1905, and with it the testimony which he had taken, and the facts found by him are as follows:

"That during the latter part of the month of August, A. D. 1904, the said Watts, then being about to engage in the business of buying and selling merchandise at Clinton, S. C., entered into an agreement with the National Bank of Newberry whereby the said bank agreed to advance to him cash from time to time as called for; that the said Watts agreed to give therefor, as received, his notes, indorsed by one J. D. Davenport; that the said Davenport was present when said agreement was made, and assented to the same, and it was further then agreed that the said Watts should insure his stock of goods to the amount of $1,000, and assign the policy to the bank; that about the same time a similar agreement was made by the said Watts with M. S. Bailey & Son, of Clinton, S. C., * * * that the said Watts was then presumably solvent, his indebtedness being insignificant."

He then reports that Watts begun business on September 1st, and apparently did a successful business; that on September 14, 1904, he took out a policy of insurance for $500, and on October 17th another policy for $1,000; that the entire stock of goods was destroyed by fire December 2, 1904; that after said loss by fire Watts was insolvent, having then no assets except the two claims for insurance, and a small tract of land, valued at about $50, and certain outstanding accounts, amounting to about $700; that immediately after the fire, on December 3, 1904, Watts assigned to the National Bank of Newberry the policy of insurance for $1,000, which, it seems, had been deposited with Bailey & Son before that date. The policy for $500 was in his desk, and was destroyed, and he assigned his claim for insurance on that policy to Bailey & Son. He finds as matter of law that, under section 3 of the bankruptcy act, Watts had committed an act of bankruptcy; he having transferred, while insolvent, a portion of his property to the creditors above named, with intent to prefer, etc.; he holding that, at the time the policies were transferred, Watts was insolvent. That Watts was actually insolvent on December 3, 1904, is not disputed.

The case is before me on a review of the referee's report. In support of the referee's conclusions, two cases are relied on (Wilson Brothers v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147; Iron

& Supply Co. v. Rolling Mill Co., 11 Am. Bankr. Rep. 200 [D. C.] 125 Fed. 974); and pending the argument before me the case of Johnston, Trustee, v. Huff, Andrews & Moyler Co. (lately decided by the Court of Appeals for the Fourth Circuit) 133 Fed. 704, was referred to by him as also sustaining his conclusions. In Wilson v. Nelson the debtor in February, 1885, to secure a loan then made, gave to the creditor irrevocable power of attorney to confess judgment after maturity upon a promissory note. The creditor, November 21, 1898, entered up judgment upon the note, and warrant of attorney; and immediately thereafter execution was issued thereon, and all of the debtor's property seized and sold. On December 10, 1898, a petition in bankruptcy was filed; and the court held (four of the justices dissenting) that the judgment so entered, and the levy of execution thereon, was a preference "suffered" or "permitted," within the meaning of clause 3 of section 3a of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], and that the failure of the debtor to vacate and discharge it at least five days before the sale on execution was an act of bankruptcy; the ground of the decision being that, the power of attorney being irrevocable, the debtor thereby without any further act of his, "suffered" or "permitted" judgment to be entered against him within four months, the effect of which would be to enable the creditor to whom it was given to obtain a greater percentage of his debt than other creditors, and that by his failure to vacate it or file a petition in bankruptcy he confessed that he was hopelessly insolvent, and consented to the preference that he failed to vacate.

In Iron & Supply Co. v. Rolling Mill Co., the rolling mill company had given to the national bank its note December 6, 1902, pledging a large quantity of material, consisting of pig iron, etc., as security for its payment, with the privilege of selling or using any or all of said material; and in case of such sale it was to pay the cash in settlement of its debt to the bank, or transfer and deliver to it its equivalent in good accounts. It appeared from the evidence that the company sold or otherwise used said material; that it did not pay any cash therefor, or on account of said note; that on February 28, 1903, it transferred on its books a large amount of open accounts; that, of the accounts so transferred, a large amount of them accrued prior to December 6, 1902, the date of the loan and pledge referred to—the evidence not showing which particular accounts represented any part of the material pledged. The evidence showed that on February 28th the defendant was indebted to a large amount other than to the bank, among its creditors being its operatives and employés. The contention of the defendant was that by the transfer of the accounts they took the place of the material, as an exchange of securities, and that therefore such transfer was not a preference, within the purview of the bankrupt act. But the court held that the facts wholly failed to show an exchange of securities; that the accounts were not substituted or exchanged for the material, which had been sold with the consent of the bank, there being no agreement that it was to be sold for its benefit, and no covenant going to the bank for the proceeds thereof; that the specific accounts rep-

resenting such proceeds were not identified, and there was no such description of them that they could be identified; that the effect of the agreement with the bank was to permit the defendant to use or sell the pledged material, and to withdraw it from the operation of the pledge, and, so far as that material was concerned, merely obligated the defendant to pay its debt to the bank with cash, or to transfer and deliver to it the equivalent in good accounts, which obligation was not performed until within four months prior to the petition in bankruptcy. The court, therefore, held that this transfer was not an exchange of one species of property for another, and at the time of such transfer the defendant was insolvent, and, being within four months preceding the bankruptcy proceedings, it gave a preference to said bank over other creditors, and was designed and calculated to have such effect.

In Johnston, Trustee, v. Huff, Andrews & Moyler Co., one White had an agreement with the Norfolk & Western Railway Company to furnish supplies and board to its employés; the railway company agreeing to deduct from the wages of the men employed by it the amount due by each of them to White, to pay that amount to him; White making out a statement each month of the amount due by each employé. White, in order to obtain money necessary to carry on his business, arranged for a credit with the Huff, Andrews & Moyler Company, and on January 30, 1902, gave them an order on the treasurer of the Norfolk & Western Railway Company for the payment of any and all moneys that "may now be due or may hereafter become due as boarding boss." There was a mutual agreement between them and White, when the order was given, that it should not be presented to the railway company, as that company objected to orders being given on it, and during the year 1902 White collected from the railway company over $13,000 for his own use. The order held by the Huff, Andrews & Moyler Company was not presented until December 26, 1902, and on December 27th White filed his petition in bankruptcy. In its opinion the court says:

"That it was the understanding and intention that the order should not put the funds payable by the railway company out of the control of White until some financial emergency arose, is perfectly obvious."

It cites Justice Swayne's opinion in Christmas v. Russell, 14 Wall. 84, 20 L. Ed. 762, that "an agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment." The court also cites Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147. I sat in that case, and concurred in the opinion, but do not conceive that it supports the position of the referee here. As the court says: "It was expressly agreed that the order should not be presented, and the assignor was permitted to collect funds for nearly a year—the funds now claimed to have been assigned." The money due by the railway company to White was, as the court says, "a fund which is substantially the bankrupt's only asset." It constituted his basis of credit, and could have been reached by legal process. It was a fund which was at all times available for the payment of his debts, and, if it had been known that

it had been assigned, other creditors might have protected themselves; and the court therefore held that, as this agreement could only take effect on the day of presentation, the delay in presenting it until the day before the bankruptcy must be held to have been a transfer on that day for a pre-existing debt, and hence a preference. An analysis of the facts in the case now under consideration shows that the cases are clearly distinguishable. Here the debtor agreed to insure for the protection of his creditor, in order to obtain the money loaned. He could not have obtained the advances otherwise, and the agreement to transfer the policy of insurance was clearly an equitable assignment. This policy of insurance was not an asset on the faith of which he received other credit. There was no proof that other creditors sold him goods on the faith of the insurance policy. There was no agreement that the assignment of the policy should not be disclosed. There was no reason why other creditors should not have protected themselves in the same way. There was no agreement to hold it in suspense for the benefit of the bankrupt until the eve of filing the petition in bankruptcy. It was not an asset available for creditors until the fire, and an effective transfer of the policy could not have been made before the fire, because most of the standard forms of policy forbid an assignment before a loss. It was not an asset that could have been reached by any process by the other creditors before the fire. It was not an agreement that was prejudicial to other creditors when made.

I have reviewed these cases at greater length than I would have otherwise thought necessary, out of respect to the learned referee, to whose opinions I generally attach much weight, but they do not support the conclusions reached by him.

The bankrupt act of July 1, 1898, c. 541, § 67d, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], provides that "liens given or accepted in good faith and not in contemplation of or fraud upon this act, and for a present consideration, * * * shall not be affected by it." The testimony supports the answer of the defendant Watts that the money was advanced to him in good faith at a time when he was solvent, to be used in his business; that there was an agreement at that time that his stock of goods was to be insured, and that the policies were to be assigned as security for the loan. There was a present consideration, and an agreement to assign the policies, which, on principle and on authority, created an equitable lien upon the money due on the policies of insurance. Chief Justice McIver, in Swearingen v. Ins. Co., 52 S. C. 315, 29 S. E. 722, says:

"While a policy of insurance is purely a personal contract between the insurer and the assured, and hence the mortgagee of the premises insured, merely as such, has no interest, either in law or equity, in a policy of insurance taken out by the mortgagor in his own name and for his own benefit, yet if the mortgagor is bound, either by covenant in the mortgage or otherwise—for example, by a valid verbal agreement—to keep the property insured, as a further security for the payment of the mortgage debt, then the mortgagee is entitled to an equitable lien upon the money due on the policy of insurance, even though taken out in the name of the mortgagor. * * * This rule is recognized in Wheeler v. Ins. Co., 101 U. S., at page 442, 25 L. Ed. 1055, where Mr. Justice Bradley thus tersely states it: 'If the mortgagor

is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on the policy taken out by the mortgagor, to the extent of the mortgagee's interest in the property destroyed.'"

The subject is fully discussed in Ketchum v. St. Louis, 101 U. S. 306, 25 L. Ed. 999; Fourth St. Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855; Walker v. Brown, 165 U. S. 664, 17 Sup. Ct. 453, 41 L. Ed. 865; and the general doctrine is that where a party by express agreement sufficiently indicates an intention to make some particular property, real or personal, or fund, a security for a debt or other obligation, and promises to assign or transfer the property as security, equity, regarding that as done which ought to be done, creates an equitable lien upon the property indicated; or, in the words of the case last cited:

"To dedicate property to a particular purpose—to provide that a specified creditor, and that creditor alone, shall be authorized to seek payment of his debt from the property or its value—is unmistakably to create an equitable lien."

Loveland, in his work on Bankruptcy, p. 600, says:

"Liens may be divided into three classes: First, common-law or retaining liens; second, liens created by statute, such as mechanics' liens; third, equitable liens." "The term 'lien,'" says he, "is especially applicable to the common-law lien; but it is by analogy generally applied to other cases, where a right to prepayment exists out of a particular property, or a particular asset or interest in property, either by contract, expressed or implied, or by the implication of a trust or statute, although the property itself may not be in the possession of or vested in the person claiming the lien. Liens of this description are in the nature of equitable charges."

The fact that the policies of insurance were not actually delivered to the creditors is of no consequence here. A case might arise in which delay or nondelivery might be important as evidence upon the question of a complete execution of the agreement for a lien, but the testimony shows beyond dispute the agreement for a lien; and equity, which regards the true intention of the transaction, will consider what was actually done as sufficient if the parties themselves treated it as a sufficient performance of that part of the agreement. "Actual delivery of the policies and continuous possession by the transferee are not indispensable to create and preserve such lien as is now being considered." Spring v. Ins. Co., 8 Wheat. 268, 5 L. Ed. 614. As most of the standard forms of policies inhibit their assignment before a loss, the actual manual delivery of the policy after the loss suffices. The creditors in this case, upon the testimony here, could have compelled the delivery of the policies.

Archbald, District Judge, in Re Charles W. Busby, 10 Am. Bankr. Rep. 650, 124 Fed. 469, says:

"At the time the debt is created the creditor has the right to dictate the terms on which he will part with his money or property, and may therefore demand that he shall first be secured to such an extent as satisfies him. With this the bankruptcy law does not undertake to interfere, the creditor being allowed to retain without question whatever advantage he has acquired thereby."

Section 57e–h, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443].

As to the life insurance policy which was assigned to the bank by the insurer, it stands as a secured, and not a preferred, matter.

The policy of insurance is a mere personal contract between the assured and the underwriters to indemnify the former against any loss he may sustain through the destruction of the insured property. It is a chose in action, and an interest in the proceeds may be assigned by parol as well as by deed. No rights to the benefit of the policy attach in favor of either mortgagees or creditors in the absence of a trust or contract to that effect, and an equitable lien arises in favor either of mortgagee or creditor when the assured enters into a contract in any form that the proceeds shall be so applied, provided no valid objection to the transaction is raised by the insured.

The case of McDonald v. Daskam, 116 Fed. 276, 53 C. C. A. 554, is nearer in its facts to the case at bar than any which has been brought to my attention. In that case a corporation procured a loan from a bank under a parol agreement by which the mortgagee was to become surety therefor, and the mortgage, together with the insurance on the mortgaged property, which was payable to the mortgagee, was to be given as collateral security; the policies of insurance being in the hands of the agent from whom they were procured. The court says:

"The evidence of the parol agreement makes clear what otherwise might be doubtful—the intention of the parties. Such parol evidence is admissible to explain the meaning of indefinite terms. The advances had been wholly obtained under, and upon the faith of, the parol agreement. The note was given upon the closing up of the matter, and, read in the light of the parol agreement, clearly discloses the intention of the parties. It declares that the insurance, if fire should occur, should stand as security for the payment. We cannot consider this agreement as a common-law pledge, and void because the policies were not given into the possession of Daskam or the bank. It was not a pledge of marketable security or a salable property. Whether we consider the verbal arrangement or the written note, it was an agreement for a beneficial interest in a chose in action—a personal contract between the insurer and the insured. Under the modern rule, such an equitable interest may be created by parol as well as by deed. The transaction, in equity, amounts to an appropriation of any claim under the policies for any loss by fire which may occur."

In that case the bankrupt, subsequent to this parol agreement, and a few days before the fire, caused to be indorsed upon two of the policies, "Loss payable to R. W. Roberts as the interest may appear;" Roberts being at that time a creditor of the bankrupt. In considering his claim the court says:

"Assuming Mr. Roberts to have had no knowledge of the equitable rights of the bank and of Daskam upon this insurance, over and above the amount of the mortgage debt, it still remains that Mr. Roberts parted with nothing upon the faith of this security, and gave no indulgence with respect to the debt upon the faith of the transfer. His equity, therefore, cannot outrank the equitable lien of Daskam and the bank. He simply stands, as respects this insurance, in the shoes of the bankrupt; taking that to which the bankrupt would have been entitled in a case of loss, after payment of the debts theretofore secured upon this insurance."

This opinion of a court of high authority—Judges Jenkins, Grosscup, and Baker—is entitled to great weight.

As the testimony shows clearly that the National Bank of Newberry and Bailey & Son have equitable liens upon the insurance

money, and that the respondent, Watts, has committed no act of bankruptcy in the transfers, the decision of the referee is reversed.

There remains another question to be considered. It appears that at the references held by the referee some testimony was brought out that subsequent to the fire Watts collected some accounts that were due him, to the amount of about $700, which was paid out by him, as far as it would go, to such of his creditors as held claims falling due; leaving outstanding a large amount of claims unpaid. The referee holds that Watts, being then insolvent, committed an act of bankruptcy, under section 3, subd. "a" (2) of the statute (30 Stat. 546 [U. S. Comp. St. 1901, p. 2422]). These alleged preferential payments were not stated in the petition as acts of bankruptcy. In fact, as it subsequently appears, one of the payments was made to one of the petitioners. The referee was of opinion that the order of reference required him to take cognizance of any evidence tending to show that any act of bankruptcy had been committed. Such was not the intention of the order, nor could such order have fairly been made. The order was, in terms, stated to be a "special order of reference." It referred the petition and the answer of Watts to the referee, "to inquire and report whether the alleged bankrupt has committed an act of bankruptcy, within the intent and meaning of the bankruptcy act. The only act of bankruptcy alleged in the petition, and to which the respondent, Watts, answered, was the transfer of the insurance policies, and the testimony should have been confined to the special issue raised by the pleadings. The petition alleged but one act of bankruptcy, and the respondent, in his answer, responded to the issue which the petitioners made. It was his right to be advised as to the charges made against him, and he cannot be justly adjudged a bankrupt on account of acts which were not charged against him. Non constat but he may have had a sufficient answer or explanation of the acts referred to.

In aid of the referee's conclusion that Watts committed an act of bankruptcy in the preferential payments, the attorneys for the petitioner, pending the hearing before me, asked leave to amend their petition so as to charge these alleged preferential payments as acts of bankruptcy. Amendments are usually allowed if the ends of justice will be promoted, but, as they are not matters of right, the court must exercise its discretion in permitting them. As an adjudication in involuntary proceedings puts a stigma upon the person so adjudicated, he ought, in fairness, to have opportunity of answering; and the proposed amendment, duly verified, should have been served upon him. This was not done. The amendment proposed states a new and independent cause of bankruptcy, not related to the original petition. The petitioners have given no reason why this alleged act of bankruptcy was not stated in their first petition. They cannot claim ignorance, because one of the alleged preferential payments now stated as an act of bankruptcy was made to parties who filed the original petition. There are respectable authorities holding that acts of bankruptcy occurring subsequent to those stated in the original petition cannot be allowed to be

brought in by amendment. The Circuit Court of Appeals of the Second Circuit, in Re Sears, 117 Fed. 294, 54 C. C. A. 532, says:

"The order allowing an amendment of the petition by the insertion of a special act of bankruptcy was erroneous, because it clearly appeared that such act of bankruptcy was not an earlier act than that first alleged, but was later."

That appears to have been the case here, for the transfers of the policies of insurance were made on December 3, 1904, and the alleged preferential payments were made after that date. The court, in the Case of Sears, holds that the provision for amendments in general order No. 6 (89 Fed. v; 32 C. C. A. ix), by implication limits the power of amendment to the single case in which an earlier act of bankruptcy is sought to be incorporated into the petition. The general rule stated by Collier, Loveland, and other writers on the bankruptcy act is that:

"Bankruptcy courts have the usual powers of courts of justice, upon motion and for good cause, to authorize amendment of pleadings, including petition. They will rarely do so if the purpose of amendment is to introduce allegations setting up an additional or new act of bankruptcy, but such an amendment will be allowed if clearly in furtherance of justice, and if its omission from the original petition is properly excused."

It does not appear to me that the proposed amendment is "clearly in furtherance of justice." The petitioners have not shown any good reason, or any reason at all, why the acts of bankruptcy set up were omitted from the original petition, and have made no excuse for such omission; and, as it appears from the whole case that the alleged bankrupt has no assets to be administered, I fail to see how the interest of creditors can be served by harassing him with further proceedings.

The report of the referee is set aside, and the petition dismissed.

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## THE CAR FLOAT NO. 19.

(District Court, S. D. New York. June 1, 1905.)

SALVAGE—RESCUING CAR FLOAT FROM BURNING PIER—AMOUNT OF AWARD.

Libelant's steam propeller, worth $25,000, while towing a derrick down the Hudson river, saw a pier at Hoboken on fire, and, leaving her tow, went into the adjoining slip and rescued claimant's car float, worth $22,000, which lay outside of a barge then on fire. The float was in a position of considerable danger, and the steamer was also subjected to some risk; it being necessary to play streams of water on both vessels during the performance of the service, to prevent them from taking fire. *Held*, that the service was one of salvage, for which libelant was entitled to an award of $1,000.

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

In Admiralty. Suit to recover for salvage service.

Avery F. Cushman, for libellant.

James J. Macklin, for claimant.

ADAMS, District Judge. This action was brought by the Merritt & Chapman Derrick & Wrecking Company to recover for

salvage services alleged to have been rendered to Car Float No. 19, on the 29th day of May, 1904, when the float was rescued from a dangerous fire which occurred about 5 o'clock P. M. at the piers of the Delaware, Lackawanna & Western Railroad Company at Hoboken, New Jersey.

The claim of the libellant is that its steam propeller William E. Chapman was proceeding down the Hudson River, with a derrick in tow bound for Brooklyn, and the fire being noticed, the tow was left at a wharf belonging to the Pennsylvania Railroad Company and the Chapman went, within 18 or 20 minutes, to the scene of the fire. It is alleged that pier 12 was on fire its entire length and several barges in the slip between piers 12 and 13 were also on fire; that No. 19 was lying alongside of a barge, the Allan Churchill, about two-thirds of the way up the slip and on the lower side of pier 12; that the Churchill was all on fire and No. 19 was smoking from the heat; that the Chapman, having arranged her hose lines previously, played 3 streams upon pier 12 and one upon herself to protect her from catching fire; that as soon as she arrived at No. 19, the three streams were turned upon her and the burning barge and a line made fast to No. 19, by which she was pulled out from between the piers and delivered to her owner in safety; that the propeller was in great danger of catching fire which made it necessary to continue playing the hose upon herself; that the heat was so intense that the members of her crew were obliged to protect their bodies and faces by clothing; that the float was in great danger, as the Churchill was on fire at the time and totally destroyed as well as pier 12; that there was no other tug near No. 19 at the time and the period of service was about half an hour during which time the Chapman was in great danger.

The claimant admits that there was a fire at the place and that the water front property there was destroyed as well as some vessels, but denies the rendition of any salvage service by the Chapman and alleges that No. 19 was lying at pier 13 and was towed out of danger with two other floats, by some other tug than the Chapman, and that if she rendered any assistance to No. 19, it was when she was not in a perilous position or in any danger.

The values of the vessels have been agreed upon: $25,000 for the Chapman and $22,000 for No. 19, but otherwise the whole matter seems to be in dispute, the claimant contending that if the Chapman rendered any service it was in towing the float to New York, after she had been removed from a position of peril between the slips by the Erie Company's tug Rochester, which cast the float off in the stream after towing her out and returning herself to the fire.

The libellant's contention is sustained by the positive testimony of three witnesses, the master, mate and deck hand of the tug, who are not, as usual in salvage cases, parties to the action and have no apparent pecuniary interest in the result. The claimant shows by one witness that No. 19 was not in the position at the wharf claimed by the libellant and by some others that several car floats were towed out from between the piers and left drifting in the river, but there is no direct testimony to overcome that of the libellant. If

it is untrue, it would naturally so appear by some convincing testimony and, in the absence of such, I conclude that the libellant should recover.

On the 13th of June, 1904, the libellant made a demand upon the claimant as follows:

"June 13, 1904.

Mr. John H. Starin,
The Cortlandt Street Piers,
New York City.
Dear Sir:—

In regard to our claim against float No. 19, the captain of our propeller 'Chapman,' which pulled her out of the slip, states that when he made fast to her, she was then alongside of the barge 'Allan Churchill,' which was all ablaze from one end to the other. We feel that our saving this float was a meritorious service, and should be well paid for. In view of our not insisting upon security being filed for our claim, please write us that you will furnish a bond if we feel at any time that our interest requires it.

Yours truly, Merritt & Chapman Derrick & Wrecking Co."

To which the claimant responded as follows:

"New York, June 23rd 1904

Merritt & Chapman D & W. Co
17 Battery Place City
Dear Sirs:

In response to your letter of 13th instant, we beg to advise that we have fully considered your salvage claim on car float #19 and to state that we are willing to pay you five hundred ($500) dollars in full of all claims.

This is the best we will do.

Yours truly Jno H. Starin
A."

The claimant now urges that this should not be entertained as an admission because it "is only evidence of a person trying to adjust a matter without litigation which the courts often encourage instead of using it as a circumstance against a party seeking to refrain from the law."

It is not necessary to resort to this correspondence as evidence to establish the claim, which is otherwise proved, nevertheless, in a case of this kind, the fact that a party makes a substantial offer of settlement, rather tends to establish the view that he believed in the merits of the claim, after a full opportunity to investigate it. Doubtless it might not of itself establish a claim disputed by competent evidence, but I think it may fairly be considered here in corroboration of the testimony. It is said in Greenleaf on Evidence, § 192:

"* * * It is the condition, tacit or express, that no advantage shall be taken of the admission, it being made with a view to, and in furtherance of, an amicable adjustment, that operates to exclude it. But, if it is an independent admission of a fact, merely because it is a fact, it will be received; and even an offer of a sum, by way of compromise of a claim tacitly admitted, is receivable, unless accompanied with a caution that the offer is confidential."

With respect to the amount of the award, the No. 19 was undoubtedly in a position of some danger of being seriously injured if not consumed. The tug was also subjected to some risk from her exposure in the service. I consider that the sum of $1,000 will be a proper salvage amount and allow that sum.

Decree for libellant accordingly.

## HIRSCHKOVITZ v. PENNSYLVANIA R. CO.

(Circuit Court, S. D. New York. May 30, 1905.)

1. WRONGFUL DEATH—STATUTES—MEASURE OF DAMAGES.
In an action for wrongful death, under a statute providing that in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person, the verdict should not exceed the value of the pecuniary assistance the jury believes the next of kin living at decedent's death would have received from him, had he lived. The jury may not fix these damages arbitrarily. There must be some evidence to sustain the amount of the verdict.
[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 111.]

2. SAME—STATUTES—CONSTRUCTION—RIGHTS OF ALIENS.
Where a statute authorizing a recovery for wrongful death provided that such recovery shall be for the exclusive benefit "of the widow and next of kin of such deceased person," and shall be distributed to them in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate, it was no defense to an action for wrongful death that deceased had no widow, and that all of his next of kin were nonresident aliens.

3. SAME—DAMAGES—EXCESSIVENESS.
Deceased was killed by the negligence of defendant when he was 27 years of age. He had been in the United States from 2½ to 5 years, was a common laborer, employed at $1.50 per day as a car cleaner, and had been previously employed as a railroad waterman. He was unmarried, and there was evidence that he sent from $20 to $25 per month to his father, in Roumania, who was 65 years of age at the time deceased died. *Held*, that a verdict for $3,500 was excessive, and should be reduced to $2,500.
[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 125, 130.]

At Law. Motion for new trial on ground, among others, that the damages awarded by the jury ($3,500) are excessive.

Max Altmayer, for plaintiff.
Robinson, Biddle & Ward, for defendant.

RAY, District Judge. This action, tried before a jury, resulted in a verdict of $3,500 for the plaintiff. The jury found negligence of defendant, causing the death of plaintiff's intestate, based on evidence and a charge to which no exceptions now urged were taken, except that as to the longevity of the parents and grandparents of the deceased. The action is based on a statute of the state of New Jersey, the pertinent sections of which read as follows:

"Section 1. That whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or the corporation which would have been liable if death had ensued, shall be liable for an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"Sec. 2. That every such action shall be brought by and in the name of the personal representative of such deceased person, and the recovery in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of

kin in the proportion provided by law in relation to the distribution of the personal property left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person, provided that every such action shall be commenced within twelve calendar months after the death of such deceased person."

1 Gen. St. p. 1188.

In this case the next of kin to decedent, Josefsohn, is the father, now 67 years of age—65 at the time of the death of the son—and a resident and citizen of the kingdom of Roumania. He has five other children residing in the old country, all poor, and having families of their own—two boys and three girls. There is no proof of property in the family, or a suggestion that Josefsohn would have fallen heir to any property. He was 27 years of age at his death and unmarried; had been in this country about 2½ to 5 years; was a common laborer here, receiving $1.50 per day as a car cleaner, and had been employed at that work for a few days only. Before that he had been in the employ of the defendant at Pittsburgh, Pa., as a waterman—supplying cars with water. There is proof, of a somewhat indefinite character, that decedent was sending about $20 per month of his earnings to his father, in the old country—sometimes $20, sometimes less, sometimes $25 per month. In the old country the decedent was a clerk in a dry goods store. The proof fails to show steady employment or prospects of any material advancement in his position. He was not a skilled workman in any field of labor. Maybe he would have remained in the United States, remained unmarried, prospered, and proved able to send large sums to the father. Maybe not. Maybe the father will live a quarter of a century, but maybe the son would have died in a few years. It is quite true that there is no fixed rule of damages in such cases. In this case the court said to the jury, among other things, at the request of the plaintiff's attorney:

"The damages to the next of kin in that respect are necessarily indefinite, prospective, and contingent. They cannot be proved with even an approach to accuracy, and yet they are to be estimated and awarded, for the statute has so commanded. But even in such a case there is and there must be some basis in the proof for the estimate. Human lives are not all of the same value to the survivors. The age and sex, the general health and intelligence, of the person killed, the situation and condition of the survivors, and their relation to the deceased—these elements furnish some basis for judgment. That it is slender and inadequate is true, but it is all that is possible. In but few cases arising under this act is the plaintiff able to show direct, specific, pecuniary losses suffered by the next of kin from the death; and generally the basis for the allowance of damages has to be found in the proof of the character, qualities, capacity, and condition of the deceased, and in the age, sex, circumstances, and condition of the next of kin. The proof may be unsatisfactory, and the damages may be quite uncertain and contingent, yet jurors in each case must take the elements thus furnished, and make the best estimate of damages they can. There seems to be no other mode of administering the statute referred to, and the protection against excessive verdicts must be found in the power of courts to revise or set aside."

I do not think the evidence justified a verdict of $3,500. It does not seem probable to this court that this son could have sent $20 to

$25 per month to his father. He had to live. Assuming that he earned $39 per month regularly, it seems improbable that he could have done this. The witnesses who spoke on the subject were deeply interested, and, again, it appeared that they could not have known with precision—assuming there was no exaggeration—the amounts sent. By reason of the fact that the tables put in evidence were called the "Northampton Tables," the court made an error in stating the expectancy of life, but this was prejudicial to the plaintiff, not the defendant. This court is of the opinion that the verdicts of juries in this class of cases as to damages should be based on facts shown by evidence, and not on guesses or speculation or conjecture. In Lindstrom v. International Navigation Co. (C. C.) 117 Fed. 170, the judge reduced a verdict of $5,000 to $1,500, and granted a new trial unless the plaintiff should consent thereto. It is true that a jury may find the expectation of life of a given decedent was much greater than shown by tables, and it is also true that a recovery in such a case as this is not restricted to the amount shown to have been furnished by the decedent to the next of kin, multiplied by the expectancy of life. It is also true in such cases that the plaintiff's recovery is restricted to pecuniary damages, and such damages as are shown by some evidence to have been sustained. It has been stated in some cases that a sum may be given by the jury that, put at interest, would produce an annual income equal to the amount furnished annually by the decedent. This court cannot assent to that doctrine. The verdict should not exceed the value of the pecuniary assistance the jury believes the next of kin living at the death of the decedent would have received from him, had he lived.

At the close of the plaintiff's case the defendant moved for a dismissal of the complaint and the direction of a verdict for the defendant upon the ground, among others, that the purpose of the act above quoted, giving the widow and next of kin a right of recovery in case of the death of the person injured, is to benefit such next of kin when citizens of, or at least residents in, the United States, or some state of the United States, and that the right of recovery is confined to our own citizens, or at least to residents of the United States, and that nonresident aliens cannot avail themselves of the benefits of the act, and an administrator appointed here cannot recover for the benefit of a nonresident alien. The court denied the motion, and said, in substance:

"I do not see how by any possibility such a limited construction can be given to this New Jersey statute. The language is plain—that every such action shall be brought by and in the name of the personal representative of such deceased person, and the recovery in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the same proportion provided by law in relation to the distribution of the personal property left by the persons dying intestate. It seems to me that if the Legislature of New Jersey had intended to confine that recovery to the widow and next of kin, residents or citizens of New Jersey, or citizens of the United States, and to exclude nonresident aliens, they would have so said. I will deny the motion."

On thorough consideration, I adhere to that ruling. It seems clear that the purpose of the Legislature of a state in enacting such a statute is not to give compensation by way of damages to the widow and next of kin who are residents of or citizens of the state or of the United States alone, and prevent their becoming a public charge, but to give this compensation by way of damages to the widow and next of kin for the pecuniary loss they have sustained, irrespective of their residence or citizenship. Had the Legislature of New Jersey intended to restrict recovery in such a case by an administrator for the benefit of the widow and next of kin of the decedent to a resident widow or resident next of kin, or both, or to a widow and next of kin who are citizens of the United States, it would have so said. The statute would have been made plain. As I look at it, such a limited and restricted interpretation would be opposed to all legitimate rules of statutory construction.

The motion for a new trial is granted, because the damages are excessive, unless the plaintiff consents, in writing, within 20 days, to reduce the verdict to $2,500. If such a consent is filed and served within that time, the motion is denied.

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## In re BEEDE.

(District Court, N. D. New York. June 5, 1905.)

1. BANKRUPTCY—LIENS—VALIDITY—WHAT LAW GOVERNS.
   The validity of a chattel mortgage as a lien on a bankrupt's assets as to all the parties is a local question, and must be determined by the decisions of the state courts.

2. SAME—FAILURE TO FILE—EFFECT.
   Where a chattel mortgage was executed and delivered in good faith, but was not filed within a reasonable time, as required by statute, and the mortgagor was permitted to retain possession of the property, the mortgage, under the law of New York, was void as to all creditors of the mortgagor then existing, or who became such while the mortgage remained unfiled, except as between such creditors and bona fide purchasers of the property for value.

3. SAME—JUDGMENTS.
   Where a chattel mortgage executed and delivered in good faith was not filed within a reasonable time, as required by the state law, nor until two days prior to the mortgagor's adjudication in bankruptcy, both creditors of the bankrupt who had acquired judgments and issued executions thereon prior to such adjudication, and those having claims accruing while the mortgage was not filed, and prosecuted to judgment and execution after adjudication, suit having been commenced prior to the institution of the bankruptcy proceedings, were entitled to urge the invalidity of such mortgage, and to a prior lien on the proceeds of the sale of the mortgaged assets, as against the mortgagee and his assignee, who took same after the adjudication in bankruptcy as collateral security to a real estate mortgage given by the mortgagee long before.

4. SAME—BANKRUPTCY PROCEEDINGS—EFFECT.
   The filing of a petition in bankruptcy against the mortgagor, and his adjudication as a bankrupt, did not prevent creditors having claims prior to the filing of the mortgage from proceeding to reduce the same to judgment and obtain execution thereon, suit having been commenced prior to the filing of the petition in bankruptcy.

5. SAME—JUDGMENTS—LIENS.

Bankr. Act July 1, 1898, c. 541, § 67, subds. "a," "b," 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], providing that claims which, for want of record or for other reasons, would not have been valid liens as against the claims of creditors of a bankrupt, shall not be liens against his estate, and that whenever a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt should be subrogated to and may enforce such rights of such creditor for the benefit of the estate, apply to judgments obtained by creditors of a bankrupt subsequent as well as prior to adjudication, in cases where the action to procure a judgment had been commenced prior to the institution of bankruptcy proceedings.

6. SAME—TITLE OF TRUSTEE—EFFECT.

A bankrupt's trustee is not a "purchaser," and the transfer to him by operation of law of mortgaged personal property does not extinguish the right of creditors to assert the invalidity of the mortgage, for nonfiling, as to the mortgagee and his assignee.

7. SAME—RIGHTS OF TRUSTEE—SUBROGATION.

Where a chattel mortgage executed by a bankrupt and delivered was void as to creditors obtaining judgments against a bankrupt, both before and after adjudication, for failure of the mortgagee to file the same within a reasonable time, the bankrupt's trustee was subrogated to the rights of such judgment creditors, as against the holder of the mortgage, and was therefore entitled to the proceeds of the mortgaged property for the benefit of the bankrupt's estate.

In re N. Y. Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133, considered and distinguished. The dictum of that case not followed. In re Ducker (C. C. A., 6th Circuit) 134 Fed. 43, 46, 47, approved and followed.

This is a controversy between the assignee of a mortgagee of Orlando Beede, the bankrupt, his trustee in bankruptcy, and certain creditors of said bankrupt who have obtained judgments against him since the filing by him of the petition in bankruptcy, as to the rights of the parties to the proceeds of the sale of the personal property of said bankrupt. The amount in controversy is over $12,000. See 126 Fed. 853.

S. L. Wheeler, for John M. Wever, assignee of mortgagee.
Pyrke & Dudley, for creditors.
Stokes & Owen, for trustee.

RAY, District Judge. The facts in this case, so far as the legal questions now involved are concerned, are easily understood. Orlando Beede, the bankrupt, was extensively engaged in the lumber business and in running two stores. Prior to March, 1901, he became badly involved financially, but his condition was known to himself only, if to himself. In fact, he was insolvent. He was borrowing money on notes and giving notes, and his brother Fletcher S. Beede became his indorser to an amount in excess of $30,000. As security for such indorsements, Orlando gave to his brother, March 23, 1901, a chattel mortgage covering substantially all of his personal property. The giving of this mortgage was not known, except to the parties thereto, and it was not filed or recorded until October 10, 1901, about seven months subsequent to its date, execution, and delivery. It is evident that Fletcher S. knew of the purpose of Orlando to file a petition in bankruptcy when he

filed the mortgage. In August and September, 1901, and within four months of the adjudication, Orlando Beede gave to Fletcher S. Beede bills of sale of this personal property for the same consideration named in the mortgage, but no claim is made under them. Two days after the filing of the mortgage, and October 12, 1901, on his own petition, said Orlando Beede was adjudicated a bankrupt. Prior to the filing of the petition and the adjudication in bankruptcy several judgments were duly obtained and duly docketed against said Orlando Beede, in favor of certain creditors, to the amount of about $5,943.85, and these are unpaid. Executions thereon were duly issued prior to such adjudication. The same day of the adjudication one Payne obtained and docketed a judgment against Orlando Beede for the sum of $5,494.26, and soon thereafter, in actions commenced before the petition in bankruptcy was filed, other judgments to the amount of $7,648.31 were perfected, filed, and duly docketed against said Orlando Beede. All of these judgments were upon debts of the said Orlando Beede existing prior to the giving of the mortgage, and during the nonfiling thereof, or which were incurred after it was given and before it was filed. John M. Wever held a mortgage on certain of the real estate of said Fletcher S. Beede, and on or about the 11th day of April, 1902, several months after the adjudication in bankruptcy, Fletcher S. Beede —he having paid certain notes of Orlando—assigned the said chattel mortgage to said Wever as collateral security to his said real estate mortgage, to the amount of $7,500. The chattel mortgage was not given to hinder, delay, or defraud creditors, and there was no agreement to keep it from the files or to keep it secret. The mortgaged property was not taken possession of by the mortgagee, but remained in the possession of the mortgagor at the time of the adjudication, and passed to the hands of the trustee when he was appointed. It was thereafter sold for the sum of $12,806.34, under an agreement that such sale should in no way affect the lien of the mortgage, if a lien, but that such proceeds should stand in place of the mortgaged property. Such agreement also submitted to this court the decision of the rights of the parties, the same as if an action had been brought for the purpose.

Wever concedes the prior right of the execution creditors who had obtained judgments and issued execution prior to the adjudication in bankruptcy. Of such prior judgments, the owner thereof, to the amount of $3,284.46, also the owner of the Payne judgment, has filed the following waiver in open court: "I waive all claim, as owner of the assignments of three judgments which I have offered in evidence, to the chattel mortgage put in evidence being void for want of filing." Wever claims $7,500 of the proceeds. If such waiver is valid as to the trustee and creditors, there is enough money, after paying the other prior judgments, to give Wever the $7,500 in full. The trustee and the creditors with judgments obtained subsequent to the adjudication assert that such waiver is inoperative and void, and that the liens of all the prior judgments attach to the proceeds, and inure to the benefit of the estate, and not

to the benefit of such creditors solely. They assert that such chattel mortgage being void as to such execution creditors, and the judgments having been obtained within four months of the bankruptcy, the lien is a preference, which may be enforced by the trustee for the benefit of the estate, or at least the trustee may recover the amount of such judgments for the benefit of the estate. The creditors with judgments obtained and docketed after the adjudication (actions commenced before) assert that, having judgments and executions, the liens thereof, in equity, attached to the property, and now attach to the proceeds thereof, as against Fletcher S. Beede, mortgagee, and John M. Wever, his assignee, the same as the judgments obtained prior to the adjudication, all taking precedence to the mortgage. They assert that, as to the mortgagee and his assignee, they are creditors armed with judgments and executions, and that the bankruptcy of Orlando Beede, the mortgagor, did not operate to suspend, impair, or extinguish their rights or remedies as against the mortgagee; that is, to proceed to judgment against Orlando Beede, and issue execution, and assert the invalidity of the chattel mortgage as to them for the reason it was not filed. They assert that Orlando Beede could not in effect validate as against them a mortgage which was always void as to them, for nonfiling, by filing a petition in bankruptcy, or, by so doing, suspend, extinguish, or defeat their rights to proceed against the property and mortgagee and his assignee. They assert that the filing of such mortgage two days before the filing of the petition in bankruptcy did not change the rights of the parties. They most strenuously protest that their rights as against Fletcher S. Beede and his assignee, and their right to proceed and have the asserted lien of such assignee, claimed by him to be prior to their rights and equities, declared and adjudged null and void as to them and all creditors in a like situation, were not and are not suspended, destroyed, or extinguished by the mere act of the mortgagor in filing a petition in bankruptcy. They assert that such act is not equivalent to the act of the mortgagor and mortgagee named in a chattel mortgage, and void for want of filing, when they elect to treat the mortgage as void for that reason, and turn over the property in payment of the debt, and it is so turned over and accepted. The validity of the mortgage as to all the parties is a local question, and must be determined by the decision of the courts of the state of New York. Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457. As to the creditors of said Orlando Beede, the mortgage was void for nonfiling; was always void; the filing thereof two days before the bankruptcy did not validate it as to them or affect their rights; and no act or acts of Orlando and Fletcher S. Beede could validate it as against them. Stephens v. Perrine et al., 143 N. Y. 476–480, 39 N. E. 11; Brunnemer, as Receiver, etc., v. Cook & Bernheimer Co. et al., 180 N. Y. 188, 73 N. E. 19; Thompson v. Van Vechten, 27 N. Y. 568; Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073; Stephens v. Meriden Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678; Southard v. Benner, 72 N. Y.

424; Mandeville v. Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678; Sheldon v. Wickham, 161 N. Y. 500, 55 N. E. 1045; Castleman v. Mayer, 168 N. Y. 354, 61 N. E. 282.

These decisions establish that the law of New York is: (1) That a chattel mortgage, there being no possession taken of the mortgaged property by the mortgagee, is absolutely void as to all creditors of the mortgagor then existing, or who may exist while such mortgage remains unfiled, except as between such creditors and purchasers in good faith for value, unless same is filed in the proper office within a reasonable time. (2) That, while such mortgage is void as to all such creditors, those creditors only who obtain a lien on the property by reducing their respective debts to a judgment and issuing execution are in a position to assert and enforce such invalidity. It is not necessary that a general creditor, to avail himself of such invalidity, have his judgment and execution before a transfer of the property is made by the mortgagor, unless made to a purchaser in good faith. (3) No act of the mortgagor or of the mortgagee, or of both together, can give validity to such an unfiled mortgage as against such creditors, including both general and judgment creditors. As between them and the mortgagor and mortgagee, it is void ab initio. (4) Even if the mortgagee takes possession of the property or takes and sells the mortgaged property under such mortgage, still such of the general creditors above specified as thereafter obtain judgment and execution may recover the property or its value, because as to them the mortgage was always void. (5) The mortgagor and mortgagee, however, may recognize the invalidity of such mortgage, and turn the property over to the mortgagee in payment of the mortgage debt, in whole or in part, but both together cannot give title as against creditors under or through the mortgage, for the reason it is invalid and void. (6) Such an unfiled mortgage is, however, good as between the parties thereto, and as to purchasers in good faith for value. And (7) such nonfiling raises no presumption of fraud. It is settled and elementary law that a creditor cannot take the property of his debtor either from him or any other person having possession and claiming it, however unfounded the claim, until he comes armed with some process authorizing the taking. It must be adjudged that he is a creditor.

This mortgage was good as between Orlando Beede and Fletcher S. Beede and his assignee, Wever. It was void as to all the creditors having judgments at the time the adjudication in bankruptcy was made. It was void as to all general creditors who were seeking to put themselves in a position to assert and enforce such invalidity, and remained void as to them notwithstanding the filing of the petition in bankruptcy, and as to them, and as between them and Fletcher S. Beede and Wever, his assignee, is still void. Stephens v. Perrine, 143 N. Y. 476, 39 N. E. 11; Brunnemer, as Receiver, etc., v. Cook & Bernheimer Co. et al., 180 N. Y. 188, 73 N. E. 19. The court in this last case says, "The authority of Stephens v. Perrine therefore stands in full force." These judgment and exe-

cution creditors now come in person, armed with lawful judgments and executions, into a court of equity, having jurisdiction of the subject-matter and of the parties, and the lawful possession of the fund, and the right to dispose of it, demanding the property or its proceeds of and as against the claim of the mortgagee and his assignee, who claim it under the alleged lien of the unfiled chattel mortgage, but which, as to these creditors, never was and is not now a lien thereon. Wever has no shadow of a claim as purchaser in good faith or for value. All these judgment and execution creditors are now in a position to assert the invalidity of such chattel mortgage, and were exercising due diligence to put themselves in that position when the petition in bankruptcy was filed. But for it, it must be conceded, they would now take the property in preference to Wever. Nothing has ever occurred to impair or impeach or extinguish the right of these creditors to assert the invalidity of such chattel mortgage as to them. It is quite true that if the mortgagor in an unfiled chattel mortgage sells the mortgaged chattels to a bona fide purchaser for value before the creditor obtains judgment and execution, such purchaser will hold in preference to the judgment creditor, because of his good faith, but in such case in no sense does the act of the mortgagor extinguish or impair the right of the creditor to impeach the alleged lien of the mortgage; that is, assert its invalidity as to himself. Should such a creditor pursue or seek to pursue the property or its proceeds in the hands of a bona fide purchaser for value, recovery would not be defeated on the ground his right to impeach the mortgage for nonfiling was extinguished, or that his right to assert its invalidity for that reason had been cut off by the act of the mortgagor, but on the ground that a purchaser in good faith and for value must for these reasons be protected.

In Sheldon v. Wickham, 161 N. Y. 500, 55 N. E. 1045, it was correctly decided that an assignee for the benefit of creditors cannot assert the invalidity of an unfiled chattel mortgage given by his assignor because of such nonfiling: First. Such assignee has no better or greater title or right than his assignor had, and, as between the mortgagor and mortgagee, the mortgage was always valid. The assignee of the mortgagor, stepping into his shoes, in the absence of some statutory authority, would not represent creditors. Second. An unfiled chattel mortgage is not a transfer in fraud of creditors. The statute does not make a failure to file a fraud, or evidence of fraud. That case holds that such an assignee is not within the enabling act of chapter 314, p. 506, Laws N. Y. 1858, providing that such assignees may disaffirm and treat as void transfers made in "fraud" of the rights of creditors, as an unfiled chattel mortgage is not made void for fraud in not filing. The question of fraud is not involved.

In Sheldon v. Wickham, supra, at page 503 of 161 N. Y., page 1045 of 55 N. E., Haight, J., in giving the opinion of the court, inadvertently, doubtless, said:

"It has been repeatedly held that such a mortgage is only void as to the persons mentioned in the statute, to wit, purchasers in good faith, and cred-

itors who are armed with some legal process authorizing a seizure of the property, and that it is valid as to the mortgagor and all other persons."

The decisions are unmistakable that an unfiled chattel mortgage is void as to all general creditors, but that those only who obtain judgments and executions can assert and take advantage of the invalidity, for until then they are not in a position, as to third persons, to assert they are creditors, or to demand or seize the property or its proceeds. If an unfiled chattel mortgage is good and valid as to a creditor who has no judgment (and it is concededly good between the mortgagor and mortgagee), why may not the mortgagee, acting in good faith, take possession and hold or sell in payment of his mortgage debt? But he cannot as against such general creditor, if such creditor subsequently obtains judgment and execution, and asserts the invalidity of the mortgage because not filed. Why? For the simple reason that as to him such mortgage was from the beginning and is absolutely void by statute. Not for fraud, but because not filed. True, the creditor cannot disturb the mortgagor or the mortgagee in his possession, etc., until he obtains judgment and execution, as until then he is not in a position to assert and enforce his right to take advantage of the invalidity of the mortgage. All this goes to the remedy. Until he has judgment it does not appear that he is a creditor. Should the Code of Civil Procedure of the state of New York provide that general creditors without judgments may take property claimed or taken by mortgagees under unfiled chattel mortgages in cases where by statute unfiled mortgages are void as to creditors, such creditors might do so in cases arising under the present statute; and if, in a given case, the mortgagee should refuse to surrender the property or its proceeds, such general creditor might bring an action, and in that suit have the question whether or not he is in fact a creditor litigated and determined. As it is, the procedure or remedy provided by law demands that the creditor first establish his claim, and the fact that he is a creditor of the mortgagor, by reducing his claim to judgment, and exhausting his remedy by execution. This done, he proceeds, not on the theory that the unfiled mortgage is void from the date of his judgment, or because he has obtained a judgment, or that its invalidity relates back (an untenable theory), but on the true theory, justified and demanded by the statute itself, and emphatically asserted by Judge Peckham in Stephens v. Perrine, supra, viz.:

"The Supreme Court has reversed the judgment for plaintiff upon the ground that, although such mortgage was void even as to existing creditors, yet, as the mortgagee filed her mortgage, and under it took possession of the property mortgaged, and sold the same by virtue of it before the creditors represented by the plaintiff had obtained any lien on the property by judgment and execution or by some other legal process, the mortgagee had the right to hold such property or its proceeds against these creditors. The court stated that the creditors, in order to take advantage of this void mortgage by reason of a failure to file it, must not only acquire a lien upon the property by virtue of a levy or other legal process, but such lien must be had before the mortgagee has reduced the property to possession and sold it to satisfy his claim. In this holding we are of the opinion the court below erred. The mortgage, as to the creditors of the mortgagor, was always void. It

continued to be void notwithstanding the fact that the mortgagee assumed to take possession under and to sell the property by virtue of such void instrument. As between these mortgagors and creditors, it was the same as if the mortgage did not exist, and the mortgagee could not, as against these creditors, obtain any rights under it. How could a mortgagee in a void mortgage, as against creditors, obtain any title to property by virtue of such mortgage? As against them the mortgagee could not rightfully take the property by virtue of this void instrument, and if she did take it in spite of the fact that the mortgage was void and no protection to her, how could she secure any further or greater right by the sale of the property and the receipt of its value? This action is against the mortgagee, and I cannot see the force of the reasoning which, while admitting that the mortgage is void as to creditors, nevertheless asserts that a title to the property covered by it may be obtained by the mortgagee by proceedings taken under it, and which assert the validity of such instrument, provided they are taken before the creditors are armed with a judgment and execution so as to enforce their rights which rest upon the invalidity of the mortgage. If void, what right has the mortgagee, as against creditors, to take possession in her character of mortgagee, and to sell or dispose of property described in it? Clearly she has none, and she does not acquire any by the celerity of her movements in seizing and selling property under it. Although, in order to themselves take the property, it was necessary for the creditors to have some legal process, yet, when that condition was complied with, their right to take it as between these parties became perfect. If, before any lien had been acquired by the creditors, the mortgagors had delivered the property to the mortgagee in payment of her debt, she could have then held it because it would have been in such a case a transfer of property by them in payment of their debt, and although it would have been in fact preferring such debt, yet it would have been a preference which the mortgagors then had the right to make. But in this case there was nothing of the kind done. The mortgagee acted under and by virtue of her mortgage all the time. The mortgagors did not deliver the property to her in payment of her debt. She took it under the assumed right given by the mortgage."

At the risk of being regarded tedious I have quoted thus at length because of the remark quoted from Haight, J., in Sheldon v. Wickham, and for the further reason that the Court of Appeals, in Brunnemer v. Cook & Bernheimer Co. et al., 180 N. Y. 188–191, 73 N. E. 19, has very recently declared, "The authority of Stephens v. Perrine therefore stands in full force."

In Bowdish v. Page, 153 N. Y. 104, 47 N. E. 44, we find nothing whatever giving sanction to the claim that an assignment by the mortgagor for the benefit of creditors, or the surrender of the possession of the mortgaged property to the mortgagee, or the filing of a petition in voluntary bankruptcy, either impairs or extinguishes the right of a creditor, whether he be only a general creditor at that time or a judgment creditor, to assert and enforce the invalidity of the unfiled chattel mortgage (invalid for that reason) as against the mortgagee and his assignee, if any, when he shall have put himself in a position to assert it. That case decided this—nothing more —that:

"While the mortgagee cannot enforce a void chattel mortgage against the creditors of the mortgagor, yet, if the mortgagor treats it as void, and, before the creditors obtain a lien, transfers the property to the mortgagee in payment of a debt, the transaction will hold."

Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073, Tremaine v. Mortimer, 128 N. Y. 1, 27 N. E. 1060, and Mandeville v. Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678, all hold that, while a mort-

gagee cannot enforce a void chattel mortgage against the creditors of the mortgagor, yet, if the mortgagor treats it as void, and, before such creditors obtain a lien, transfers the property to the mortgagee in payment of the debt, the transaction will hold.

In Bowdish v. Page, supra, the mortgage had become void through the conduct of the parties with respect to the property so mortgaged, not for nonfiling of the mortgage. In this case (Bowdish v. Page) when the property was transferred in payment of the debt the creditor had not obtained a lien by judgment. The court said:

"In that situation, plaintiff's right to the goods was superior to the bank's, for it rested not upon the void chattel mortgage, but upon an independent transfer of possession by the mortgagor. Had it been otherwise, the doctrine of Stephens v. Perrine, 143 N. Y. 476, 39 N. E. 11, would have applied, and the plaintiff would have had no right to the property as against Isaac's creditors. The referee's decision in respect to the plaintiff's possession is not predicated upon the chattel mortgage, and that possession cannot be qualified by a reference to that source of title."

In Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073, it was broadly held:

"The word 'creditors' in the provision of the act of 1833 [section 1, c. 279, p. 402, Laws 1833], in reference to the filing of chattel mortgages, which provides that such a mortgage, unless filed as directed by the act, 'shall be absolutely void as against the creditors of the mortgagor,' includes creditors whose debts antedate the execution of the mortgage, as well as those whose debts were subsequently contracted. A simple-contract creditor is also as much within the protection of the statute as a creditor whose debt has been merged in a judgment."

In Stephens v. Perrine, supra, the opinion of the court emphasizes this language by quotations and approval, and says:

"The language of Chief Justice Andrews in Karst v. Gane [supra] gives no countenance to the claim made in this case. He there said: * * * This statement is perfectly true, but is no justification for the claim that the mortgagee can herself defeat these creditors by taking possession of the property under a mortgage which as to them is nonexistent."

As, in the case now before the court, Wever claims the proceeds of the property mortgaged (the same being treated as the property itself), which is in the hands of the trustee in bankruptcy, under and by virtue of the mortgage against creditors with judgments and executions, it becomes interesting to know and ascertain when and how, if ever, he became entitled thereto as against creditors, when and how these creditors lost their right on obtaining judgment against Orlando Beede to assert the invalidity of a mortgage as to which it was said by Andrews, C. J., speaking for the court, in Karst v. Gane, supra, "Such a mortgage, therefore, is not valid as against an antecedent creditor, although it was filed before the creditor acquired a lien upon the property by judgment and execution," and as to which it was said by Peckham, J., speaking for the court, in Stephens v. Perrine, supra, "The mortgage, as to the creditors of the mortgagor, was always void," and "a mortgage which as to them is nonexistent." We have seen these able and distinguished jurists were speaking of those who were "general creditors" with-

out judgments when the mortgage was given, etc., and who obtained judgment thereafter, and after the mortgagees had asserted some right under the unfiled mortgage. These judgment creditors are now in court in their own proper persons, asserting their rights. They are not represented by the trustee in bankruptcy, nor do they claim through him.

Did the filing of his voluntary petition in bankruptcy by Orlando Beede, October 12, 1901, followed by adjudication the same day, impair, suspend, or extinguish the right of his general creditors to reduce their respective claims to judgment, issue execution thereon, and thereupon assert the lien of such judgments as prior and superior to the alleged lien of a chattel mortgage held by another creditor, but which mortgage had not been filed as required by statute? We have seen that such unfiled mortgage was always void as to these general creditors. The last decision of the Court of Appeals of the state of New York speaking on this subject reasserts that holding most emphatically. In any event, such mortgage as to such creditors became absolutely void the moment such creditors obtained their judgments. Being void for all purposes, as declared by the courts of the state of New York, the invalidity related back to the giving of the mortgage, and is to be regarded and treated as void from the very beginning. If the right of these general creditors to obtain judgment, and then assert the invalidity of the chattel mortgage as against the mortgagee and his assignee, was extinguished by the filing of the petition in bankruptcy, it must have been because of some provision of the bankruptcy act itself for which this court has searched in vain.

In re New York Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133, a chattel mortgage given more than four months prior to the filing of the petition in bankruptcy had been filed properly and in due time, but the mortgagee had failed to properly refile the same, although an attempt had been made to comply with the statute in that respect. One judgment had been obtained against the mortgagor prior to the adjudication in bankruptcy. There were other creditors, but no one of such other creditors had obtained judgment subsequent to the adjudication, nor had they, so far as appears, attempted so to do. The trustee in bankruptcy raised the question of the invalidity of the chattel mortgage because of the failure to refile the same in compliance with the statute. He claimed that he was in a position to raise the question in behalf of the estate represented by him, or in behalf of the general creditors, notwithstanding the fact that these general creditors had not obtained judgment. The Circuit Court of Appeals properly held, first, that the trustee in bankruptcy did not represent the general creditors, so as to be able to raise the question of the invalidity of the mortgage; second, that as to the bankrupt the chattel mortgage was good, always good, and that the trustee took and represented no greater or better title or right than that possessed by the bankrupt himself. The question was not in the case, and the court was not called upon to decide, whether or not general creditors who obtain judgments and executions against the bankrupt subsequently to the filing of the

petition in bankruptcy and the adjudication may effectively assert the invalidity of a chattel mortgage, as to them, because not filed either for their own benefit solely, or for the benefit of the estate represented by the trustee in bankruptcy.

It requires no argument to show that, in the absence of an express provision authorizing a trustee in bankruptcy to bring suit in the name of a creditor against the bankrupt of whose estate he is trustee, and whose title he takes and represents (an unthinkable proposition, for it would be authorizing the trustee to sue himself), the trustee cannot be subrogated to or enforce the rights of a creditor to obtain judgment against the bankrupt, so as to assert the invalidity of an unfiled chattel mortgage in the interest of the estate. But there is no provision in the bankruptcy act forbidding the bringing and prosecution to judgment of suits against the bankrupt by his creditors to establish their claims, or forbidding the prosecution to judgment of actions pending when the petition in bankruptcy is filed. True, the bankruptcy court may enjoin the prosecution of such actions in the interest of the estate, but it is not supposed that it will so act for the purpose of depriving creditors of their rights, as against alleged lienors. If such actions are pending as they were in this case, and are allowed to proceed to judgment as they were in this case, and executions issue as in this case, such creditor at this point "is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor, who afterwards" became a bankrupt. In such a case—and it is this case precisely—the creditor, now armed with judgment and execution, is prevented from seizing and selling the property on execution by reason of the fact that the court has the property in its possession, and is entitled to control and direct its disposition. But the lien, as against the unfiled chattel mortgage, is established. The bankruptcy court is bound to administer and distribute the mortgaged property or its proceeds to the general creditors, recognizing and first paying valid liens, as determined and made valid by the laws of the state, in their order of priority, unless invalidated by the bankruptcy act. That act cannot, or at least does not attempt to, create a lien in favor of any creditor or person, or to validate an invalid or void lien, made so by the law of the state, or to disturb the priority of liens. As in this case the creditors of Orlando Beede have proceeded to judgment without hindrance, and have established their claims as against him and his estate and Fletcher S. Beede and his assignee, and their lien upon and claim to the property in question is superior to that of the mortgage, which was and is void as to them because not filed, it seems to this court inevitable that it must recognize in the distribution of this fund the invalidity of the mortgage, and the superior right to the fund in question of these judgment creditors. Nothing is taken from the estate or the trustee, for, as to the estate and the trustee, primarily, the mortgage was and is good. This action by this court protects the rights of these creditors as against Fletcher S. Beede and his assignee, whose mortgage, as to such creditors, is and always was void. As to them Orlando Beede was powerless to validate the

mortgage by filing a petition in bankruptcy. Either these creditors, now armed with valid judgments, have rights to the fund in question superior to the rights of Wever, as assignee of Fletcher S. Beede, or the filing of the petition in bankruptcy extinguished the rights of the then general creditors to pursue their rights and remedies given by the laws of the state of New York against another general creditor, having an alleged lien on the property of the bankrupt, which the same laws declare and make void as to them. As before stated, I find no authority for such a proposition. It is not found in the cases cited in the Economical Printing Company Case or in the bankruptcy act. The action of a creditor in securing judgment and execution against his debtor, so as to assert the invalidity of an unfiled chattel mortgage, is not one of "vigilance," and, if he acts within the period prescribed by the statute of limitations, he is in time. He cannot bring action upon his claim until it has become due, and he is not supposed to be informed of unfiled chattel mortgages or of the intention of his creditor to file a petition in bankruptcy. Whether or not he shall have his remedy against a chattel mortgage void as to him because not filed as required by law does not depend on the volition of the mortgagor. No act of the mortgagor can validate such a mortgage, or make it a protection to himself or the mortgagee in dealing with the property, so far as creditors who thereafter arm themselves with judgments and executions are concerned. True, the mortgagor may elect to treat it as void, and turn the property over to the mortgagee in payment of the debt, in whole or in part, if the mortgagee will accept it, but this disposition of the property he may make if no mortgage were given. The mortgagor may sell the property to other parties, but with the consent of the mortgagee only. If he disposes of it otherwise, he is guilty of a crime. Pen. Code N. Y. § 571, which reads as follows:

"A person who having theretofore executed a mortgage of personal property, or any instrument intended to operate as such, sells, assigns, exchanges, secretes or otherwise disposes of any part of the property upon which the mortgage or other instrument is at the time a lien, with intent thereby to defraud the mortgagee, or a purchaser thereof, is guilty of a misdemeanor."

Hence the mortgagor cannot dispose of the property without the consent of the mortgagee, and both together cannot dispose of it by virtue of the mortgage, for as to creditors that is void.

I have no doubt that the provisions of sections 67a and 67b (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) apply to the case of judgments obtained by the creditors of a bankrupt after adjudication, the same as to the case of judgments obtained before. While it is the policy of the bankruptcy act to leave all valid liens obtained more than four months prior to the filing of the petition untouched, it is not its policy or effect to validate for the benefit of one creditor an instrument purporting to create a lien on the property of the bankrupt, declared to be void, in the interest of all unsecured creditors, because of the omissions of the creditors asserting the lien to comply with the provisions of law. The lien of the mortgage as against the estate of the bank-

rupt is good; that is, it will take the property from all creditors, and apply it to the satisfaction, in whole or in part, of the debt of the mortgagee, and thus deprive the creditors of their rights to assert the invalidity of such mortgage for nonfiling. If the creditors obtaining judgments are allowed, however, to take the property from the mortgagee for their sole benefit liens, or, in fact, preferences, obtained within four months are recognized, in a way. Hence the provisions of subdivisions "a" and "b" of section 67 of the bankruptcy act. These provisions permit and demand the maintenance and enforcement of the rights of creditors to overthrow such secret liens, void for nonfiling, in the interest of all the creditors.

The subdivisions of section 67 referred to read as follows:

"Liens. (a) Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate. (b) Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."

These subdivisions of section 67 were enacted in the broad daylight of Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816, and In re Collins, 12 Blatchf. 552, Fed. Cas. No. 3,007, which cases, broadly construed, hold the general principle that as an assignee in bankruptcy, trustee in the present act, takes the title of the bankrupt charged with all liens and equities good as against such bankrupt, a mortgage or other lien good as between the bankrupt and the holder thereof is good as against such trustee and the estate in bankruptcy, unless some provision is found in the bankruptcy act providing for the nullification of such lien. All liens obtained or given within four months of the filing of the petition are made void See section 67, Act 1898, as amended. All alleged liens voidable by creditors for want of "record or for other reasons," including filing, whenever given, "shall not be liens against his estate"—the estate of the bankrupt. Section 67a, supra. This was inserted in this act to prevent secret liens operating to defraud or even mislead creditors by reason of being secret, even if not made to hinder, delay, or defraud creditors. It was conceded in the reasoning and discussion of the general question in In re Economical Printing Company, supra, that section 67a and section 67b cover judgments obtained before the filing of the petition in bankruptcy. The reasoning of the court, although the question was not involved, and all that was said was obiter, and for that reason not binding on this court in this case, would seem to indicate that, in the opinion of the court, judgments against the bankrupt obtained after the filing of the petition and adjudication by creditors whose claims antedated the giving of the mortgage, and existed during the period of unfiling, as well as those incurred during that period, are not within the terms of sections 67a and 67b. But that opinion seems to be based on the assumption that in New York unfiled chattel mortgages are not void as to general creditors until judgment is obtained

and execution issued—an assumption utterly at variance with the decisions of the Court of Appeals in Karst v. Gane, Stephens v. Perrine, Mandeville v. Avery, and in the very recent case of Brunnemer v. Cook & Bernheimer Co. et al., supra, although finding support in some of the expressions of the opinion in Stephens v. Meriden Britannia Co., supra, which, however, were not at all necessary to the decision of the case, and on the further assumption that the filing of the petition in bankruptcy extinguishes the rights of these creditors to question the validity of an unfiled mortgage.

Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, affirming 118 Fed. 1017, 56 C. C. A. 383, affirming (D. C.) 112 Fed. 52, has nothing directly to do with the pivotal question in this case. There the trustee in bankruptcy claimed certain property for the reason that a conditional bill of sale was not filed as required by section 112, c. 418, p. 540, Laws N. Y. 1897, which provided that, if not filed as directed, such instrument should be void as against subsequent purchasers, pledgees, or mortgagees in good faith, as to whom, in case of nonfiling, the sale should be deemed absolute. The courts—District Court, Circuit Court of Appeals, and Supreme Court of the United States—all held that the instrument was only void as to subsequent purchasers, pledgees, and mortgagees in good faith, and was good as to the bankrupt; that, as the trustee in bankruptcy took only the title of the bankrupt, and was not a purchaser, pledgee, or mortgagee, the instrument was not void for nonfiling as to him. Clearly, it was not void, but valid, as to all creditors, for they are neither "subsequent purchasers" nor "pledgees" nor "mortgagees" in good faith or otherwise.

In New York Economical Printing Company Case, supra, the Circuit Court of Appeals said:

"The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee."

In Hewit v. Berlin Machine Works, 194 U. S., at page 302, 303, 24 Sup. Ct., at page 692 [48 L. Ed. 986], the Supreme Court quote this language, and say:

"We concur in this view, which is sustained by decisions under previous bankruptcy laws [citing cases], and is not shaken by a different result in cases arising in states by whose laws conditional sales are void as against creditors."

In the case under consideration the lien of the mortgage given by Orlando Beede to Fletcher S. Beede was not "a lien good at that time [the date of adjudication] as against the debtor and as against all of his creditors," for it was void—absolutely and concededly void—as to all of the creditors who had then obtained judgments; and it was also void as to those creditors who were in process of obtaining judgments, and whose pending proceedings ripened into

judgments a few days thereafter, for, under the decisions of the Court of Appeals of the state of New York, already cited, it is held that such a mortgage is void as to a creditor who obtains a judgment at any time. The fact that the mortgagor may sell the property to the mortgagee in payment of the debt, recognizing the invalidity of the mortgage, does not affect that proposition. The trustee in bankruptcy is not a purchaser, and the transfer to him by operation of law does not extinguish the right of the creditors to assert the invalidity of the mortgage for nonfiling as to the mortgagee and his assignee.

In re Shirley, 7 Am. Bankr. Rep. 299, 112 Fed. 301, 50 C. C. A. 252, and the recent case of Meyer Bros. Drug Co. v. Pipkin Drug Co. (C. C. A.) 136 Fed. 396, have no application here. In re Pekin Plow Co., 50 C. C. A. 257, 112 Fed. 308, Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229, and In re H. G. Andrae Co. (D. C.) 117 Fed. 561, are worthy of consideration in this connection. They are in conflict with Economical Printing Co. Case, supra. This same question has been passed on by the Circuit Court of Appeals, Sixth Circuit (In re Ducker, 134 Fed. 43, 46, 47), and the holding there is in perfect accord with the views here expressed. I concur in that decision.

There is no doubt of the jurisdiction of this court to determine all these questions. In re Antigo Screen Door Co., 123 Fed. 249, 59 C. C. A. 248; In re Kellogg, 121 Fed. 333, 57 C. C. A. 547.

The creditors who have waived the question of the illegality of the chattel mortgage for nonfiling will lose nothing, as this court is satisfied that the entire fund goes to the trustee in bankruptcy for distribution to the creditors of the bankrupt who have provable claims that are proved and allowed. The invalidity of the chattel mortgage as to the judgment creditors does not inure to their benefit alone, but to the benefit of all the creditors. The trustee in bankruptcy is subrogated to their rights for the benefit of the estate.

It is so ordered.

## UNITED STATES v. JOYCE.

(District Court, M. D. Pennsylvania. May 26, 1905.)

No. 24.

1. OLEOMARGARINE — WHOLESALE DEALERS — TAXES—FAILURE TO PAY—OFFENSES—PROSECUTION—INDICTMENT.

   Act Cong. Aug. 2, 1886, c. 840, § 4, 30 Stat. 209 [U. S. Comp. St. 1901, p. 2229], provides that every person who carries on the business of a wholesale dealer in oleomargarine, without having paid the special tax therefor, shall, besides being liable to pay the tax, be fined not less that $500 nor more than $2,000. *Held* that, though a violation of such section is not in terms made a misdemeanor, such violations are in the nature of criminal offenses, and may be prosecuted by information or indictment.

2. SAME—SUFFICIENCY—CRIMINAL PLEADING.

   An indictment in the words of Act Cong. Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], charging defendant with knowingly, willfully, and unlawfully carrying on the business of a wholesale dealer

**in oleomargarine without having paid the special tax therefor as required by law, is not objectionable for indefiniteness nor for failure to negative that defendant was a manufacturer selling his own product in stamped packages at the place of manufacture, within the exception of the statute.**

Rule to Show Cause why Indictment should not be Quashed.

Charles P. O'Malley, for defendant.
S. J. M. McCarrell, U. S. Atty.

ARCHBALD, District Judge. This is an indictment under the act of August 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], which prohibits the sale of oleomargarine except on the payment of certain taxes and the observance of certain terms and conditions. A distinction is made by the act between manufacturers and wholesale and retail dealers, both with regard to the amount of the tax to be paid, the regulations to be observed, and the penalties imposed for a disregard of the law. By section 3 [U. S. Comp. St. 1901, p. 2229]: "Every person who sells or offers for sale oleomargarine in the original manufacturer's packages shall be deemed a wholesale dealer." An exception is made as to manufacturers who have given bond and paid the tax required of them, and who sell only oleomargarine of their own production, in properly stamped original packages, at the place of manufacture, who would otherwise come within this designation. By section 4: "Every person who carries on the business of a wholesale dealer in oleomargarine, without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than $500 nor more than $2000." A violation of this section of the act, as it will be noted, is not in terms made a misdemeanor, although in the case of a retail dealer, which immediately follows, it is characterized as an offense. Neither is anything said about a conviction. And by section 19 (24 Stat. 212 [U. S. Comp. St. 1901, p. 2234]) all fines, penalties, and forfeitures imposed by the act are made recoverable in any court of competent jurisdiction, which would seem to import a civil, rather than a criminal, action. Violations of the act of the character here in question were, however, regarded in Schick v. United States, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, as in the nature of criminal offenses which might be prosecuted by information or indictment, and the present proceedings are therefore justified.

The only question is as to the sufficiency of the indictment. This charges the defendant substantially in the words of the statute with knowingly, willfully, and unlawfully carrying on the business of a wholesale dealer in oleomargarine without having paid the special tax therefor as required by law. The complaint is that this is not specific; but I hardly see how with any profit it could be made much more so. The act, as already pointed out, defines what constitutes a wholesale as distinguished from a retail dealer or a manufacturer; and the defendant is charged with having sold or dealt in oleomargarine in that way, to do which lawfully he was required to pay a certain tax, about which there is no question or controversy,

and which it is charged that he had neglected to pay. He is thus fully apprised of the charge which he is called upon to meet, and anything more would be merely verbiage. The only thing possible that I can think of is that the indictment might have negatived that the defendant was a manufacturer selling his own product in stamped original packages at the place of manufacture, within the exception provided by the statute. But that would have involved rather than simplified the matter, and certainly was not necessary to define the charge.

The rule to show cause why the indictment should not be quashed is discharged.

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## UNITED STATES v. JOYCE et al.

(District Court, M. D. Pennsylvania. May 31, 1905.)

No. 27.

1. OLEOMARGARINE—INDICTMENT AGAINST WHOLESALE OR RETAIL DEALER—CRIMINAL PLEADING.

   Where a person is indicted for the unlawful sale of oleomargarine, in violation of Act Cong. Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], it is sufficient to charge in the words of the act that the defendant was carrying on the business of a wholesale or of a retail dealer, as the case may be, without having paid the tax required by law.

2. SAME—SELLING IN UNLAWFUL AND UNSTAMPED, UNMARKED, OR UNBRANDED PACKAGES.

   Act Cong. Aug. 2, 1886, c. 840, § 6, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2230], requires all oleomargarine to be packed by the manufacturer in new wooden packages containing not less than 10 pounds, and marked, stamped, and branded as prescribed by the Secretary of the Treasury, and that all sales by manufacturers and wholesale dealers shall be in original packages. Retail dealers are required to sell only from original stamped packages in quantities not exceeding 10 pounds, and shall pack the oleomargarine sold in suitable wooden or paper packages marked and branded as prescribed, and every person knowingly selling or delivering, etc., any oleomargarine in any other form than in new wooden or paper packages as prescribed, etc., shall be fined and imprisoned. *Held*, that an indictment charging generally that defendants did knowingly, willfully, and unlawfully sell and offer for sale, deliver and offer to deliver, oleomargarine in other form than in new wooden or paper packages marked, stamped, and branded as required by law, without alleging whether the sales were at wholesale or at retail, and in what respect the packages were not in the form prescribed, and what stamps, marks, or brands required by law they did not have thereon, was insufficient.

3. SAME—DEFACEMENT OF STAMPS.

   Act Cong. Aug. 2, 1886, c. 840, §§ 6, 10, 24 Stat. 210, 211 [U. S. Comp. St. 1901, pp. 2230, 2231], provide different stamps, marks, and brands for oleomargarine according as it is of domestic or foreign manufacture, and, if the former, if it is to be sold at wholesale or at retail. Section 7 requires every domestic manufacturer to paste securely on each package a printed label giving the number of the factory and the district and state, etc.; a warning against the removal of the contents of the package without destroying the stamp, which is made an offense; and section 15, 24 Stat. 212 [U. S. Comp. St. 1901, p. 2233], makes it an offense to deface or remove any of the stamps, marks, or brands required by law from such packages. *Held*, that an indictment alleging that defendants willfully, etc., defaced the stamps, marks, and brands upon two certain

packages containing oleomargarine, which packages were in their possession for sale, but which failed to show that the stamps removed were such as were prescribed by the statute, was insufficient.

Indictment under Act Cong. Aug. 2, 1886, c. 840 (24 Stat. 209 [U. S. Comp. St. 1901, p. 2228]), for the unlawful sale of oleomargarine and the removal and defacement of stamps. Rule to show cause why indictment should not be quashed.

Charles P. O'Malley, for defendants.
S. J. M. McCarrell, U. S. Atty.

ARCHBALD, District Judge. There is nothing in the exception that the indictment is not sustained by the complaint made before the commissioner, on which the defendants were arrested and bound over, everything that is charged in the one appearing also in the other, and the cases which hold that, to the extent that they vary, the indictment cannot be sustained, do not therefore apply. Neither is there any valid objection to the first and second counts, in which, in the words of the act, the defendants are charged, in the one with carrying on the business of a wholesale, and in the other of a retail, dealer in oleomargarine, without in either instance having paid the tax required by law. With regard to the other two counts, however, the case is different. Of these the third is based on the sixth section of the oleomargarine act, a copy of which is set forth in the margin.[1]

This section, as it will be observed, provides for different forms of packages and somewhat different regulations, according as sales are to be made, on the one hand by manufacturers and wholesale dealers, and on the other by those who sell at retail. In the one case the oleomargarine is required to be packed in firkins, tubs, or other wooden packages not before used for that purpose, containing not less than 10 pounds, marked, stamped, and branded as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury shall prescribe, sales by manufacturers and wholesale dealers being required to be made in such original stamped packages;

[1] Act Aug. 2, 1886, c. 840, 24 Stat. 210 [U. S. Comp. St. 1901, p. 2230]: "Sec. 6. That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars, and be imprisoned not more than two years."

while in the case of retailers the oleomargarine must be sold only from such original stamped packages, in quantities not exceeding 10 pounds, and must be packed in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury shall similarly prescribe. It was held in Dougherty v. United States, 108 Fed. 56, 47 C. C. A. 195, that the penal clause at the end of the section applies to all kinds of dealers, but this does not dispose of the distinctions made in the first part of the section with regard to them. This, the third count of the indictment fails to observe, charging generally, that the defendants did knowingly, willfully, and unlawfully sell and offer for sale, deliver and offer to deliver, oleomargarine in other form than in new, wooden, or paper packages, marked, stamped, and branded as required by law. To a certain extent this follows the words of the act creating the offense, but the case is one where that alone will not do. The defendants are entitled to such additional particulars as will individuate the offense charged and enable them to prepare to meet it. Were the sales, of which complaint is made, at wholesale or at retail? In what respect were the packages not in the prescribed form, and what stamps, marks, or brands required by law did they fail to have on them? It is the sale of oleomargarine in other than in new wooden or paper packages, as thereinbefore described in the section, that this clause of it prohibits, and not simply sales in the immediate character of package spoken of. This carries into the offense, so created, as an essential part of it, the previous provisions of the section, with the distinctions which have been referred to, to which regard must be had in any particular case, in order to properly define and individuate that which is intended to be covered. No doubt the court will take judicial notice of the marks, stamps, and brands which are required by the regulations prescribed by the Internal Revenue Commissioner with the approval of the Secretary of the Treasury, which, being authorized by statute, have the effect of law. Wilkins v. United States, 96 Fed. 837, 37 C. C. A. 588. But enough facts must be given to enable the court to apply these regulations where they are relied upon, in order to see whether an offense has been committed by the failure to observe them. As the case stands here, we have more generalities, which, however necessary to negative a compliance with the statute, are not sufficient, without more, to properly inform the defendants or the court of the exact character of the charge which is preferred against them.

Neither is the fourth count materially better. It is based on the fifteenth section of the act (24 Stat. 212 [U. S. Comp. St. 1901, p. 2233]), and charges that the defendants "did knowingly, willfully and unlawfully remove and deface the stamps, marks and brands upon two certain packages containing oleomargarine subject to United States tax, which said packages were in their possession for purpose of sale." The same complaint is made of this that although it follows the words of the act it is not sufficiently specific. The difficulty is that different stamps, marks, and brands are provided for, according as the oleomargarine is of domestic manufacture (section

6) or imported (section 10, 24 Stat. 211 [U. S. Comp. St. 1901, p. 2231]), or, if the former, is to be sold at wholesale or at retail. Every domestic manufacturer, moreover (section 7, 24 Stat. 210 [U. S. Comp. St. 1901, p. 2231]), is required to paste securely upon each package a printed label, giving the number of the factory and the district and state in which it is situated, stating that he has complied with the law, and cautioning every one not to use the package again, or the stamp upon it, or to remove the contents without destroying the stamp; the removal of any label so affixed being also made an offense, which might be regarded as coming within the terms of the count. In view of these different provisions, the defendants are entitled to be informed of the charge against them with more definiteness than is to be found by following the words of the statute. It is true that, under the fifteenth section, the offense is all one, whatever be the character of the stamps, marks, or brands removed or defaced, provided, of course, they are such as are required by the federal law. But that does not meet the case. It is because of this very generality that a more particular description is called for, in order to bring the charge down to something definite and certain. The observation just made calls attention also to another defect. It is not averred that the stamps, marks, or brands, removed or defaced, were such as were required to be or had been put on the packages under question in compliance with the law. It is not every stamp, mark, or brand, in other words, the defacement or removal of which makes the party liable, but only such as are prescribed by the statute. It must therefore be averred—as it certainly must be proved—as an essential element of the charge that the stamp, mark, or brand removed or defaced was of this character, without which no offense is in fact stated.

The rule is made absolute as to the third and fourth counts of the indictment, which are hereby quashed.

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## EDISON ELECTRIC CO. v. WESTINGHOUSE, CHURCH, KERR & CO.

(Circuit Court, D. New Jersey. November 20, 1890.)

1. WITNESSES—EQUITY—TAKING OF TESTIMONY—CROSS-EXAMINATION.
   Where complainants' notice for the taking of testimony signifies a desire that the testimony be taken orally, defendants will be allowed to cross-examine complainants' foreign witness orally if they so elect, immediately following the close of the direct examination.

2. SAME—WITHDRAWAL OF INTERROGATORIES.
   Where defendants elect to cross-examine complainants' foreign witness orally, complainants will be given leave to withdraw direct interrogatories filed by them, and examine the witness orally.

Edmund Wetmore, Leonard E. Curtis, and Wm. S. Gummere, for defendants.

GREEN, District Judge. 1. Construing the notice given by complainants to defendants for the taking of testimony as a notice that complainants desired the testimony in the cause to be taken

orally, and following the case of Bischoffscheim v. Baltzer (C. C.) 10 Fed. 1, I think it proper to permit the defendants to cross-examine Sir William Thomson orally, if they so elect. Such election must be made within 10 days from date.

2. If defendants elect to cross-examine orally, such cross-examination must immediately follow the close of the direct examination. The commissioner will not be directed to return the answers of witness to the direct interrogatories for examination by defendants before the commencement of the cross-examination.

3. If defendants elect to cross-examine orally, complainants have leave, if they choose, to withdraw the direct interrogatories heretofore filed, and examine Sir William Thomson orally.

4. If defendants elect to cross-examine by written cross-interrogatories, let them be filed within 10 days from date.

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## ENCYCLOPÆDIA BRITANNICA CO. v. WERNER CO. et al.

(Circuit Court, D. New Jersey. May 31, 1905.)

DEPOSITIONS—MODE OF TAKING—POWER OF COURT.

Equity rule 67, which authorizes the evidence in a cause to be taken orally upon application by either party for an order therefor, is applicable to depositions taken on a commission issued under Rev. St. § 866 [U. S. Comp. St. 1901, p. 663], and, where such a commission is applied for by one party to take the testimony of foreign witnesses, the court has power to permit the adverse party to cross-examine such witnesses orally.

In Equity. On complainant's application for a commission for taking depositions of foreign witnesses.

See 135 Fed. 841.

Frederic R. Kellogg, for complainant.

Rollin M. Morgan and James Buchanan, for defendants.

LANNING, District Judge. The complainant has, on due notice, applied to this court for a commission to take the testimony of witnesses residing in London, England, upon written interrogatories and cross-interrogatories. The defendants insist that they be permitted to conduct their cross-examination orally. The question is as to the power of the court and the proper practice in such a case.

Both parties agree that the application is not made under the provisions of section 863 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 661]. That section plainly authorizes depositions de bene esse to be taken within the United States only. Cortes Co. v. Tannhauser (C. C.) 18 Fed. 667; Bird v. Halsy (C. C.) 87 Fed. 677; The Alexandra (D. C.) 104 Fed. 907; First Foster's Fed. Prac. (3d Ed.) 636.

Section 866 of the Revised Statutes [U. S. Comp. St. 1901, p. 663] provides that where it is necessary, in order to prevent a failure or delay of justice, a court of the United States "may grant a dedimus potestatem to take depositions according to common usage." The

same language was contained in section 30 of the original judiciary act of September 24, 1789, c. 20, 1 Stat. 88. In United States v. Parrott, 1 McAll. 447, Fed. Cas. No. 15,999, the Circuit Court for the Northern District of California, in construing section 30 of the act of 1789, said that, when an application for such process is made to a court of equity, the "common usage" is to be ascertained by reference to the usages of chancery. In United States v. Fifty Boxes (D. C.) 92 Fed. 602, the District Court for the Southern District of New York said:

"The phrase 'according to common usage,' in section 866, authorizing the court to 'grant a dedimus potestatem to take depositions according to common usage,' means according to the existing practice, whether at law or in equity; that is, by a commission upon interrogatories and cross-interrogatories, as was the common usage both at the time when section 866 was passed in 1874, and at the time of the passage of the judiciary act of 1789, in which substantially the same provision was enacted."

In this district, Judge Green, on November 20, 1890, in the unreported case of Edison Electric Co. v. Westinghouse, Kerr & Co., 138 Fed. 460, following the case of Bishoffscheim v. Baltzer (C. C.) 10 Fed. 1, allowed the defendant to cross-examine the complainant's foreign witness orally. The case of Bishoffscheim v. Baltzer rested on the theory that equity rule 67 authorizes that practice. I do not think the later cases of Cortes Co. v. Tannhauser, Bird v. Halsy, and The Alexandra, supra, are in conflict with Bishoffscheim v. Baltzer.

Depositions de bene esse may be taken, under the authority of section 863, on notice from one party to the other, without commission. When they are to be taken under the authority of section 866, a commission must be issued. In the present case, the complainant applies for a commission. If the only authority for taking depositions under a commission is to be found in section 866, then I think "common usage" would require them to be taken on written interrogatories and cross-interrogatories. But equity rule 67 is clearly applicable to depositions taken under a commission. Previous to 1861, as Judge Blatchford points out in Bishoffscheim v. Baltzer, the rule authorized depositions to be taken under a commission on oral interrogatories, provided the parties agreed thereto. But in 1861 the clause relating to taking testimony by agreement on oral interrogatories was repealed, and the rule was amended by adding to it provisions making oral examination the rule if either party desires it, and examinations by written interrogatories the exception.

I will follow the practice established in this court by Judge Green, and allow the defendants to cross-examine the complainant's witnesses orally. Of course, the direct examination may also be oral if the complainant desires it. I may refer, also, to forms Nos. 187 and 188 in 1 Loveland's Forms of Federal Practice as a recognition of the right to examine witnesses in a foreign country orally under a commission or dedimus potestatem, and also to Western Division of Western N. C. R. Co. v. Drew, 3 Woods, 691, Fed. Cas. No. 17,434, and Bate Refrigerating Co. v. Gillette (C. C.) 28 Fed. 673, the latter being a case decided in this court, as to the effect of equity rule 67.

## In re MacDONALD.

(District Court, D. Connecticut. May 11, 1905.)

No. 1,432.

BANKRUPTCY—PROPERTY VESTING IN TRUSTEE—UNCOMPLETED VESSELS IN SHIPYARD.

The bankrupt at the time of his bankruptcy was conducting a shipyard, and had contracted with the several petitioners to build vessels for them; the contracts providing for the making of partial payments by them at certain stages in the progress of the work, and that title should vest as each payment was made. At the time of the bankruptcy one of said vessels had been practically completed, so far as the work of the bankrupt was concerned, the payments had been made, and it had been launched and delivered to the petitioner for whom it was built, who was to complete it himself. The others remained in the yard in various stages of construction, but the required payments had been made, and exceeded the value of the structures. None of such vessels were scheduled by the bankrupt, but all were taken possession of by the trustee, who declined to complete the contracts. *Held*, that the title to such vessels, so far as completed, was in the several petitioners, who were entitled to their possession.

In Bankruptcy. On report of special master in the matter of several petitions for possession of personal property in the hands of the trustee.

Petition for Possession of Schooner George F. Scannell.

To the Honorable James P. Platt, Judge of the District Court of the United States for the District of Connecticut: The petition of Edward H. Jones, master, in behalf of the owners of the schooner George F. Scannell, respectfully shows:

First. That on the 7th day of December, A. D. 1903, he entered into a contract with M. B. MacDonald, the bankrupt herein, for the building of a four-masted schooner for himself and other co-owners, the original copy of which contract the petitioner will exhibit in court upon the hearing of this petition. That said contract, after setting out the specifications for said schooner, says the following about terms of payment, and the vesting of the title after said payments:

"Five Hundred Dollars upon the execution of the Contract ($500).

"Thirty-five Hundred (3500) dollars when the keel is laid, and frame is in the yard.

"Five thousand (5000) dollars, when frame is up.

"Five thousand (5000) dollars, when ceiled.

"Five thousand (5000) dollars when planked.

"Four thousand (4000) dollars when nearly ready to launch.

"Four thousand (4000) dollars when the vessel is completed and delivered over to the party of the second part.

"It is also further agreed, that as each payment is made under this contract, title to the amount thereof, shall vest in the subscribing owners, and be protected by insurance at the expense of the party of the first part and made payable in case of loss to the party of the second part.

"Executed in the presence of M. B. MacDonald
"Geo. A. Tooker. Edward H. Jones."

Second. That, according to the terms of said contract, upon each payment being made the title of the schooner, in her then process of construction, vested in your petitioner and his co-owners, and never in any manner did it vest or ever was it in M. B. MacDonald, the bankrupt herein.

Third. That, according to the terms of said contract, your petitioner made the payments to said M. B. MacDonald as specified in said contract, and that

said schooner was launched and turned over to your petitioner, according to the terms of said contract, by M. B. MacDonald, the builder, and bankrupt herein, on the 31st day of December, A. D. 1904.

Fourth. That your petitioner, after the vessel was launched and formally turned over to him on January 3, 1905, had the same enrolled and numbered in the customhouse at Stonington, as required by the laws of the United States, which enrollment the petitioner will exhibit in court upon the hearing of this petition.

Fifth. That thereafter and recently the said M. B. MacDonald filed with the clerk of the District Court of the United States for the District of Connecticut a petition, with proper schedules, duly verified, by which he prayed that he might be adjudicated a bankrupt, as provided by the bankruptcy act and any amendments supplementary thereto or amendatory thereof, and did not include in said schedules, as property belonging to him, the said schooner George F. Scannell.

Sixth. That thereafter, and on the 23d day of February, 1905, one Amos R. Chapman, of Mystic, Connecticut, was duly appointed trustee of the goods, chattels, and credits belonging to the said bankrupt, and did duly qualify as such trustee by giving the bond required by law, and that said trustee has caused the schooner George F. Scannell to be appraised as the property of M. B. MacDonald. That said trustee has wrongfully, unlawfully, and illegally taken possession of the said schooner, and unlawfully withheld her from your petitioner, and, in violation of law, and in furtherance of his unlawful seizure of said schooner, has placed a keeper on board of her.

Seventh. That your petitioner has informed the said trustee, Amos R. Chapman, verbally and by letter from his attorney, that said schooner George F. Scannell was not the property of M. B. MacDonald, the bankrupt herein, and never had been—she having been built under a contract which, upon each payment being made, vested the title of said schooner, in her then condition, in the subscribing owners—and has offered to exhibit said contract to the trustee; but the said trustee, ignoring the contract, and in violation of law, refused and still refuses to allow your petitioner to remove said schooner from the place where she is now lying, and, because of such action by the trustee, your petitioner has been unable to do anything towards finishing said schooner and getting her ready for sea.

Eighth. That the said schooner George F. Scannell is now lying at the dock in MacDonald's Shipyard, in Mystic, Connecticut, and is a valuable, four-masted schooner, of the following dimensions: Length of keel, 160 feet; beam, 37 feet; depth of hold, about 13½ feet; and estimated to cost, when completed, about $41,000. That said schooner is now all completed, with the exception of a little work on her cabin, trunneling, and rigging, and can be made ready for sea in about one month. That a fair and reasonable demurrage for said schooner is $75 a day.

Wherefore your petitioner demands judgment against said bankrupt and his trustee, Amos R. Chapman, for the possession of said schooner George F. Scannell, and the return thereof to the said petitioner, together with damages in the sum of $3,000 for the unlawful detention and possession of said schooner, together with the costs of this proceeding, and for such other and further or different relief as the court may deem just and proper.

James D. Dewell, Jr.,
Attorney for Petitioner.

The remaining petitions, and the contracts therein set out, were in substance the same as the foregoing, with the exception noted by the master in the case of George W. Frost.

Report of Special Master.

To the Hon. James P. Platt, Judge of said Court: The undersigned, having been appointed special master by this court, by order dated March 20, 1905, upon the petitions of four several claimants of four several schooners and keels, etc., schooners in process of completion by said bankrupt at the time he was adjudicated a bankrupt, and now in the possession of Amos R. Chapman, of Mystic, as the trustee in bankruptcy of said bankrupt, and

praying for the delivery of the same to the petitioners, to take proofs as to the facts alleged in said petitions, and report such proofs and his opinion thereon at a day not later than the 3d day of April, A. D. 1905, and having proceeded to act upon said appointment, would respectfully report:

That on said 20th day of March, 1905, he issued a citation to the said trustee, citing him to appear in his office in Hartford to file his answers and make his proofs in said matter, and sent said citation, with copies of said several petitions, and of the orders of court thereon, duly attested by the certificate and seal of the clerk of court, by registered mail, to the said trustee, which was thereafter, on the 24th day of March, A. D. 1905, duly received and receipted for by the said trustee. That thereafter, on the 27th day of March, A. D. 1905, the said trustee appeared before the master at his office in Hartford, with counsel and witnesses, and filed answers to said several petitions, and the parties were at issue upon said several petitions, as by said petitions, and the respective answers thereto, herewith returned, appears. And thereupon and thereafter on said day and March 29th and March 31st the parties were fully heard by their witnesses and counsel, and the proofs of the parties, the testimony of their witnesses duly sworn before the master, and the exhibits offered by them were duly considered, and herewith returned with the master's notes of the evidence given.

From such proofs taken, with records in bankruptcy previously filed in this court, I find that said Michael B. MacDonald was a shipbuilder residing in Mystic, Conn., and having a shipyard in Mystic, on Mystic river, above the railroad bridge, where he had for some years constructed vessels; employing at the time of his bankruptcy, February 3, 1905, about 100 workmen. The name M. B. MacDonald & Sons appeared on the principal shop or building in the shipyard, and such name was printed on some of the letter heads used by him, and three of his sons appear in the list of employés; but the proof was that they had no interest in the concern save their wages, and that the bankrupt was the sole proprietor. He gave mortgage security for his debts, commencing in 1900, and afterwards in 1902 and 1903, so that at the time of his bankruptcy he owed $9,900 on mortgage, but it does not appear definitely when he became insolvent or of shaky credit. It does appear that his financial standing was such at the time of the making of the Gilbert, Davis, and Jones contracts for shipbuilding, upon which these petitions were based, he did give a guaranty to the contractors that he would complete the vessels according to contract, and with all of them he agreed that title to the work, as fast as paid for under the contracts, should vest in the contractors. Such precautions to secure business and the safety of the contractors did not indicate full confidence on the part of the contractors in his financial ability to build and complete as he contracted.

As to the contracts of Davis, Gilbert, and Jones, the agreement that the title of the work should be in the contractors as fast as paid is in black and white. As to the Frost contract, it does not appear. But it does appear that the minds of MacDonald and Frost did meet on that point, as a definite condition of the contract, and Frost set about getting up such a contract. He had seen and read the Davis contract for the schooner C. E. Wilbur, and such a contract for his schooner he and MacDonald agreed to. Frost went to Davis to get it, or a copy, as a form for his own. Davis let him have a copy, but, being unwilling to have his contract prices made known, he tore off the final sheet or sheets, as this was the part which contained the contract as to the vesting of title to the work so far as paid for. Otherwise the specifications were quite similar, only Frost's was to be "baldheaded," while the Wilbur was to carry topsails. He took the abbreviated form of contract to his ship agents in Boston (John S. Emery & Co.) for a pattern for his projected schooner, and consulted them, and obtained their approval of the form; and they drafted a form of a contract from it and sent it to him within three days thereafter. This he took to MacDonald, and they executed it; both understanding and believing it was similar to the contract for the Wilbur, and that it contained a provision that the title to the schooner to be constructed should, proportionately as each payment was made, vest in the contractors in the same proportion as such payment was to the total of payments to be made.

MacDonald told Frost that the title was in him as fast as payments were made, and both believed it, until later investigation shows that the matter on the final sheet of the Davis contract did not get into the Frost contract at all. Great carelessness is evident. If the actual contract can be supplemented by proof of intention of this further condition, I find such intention of the contracting parties proved.

It is claimed on the part of the trustee that, by the Connecticut decisions, the possession of personal property on the part of the vendor, after payment, is colorable and fraudulent as to creditors, and the claim is correct as to movable chattels; also that no title could pass or did pass to these vessels so long as they were in the possession of MacDonald, although paid for, so far as creditors are concerned, and that all these contracts were fraudulent as to them—and cite in support of their various contentions Williams v. Jackman, 16 Gray, 514; The Revenue Cutter No. 2, Fed. Cas. No. 11,714; Clarkson v. Stevens, 105 U. S. 505, 27 L. Ed. 139; Shaw v. Smith, 48 Conn. 306, 40 Am. Rep. 170; In re Wilcox & Howe, 70 Conn. 220, 39 Atl. 163; Newtown Savings Bank v. Lawrence, 71 Conn. 358, 41 Atl. 1054, 42 Atl. 225; and many other cases. The petitioners rely mainly on the case of The Poconoket (D. C.) 67 Fed. 262, and same on appeal in 70 Fed. 640, 17 C. C. A. 309.

It is evident that vessels in process of construction, prior to launching, cannot be physically delivered, and that if one is being built for any contractor, and the work and materials put on her are being paid for by the contractor as fast as or faster than put on, and the contract is publicly made that the title shall vest in the contractor, to that extent it is a fraud upon no one. In all these cases contracts were made or attempted to be made for such purpose. So far as appears, MacDonald was, at the time these contracts were made, obtaining no work, except upon such contracts. Contracts purporting to give employment to a skillful mechanic and shipbuilder, having insufficient capital to carry out such contract on his own credit, and thereby giving him and his plant and a hundred or more employés employment, and permitting contractors to avail themselves of his skill as a shipbuilder, could not, certainly, be considered as against public policy. It would seem that the law should as fully protect the property and materials put upon an immovable chattel by a shipbuilder, and paid for, as that put upon a house by a carpenter. That such contracts are good is the law of The Poconoket, heretofore cited, as I understand it. The trustee declines to complete these contracts.

The four contractors, who are petitioners, allege, in substance, as follows:

Cornelius A. Davis, of Somerset, Mass., a shipwright and builder, made an agreement with MacDonald on or about April 4, 1904, to furnish all the materials to build and launch a four-masted schooner, all for $27,000, to be paid for as per contract; title to vessel to amount of each payment to vest in Davis as paid.

| | | | | |
|---|---|---|---|---|
| Davis paid | April | 18, | 1904 | $1,000 |
| " " | July | 11, | " | 3,000 |
| " " | Nov. | 4, | " | 4,000 |
| " " | Dec. | 23, | " | 4,000 |

The schooner was ceiled at that time, being the stage of construction calling for that payment in the contract.

MacDonald went into bankruptcy February 3, 1905, and did not include the schooner in the schedules. Amos R. Chapman was appointed trustee about February 23, 1905, and took possession of the shipyard and schooner, and has refused to give it up. Value, according to appraisal, $9,330.82. MacDonald's work on her ceased about the 1st of January.

In this case I find that the possession of the schooner should be delivered to Davis, with whatever rights to complete her where she lies as the bankruptcy court has power to give the trustee, and that the modifications of the contract placed thereon by the parties December 23, 1904, is immaterial to Davis' right of possession.

(2) Edward H. Jones, master for owners of the schooner George F. Scannell, made an arrangement with MacDonald to build the schooner for himself and other co-owners. This agreement was made December 7, 1903, and called for $27,000 at various stages of the work, and Jones made all these payments

as agreed, and on December 31, 1904, the Scannell was launched and turned over to him; and he had her enrolled in the customhouse at Stonington, as required by law, January 3, 1905, and she was taken to Cottrell's dock, where she was attached later by one of Mr. MacDonald's creditors. MacDonald did not schedule her in his bankrupt schedules, but Chapman, trustee, February 28, 1905, took possession of her, and still holds the possession of her. She is nearly completed, and will be worth about $41,000. The petitioner wants possession, and $2,000 demurrage—$75 per day. The trustee has put a keeper on board, had her appraised as the assets of MacDonald, and is using up her value in keeperage, etc.

(3) George W. Frost, of Central Falls, R. I., made a contract with MacDonald to build a four-masted schooner, April 30, 1904, for $38,400, to be completed January 1, 1905, and to be paid for in stages; title to vest with each payment. He has paid $19,960. She was not scheduled by the bankrupt, but has been inventoried and appraised by the trustee, who holds possession, and is worth from $8,000 to $9,000 in the present, incomplete state, as appraised. Frost prays for possession and damages and costs.

(4) Mark L. Gilbert, of Mystic, claims that on May 23, 1904, he made an agreement with MacDonald whereby MacDonald was to build and launch the hull of a four-masted schooner on the 1st day of March, 1905, for $23,250, to be paid for in stated sums at various stages of construction, with title to the amount paid for to vest in said Gilbert upon each payment, and that he has paid $3,250 upon said construction, and is entitled to the keel and frames that have been set up and prepared. The trustee has taken possession of the same, and has destroyed the construction in part by using 13 of the frames in the Boggs, another schooner in course of building in the same yard. Appraised value of the keel, etc., $310.10. He prays for possession of so much as is left, and for damages for the destruction of the 13 frames misapplied. As to the Jones schooner, MacDonald's contract only extended to completing the schooner to an extent sufficient to launch; Jones himself to do the rest, amounting to several thousands of dollars—$11,000 or $12,000. That she was so far completed as to be fit to be launched at the time she was launched and delivered is affirmed on one side, and denied on the other. Jones had anticipated getting her launched and away from the shipyard before winter set in—as early as midsummer—and had then obtained permission to take her into Cottrell's dock, where she now lies. She was liable to be frozen in if she remained at the shipyard till winter, and in fact it appears in the evidence that she had to be cut out to some extent when she was launched and taken away, and it was necessary she should be where she could be got out readily, so that Jones could do his completing work, which would require a month or so after MacDonald had completed his part. The title delivery was December 28th, by builder's certificate, etc.; the physical, December 31st, when MacDonald tied her to Cottrell's dock at Jones' request. It is true, there were many ceiling bolts to be driven upon her, also many keelson bolts, and many other minor matters, but the weight of evidence was that she was "fit to launch," which seems to be amply supported by the fact that she has been afloat three months and more without pumping at this time. There is evidence in the case that Frank MacDonald, one of MacDonald's sons, and bookkeeper for him, about the time of the launch, interviewed Mr. Crandall, the draw tender on the railroad bridge, to ascertain whether or not it would be opened in the nighttime, on application, for the passage of towboat and tow, and, after ascertaining that it would, went on the same night to intercept Jones, at New London, and Tooker, an agent of Miller & Houghton, ship agents, of New York, who were acting as agents for the schooner's owners—said Jones and Tooker being then on their way to New Haven to consult their proctor as to future proceedings—and then and there informed them of the fact. Whatever plot or design on the part of Jones, Tooker, or Frank MacDonald this information was obtained to assist or develop, it evidently did not develop, for the next day the boat, in obedience of a telegraph or telephone from Jones, at New York or New Haven, was launched by MacDonald, and taken across the river, some five minutes' walk, to Cottrell's wharf, and tied up, as had been arranged for by Jones the summer before. If any scheme had been at any time exploited or devised by

Tooker or any one to run off the schooner by stealth out of the reach of MacDonald's creditors, in contemplation of bankruptcy, it was summarily dropped and utterly abandoned. She was attached January 7, 1905, on the suit of Standard Machine Co. v. MacDonald; but subsequently the trustee in bankruptcy took possession of her, and had her appraised at $23,500, and she is still in his possession. She is not worth as much as has been paid for her, and the trustee has no interest in her for labor or materials, and she should be returned to Mr. Jones at once, lest further loss occur to her owners through the law's delays.

As to the Frost petition, I have heretofore stated the proofs and my opinion. I find that the boat, in her present stage—keel and frame, etc.—should be delivered to Frost, and such time for completion should be given or leased to her owners, consistent with their rights and the rights of creditors under the bankrupt law, considering that the bankrupt is as entirely bankrupt as to his contracts and engagements as he is as to his debts, and that neither he nor his trustee can be compelled to fulfill his engagements of either sort.

As to Gilbert's claim, his contract was for a four-masted schooner, made May 23, 1904, with payments stated in the contract at different stages; title to the vessel to be in him as fast as payments were made. He paid $100 at the time the contract was signed, and again $3,150 at the time MacDonald informed him that the keel was laid and the frames were in the yard. If there had been any frames molded and designated for this schooner, they cannot be found in the yard now; and there is evidence showing most of the molded frames, which lay about the yard in undistinguished piles, have gone into a certain schooner, called the "Boggs," which is in the stocks or frames in the yard, awaiting completion. The keel has been appraised at $310.10, and its whereabouts is known and designated, and should be delivered to Gilbert, and all such rights and conveyances for completing her be leased to Gilbert as is possible under the bankrupt law; and by so doing he may decrease the obligations of the estate to the guarantors of MacDonald upon the contract, who have probably a provable claim against him for so much as they shall lose by his nonfulfillment of the contract, at least to the extent of the payments he has received thereon, over and above the value of the work done as appraised.

I find that the court has full power to supervise and revise the proceeding of the referee and trustee in all such matters, when brought to its attention, in the most summary and informal manner, as in this case, certainly if they appear and are heard thereon.

Samuel Park and James D. Dewell, Jr., for petitioners.
H. A. Hull and H. W. Rathbun, for trustee.

PLATT, District Judge. Upon adjudication, the trustee took title to all property which was then vested in the bankrupt, subject to all valid claims, liens, and equities. The title to the property which the petitioners ask to reclaim was, as appears by the evidence and the report of the special master, vested in them, and not in the bankrupt. Such vesting was based upon contract, and full value for the interests vested had been paid.

The case of the Scannell is a clear one, because physical delivery of possession had been added to the actual title. As to the other contracts, it would be a queer proceeding for a court, which in such matters as this is understood to invoke and apply the pure principles of equity, to deprive the petitioners of the benefit of deliberate contracts, made with an open eye and for good reason, and in the same breath turn over to the general mass of creditors uncompleted parts of certain things, which the trustee is unable and unwilling to so treat as to give them hereafter a substantial value. The Poconoket Case (D. C.) 67 Fed. 265, is not exactly in point, it

is true, but that Judge Butler was not much impressed with the possibility of change which the facts of this case present is also quite evident.

It is not apparent that the fact that creditors herein attempted to assert claimed rights adds anything to the force of the reasoning presented by counsel for the trustee and those particular creditors.

The report of the special master is confirmed, and let the properties in question be delivered to the petitioners in accordance therewith, but without costs or disbursements or demurrage in the case of the Scannell, the said properties having come to the possession of the trustee by process of law, and not by effective action on his part.

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## HILLIARD v. LYMAN et al.

(Circuit Court, D. Vermont. May 24, 1905.)

CORPORATIONS—PERSONAL LIABILITY OF DIRECTORS FOR EXCESSIVE INDEBTEDNESS—VERMONT STATUTE.

Under V. S. 3724, relating to corporations, which provides that "no debts shall be contracted by the corporation exceeding in amount two-thirds of the capital stock actually paid in, and a director assenting to the creation of an indebtedness exceeding such amount shall be personally liable for the excess," the avails of the liability of directors who assent to the creation of indebtedness in violation of such provision are not assets of the corporation, to be collected and marshaled between creditors, but the directors assenting are personally liable jointly and severally directly to a creditor whose debt was beyond the limit, who may enforce such liability by an action at law against one or more of them.

At Law. On demurrer to declaration.

Edward H. Deavitt, for plaintiff.

E. Henry Powell, Max L. Powell, and Wilder H. Burnap, for defendants.

WHEELER, District Judge. The statute under which the defendants were directors provides (V. S. 3724):

"No debts shall be contracted by the corporation exceeding in amount two-thirds of the capital stock actually paid in; and a director assenting to the creation of an indebtedness exceeding such amount shall be personally liable for the excess."

The declaration alleges the creation of an indebtedness of the corporation amounting to $2,800 to the plaintiff, in excess of two-thirds of the capital stock actually paid in, assented to by the defendants as directors, whereby they became liable therefor by force of the statute, and in consideration thereof undertook and faithfully promised to pay the same. The principal grounds of demurrer urged are that all the creditors in excess are not joined as plaintiffs, and that the remedy, if any, cannot be enforced at law, but only in equity. This statute is to be taken at its face value. There is no other provision regarding its enforcement, or relating to it. Decisions upon other statutes with limitations upon the amount of liability, or providing for its enforcement, are not applicable to these

questions. This liability seems to be original, raised by the statute upon the assent of a director. Windham Provident Institution v. Sprague, 43 Vt. 502. The liability for a debt must be a liability to the creditor, and the avails of the liability would not be assets of the corporation. There is no limit to liability upwards, but it extends as far as the assent goes, and no creditor would have any right to or interest in any recovery by another, as there would or might be if there was a limit to the amount that could be recovered by all. Each creditor must recover only upon the assent of each director to the indebtedness to him in excess, and what is so recovered belongs to that creditor only, and there can be no marshaling between these more than between any creditors of a common debtor. It is the assent of each director that is material to the liability for excess, and they are not holden as a board or body, but each only according to his individual assent; but several assenting to the same debt would seem to be liable jointly on account of that identity.

Demurrer overruled.

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## CLYMER v. SUPREME COUNCIL, A. L. H., et al.

(Circuit Court, E. D. Pennsylvania. May 31, 1905.)

No. 7.

MUTUAL BENEFIT INSURANCE—RESCISSION OF CONTRACT—LACHES.

Where a member of a mutual benefit association was entitled to rescind his contract and recover the assessments paid because of the illegal attempt of the society to reduce the amount payable thereon, but, while protesting, paid the assessments made against him on the new basis for three years before electing to rescind, during which time the society lost a large number of members by death and withdrawal, who would have been assessable to pay his claim, and also took in new members in ignorance of such claim, the delay constituted such laches as to estop him from recovering back the assessments paid.

At Law. On motion by defendant for judgment notwithstanding the verdict.

B. Elwert, for plaintiff.

Kendrick & Atkin, for defendants.

J. B. McPHERSON, District Judge. There were no facts in dispute at the trial, and a verdict was accordingly directed in favor of the plaintiff, the court reserving the question whether any evidence had been offered that should carry the case to the jury. It was shown that the plaintiff held a certificate for $5,000 in the American Legion of Honor, which the supreme council of the order had attempted to reduce to $2,000 by an amended by-law, which was passed in August, 1900, and put into effect in October of that year. The plaintiff was duly notified of the amendment, and when the first assessment under it, which reduced the charge upon his certificate from $11.40 to $4.56, was presented for payment, he pro-

tested to the collector against the action of the supreme council, but finally paid the smaller amount; and thereafter, without further protest, paid assessments of $4.56 until September, 1903, when he ceased payment and brought this suit, declaring in his statement of claim that "plaintiff now elects to rescind said contract, considers it terminated, and declines to pay any further assessment." His testimony upon this point is as follows:

"Q. You knew that they passed such a by-law reducing the face value of the policy?
"A. Yes, I had known that.
"Q. When the collector came around to collect, what did you do, right after this by-law went into effect?
"A. I protested, saying while they had every right to make as large assessment as was necessary to pay for the decree [deaths?], they had no right to reduce my certificate.
"Q. Then you continued to pay as the assessments were levied?
"A. Exactly.
"Q. During that time, between August, 1900, and the time you brought suit, did this organization issue to you any policy with the reduced amount?
"A. That is the only policy.
"Q. Did they in any way stamp your policy showing it was reduced?
"A. Not in any way, outside of the notice they sent around that they intended to do so."

On his direct examination he testified that the notices of assessment after October, 1900, did not indicate on what amount he was being assessed, and that he received no other word from the order that he was being assessed on a $2,000 policy "but the two circulars"—meaning the circular of August or September, 1900, notifying him of the amendment, and a circular of August 29, 1903; the latter being of no importance in this trial. But it appeared afterwards that he had probably misunderstood the questions of his own counsel, for he testified on cross-examination as follows:

"Q. You testified in chief that you had been advised of the by-laws passed in 1900, reducing the amount payable under your policy. Is that so?
"A. Yes, that is right.
"Q. With that knowledge, did you subsequently pay the amounts, between 1900 and 1903?
"A. Whatever was called, yes.
"Q. Did you protest in any other manner than in the manner which you have described to the reduction in your policy?
"A. No.
"Q. What words did you use to the collector at the time you made this protest?
"A. That they had a perfect right to levy whatever assessments were required to pay for the death benefits, and they had no business to reduce my certificate, or the amount of my certificate.
"Q. Between 1900 and 1903, were your assessments lower than they had been under the $5,000 plan?
"A. Yes.
"Q. They were lower?
"A. Yes."

Upon these facts, the case is not distinguishable from Supreme Council, etc., v. Lippincott (C. C. A.) 134 Fed. 824, decided by the Court of Appeals for this circuit, and upon the authority of that decision, therefore, the defendant is entitled to judgment upon the reserved point.

There is another ground equally fatal to the plaintiff's claim. In Supreme Council, etc., v. McAlarney (C. C. A.) 135 Fed. 72, also decided by the Court of Appeals for this circuit, the sufficiency of an affidavit of defense filed by the council was in question. It averred, inter alia:

"That the revenues of the defendant association are derived from assessments levied against its members, whenever its obligations require; that its officers did not know of the plaintiff's claim, and therefore did not provide for the same in calling assessments during the period between the time the right of rescission accrued to the plaintiff, in October, 1900, and the bringing of this suit, in May, 1904; that during that time about 3,000 members have either died or dropped out of the association, against whom assessments would have been laid proportionately, and collected, with which to pay the plaintiff's claim; that during said time 125 persons joined the association in ignorance of the plaintiff's claim; that the defendant association has been conducting its affairs on the belief that no such claim existed as the plaintiff now makes; and that the defendant has suffered damage in the respects mentioned, through the delay of the plaintiff in rescinding his contract."

These averments were held by the Court of Appeals to be sufficient to prevent a summary judgment, the court saying:

"It seems to us that the affidavit of defense fairly and sufficiently raised the defense that the delay of the plaintiff in signifying his election to rescind was both unreasonable and hurtful to the defendant, and therefore that the plaintiff had lost his right to treat the contract as rescinded and recover back the assessments he had paid."

What was only averred in McAlarney's Case was established on the present trial, for it was admitted by the plaintiff's counsel "that at least 100 members were admitted between October, 1900, and October, 1903, to the defendant organization, without knowledge of the plaintiff's claim set up in this suit."

Moreover, the case now under consideration goes further than McAlarney's, for the additional admission was made "that fifty members died during that period, and recovery from their estates for amounts based upon the plaintiff's certificate of $5,000 cannot now be obtained."

These facts, which happened during the delay of the plaintiff in giving notice of his election to rescind, must be held (to use the language of the Court of Appeals) to have been "both unreasonable and hurtful to the defendant," the result being "that the plaintiff had lost his right to treat the contract as rescinded and recover back the assessments he had paid."

On either ground, therefore, or on both grounds, the defendant is entitled to judgment notwithstanding the verdict.

## In re HENDRICK.

(District Court, D. Connecticut. June 20, 1905.)

No. 1,357.

1. BANKRUPTCY—DISCHARGE—PLEADINGS.
On the hearing of specifications filed against a bankrupt's discharge, the bankrupt, though entitled to file papers in resistance of the specifications, is not bound to do so.

2. SAME—HEARING.
Where an application for a bankrupt's discharge was referred to the referee, as special master, to hear the facts and report his conclusions, and specifications of objection filed by creditors were not sufficiently specific, the master's duty was merely to report back to the court that nothing had been filed with him in the way of objections requiring the taking of testimony.

3. SAME—SPECIFICATIONS—AMENDMENT.
Specifications of objection to a bankrupt's discharge, filed before the referee, which were defective in form, may be cured by amendments not changing the substantial nature of the objections.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 716.]

In Bankruptcy.

Brown & Perkins and J. J. Desmond, for creditors.
B. M. Holden, for bankrupt.

PLATT, District Judge. The referee seems to have confused his functions. I have read the papers sent up to me pretty carefully, and I am unable to find that anything has transpired before him in the matter since March 2, 1905, which permitted him to avail himself of section 39 (5) of the bankrupt act, or authorized the bankrupt to ask him so to do. Act July 1, 1898, c. 541, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3436]. If such things can be done, hearings on discharges might become interminable.

Passing by the earlier entanglements which have cumbered this case, and which do not concern us now, it appears that the bankrupt applied for his discharge on March 2, 1905. That application was referred to Mr. Browning, the referee, as a special master to hear the facts and report to me his conclusions. This is the generally accepted method of procedure, and is a convenient one, because the referee knows the case.

After the usual preliminaries, certain creditors filed certain specifications. The case was then ready to be heard by the special master. The bankrupt had the right to file whatever papers he might see fit to file, but he was under no compulsion to file any. The specifications of objection required proof, and, until a sufficient quantity of proof had been presented to the master, no valid objection to a discharge existed, and no testimony should have been heard, except such as had for a foundation a valid specification of objection. The creditors were acting at their own risk when they filed their objections. If they were not sufficiently specific, the master's only duty was to report back to me that nothing had been filed with him in the way of objections which he thought required

him to take testimony. On the other hand, if the specifications did contain allegations which, if substantiated, would amount to a valid objection to discharge, it was his duty to hear the case and report.

It is supposed that the referee appreciated the situation, and has certified the questions involved before him as special master ex abundante cautione. In an ordinary case, the matter would be sent back without other comment than to call attention to the error, but the matter in hand is unusual, and, with the plain understanding that my action shall create no precedent, I will say a word about the specifications. The creditors have offered to file amendments which go to matters of form. I think that they are entitled to do this, if by so doing they shall not change the substantial nature of their objections. The paragraph marked "6" in the certificate sent to me is so framed as to constitute a valid specification of objection under subdivision 4 of paragraph 14 of the bankrupt act [U. S. Comp. St. Supp. 1903, p. 411], and, if nothing else were properly set forth, the hearing ought to proceed at once upon the issues there raised.

I have taken much pains to do something toward untangling the complexities which have insinuated themselves into what ought to have been a simple matter, and I shall hope that orderly procedure may now take the place of uncertainty.

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## WEED et al. v. CENTRE & C. ST. RY. CO.

(Circuit Court, E. D. Pennsylvania. June 19, 1905.)

No. 41.

CONTRACTS—FAILURE OF CONSIDERATION—PERFORMANCE.

Where defendant agreed to pay plaintiffs $20,000 in consideration of a loan of plaintiffs' credit for the purpose of raising funds to construct a street railroad, but no moneyed institution or individual could be found who was willing to accept plaintiffs' indorsement as sufficient security for advances, and as a result the enterprise was entirely abandoned, without any notes being ever executed or offered plaintiffs for indorsement, and plaintiffs were not asked to lend their credit and did not assume any obligation, plaintiffs were not entitled to recover the balance of the consideration unpaid.

Motion by Defendant for Judgment on Reserved Point Notwithstanding the Verdict.

Charles Schlegel and A. M. Imbrie, for plaintiffs.

D. L. Krebs and Alex. Simpson, Jr., for defendant.

J. B. McPHERSON, District Judge. At the conclusion of the testimony both parties asked the court for binding instructions, and this, as was decided in Beuttell v. Magone, 157 U. S. 157, 15 Sup. Ct. 566, 39 L. Ed. 654, "was necessarily a request that the court find the facts, and the parties are therefore concluded by the finding made by the court." A verdict was thereupon directed in favor

of the plaintiffs, but the court reserved the question whether there was any evidence to go to the jury in support of the plaintiffs' claim. The present motion is for judgment in favor of the defendant notwithstanding the verdict, upon the ground that there is no evidence to support the finding.

The action is brought upon the following agreement between the plaintiffs, who were a banking firm of New Haven, Conn., and the defendant, a corporation of the state of Pennsylvania:

"This agreement, made and entered into at New York City, this sixteenth day of April, 1902, by and between the Centre and Clearfield Street Railway Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, party of the first part, and the banking firm of Weed & Williams, of New Haven, Connecticut, parties of the second part, witnesseth:

"That whereas the party of the first part desires to provide funds necessary to pay for the construction and equipment of an electric railroad through the Borough of Osceola, Clearfield County, Pennsylvania, and from said Borough of Osceola to Phillipsburg, Centre County, Pennsylvania, according to its line of survey and location, and

"Whereas the parties of the second part are willing to extend a certain credit and guaranty of funds on the terms and conditions hereinafter stated,

"Now therefore, the parties hereto hereby agree as follows:

"First. The parties of the second part hereby agree to endorse and guarantee the note or notes of the party of the first part at such time or times and in such sum or sums as may be necessary to provide funds to pay for labor and material to be used in the construction and equipment of said railroad. The aggregate amount that the said parties of the second part agree to guarantee shall be a sum equal to eighty-five (85) per cent. of the face or par value of four hundred thousand ($400,000) dollars of the first mortgage bonds of the party of the first part.

"Second. The parties of the second part shall receive as compensation for said endorsement and guaranty, the sum of twenty thousand ($20,000) dollars, to be paid on the signing of these presents, and as a further compensation shall own and be entitled to receive two-tenths ($^2/_{10}$) of the capital stock of the party of the first part.

"Third. The party of the first part hereby agrees to deposit with a trust company hereafter to be selected by the parties hereto, all of the first mortgage bonds of the party of the first part, aggregating $550,000 and all of the capital stock of said party of the first part aggregating $550,000, in trust, as security to the parties of the second part on account of their endorsement and guaranty.

"Fourth. The party of the first part hereby agrees to protect the property of said railroad from all liens and claims whatsoever for labor performed or material furnished or for labor contracted to be performed or material contracted to be furnished prior to the date hereof and hereby agrees to at all times protect the property of said railroad from any claims or litigation that might in any way grow out of contracts that have heretofore been made by the party of the first part or any of its officers or agents.

"The party of the first part further agrees to at all times protect the franchises of said railroad and to procure any rights of way that may be required for the construction and operation of said railroad, which said rights of way shall be vested in and preserved to the party of the first part or its assigns, free and clear of all debt or incumbrance.

"Fifth. It is hereby agreed by both parties hereto that the note or notes that may be executed hereunder and the endorsement and guaranty thereon shall be renewed as often as may be necessary to extend said note or notes to a date one year after the said railroad shall have been completed and put in operation, unless said note or notes shall be paid at an earlier date in the manner hereinafter provided.

"Sixth. It is agreed by the party of the first part that the parties of the second part shall have the right to countersign all engineers' certificates for

labor performed and to approve all bills for the purchase of any material that shall enter into the construction of said railroad and to approve all contracts made for the purchase of rolling stock for use on said railroad.

"Seventh. It is hereby further agreed by both parties hereto that the bonds to be pledged as security hereunder may be released at any time during the continuance of this agreement in blocks of $5,000 par value upon payment to the trust company then holding said bonds a sum equal to not less than eighty-five (85) per cent. of the face or par value of the bonds to be released, which money shall be applied to the payment of the note or notes of the party of the first part bearing the endorsement and guaranty of the parties of the second part."

Only $1,000 was paid to the plaintiffs under paragraph 2, and this suit is brought to recover the remaining $19,000. The agreement does not contemplate that the plaintiffs should advance any money to the defendant, but only that they should lend their credit by indorsing the defendant's notes, and it may be conceded that the plaintiffs were always ready and willing to fulfill their part of the agreement, but the difficulty was that their credit did not enable the defendant to raise the necessary funds. No moneyed institution or individual could be found who was willing to accept the plaintiffs' indorsement as sufficient security for advances, and as a result the enterprise was abandoned. No notes were ever executed or offered to the plaintiffs for indorsement; the road was never built; the stock and bonds were never issued; the plaintiffs were never called upon to lend their credit, and did not assume an obligation of any kind, and they are now under no liability whatever by reason of the agreement. Under such circumstances, I think the contract came to an end, and that the plaintiffs have no legal right, as they certainly have no equity, to ask the defendant to pay them $19,000 in exchange for what turned out to be a valueless promise to indorse the defendant's notes.

Judgment may be entered for the defendant on the reserved point, notwithstanding the verdict.

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## BARNES v. BEE et al.

(Circuit Court, N. D. West Virginia. June 13, 1905.)

1. TAXATION—ASSESSMENT—UNDIVIDED INTEREST—PAYMENT OF TAXES.

Two tracts of land consisting of 69½ and 2½ acres, respectively, as to which the owner had sold an undivided one-sixteenth interest in all oil, gas, and other mineral substances in and under the same, were assessed as a whole to such owner at $6.50 per acre, but the valuation was erroneously set down as $425 and $15, respectively, instead of $451.75 and $16.25; the levies being properly extended on the true valuation. The same mistakes as to the total valuations of the tracts were made from year to year thereafter until a reassessment was made, when the officer neglected to extend the levies on the true valuation, but extended them on the erroneous valuation carried over from the book of the preceding year, prior to which the grantee of the mineral interest had conveyed one-half of such interest to B., who was assessed independently on his undivided interest. *Held*, that the intention was to assess the full taxes on the full valuation of the entire property to the original owner, and, she having paid the amount assessed, the assessment against B. was void.

2. SAME—UNDIVIDED INTEREST—ASSESSMENT—STATUTES.
Code W. Va. 1899, c. 29, § 25, provides that, where a tract or lot of land becomes the property of different owners in several parcels, and one person becomes the owner of the surface and another of the minerals under the same, or of the timber alone on the land, the assessor shall divide the value at which the whole had before been assessed among the different owners, having regard to the value of each interest compared with that of the whole, and Code 1899, c. 29, § 37, and Acts 1905, p. 303, c. 35, § 49, requires that the "tract" be assessed in the name of the person who by himself or his tenant has the freehold in possession. *Held*, that where the owner of certain land conveyed merely an undivided one-sixteenth part of all oil, gas, or other mineral substances in and under the same, the grantees of such undivided interest did not hold by a complete and separate title, and hence their interest was not subject to a separate assessment for taxes as an undivided interest "in oil, gas, and other mineral substances."

3. TAX SALES—DEEDS—VACATION—TENDER.
Where a tax deed was set aside as absolutely void under a sale unauthorized by law, the owner was not required to pay the tax purchaser his outlay under Code 1899, c. 31, § 25, requiring such payment as a condition precedent to the vacation of a tax deed for irregularities in the proceedings.

4. SAME—COSTS.
Where, in a suit to set aside a tax deed, it was determined that the deed was absolutely void on the ground that the property was not subject to the assessment in question, the assessment having been made by the negligence of the state's officers, costs would not be allowed to either party.

In Equity.

Van Winkle & Ambler and Merrick & Smith, for plaintiff.
George W. Johnson and T. P. Jacobs, for defendant.

DAYTON, District Judge. John H. Kelley and Clara V. Kelley, on March 29, 1898, by deed which was admitted to record April 2, 1898, conveyed to plaintiff, Barnes, a citizen of Ohio, "one-sixteenth part of all oil and gas and other mineral substances in and under" two parcels of 69½ and 2½ acres of land, situate in Ritchie county, this state, fully described in the deed by metes and bounds, for the consideration expressed of $2,000 cash. By deed of September 21, 1898, recorded September 24, 1898, Barnes conveyed a half of this, or 1/32 interest in all, to Mallory Bros., but they subsequently by deed dated March 29, 1903, reconveyed back this interest to Barnes. The surface and remaining 15/16 undivided interest of the "oil, gas, and other mineral substances" remained vested in Mrs. Kelley. On the landbooks of Ritchie county, Mrs. Kelley, for the year 1898, was assessed with these two tracts separately as 69½ acres and 2½ acres in fee, as situate on "Wts of Bond Creek," northeast 9 miles from courthouse, valued each at $6.50 per acre, and a total valuation of $425 for the 69½ acres, instead of $451.75, the true total at that rate, and for the 2½-acre tract of $15, instead of $16.25, the true valuation at that rate. She was assessed for state purposes on the 69½ acres at the rate of 25 cents on the $100, the sum of $1.13, the full amount due on the true valuation, 6¾ cents more than due on the valuation given; 45 cents for state school purposes, at a rate of 10 cents, the correct amount on the

true valuation, 2½ cents too much on the valuation given; $1.81 for county purposes, at a rate of 40 cents, the correct amount on the true valuation, 11 cents too much on the valuation given; $2.26 for road purposes and teachers' fund, respectively, each at the rate of 50 cents, the right amount on the true valuation, 12½ cents too much on each for the valuation given; and $1.36 for building fund at a rate of 30 cents, the correct amount on the true valuation, 8½ cents too much on the valuation given. The 2½-acre tract also shows that, while the valuation was fixed at $15, instead of $16.25, the taxes were assessed upon the true valuation, and not the valuation given. These tracts had been acquired by Mrs. Kelley by different deeds from different parties. In pencil, on the assessment book, just after Mrs. Kelley's name, is written, "1–16 oil reserve to G. W. Barnes;" but the plaintiff, although his deed bore date two days before April 1st, the assessment date fixed by law, was not assessed in any manner for that year on account of his 1/16 undivided interest in the "oil, gas, and other mineral substances in and under" said two parcels of land. For the year 1899 Mrs. Kelley is assessed with these same two tracts separately, as having title in fee, and the same location, bearing, and distance from the courthouse are given, as also the same valuation of $6.50 per acre each, and the same erroneous total valuations of $425 and $15, respectively. This year, however, she was not assessed at the given rates upon the true total valuation, as was the case in the preceding year, but upon the false total valuations given for both years. In this last year, following her name, in parenthesis, are the words, "Less 1/16 oil, &c." For this year 1899, when, by the records, Mrs. Kelley was shown to be vested with fee-simple title in the surface of and in 15/16 undivided interest in the "oil, gas, and other mineral substances in and under" these two tracts and 1/32 of the latter, undivided, was in plaintiff, Barnes, and the remaining 1/32 thereof was in Mallory Bros., the said Mallory Bros. were assessed with nothing, so far as shown, because of their interest, but plaintiff, Barnes, was assessed with "1–16 oil, etc., reserve" in 72 acres, claimed now to be the 69½ and 2½ acre tracts consolidated, at the rate of 50 cents per acre, or a total valuation of $36, upon which taxes amounting to 78 cents in all, according to the fixed rates, were charged. These taxes were not paid by Barnes, by reason of which this interest was returned delinquent, and sold by the sheriff January 13, 1902, and purchased by defendant Bee, who paid a total for taxes and expenses of $2.35, and on the 16th day of January, 1903, had a surveyor's report made, and on January 19, 1903, received from the clerk of the county court a deed therefor, which surveyor's report and deed was on said last day admitted to record. It is to be noted that neither the report nor deed bound the 72 acres as a single tract, but simply copy the metes and bounds of the 69½ and 2½ acres, respectively, apparently from the deed of Kelley and wife to Barnes, to which both refer. Meanwhile, on the 20th day of October, 1902, Kelley and wife and Barnes made a lease, in which Mallory Bros., did not join, to Upham & Rolston, whereby they granted the lessees all the oil and gas in and under these lands de-

scribed as 70 acres, and described generally by reference to the abutting owners, for the period of two years upon usual terms for the payment of one-eighth royalties and other conditions not necessary to set forth. This lease was assigned by the lessees to Sarber Bros. & Co., and on January 14, 1903, the lease and assignment were together admitted to record. A valuable 200-barrel oil well resulted, and this one-sixteenth undivided interest became of value estimated at from $5,000 to $6,000. Defendant Bee insisted upon his being the owner of the interest under his tax deed, refused to surrender his claim; hence this suit brought to set aside said tax deed as a cloud upon his title, and the appointment of a receiver herein, to whom has been paid over the proceeds arising from the sale of oil due to this interest.

Casting aside all minor and technical objections, the grounds set forth and insisted upon as the basis for this relief may be reduced to three: First. Because of errors and variances apparent on the face of the tax record. Second. Because the whole property, including the one-sixteenth undivided interest in the "oil, gas, and other mineral substances" sold, was, for the year in question—1899—assessed to Mrs. Kelley, and all taxes due thereon were paid by her. Third. Because the assessment of the one-sixteenth undivided interest in the "oil, gas, and other mineral substances" was wholly unauthorized by law, and therefore void, and, in consequence, no sale could be made thereof, and no title thereto secured thereby.

Taking up the first ground, it may be noted that the following objections may be urged to the tax record: (a) The description given in the assessment as "1–16 oil, &c., reserve," was wholly misleading. Barnes had not "reserved" any such interest in 72 acres, or, so far as shown, in any other tract. He had sold no land then in which to "reserve" anything. (b) The assessment of such interest in 72 acres was misleading. He never had owned such interest in a single tract of 72 acres, but had purchased said interest in two distinct and separate tracts of 69½ acres and 2½ acres, which had theretofore been, and were that year, assessed as separate tracts to Mrs. Kelley; and he had made no request for, and had no knowledge of, any consolidation. (c) The assessment to him of a one-sixteenth interest was erroneous and misleading, for on the 1st day of April, 1899, the assessment date, he had no one-sixteenth interest in a 72-acre tract, nor in the 69½ and 2½ acre tracts, which could be consolidated into such. He had sold one-half of a sixteenth interest in the parcels in September, 1898, to Mallory Bros. by deed which had been duly recorded, and knowledge of, by statute, was expressly required to be taken by the assessment officers. It is insisted that Barnes had right to presume that officers would discharge their duty in this behalf, and that, if he was assessable at all upon an undivided interest by the action of the assessment officers, he would be so assessed upon the true interest owned by him as disclosed by the record, and not upon a wholly different interest. (d) Both the delinquent and sale returns vary wholly from the assessment. These returns show Barnes to be returned delinquent

on 72 acres, qualified before his name by the letters "M. R." under title "Estate Held," and the sale return shows that said 72 acres with such "M. R." estate held therein by Barnes were sold, and purchased by Bee. The letters "M. R." are explained to mean "Mineral Right." It is insisted that the whole mineral right in the 72 acres was therefore returned delinquent and sold in the name of Barnes, who never had had more than a sixteenth undivided interest in such mineral, and in fact had at the time only an undivided thirty-second interest. (e) Both the surveyor's report and the deed varied from the assessment, the delinquent and the sale returns touching the description of the tracts, and the interest therein sold.

There would be no difficulty in this matter had this tax sale and conveyance been made prior to the year 1882, but on the 24th of March of that year (chapter 130, p. 387, Acts 1882) the Legislature enacted what is now section 25 of chapter 31 of the Code of West Virginia of 1899, making sweeping changes in the law as then existing. The purpose and object of this section is very clear. It manifestly was designed, as Brannon, J., expresses it in Winning v. Eakin, 44 W. Va. 19, 28 S. E. 757, "to render these tax sales efficient to collect delinquent taxes, and to confer upon the purchaser a substance, and not a shadow." Changing the former law as contained in chapter 117, p. 308, Acts 1872–73, which provided a tax deed should not be set aside except for irregularity apparent on the face of the proceedings, and of character such as "materially to prejudice the rights of the owner whose real estate is sold," it enacted such tax deed should not be set aside unless the "irregularity appear on the face of such proceedings of record in the office of the clerk of the county court, and be such as materially to prejudice and mislead the owner of the real estate so sold, as to what portion of his real estate was sold, and when and for what years it was sold, or the name of the purchaser thereof; and not then, unless it be clearly proved to the court or jury trying the case, that but for such irregularity, the former owner of such real estate would have redeemed the same." Not content with this, it proceeds at great length to exclude in detail the consideration of almost every such material and prejudicial irregularity that could be conceived of that might possibly come within the scope of the already very restricted exception. For example:

"No irregularity, error or mistake in the delinquent list, or the return thereof, or in the affidavit thereto, or in the list of sales filed with the clerk of the county court, or in the affidavit thereto, or in the recordation of such list or affidavit or as to the manner of laying off any real estate so sold, or in the plat, description or report thereof, made by the surveyor, or other person," shall invalidate the sale and deed. Again: "But no sale or deed of any such real estate under the provisions of this chapter shall be set aside, or in any manner effected by reason of the failure of any officer mentioned in this chapter to do or perform any act or duty herein required to be done or performed by him after such sale is made, or by the illegal or defective performance or attempt at the performance of any such act or duty after such sale, or by reason of the conveyance by the deed hereinbefore mentioned and prescribed, of a less quantity of real estate than that mentioned in the list of sales made out and returned as provided in the twelfth, thirteenth and four-

teenth sections of this chapter, if the real estate so conveyed by such deed, be in fact, the same which was sold as delinquent."

The wisdom, not to say the honesty, of such legislation, may well be doubted. When the people elect men to offices strenuously sought for by them, require them to take oaths properly to perform their duties, they may reasonably expect them to perform such duties honestly, legally, and accurately. If they do not by reason of either negligence or incompetency, they ought to be either made to suffer for the one or be removed for the other. This sweeping condonation and practical legalization of their illegal negligent acts, their criminal carelessness in fact, cannot be justified by saying the state and county must be secured in their revenue, a considerable part of which is collected for the very purpose of paying these officers' salaries; and this is especially so when the gross carelessness and illegal actions tend to involve taxpayers living miles away, frequently in other counties and other states, in a penalty loss, often of thousands of dollars of property, because the state would otherwise lose, or be delayed in the collection of, a few paltry cents of its revenue. To say that these sworn officers can perform their duties erroneously, irregularly, negligently, corruptly, illegally, and yet the citizen shall suffer all the consequences of this conduct on the part of the state's agents to the extent of the loss of his property, sounds more like practical confiscation than taking property by "due process of law." The courts have to enforce such legislation, but they are not restrained from expressing their condemnation of it, and in equity may construe it strictly under the well-settled principle that equity abhors penalties.

The Supreme Court of Appeals of West Virginia has gone a long way in upholding this statute in its broadest scope. They have held in State v. McEldowney, 47 S. E. 650, that the return of the delinquent list to a term other than the one required by law is cured by sale under this statute, and that these curative provisions apply to purchases by the state itself at tax sales; expressly overruling as to both points their prior decision in McGhee v. Sampselle, 47 W. Va. 352, 34 S. E. 815. Thus the state itself is to be permitted to enforce this penalty against the private citizen arising from the misconduct of its own agents or officers.

Again, in Hornage v. Imboden, 49 S. E. 1036, decided in February last, they hold failure to make out and swear to a list of land delinquent by the 1st of June, as required by section 18 of chapter 30 of the Code of 1899, failure to post a list of delinquent lands as required by section 18 of the same chapter, failure to present the delinquent list to the term of court required by section 21, the unwarranted action of the court upon these lists at a special term without notice published in the call for the special session of their purpose to do so, the fact that an affidavit to a list of sale contains no venue and does not show of what county the notary is a notary, are defects, violations of plain legal requirements in fact, held to be cured by this statute. Apparently there is one legal requirement governing these sales that has not been swept away by this amend-

ed section 25 and the Supreme Court of Appeals of the state in construing and enlarging its provisions. In Mosser v. Moore, 49 S. E. 537, decided in December last, it is held:

"A list of lands delinquent for taxes and a list of lands sold for taxes, giving no specification or description whatever of a tract or lot of land sold for taxes—utterly blank therein—are void, and render a tax sale of such tract and deed under it void; and such defect is not cured by section 25, c. 31, Code 1899."

Brannon, J., in this case decides that a delinquent list is actually required; that, if there is no delinquent list, the presumption arises that taxes have all been paid, and no lands are delinquent, and therefore none could be sold. Then he goes a step farther, and holds that in making these delinquent lists the officer ought not to simply return the name of the party and the amount of the taxes, thus: "Eliza E. McMillen, $18.14," but ought to give some description—some number of acres—(possibly any number would do), just some little something that might identify! And he thinks the same thing ought to be true about the sale list, notwithstanding the curative features of section 25. However, Dent, J., could not, it seems, go so far. It meant too much future labor for the state and county officials, perhaps, so he filed a dissenting opinion, valuable because it collates and cites the numerous cases decided by that court touching tax sales, in which he holds such delinquent and sale lists as Brannon, J., objects to, are all "cured" after sale and deed by the omnipotent section 25! It would require entirely too much time and space to consider the more than 30 other cases decided by the state court touching irregularities in these tax sales. Dent, J., in his dissenting opinion just referred to, points out a number that have been superseded by the change of the statute; others are in irreconcilable conflict with each other; while others have been expressly overruled. It is sufficient for me to say with the utmost respect and deference that I have no sympathy for the purposes and objects designed to be accomplished by this section 25, and I am constrained to think that the Supreme Court of the state has gone much too far in construing liberally, if not enlarging, its scope, instead of construing strictly its provisions as being contrary to common right and honesty. I fully appreciate the obligation upon federal judges to follow in a spirit of comity the courts of the state touching its statutes, and I will certainly discharge this obligation so far as possible; yet in view of the conflict and confusion existing in the state court's decisions, in this case, if it stood alone upon that point, I do not believe I would hesitate to set aside as void the sale and deed, notwithstanding section 25, because of the irregularities on the face of the proceedings materially prejudicing the owner Barnes "as to what portion of his real estate was sold," because an estate of "M. R.," which he never had, and which is undefined in the law, and would be unintelligible without explanation, was sold and conveyed to an extent of at least double the amount of interest he had in the two tracts at the time of the assessment, the delinquent and the sale return. If, as counsel for defendant contend, when Barnes took his conveyance he held thence adversely to the

world, then it would likewise be true that when Mallory Bros. took their conveyance from Barnes they likewise held adversely to all, and they had to be assessed with their interest as adverse. The officers could not ignore the one conveyance and take cognizance of the other. They could not, in my judgment, no matter how much aided by section 25, "make fish of one and fowl of the other." The solution of the other two questions involved, however, makes it unnecessary for me to assume this responsibility.

The second objection to the validity of this deed is because the whole property, including the sixteenth undivided interest held at the time by Barnes and Mallory Bros., was for the year in question —1899—assessed to Mrs. Kelley, and all taxes due thereon were paid by her. It is too well settled in this state to longer admit of doubt that the state is entitled to but one payment of taxes on lands held under one and the same title. A payment by one heir of the whole amount inures to the benefit of his coheirs; so, too, payment by the vendor inures to the benefit of his vendee, and a payment by one co-tenant or by one joint owner of the whole inures to the benefit of the other co-tenant or joint owners. Whitham v. Sayres, 9 W. Va. 671; Simpson v. Edmiston, 23 W. Va. 675; Bradley v. Ewart, 18 W. Va. 598; Gerke Brewing Co. v. St. Clair, 46 W. Va. 93, 33 S. E. 122. See, especially, the case of State v. Low, 46 W. Va. 451, 33 S. E. 271, an oil case very much in point. It is therefore a simple question of ascertaining whether all interests in these two tracts were assessed to and taxes paid by Mrs. Kelley for this year 1889. In the statement of the facts of the case I have pointed out the true situation. In 1898—the year previous—by the carelessness and mistake of the officer making out the assessment book, the total valuation of the 69½ acres assessed to Mrs. Kelley at $6.50 per acre was set down as $425, when it was in fact $451.75. The levies, however, were properly made and extended, based upon the true total valuation, and not upon that set down in the book. The same careless mistake was made in regard to the 2½-acre tract, incomprehensible as it may seem, where the total valuation was set down at $15, when in fact it was $16.25, and here, too, the levies at the proper rates were extended upon the true, and not the given, total valuation. It would be useless to try to determine how this mistake could be made in two items one after the other, yet a minute's calculation will show that it was done. In 1899 precisely the same mistakes were made as to the total valuations of the tracts, doubtless arising from the fact that the official copied mechanically the book of the year before, the matter to that point being unchangeable from year to year substantially so long as the ownership remained the same, until a new reassessment was made. This year, however, unlike the preceding one, he forgot entirely to extend the levies upon the true valuations, but did so upon the erroneous one which he had carried over and set down from the book of the preceding year. This is the exact situation, and by the error of their officer and agent the state, county, and district lost, all told, the sum of 55 cents of their taxes. Shall this error of the officer be made the excuse for the assessment to Barnes independently, upon

his undivided interest, of 78 cents taxes, for the nonpayment of which he is to lose property for which he paid $2,000, and which has developed a value of $5,000 or $6,000? I think not. I have not the slightest doubt that the true intention was to assess the full taxes upon the full valuation to Mrs. Kelley, and that if the state, county, and district lost the 55 cents it was solely through the fault and error of its agent and officer, to whom it should look alone for indemnity, notwithstanding the "curative" powers of said section 25. These taxes assessed were paid by Mrs. Kelley. There is no dispute about that. Therefore it is clear that such payment operated as payment on behalf of herself, Barnes, and Mallory Bros., who together owned at the time all the fee-simple title in the two tracts, including surface, "oil, gas, and other mineral substances." It follows, therefore that the separate assessment to Barnes was wholly unwarranted and erroneous; that the delinquent return and sale made to Bee were likewise unwarranted and illegal; and the tax deed based thereon was absolutely void, and must be set aside as such.

This settles the case, but, if I am to follow the rule laid down for the state courts, and decide all the points fairly arising upon the record, a brief consideration may properly be given to the third objection—that the separate assessment of the undivided interest in "oil, gas, and other mineral substances" was wholly unauthorized by law, and therefore void. No valid sale can be made for nonpayment of delinquent taxes where there has been no legal assessment of such taxes. Cunningham v. Brown, 39 W. Va. 588, 20 S. E. 615. Section 25 of chapter 29 of the Code of West Virginia of 1899 provides:

"Where a tract or lot of land becomes the property of different owners, in several parcels, or one person becomes the owner of the surface and another of the minerals under the same, or of the timber alone on said land, the assessor shall divide the value at which the whole had before been assessed, among the different owners, having regard to the value of each interest, compared with that of the whole and enter the same in the land book."

It is clear from an examination of the tax laws of Virginia and of this state from the Revised Code of 1819 (Va.) down to the present day that the system of taxation for farm and other lands, except town lots, has been based upon the "tract" as a whole as a particular identity. The "tract," the "parcel," the "homestead," the "farm," are words the most common known to the law in these states, and they all convey the same meaning involving a boundary of land identified and distinct as such. All these tax laws have required the separate and distinct tracts to be assessed. Section 8 of chapter 183, Rev. Code (Va.) 1819, directs that:

"The commissioners shall enter each tract of land separately in their said books; and according to the best information which they can obtain, shall particularly describe the same in the manner following: In the first column they shall enter the name of the person, who, by himself, or his tenant, has the freehold in possession; in the second, the place of his residence; in the third, his estate, that is, whether for life, or in fee; in the fourth, the number of acres of land; in the fifth, the description of the land as to the water courses, mountains, or other notorious places, on which or near to which it

lies, other lands which it adjoins, and the number of the tract, if any; in the sixth, its distance and general bearing from the court house of the county."

These requisites for the identification of the "tract" of land as such have been continued from that day to this in our assessment laws, and are substantially found in section 37, c. 29, of the Code of 1899, and also in section 49 of chapter 35, p. 303, of the Acts of 1905. In all it is to be observed that the "tract" was to be assessed in the "name of the person who, by himself or his tenant, has the freehold in possession." The man in possession would have the use, the rents, issues, and profits, hence should pay the taxes, was and has been the reasonable theory. Section 25 of chapter 29, so far as it provides for separate assessment of surface and mineral held by different ownership, was a departure, first enacted February 29, 1860, and was incorporated into and made a part of section 22, c. 35, Code Va. 1860, from which it has come down to us with slight amendment regarding timber held separately. As I have said, the theory of our tax laws has all these years been to assess lands by "tract" identities to the person having the freehold in possession. I do not think there can be any doubt of the fact that this new section contemplated division of assessment of a tract only where there had been complete severance of the surface and minerals in ownership. This is made very plain by the words of the original act:

"In all cases in which the surface of land is held by one person, and the minerals under the surface are held by another, the commissioner or commissioners of the revenue in counties in which any such mineral and surface titles exist, are hereby authorized and required to determine the relative value of each," etc.

This makes clear that the severance was to be complete, and the holding to be by separate titles. It seems to me clear that no such severance could possibly be considered as having been made where there has been conveyed, as in this case, only a fractional undivided interest in the minerals. It being an undivided interest, the idea of severance is, on the contrary, refuted. It is an interest with the owner in and to every drop of oil, every inch of gas, and every atom of mineral substance. Therefore section 25 of chapter 29 does not apply. On the contrary, the general rule does apply that the person was to be taxed who had the freehold in possession; in this case Mrs. Kelley. It is therefore, without need of further discussion, sufficient to say that the undivided sixteenth interest could not be assessed to Barnes, that there was no warrant in law for such assessment; therefore for this reason the sale and deed made to Bee were absolutely null and void.

In conclusion I have some trouble in my mind in determining what direction should be made herein as to the payment of costs. The plaintiff, Barnes, has tendered and deposited with the clerk of this court $15 on account of the taxes paid and expenses on the part of defendant Bee in obtaining the tax deed. The Supreme Court of Appeals of West Virginia has determined that, where a tax deed is vacated for irregularities in the proceedings, the owner, as a condition precedent, must pay these taxes, interest, and expenses as

required by chapter 31, § 25, of Code 1899. Mosser v. Moore (W. Va.) 49 S. E. 537. On the other hand, it has held, where such deed is set aside as absolutely void under a sale unauthorized by law, the owner will not be required to repay the tax purchaser his outlay. State v. McEldowney (W. Va.) 47 S. E. 650. The latter condition is the case here, so that the clerk is directed to return to plaintiff, Barnes, the $15 deposit made by him. As to the costs of this suit itself, I very well understand the general rule that the prevailing party will recover, but my judgment has been for some time that in cases of this kind an exception ought to be made. In fact, I believe that possibly as strong an excuse or reason as could be urged for the enactment of the curative statute referred so frequently to herein was the fact that, owing to the persistent and almost universal neglect and violation of law of the officers charged with making tax records it became generally current that no sale would stand, and the purchaser would be sued, and have his deed set aside, and heavy costs to pay, whereby citizens were deterred from buying. The true remedy for this, in my judgment, would have been by statute to have required such officers to be made parties to the suit, and, in case the sale had to be set aside because of irregularity or violation of the law, assess both costs and damages against the one or ones responsible for the error or illegal acts. When a man buys in a tract of land offered him by the state at a tax sale, he has a right to presume that the state, in representing it to be properly assessed, returned delinquent, and subject to sale, is, through its agents, representing the truth; and, having bought, he has a right to stand by his sale until the courts say these representations were false. To amerce him in costs for the illegal acts and false representations of the state's agents does not seem to me to be right. On the other hand, the plaintiff owner may well be reminded to be diligent in looking after his taxes by letting him know that if he does not, and suit has to be brought by him, his rights will be preserved to him therein, but he must look only to the officers whose fault has caused him the trouble to indemnify him his costs, expenses, and damages. In this case the costs have been increased to the extent of $108 by the wholly unnecessary reference of the case to a special commissioner to ascertain facts that were fully disclosed by the exhibits filed with bill, and this sum, by consent of parties, has been paid out of money in the receiver's hands under order which reserves decision as to the party who should ultimately be required to pay. As I have said, this reference was unnecessary and unwarranted. It does not appear upon whose motion it was made, and I think, in the absence of such appearing, I must presume that it was made on motion of the plaintiff, whose duty it always is in prosecuting suit to see that no unnecessary or vexatious costs are incurred by him to be ultimately taxed in most cases where he prevails against his adversary. Therefore, if I had determined to award costs in this case against defendant, this item would have been directed to be omitted from the taxation thereof. Under all these circumstances let decree be entered setting aside the tax sale and deed as absolutely void; directing the

$15 deposit made by plaintiff with the clerk to be returned to him; further ascertaining the sum now in the hands of Receiver Dellicker arising from the sale of oil due this interest, and directing such sum, less the receiver's actual expenses incurred and a 5 per cent. commission for his services, to be paid over to plaintiff, or his attorney, providing that duplicate receipts be taken by the receiver for such payment, one of which shall be filed in the papers of the cause and the other retained by him; further directing said receiver to turn over said oil interest to said plaintiff free and acquit from any further control of his as to the same or over the proceeds arising therefrom, and setting forth that said receiver, by paying said fund and turning over said property, will acquit himself and sureties from all liability by reason of his receiver's bond; and finally directing this cause to be stricken from the docket of this court as ended, without costs awarded to either parties.

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## Ex parte CALDWELL.

(Circuit Court, N. D. West Virginia. June 13, 1905.)

1. HABEAS CORPUS—FEDERAL CONSTITUTION—CONSTRUCTION.
   Const. U. S. art. 1, § 9, providing that the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it, is not a grant of power to the federal courts, but a prohibition against its suspension by Congress or the executive.

2. SAME—EXTENT OF POWER.
   Under Rev. St. U. S. §§ 716, 751, 752, 753 [U. S. Comp. St. 1901, pp. 580, 592], authorizing federal courts to issue the writ of habeas corpus, the power of such courts to issue such writs is co-extensive with the common-law power, provided only that the writ shall not be issued for the deliverance of a prisoner in jail, except in cases specified.
   [Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, §§ 38–45.
   Jurisdiction of federal courts in habeas corpus cases, see note to In re Huse, 25 C. C. A. 4.]

3. SAME—SCOPE OF WRIT.
   A writ of habeas corpus may be issued out of the federal courts to inquire into the cause of a commitment under a civil as well as a criminal process.
   [Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 38.]

4. SAME—STATE LEGISLATURE—DEPARTMENTS OF GOVERNMENT—CONDUCT OF EXECUTIVE—LEGISLATIVE COMMITTEE—EXAMINATION.
   Const. W. Va. art. 5, provides that the legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the power properly belonging to either of the others, nor shall any person exercise the powers of more than one of them at the same time. Article 4, § 9, provides for the impeachment of state officers by the House of Delegates and trial by the Senate; that judgment in case of impeachment shall not extend further than the removal from office and disqualification to hold any office of honor, trust, or profit under the state; and that the Senate may sit during the recess of the Legislature for trial of impeachments. *Held*, that the House of Delegates had no power to appoint a committee to sit during vacation to investigate al-

leged misconduct of the Governor, in pursuance of a special message submitted by him solely for the purpose of vindicating the Governor, whose term would expire before he could be tried or impeached.

5. SAME—WITNESSES.

The House of Delegates of West Virginia having no power to appoint a legislative committee to investigate during vacation the alleged misconduct of the Governor, for which he could not be impeached because of the approaching expiration of his term of office, such committee had no power to incarcerate a witness for refusing to obey its subpœna.

Reese Blizzard and Chas. T. Caldwell, for petitioner.
Chilton, MacCorkle & Chilton, for respondent.

DAYTON, District Judge. Article 1, § 9, of the Constitution of the United States provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." This provision is not a grant of power to the federal courts, but a prohibition against its suspension by Congress or the executive. The right existing in federal courts to issue the writ is purely a statutory one conferred by sections 716, 751, 752, and 753 of the Revised Statutes [U. S. Comp. St. 1901, pp. 580, 592].

Section 751: "The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus."

Section 752: "The several justices and judges of the said courts within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

Section 753: "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States," etc.

It will thus be seen that the power of federal courts to issue this writ is coextensive with the common-law power, provided only that it be not used for deliverance of a prisoner in jail, except in the cases specified. This federal jurisdiction, when assumed, is paramount. These sections of the Revised Statutes authorizing the issuance of the writ are the supreme law of the land, and a judgment of acquittal thereunder by the federal courts will protect the relator from molestation or prosecution elsewhere. Kelly v. State of Georgia (D. C.) 68 Fed. 652.

The writ may issue to inquire into the cause of commitment under a civil process as well as a criminal one. Ex parte Randolph, Fed. Cas. No. 11,558.

Chief Justice Waite, in Ex parte Tom Tong, 108 U. S. 556, 2 Sup. Ct. 871, 27 L. Ed. 826, says:

"The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary because of what is done to enforce laws for punishment of crime; but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right of liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings."

The exercise of this power by federal courts to release citizens from unlawful restraint imposed by inferior federal tribunals or authority is accompanied with no embarrassment or difficulty. It seems to us such exercise is not only a right, but a duty, always bearing in mind that the writ shall in no case be allowed to become a substitute for a writ of error or appeal. Its plain and simple scope in such cases is to restore to his liberty a person held under void authority. Mr. Black, in his exhaustive note to In re Huse, 79 Fed. 305, 25 C. C. A. 1, has well said:

"A writ of habeas corpus cannot be used as a substitute for an appeal or a writ of error. It cannot be made the means of procuring in a higher court a review of the judgment of a lower court in respect to alleged errors, either of law or fact, or mere irregularities, occurring in the course of a criminal trial. Since it is in the nature of a collateral attack upon the judgment, the inquiry is limited to the question whether the trial court has acted without jurisdiction, or has exceeded its jurisdiction, so as to render the sentence void"—citing numerous authorities.

The exercise of this power in behalf of federal officers prosecuted illegally by state courts has also become a well-determined one, having been exercised to the fullest limit in the famous case of In re Neagle, 39 Fed. 833, 5 L. R. A. 78, and Id., 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55, where a United States marshal being tried by a state court for homicide, committed in defense of the life and person of a justice of the Supreme Court, was released.

The power of federal courts to release by habeas corpus a person held in state custody contrary to federal Constitution or laws is unquestioned, but the exercise of this power is accompanied with very great embarrassment, and should be so exercised with sound discretion and great caution. In re Huse, 79 Fed. 305, 25 C. C. A. 1; In re Jordon (D. C.) 49 Fed. 238; Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868; Ex parte Fonda, 117 U. S. 516, 6 Sup. Ct. 848, 29 L. Ed. 994; Cook v. Hart, 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934. In this latter case Mr. Justice Brown says:

"Where a person is in custody under process from a state court of original jurisdiction for an alleged offense against the laws of that state, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court of the United States has a discretion whether it will discharge him in advance of his trial in the court in which he is indicted, although this discretion will be subordinated to any special circumstances requiring immediate action. While the federal courts have the power and may discharge the accused in advance of his trial, if he is restrained of his liberty in violation of the federal Constitution or laws, they are not bound to exercise such power, even after a state court has finally acted upon the case, but may, in their discretion, require the accused to sue out his writ of error from the highest court of the state, or even from the Supreme Court of the United States."

See, also, New York v. Eno, 155 U. S. 89, 15 Sup. Ct. 30, 39 L. Ed. 80; In re Chapman, 156 U. S. 211, 15 Sup. Ct. 331, 39 L. Ed. 401; Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406.

The reasons why federal courts should exercise this power with caution and only in extraordinary cases, where it affects the control of the state courts, are clear and cogent. They spring from the peculiar relations existing between the two authorities, from the

mutual comity and forbearance which ought to exist between them, and to avoid all strife and conflict that may arise on account of their concurrent jurisdiction, having the same purpose and duty to perform—that to administer justice "agreeable to the usage and principles of law."

Under these principles and limitations, we come therefore at once in this case to the first important question—whether the facts are of such character as to warrant, in its sound discretion, the intervention of this court. Briefly stated, here is a citizen of the United States, resident within the jurisdiction of this court, who says that he is deprived of his liberty, not by "due process of law," not by any court of competent jurisdiction, state or federal, but by a pretended writ of attachment and arrest issued by another citizen claiming to be chairman of a committee, constituted by a single house of the legislative branch of the state, sitting without power or authority, after the power of such house itself by reason of its adjournment, under the Constitution of the state, had ceased or was in abeyance, seeking to investigate, and to require him to testify touching, matters that the Legislature could not itself, or through any committee constituted by it, inquire into, but which matters were peculiarly within the province of the judicial power of the state under its well-ordered criminal laws to examine and decide upon. If these things be true, is it not such an extraordinary condition of affairs as would warrant the intervention of the first court, state or federal, applied to? Need there be any hesitation about acting because of forbearance due the state courts, when their action is not only not involved, but their authority is actually usurped by another and distinct department of government, contrary to the express inhibition of the state Constitution, under which both of them must act? Is not the "free doom" of every citizen under the law as dear and as precious to the American to-day as it was to the Saxon of old? Is his enjoyment of it to be jeopardized for a day by the unwarranted and vexatious action of private citizens acting under a wholly unwarranted and usurped power, not of a judicial, but of a legislative, body? We think there can be but one answer. If these allegations be true, it is not only the exercise of a sound discretion, but an imperative duty, for this court, thus appealed to, to intervene for both the protection of the citizen's right, and the maintenance of the power and jurisdiction of the judiciary, federal and state, to enforce, as constitutionally required of it, without interruption, the laws which it is the sole power of the legislative branch of government to enact.

Therefore the matter resolves itself finally into an examination of whether these allegations are true or not. In re Jordon (D. C.) 49 Fed. 238, speaking of the duty of federal courts touching their exercise of the power to issue these writs in behalf of persons held under state authority, an investigation of the questions raised, where practicable, is not only authorized, but urged, before issuing the writ. We have before us the petition and the return of the arresting officer. Besides these this court, like any other court within the jurisdiction of this state, has right to take judicial notice of the journal of the House of Delegates of the state, so far as pertinent.

From these it appears clearly: On February 24, 1905, within three hours of midnight, when the regular session of the Legislature, by constitutional limitations, was to expire, Albert B. White, then Governor of the state, but whose term of office by like constitutional limitation was to expire nine days thereafter, sent to the House of Delegates this message:

"To the Honorable the Speaker and Members of the House of Delegates: A few days ago certain charges were made against me by a member of the State Senate, and printed broadcast in the newspapers. These charges were that (1) I had an agreement, understanding or contract whereby the fees or emoluments or both, received by the Secretary of State, whom I appointed, were divided with me, or applied, appropriated or paid in some manner to my use and benefit, directly or indirectly, and (2) that I was concerned in an improper manner in the proposed reduction of the license tax on charters of 'non-resident' domestic corporations. In the State Senate a committee was raised to investigate these charges. I and others appeared before the committee and made statements. It is understood that the committee will take no further testimony. I feel that the grave charges made against me have not been duly investigated, especially as there are rumors in circulation that there is evidence of the truthfulness of these charges, or of one of them, which evidence was not presented but withheld under some sort of alleged agreement or understanding; and this has been stated in some newspapers. The House of Delegates has the sole power of impeachment under our Constitution. If I am guilty of these charges, or either of them, I ought to be found guilty and punished, either by impeachment, or on indictment and trial in court. If I am innocent, as I declare I am, I have the right to have that fact declared after a full, free and thorough investigation, and my good name and that of my family vindicated. Besides, I submit that the honor of the state, whose chief officer I am, demands that these charges be promptly and thoroughly inquired into, and their truthfulness established.

"I therefore earnestly request that your honorable body will raise a committee to investigate these charges, and also whether I have been or am to be, in any way whatsoever, the recipient, directly or indirectly, of any of the fees or emoluments of the Secretary of State or of any other officer or person appointed by me; and that such committee be empowered to sit after the adjournment of the Legislature, be given full power to compel the attendance of witnesses, and to send for persons and papers and be instructed to make full and thorough investigation, and when it has completed the same and made its report to file a transcript of the evidence taken before it and its report with the Governor, to be by him laid before the next session of the Legislature, special or regular; and that in the meantime their findings be made public.

"Respectfully, Albert B. White.

"Executive Chamber, Charleston, W. Va., February 24th, 1905."

One hour later Mr. Seaman, a member, submitted to the House the following:

"Whereas, His Excellency, Governor Albert B. White, in a written communication of this date, has requested the House of Delegates to make an investigation of certain charges made against him, as set out in his said communication, therefore,

"Resolved, That the Speaker of this House be and he is hereby instructed to appoint a committee of three members of the House as such committee of investigation. Such committee will meet as soon as practicable and select one of its members chairman, and has leave to sit after the adjournment of the present session, and is hereby instructed to investigate fully and thoroughly the charges and matters as follows:

"First, Whether Governor Albert B. White had or has any agreement, understanding or contract with any one whereby the fees and emoluments of the office of Secretary of State were to be divided or shared with him in any way, manner or form, either directly to himself, or indirectly through any other person, firm or corporation; and whether Governor Albert B. White did

ever in fact in any way, manner or form receive any of the fees or emoluments of the office of Secretary of State.

"Second, Whether Governor Albert B. White was concerned in any improper manner in the proposed reduction of the license tax on the charters of 'non-resident' domestic corporations.

"Said committee is hereby empowered to compel the attendance of witnesses and to send for persons and papers, to appoint a sergeant-at-arms, necessary stenographers and clerks, and to employ such counsel as may be necessary to conduct said investigation. Members of the committee shall receive the same compensation and mileage as are paid to members of the Legislature. Such compensation and mileage and other expenses of the committee shall be paid by the Auditor out of the appropriation for contingent expenses of the House of Delegates on the certificate of the chairman of the committee."

—Which was immediately adopted, and the Speaker appointed Mr. Seaman, Mr. Maxwell (of Harrison), and Mr. Preston such committee. This committee, it seems, organized, electing Mr. Seaman as chairman, and proceeded with the investigation. Among others, the relator was summoned as witness for a specified date, failed to attend, was again summoned for another day, and failed and refused to attend, whereupon an order of attachment and arrest was issued against him, signed by Seaman as chairman of this committee, directed to Sheriff Carfer, of Wood county, who duly took him into custody, from which he is seeking hereby to be discharged.

Article 5 of the Constitution of West Virginia in a single section provides:

"The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the power properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature."

The 50 sections of article 6, among other things, provide that the legislative power shall be vested in the Senate and House of Delegates; fixes the number of each of these bodies, the term of office, and the qualifications required of members; that the Legislature shall meet at the seat of government "biennially and not oftener," unless convened by the Governor in special session under limitations set forth; that no session shall continue longer than 45 days without concurrence of two-thirds of the members elected to each house, and neither house, during a session, shall adjourn for more than three days without consent of the other; that a majority of the members elected to each house shall constitute a quorum; that attendance may be compelled; that each shall judge of the election returns and qualifications of its members, elect its presiding officers, appoint its officers, and remove them at pleasure, punish its own members for disorderly conduct, and by two-thirds vote expel once such member. Then in section 26 it provides:

"Each house shall have power to provide for its own safety, and the undisturbed transaction of its business, and may punish, by imprisonment, any person not a member, for disrespectful behavior in its presence; for obstructing any of its proceedings, or any of its officers in the discharge of his duties, or for any assault, threat or abuse of a member, for words spoken in debate. But such imprisonment shall not extend beyond the termination of the session, and shall not prevent the punishment of any offense by the ordinary course of law."

By section 45 of this article it is also further provided:

"It shall be the duty of the Legislature, at its first session after the adoption of this Constitution, to provide, by law, for the punishment by imprisonment in the penitentiary, of any person who shall bribe, or attempt to bribe, any executive or judicial officer of this state, or any member of the Legislature in order to influence him, in the performance of any of his official or public duties; and also to provide by law for the punishment by imprisonment in the penitentiary of any of said officers, or any member of the Legislature, who shall demand, or receive, from any corporation, company or person, any money, testimonial or other valuable thing, for the performance of his official or public duties, or for refusing or failing to perform the same, or for any vote or influence a member of the Legislature may give or withhold as such member."

Carrying out this Constitutional requirement, an act of the Legislature of the state was approved April 1, 1873 (embodied in the Code of 1899 as section 5a, c. 147), whereby it was made a felony for any one to bribe by directly or indirectly giving to or bestowing upon any executive or judicial officer, or any member of the Legislature, money, testimonial, or thing of value in order to influence him in the performance of any of his official or public duties, and also making it a felony for any executive or judicial officer to receive any money, testimonial, or thing of value for such purpose, and further disqualifying any one convicted of either offense from ever holding any office of honor or trust in the state. The law prior to that time had been embodied in sections 4 and 5 of chapter 147 of the Code of 1899 (re-enacted from sections 4 and 5 of chapter 194 of the Code of Virginia, 1860), which made these offenses misdemeanors of grave character.

Section 9 of article 4 of the Constitution provides:

"Any officer of the state may be impeached for mal-administration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor. The House of Delegates shall have the sole power of impeachment. The Senate shall have the sole power to try impeachments, and no person shall be convicted without the concurrence of two-thirds of the members elected thereto. When sitting as a court of impeachment, the president of the Supreme Court of Appeals, or, if for any cause it be improper for him to act, then any other judge of that court, to be designated by it, shall preside; and the senators shall be on oath or affirmation, to do justice according to law and evidence. Judgment in cases of impeachment shall not extend further than to remove from office, and disqualification to hold any office of honor, trust or profit under the state; but the party convicted shall be liable to indictment, trial, judgment and punishment according to law. The Senate may sit during the recess of the Legislature, for the trial of impeachment."

Section 7, c. 12, Code 1899, provides:

"When the Senate or House of Delegates, or a committee of either house, authorized to examine witnesses, or to send for persons and papers, shall order the attendance of any witness, or the production of any paper as evidence, a summons shall be issued accordingly, signed by the presiding officer or clerk of such house, or the chairman of said committee, directed to the sheriff or other proper officer of any county, or the sergeant-at-arms of such house, or any person deputed by him. And when served, obedience thereto may be enforced, by attachment, fine or imprisonment, at the discretion of the house which appointed the committee; and if the committee be authorized to sit during the recess of the Legislature or the recess of the house which appointed the committee, then obedience to the summons may be enforced by said committee as aforesaid."

These constitutional and legislative provisions, we believe, are all that can be considered as involved in the determination of the questions before us.

At the very threshold it may be asked whether the limitations of the Constitution were not intended to, and do, substantially prevent legislative investigations through committees during the recess of the body itself. Its provisions expressly limit the sessions to biennial ones, not to exceed a total of 45 days each, only to be extended by concurrent vote of two-thirds of the members of both houses. It fixes, by section 33, art. 6, a per diem compensation, with mileage allowance, and then distinctly provides that no other allowance or emolument shall directly or indirectly be made or paid to the members of either house for postage, stationery, newspapers, or any other purpose whatever. It makes express provision that the Senate may sit during recess for the trial of impeachment cases. Thus it will be seen that not by direct prohibition, but by strong negative limitations, the appointment of legislative committees to sit during recess is condemned. It would seem clear that the framers of this Constitution contemplated that the legislative duties should be performed by the legislative body itself within a fixed period, and for a fixed per diem compensation. The wisdom of such limitation is clear, for otherwise the tendency of the Legislature to resolve itself into committees to investigate one after the other the public institutions and other matters that would furnish plausible excuse during recess, whereby they might extend and increase their own compensation to any number of days short of the total involved in the recess, is very apparent. However, in our view of this case, we do not deem it necessary to decide finally this point which would necessarily involve the constitutionality of a part of section 7, c. 12, of the Code, which we have hereinbefore cited. It can far more appropriately be left for the state courts, construing its own Constitution in its own way and in its own time, to do this.

There is a more grave and crucial question involved, which, if we entertain this writ, must be decided by us, however, and that is whether, under the Constitution of West Virginia, the House of Delegates had the power to constitute this committee for the purpose of investigating the matters set forth in its resolution, clothing it with power to sit in vacation, compel attendance of witnesses, and to arrest and punish recalcitrant ones. It would seem from the reading of article 5, cited above, that the framers of the Constitution determined jealously to safeguard the very fundamental principle, adopted in the national and all the state governments, whereby all governmental power is to be divided into the three great departments, the executive, the legislative, and the judicial, by plain, explicit, and separate article. Not only does it divide the power among these grand departments, but it explicitly provides that neither of these departments shall exercise the powers properly belonging to either of the others, and then proceeds in other articles to define the limitations and powers of each. If we analyze rightly, the real object of this legislative investigation was to ascertain whether or not Albert B. White, as Governor of the state, had re-

ceived or was to receive from Wm. M. O. Dawson any sum of money, or any division of fees or any other thing of value, directly or indirectly, for and in consideration of his appointment by White, as Governor, to the honorable and lucrative office of secretary of state, this appointment, under the Constitution at that time existing, being said White's official duty to make. The second charge is of the same character. The Governor could not "improperly" be connected with legislative action such as to warrant legislative investigation, unless it was such as to warrant impeachment or prosecution.

For what purpose was this investigation to be made? Can it be said that it was a preliminary investigation instituted by the House of Delegates for the purpose of securing information and facts upon which to base its impeachment of the Governor? Certainly not; for this resolution was passed within nine days of the expiration of the term of said White as such Governor by operation of law on March 4, 1905. It was passed less than three hours before the adjournment of the session of the Legislature by constitutional limitation. It expressly provided that the investigating committee was to sit in vacation, and it was expected to make its report to the next succeeding session, long after the said White's term would have expired, and after any impeachment proceeding could be instituted against him; for article 4 of the state Constitution, quoted by us above, expressly limits the extent of impeachment to removal from office. Was the purpose of this resolution to ascertain the guilt or innocence of White and Dawson touching this charge, so that the Legislature might enter judgment and punish one or both, if found by this investigation to be guilty? Such an effort would be a palpable and gross assumption of power on its part, unwarranted, yes, expressly prohibited, by the Constitution. If these charges were and are true, then both White and Dawson are guilty of grave and serious felonies; if false, then they are the victims of cruel and criminal slander or libel. In either event, the only tribunals under the Constitution where these things can be legally investigated are the courts of the state. It is the solemn duty of certain officers of the state, elected for the purpose, to bring such charges before the grand juries having jurisdiction, and full power is vested in the courts to compel not only this relator, but any and all other witnesses, to appear there and testify.

If this investigation was to be made solely for the vindication of these gentlemen charged, or to soothe the outraged feelings of either or both, it is simply enough to say that legislatures are not elected for this purpose, but the courts here are the proper forums wherein damages may be sought and awarded for all such injuries. It would be a very remarkable spectacle, indeed, for Congress and Legislatures of the states to conduct investigations for vindication purposes, at the expense of the people, in every instance where, in the heat of partizan debate, some charge of misconduct, malfeasance, or violation of law is made against a public official, and extend such vindicatory investigation to such officials after they have filled their terms of office and passed into private life.

That this latter was the sole and only purpose for the creation of this committee and for the authorization of this investigation does not depend upon inference and implication alone. On the contrary, it appears positively and without any doubt. It originated with and was solely instigated by the Governor himself. Its origin sprung from his special message sent to the House of Delegates, in which he set forth that the charges had been made by a member of the Senate and printed broadcast in the newspapers; that the Senate had investigated them, and he and others had testified; that he was not satisfied (it is clearly to be inferred that the Senate was). He admits that, "if guilty of these charges, or either of them, be ought to be found guilty and punished, either by impeachment, or on indictment and trial in court." The former he knew to be impossible, under the circumstances; the latter he knew could not be subject of legislative action. He then reaches the erroneous conclusion, the non sequitur, that, if innocent, he "had the right to have that fact declared [by legislative action] after full, free and thorough investigation [by a single branch of the Legislature, where the charge did not originate, and after the other branch, where it did originate, had investigated, but not to his liking or entire satisfaction], and his good name and that of his family vindicated." Thereupon this branch of the Legislature passed the resolution providing for this committee, expressly setting out in the preamble thereto the special message requesting the investigation, and expressly instructing the committee to be appointed only to "investigate fully and thoroughly the charges." This, then, was the sole purpose for the creation of this committee, as clearly appears, and, such appearing, disposes of the argument of counsel based upon the theory that this investigation was authorized in order to furnish the Legislature with facts upon which to base future legislation.

It is true generally, as contended for, that all inferences are to be made and all doubts solved in favor of the legitimacy of the legislative purpose and action, but not when it expressly appears by the act itself, in positive terms, that its purpose is illegitimate and contrary to constitutional limitations.

The principles we have here set forth are involved to a considerable extent in the leading case of Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377, where Mr. Justice Miller, with great learning, has discussed and defined the powers of and limitations upon the national House of Representatives in making similar investigations, only authorized to be made by the courts.

Let the petitioner be discharged.

## ATLAS REDUCTION CO. et al. v. NEW ZEALAND INS. CO. OF NEW ZEALAND.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1905.)

No. 1,934.

1. INSURANCE—POLICY IS CONTRACT.
A policy of insurance is a contract by the terms of which must be measured the right of the insured and the obligation of the insurer.

2. SAME—STIPULATIONS INTENDED TO PRESERVE WRITTEN POLICY FROM CHANGE OR ALTERATION BY PAROL.
Stipulations in written policies of insurance intended to preserve the policy from change or alteration by parol, and to make it and such indorsements thereon or additions thereto as may be made in writing a complete repository and memorial of the entire agreement, are valid and for the benefit of both parties and of the community at large; and to give effect to the purpose of such a stipulation, so far as it can reasonably be done, especial care should be taken to find in the policy and in any indorsements thereon or additions thereto the means of its or their proper interpretation, without resort to parol evidence.
[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 292–294, 298, 313.]

3. SAME—CONSTRUCTION OF "LOSS PAYABLE" INDORSEMENT.
An indorsement was made upon a policy of fire insurance, by the agents of the insurer, at the request of the insured, as follows: "Subject to all the conditions of this policy, loss, if any, payable to D. & S. as their interest may appear." *Held:* (a) The indorsement must be read in the light of the purpose which actuated the parties in stipulating that the policy could be modified, or any provision thereof waived, only by a writing of equal dignity and credit with the policy itself. (b) Such an indorsement is a common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, skill, and success in trade, but who requires some indemnity against such accidents as loss by fire; and it does not create a new contract of insurance with the payee, or abrogate or waive any condition of the policy. (c) The terms of the indorsement are not conflicting, but consistent and plain, and their purpose and effect are to make D. & S. the simple appointees of the insured to receive payment of any loss payable to the insured under the policy, and to receive it, not absolutely, but to the extent of any interest they may have in such payment at the time of the loss, consistently with the due observance by the insured of all the conditions of the policy. (d) The words "as their interest may appear" are plainly prospective, and refer to an interest, not in the property insured, but in the payment of the loss. They are words of restriction, without which the whole loss would be payable absolutely to D. & S., without any showing of an interest in its payment or of the extent of that interest. (e) The indorsement does not give consent to the incumbering of the insured personal property by a chattel mortgage (1) because it does not mention a chattel mortgage, or describe D. & S. as chattel mortgagees, or show that the attention of the parties was directed to a chattel mortgage; (2) because it was not necessary that there should be a chattel mortgage to enable the insured to make a valid appointment of D. & S. to receive payment of the loss, if any, or to give them an interest in the payment of the loss; and (3) because the words "subject to all the conditions of this policy" show that the conditions were not intended to be abrogated or waived, but to have effect and be respected as if the indorsement had not been made, and among the conditions of the policy are these: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage, * * * and no officer, agent, or other representative of this company shall have power to

waive any provision or condition of this policy, * * * 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." (f) There being no claim of fraud or mutual mistake, it is not permissible to show by oral testimony that at the time of making the indorsement the agents knew that the insured personal property was incumbered by a chattel mortgage and intended by the indorsement to consent thereto on behalf of the insurer, because what the agents may have known, and even what they may have said, is of no importance, as under the stipulations of the policy they were powerless to waive any provision or condition, or to affect the rights of the parties, except by a writing indorsed upon or added to the policy, and whatever was not so indorsed upon the policy or added to it was the same as if not done, because it was not authorized.

4. SAME—STIPULATION AGAINST CHATTEL MORTGAGE—BREACH.

Where a policy of fire insurance covering personal property contains a stipulation entirely avoiding the policy, if such property be or become incumbered by a chattel mortgage, without consent thereto being indorsed upon or added to the policy, the giving of a chattel mortgage upon such property by the insured during the term of the policy, without the consent of the insurer indorsed upon or added to the policy, terminates the insurance and prevents a recovery under the policy by the insured or his appointee for a subsequent loss by fire.

Hook, Circuit Judge, dissenting.

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

For opinion below, see 121 Fed. 929.

This was an action at law by the Atlas Reduction Company, a Colorado corporation, George B. Dodge, and Archie M. Stevenson, upon a policy of fire insurance issued by the New Zealand Insurance Company, a New Zealand corporation, to the reduction company, upon certain property, real and personal—principally personal—belonging to the latter company, and connected with what was known as the "Delano Chlorination Mill." The policy contained these provisions:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; * * * or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; * * * or if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured or otherwise; or if this policy be assigned before loss. * * * If this policy shall * * * become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement 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."

After the issuance of the policy the property insured was incumbered by two mortgages, one of the realty and the other of the chattels, executed to Dodge and Stevenson to secure the payment of an indebtedness owing to them by the reduction company. On the same day the insurance company's

agents at Denver, Colo., who had negotiated and issued the policy, made the following indorsement thereon: "Subject to all the conditions of this policy, loss, if any, payable to G. B. Dodge and A. M. Stevenson, as their interest may appear." Subsequently, during the term for which the policy was issued, and during the continuance of the indebtedness secured by the mortgages, the property was destroyed by fire. To the complaint, which set forth these facts, a demurrer was sustained ([C. C.] 121 Fed. 929), and, the plaintiffs declining to amend, judgment was given for the defendant.

Daniel Prescott, for plaintiffs in error.

Sylvester G. Williams, for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

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

In approaching the decision of any controversy arising out of a policy of insurance it is well to have in mind the cardinal rule that the policy is a contract by which must be measured the right of the insured and the obligation of the insurer. As was said by Mr. Justice Jackson in speaking for the court in Imperial Fire Insurance Company v. Coos County, 151 U. S. 452, 462, 14 Sup. Ct. 379, 38 L. Ed. 231:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage upon the terms and conditions agreed upon, and upon no other; and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfilment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and, in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

See, also, Jeffries v. Life Insurance Co., 22 Wall. 47, 54, 22 L. Ed. 833; Ætna Life Insurance Co. v. France, 91 U. S. 510, 512, 23 L. Ed. 401; Phœnix Life Insurance Co. v. Raddin, 120 U. S. 183, 189, 7 Sup. Ct. 500, 30 L. Ed. 644; National Surety Co. v. Long, 60 C. C. A. 623, 627, 125 Fed. 887.

Stipulations such as are contained in this policy have frequently been subjected to consideration in the courts, and their validity is not open to question. Carpenter v. Providence Washington Insurance Co., 16 Pet. 495, 512, 10 L. Ed. 1044; Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, 463, 14 Sup. Ct. 379, 38 L. Ed. 231; Northern Assurance Co. v. Grand View Building Associa-

tion, 183 U. S. 308, 361, 364, 22 Sup. Ct. 133, 46 L. Ed. 213; Hunt v. Springfield Fire & Marine Insurance Co., 196 U. S. 47, 25 Sup. Ct. 179, 49 L. Ed. 381; Forbes v. Agawam Mutual Fire Insurance Co., 9 Cush. 470; Worcester Bank v. Hartford Fire Insurance Co., 11 Cush. 265, 59 Am. Dec. 145; Walsh v. Hartford Fire Insurance Co., 73 N. Y. 5; Smith v. Insurance Co., 60 Vt. 682, 691, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144; Cleaver v. Traders' Insurance Co., 71 Mich. 414, 39 N. W. 571, 15 Am. St. Rep. 275; Winehill v. Germania Insurance Co., 27 La. Ann. 63; Girard Fire & Marine Insurance Co. v. Hebard, 95 Pa. 45; Hutchinson v. Western Insurance Co., 21 Mo. 97, 64 Am. Dec. 218.

One claim of the plaintiffs is that the allegations of the complaint are to the effect that the giving of the chattel mortgage was consented to by the insurance company, acting through those in superior authority, such as the board of directors, and not through subordinate agents, whose power was restricted by the terms of the policy, and that it was not necessary that consent so given be indorsed upon or added to the policy. But, whatever might have been the effect of consent so given, but not indorsed upon or added to the policy, we think the allegations of the complaint are not reasonably susceptible of the interpretation suggested, and that they mean nothing more than that consent to the chattel mortgage was given at the time and place when and where the loss payable indorsement was made upon the policy and by the agents who made that indorsement.

The real and controlling question is: What, in view of the plain and unambiguous stipulations in the policy, is the meaning and interpretation of this loss payable indorsement? Obviously, the words used therein must be read in the light of the purpose which actuated the parties in stipulating that the policy could be modified, or any provision or condition thereof waived, only by a writing of equal dignity and credit with the policy itself. Of the purpose of such stipulations it is said in Northern Assurance Company v. Grand View Building Association, supra:

"It should not escape observation that preserving written contracts from change or alteration by verbal testimony of what took place prior to and at the time the parties put their agreements into that form is for the benefit of both parties. In the present case, if the witnesses on whom the plaintiff relied to prove notice to the agent had died, or had forgotten the circumstances, he would thus, if he had depended to prove his contract by evidence extrinsic to the written instrument, have found himself unable to do so. So, on the other side, if the agent had died, or his memory had failed, the defendant company might have been at the mercy of unscrupulous and interested witnesses. It is not an answer to say that such difficulties attend other transactions and negotiations, for it is the knowledge of the inconveniences that attend oral evidence that has led to the custom of putting important agreements in writing, and to the legal doctrine that protects them when so expressed, and when no fraud or mutual mistake exists, from being changed or modified by the testimony of witnesses as to conversations and negotiations that may never have taken place, or the real nature and meaning of which may have faded from recollection. Besides the importance of such considerations to the parties immediately concerned in business transactions, the community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies. It

would be very unfortunate if prudent men should be deterred from investing capital in such companies by having reason to fear that conditions which have been found reasonable and necessary to put into policies to protect the companies from faithless agents and from dishonest insurers are liable to be nullified by verdicts based on verbal testimony." 183 U. S. 364, 22 Sup. Ct. 133, 46 L. Ed. 213.

In this policy it was plainly stipulated that, if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage, the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, should be void; that the policy was made and accepted subject to the stipulations and conditions therein, together with such other provisions, agreements, or conditions as should be indorsed thereon or added thereto; that in respect of any provision or condition which by the terms of the policy it was within the power of an officer, agent, or other representative to waive, the power to waive the same could be exercised only by a written indorsement upon or addition to the policy, and that no privilege or permission affecting the insurance should exist or be claimed by the insured unless so written or attached. The loss payable indorsement renewed, and in effect reiterated, all of these stipulations by declaring that it was made "subject to all the conditions of this policy." It is plain, therefore, that the indorsement was written upon the policy in pursuance of a mutual and expressly declared purpose to make the policy with the indorsement a complete repository and memorial of the entire agreement, and to preclude any resort to parol evidence. Effect should be given to this purpose so far as it can reasonably be done, and to that end especial care should be taken to find in the indorsement, and in the policy of which it is part, the means of its proper interpretation.

The fact, as alleged in the complaint, that the indorsement was written upon the policy on the same day that the chattel mortgage was executed, is not material, because at most it would only tend to show that the agents of the company knew of the chattel mortgage when the indorsement was written. There being no allegation of fraud or mutual mistake, and this being an action at law, what the agents may have known, and even what they may have said, is of no importance, because by the stipulations of the policy they were powerless to waive any provision or condition or to affect the rights of the parties except by a writing indorsed upon or added to the policy. Whatever was not so indorsed upon the policy or added to it was the same as if not done, because it was not authorized, and was to be without effect.

Carpenter v. Providence Washington Insurance Co., 16 Pet. 495, 512, 10 L. Ed. 1044, was an action upon a policy of fire insurance containing a provision to the effect that if, without notifying the company, and having the same mentioned in or indorsed upon the policy, the insured then had or should thereafter obtain any other insurance upon the same property, the policy should be void and of no effect. Other insurance was had or obtained, and was not mentioned in or indorsed upon the policy. At the trial the plaintiff

requested the court to instruct the jury that, if the company had notice in fact of the other insurance, this was a compliance with the provision in the policy. The request was refused, and an instruction was given to the effect that notice to the company of the other insurance was not sufficient, but that the same should have been mentioned in or indorsed upon the policy; otherwise the policy became void. Of this it was said by Mr. Justice Story, who delivered the opinion of the court:

"We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said that the stipulation in the policy is complied with when there has been no such mention or indorsement as it positively requires, and without which it declares the policy shall henceforth be void and of no effect."

The subject was again considered and the authorities exhaustively examined in Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, where the ruling in Carpenter v. Providence Washington Insurance Co. was affirmed and applied.

Forbes v. Agawam Mutual Fire Insurance Co., 9 Cush. 470, was an action upon a policy of fire insurance containing a provision to the effect that, if other insurance was had or obtained upon the same property, the policy should be void, unless the other insurance was consented to by the directors, and their consent signified by a statement thereof in the policy, or by an indorsement thereon signed by the secretary. Other insurance was obtained, but the same was not consented to in the manner prescribed in the policy. It appeared by the evidence that in the application for the policy the insured had requested that consent to obtaining other insurance be signified in the policy, and that this application bore an indorsement of approval by one of the directors. Of this it was said by Chief Justice Shaw:

"But we think this evidence is far from warranting the inference sought to be drawn from it. It certainly proves notice of the applicant's desire to have leave to make further insurance, and that this permission might be expressed in the policy. But it was not so expressed, and the noncompliance with such an explicit request is almost as significant as a refusal. And the assent and approval of the director was an approval only of the application, and did not constitute the contract, or any part of it."

Worcester Bank v. Hartford Fire Insurance Co., 11 Cush. 265, 59 Am. Dec. 145, was an action upon a policy of fire insurance containing a provision to the effect that, if the insured should obtain subsequent insurance without giving the company notice thereof, and having the same indorsed on the policy or otherwise acknowledged in writing, the policy should cease, and be of no further effect. The insured obtained subsequent insurance, and exhibited a memorandum thereof to the agent of the company. The agent took the memorandum to make entry of the subsequent insurance upon his book of policies, and returned it to the insured, saying that he had made the entry, and that it would be the same as if indorsed upon the policy. In fact, the agent did not enter on his book all the subsequent insurance mentioned in the memorandum. Upon the au-

thority of Forbes v. Agawam Mutual Fire Insurance Co., supra, it was held that the stipulation in the policy was not complied with, and that the policy was void.

Walsh v. Hartford Fire Insurance Co., 73 N. Y. 5, was an action upon a policy of fire insurance containing a provision to the effect that, if the premises insured should become vacant by the removal of the owner or occupant, and so remain for more than 15 days without notice to the company and consent indorsed upon the policy, the same should become void; and that no officer, agent, or representative of the company should be held to have waived any of the terms and conditions of the policy unless the waiver should be indorsed thereon in writing. The premises became vacant, and remained so for more than 15 days. The insured notified the company's agent that the premises had become vacant, requested him to consent to their remaining so, and inquired if it was necessary that the consent be indorsed on the policy. The agent gave his consent, and made a memorandum thereof in his register, but stated that it was not necessary to indorse the same upon the policy, and no such indorsement was made. The court, referring to the provision in the policy, said:

"This is a plain limitation upon the power of agents, and can mean nothing less than that agents shall not have the power to waive conditions except in one mode, viz., by an indorsement on the policy. The plaintiff is presumed to have known what the contract contained, and the proof tends to the conclusion that this provision was brought to his notice. He saw fit, however, to accept the assurance of the agent that an entry in the register was sufficient. It is difficult to see how, upon the law of contracts and agency, the plaintiff can recover. The entry in the register was not an indorsement on the policy. The oral consent was an act in excess of the known authority of the agent. The provision was designed to protect the company against collusion and fraud, and the dangers and uncertainty of oral testimony. The case seems to be a hard one for the plaintiff; but courts cannot make contracts for parties, nor can they dispense with their provisions."

It follows, as before indicated, that the proper determination of the question whether the incumbrance created by the chattel mortgage was assented to by the company's agents depends entirely upon the true meaning and interpretation of the loss payable indorsement placed by them upon the policy. That indorsement reads: "Subject to all the conditions of this policy, loss, if any, payable to G. B. Dodge and A. M. Stevenson as their interest may appear." Could the insurance company, consistently with a purpose to insist upon and enforce all the conditions of the policy, agree to pay the loss, if any, to Dodge and Stevenson as their interest may appear? If it could, that is plainly what was done. The indorsement does not mention the chattel mortgage, it does not describe Dodge and Stevenson as chattel mortgagees, and it does not show that the attention of the parties was directed to the chattel mortgage. All this is conceded, and the contention of the plaintiffs, as stated in the brief of counsel, is this:

"The language of the indorsement is absolutely broad and embracive. The language is, 'As their interest may appear.' This is limited only by their ability to make their interest appear. Whatever interest they may be able, by proper proofs and in the proper manner, to make it appear that they

possess, necessarily comes within the meaning and terms of this indorsement. The greater includes the less, and if, at the time of the loss, their interest is made to appear to be that of mortgagees, such interest is necessarily included in the terms of this indorsement."

Doubtless this would be a proper interpretation of the words "as their interest may appear," if they stood alone or were controlling. They are plainly prospective, and refer, not to an interest existing at the time when the indorsement was written, but to such interest as may appear at the time of the loss, if any, without regard to the character of the interest, or the time when it may have arisen. The interest referred to is not an interest in the property insured, but is an interest in the payment of the loss, whether predicated upon an interest in the property or otherwise. In this respect the terms of the indorsement may be properly said to be "broad and embracive."

But the question under consideration is not solved by merely ascertaining the meaning of the words "as their interest may appear." They do not stand alone, and are not controlling. By the plain terms of the indorsement the consent to pay the loss to Dodge and Stevenson was made "subject to all the conditions" of the policy. This qualifying clause means that the consent was given upon the express condition that the conditions of the policy were not thereby abrogated or waived, but that they should have effect and be respected in like manner as if the indorsement had not been made. It means that a loss, to be payable to Dodge and Stevenson under the indorsement, must be one which, under the conditions of the policy, would be payable to the insured, and that whatever, under those conditions, would defeat the insured's right to payment in the absence of the indorsement, will equally defeat it in the presence of the indorsement. True, if the terms of the indorsement were conflicting—that is, if the appointment of Dodge and Stevenson to receive payment of the insured's loss, if any, was necessarily inconsistent with any condition in the policy—a familiar rule would require that, to the extent of the inconsistency, controlling effect should be given to that appointment, rather than to the qualifying clause. But is there any such conflict? If not, effect must be given to both the appointment and the qualifying clause, if it can reasonably be done, as it is not permissible to assume that any of the words of the indorsement were employed carelessly, or to no purpose. In respect of this the contention of the plaintiffs is that by the use of the words "as their interest may appear" it was assumed and recognized that Dodge and Stevenson had or might have an interest in the payment of the loss, if any should occur, and therefore that consent was impliedly given to any act by which an interest had been or should be acquired, even though it be one which otherwise would avoid the policy; in other words, that consent was impliedly given to any sale of the property insured which had been or should be made to Dodge and Stevenson, and to any chattel mortgage of the personalty which had been or should be given to them, and to any sale to them of the property which had been or should be made on legal process, and to any assignment to them

of the policy which had been or should be made. It is not easily conceivable that an indorsement which so distinctly declared a purpose to insist upon and enforce "all the conditions" of the policy was really intended to abrogate or waive so many of them. Moreover, it was not essential that any act violative of the conditions of the policy should have occurred or should occur to give Dodge and Stevenson an interest in the payment of the loss. They were creditors of the insured and mortgagees of the insured realty, both of which were consistent with the conditions of the policy, and either of which gave them a sufficient interest in the payment of any loss sustained by the insured to support the loss payable indorsement. There was therefore no necessary inconsistency between the assumption and recognition in the indorsement that Dodge and Stevenson had or might have an interest in the payment of such loss, and the express reservation to the company of the right to insist upon and enforce all the conditions of the policy. In these circumstances it cannot be reasonably said that the words "as their interest may appear" impliedly gave consent to any act violative of the conditions of the policy. A more reasonable view of the office performed by these words is that they define the contingency in which and the extent to which—consistently with the conditions of the policy—the insured's loss, if any should be sustained, was intended to be made payable to Dodge and Stevenson. Without these words in the indorsement, the whole loss would be payable absolutely to Dodge and Stevenson without any showing of an interest on their part or of its extent. They are words of restriction, not of enlargement.

The purpose and effect of loss payable indorsements upon policies of insurance have frequently been considered in the courts, and, in the absence of some provision to the contrary, it has been quite uniformly held that such an indorsement is a mere appointment of a payee to receive payment of the insured's loss, and does not create a new contract of insurance with the payee, or abrogate or waive any condition of the policy.

Bates v. Equitable Insurance Co., 10 Wall. 33, 19 L. Ed. 882, was an action upon a policy of fire insurance containing a provision that, if the property insured should be sold or conveyed, or the policy be assigned, without the consent of the company, the policy should become void. Philbrick, the insured, sold the property to Bates, and wrote upon the policy, "Payable, in case of loss, to E. C. Bates." The company then caused an indorsement to be written under that of Philbrick, saying, "Consent is hereby given to the above indorsement." The defense was that the sale of the property was without the consent of the company, and avoided the policy, and the plaintiff insisted that notice of the sale and consent thereto was implied by the indorsements. It was said by Mr. Justice Miller, who delivered the opinion of the court:

"If Philbrick could not, in law or in fact, have directed the payment of the loss, if one should occur to him, as owner of the property, to another party, with the consent of the company, then it would be a reasonable inference that the indorsement made by him implied a sale of his interest. But if he could

make, with the consent of the company, a valid appointment that any loss covered by the policy should be paid to a third person, though he remained the owner of the goods, and the loss was his loss, then the indorsement of Philbrick does not necessarily convey the idea of a sale, nor the consent of the company imply a consent to a sale. Now, it is a well-known and frequent thing in insurance business for a person to insure his life or his property, and either in the policy itself, or by indorsement at the time it is made, or by subsequent indorsement, to which the consent of the company is generally required, to direct the loss to be paid to some third party. And this is done in language similar, if not identical with that used in this case. It is a mode of appointing that the loss of the party insured shall be paid by the company to such third person. This transaction is a very common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, his skill and success in trade, but who requires indemnity against such accidents as loss by fire or the perils of navigation. The property of the debtor at risk being thus insured for the benefit of the creditor, gives him this indemnity. In the face of this frequent use of the two indorsements on the policy, it cannot be held that they imply of themselves a knowledge of the sale or a consent to insure the purchaser."

In Ermentrout v. American Fire Ins. Co., 60 Minn. 418, 62 N. W. 543, it was said:

"In cases where the loss is 'payable to the mortgagee' it is an absolute appointment of the mortgagee as payee of the whole loss, and a direction to pay it to him. * * * But, where the policy provides that the loss shall be payable to the mortgagee, or, as in this case, to his assignee, 'as his interest may appear,' it is neither an assignment of the policy nor an absolute appointment of the mortgagee as payee of the whole or any part of the loss, but a limited and conditional appointment to receive payment of the loss to the extent of his interest, if any is made to appear."

In Brunswick Savings Institution v. Commercial Union Insurance Co., 68 Me. 313, 28 Am. Rep. 56, it was said:

"The clause in the policy, 'payable in case of loss to the Brunswick Savings Institution to the amount of mortgage held by them,' is not an insurance of the plaintiffs' interest in the property, nor an assignment of the policy to the plaintiffs. It is merely a contingent order or stipulation, assented to by the defendants, for the payment of the loss of the assured, if any, to the plaintiffs. It gives the plaintiffs the same right to recover that the assured would have if no such clause had been inserted in the policy. Any violation of the conditions and stipulations of the policy which would defeat the right of the assured to recover upon it will defeat the right of the plaintiffs."

In Wunderlich v. Palatine Fire Insurance Co., 104 Wis. 395, 402, 80 N. W. 471, it was said of a provision that the loss should be payable to a third person as his interest might appear:

"The rights of a claimant under this familiar clause, where the title and ownership of the property remains in the assured, are no longer open to doubt or debate in this state. They were settled by Chandos v. Am. F. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321; Carberry v. German Ins. Co., 86 Wis. 323, 56 N. W. 920; and Williamson v. Mich. F. & M. Ins. Co., 86 Wis. 393, 57 N. W. 46, 39 Am. St. Rep. 906. The contract is with the assured. To him alone is the insurer liable, and upon his acts will that liability depend. The claimant under such a provision is not an assignee of the policy, so as to hold an independent right of recovery, but a mere appointee to receive the whole or a part of the money which the assured is entitled to recover, but to receive it under and in the right of the assured."

Scania Insurance Co. v. Johnson, 22 Colo. 476, 45 Pac. 431, was an action on a policy of fire insurance containing a provision declaring

the policy void if the property insured be sold without the consent of the company indorsed on the policy, and containing the further provision: "Loss, if any, payable to Mrs. H. Johnson as her interest may appear." When the policy was issued, Mrs. Johnson held a mortgage upon the property, and subsequently the insured unconditionally conveyed the property to her, but no consent to the sale was indorsed on the policy. It was said by Mr. Justice Campbell, who delivered the opinion of the court:

"It was the mortgagor's property and her interest therein which were insured, and the effect of the language quoted was merely an appointment of Mrs. Johnson to receive the amount of any loss that might occur. Any act of the mortgagor in violation of the terms of the policy against a sale thereof would defeat not only the right of the mortgagor to a recovery, but also a recovery by the mortgagee. * * * The sale of this property by the assured without the consent of the company was a violation of the conditions of the contract which, by an express provision, invalidated the policy. At the time of the fire the mortgagor had parted with all of her interest in the property, and had transferred the title. She therefore suffered no loss as the result of the fire, and, as the mortgagor cannot recover, neither can the mortgagee."

Delaware Insurance Co. v. Greer, 57 C. C. A. 188, 190, 191, 193, 120 Fed. 916, 918, 919, 921, 61 L. R. A. 137, was an action upon a policy of fire insurance containing a provision to the effect that, unless otherwise provided by agreement indorsed upon the policy or added thereto, the entire policy should be void if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice be given of sale of any property covered by the policy by virtue of any mortgage or trust deed. An indorsement was written upon the policy making the loss, if any, payable to certain mortgagees, as their interest might appear. Proceedings to foreclose these mortgages were thereafter commenced with the knowledge of the insured, but consent of the insurance company thereto was not obtained. The defense to the action upon the policy was that the commencement of the foreclosure proceedings with the knowledge of the insured avoided the policy, and the plaintiffs contended that by consenting to make the loss, if any, payable to the mortgagees as their interest might appear the company had impliedly consented to whatever was essential to make the mortgages effective, and had thus waived the condition against foreclosure proceedings. Judge Sanborn, in delivering the unanimous opinion of the court, said:

"They argue that a mortgage is an incident of a debt; that the right to foreclose is an attribute of a mortgage; that, when the insurance company agreed that the loss should be paid to the mortgagees as their interest might appear, they thereby consented to the exercise by them of their right to foreclose; and from these premises they draw the conclusion that the mortgagees were thereby excepted from the provision of the policy that it should be void if foreclosure proceedings were commenced with the knowledge of the insured. The soundness of the premises upon which counsel base their contention is conceded, but the alleged conclusion does not follow. On the other hand, the plain reading of the clauses of the policy is, and the evident intention of the parties to the contract was, in the first place, to concede the right of the mortgagees to foreclose their mortgage, and in view of this situation to clearly provide what the rights and relations of the parties should be if the

mortgagees exercised their right to commence their proceedings to foreclose. The parties to the policy, in other words, recognized the right of the mortgagees to enforce the terms of their mortgage, and provided in plain terms that if they commenced proceedings for that purpose, and these proceedings came to the knowledge of the insured, the policy should be void. * * * The true construction of the clause, 'Loss, if any, payable to ———, mortgagee, as his interest may appear,' or of words of similar import, when attached to policies of fire insurance, is, and has been for more than 40 years, that the mortgagee is thereby made the simple appointee of the mortgagor, and that his indemnity is at the risk of the acts and omissions of the latter which would avoid, terminate, or affect the mortgagor's insurance under the original policy. * * * The result is that, unless otherwise provided by agreement indorsed on or added to the policy, the insurance of a mortgagee under the customary clause, which reads, in substance, 'Loss, if any, payable to ———, mortgagee, as his interest may appear,' ceases if foreclosure proceedings are instituted against the mortgagor, and the latter knows that they have been commenced, at any time before the fire which causes the loss occurs."

The conclusion, enforced by the plain terms of the policy and of the indorsement, and by settled rules of decision, is that the purpose and effect of the indorsement was to make Dodge and Stevenson the simple appointees of the insured to receive payment of any loss payable to the insured under the original policy, and to receive it not absolutely, but to the extent of any interest which at the time of the loss they might have in such payment, consistently with the due observance by the insured of all the conditions of the policy; that the indorsement did not in terms or by implication consent to the incumbrance created by the chattel mortgage, and that in consequence the policy was avoided by that incumbrance.

Nor is there anything in the opinion in Hagan v. Scottish Insurance Co., 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229, which is inconsistent with this conclusion or with the cases in the Supreme Court to which reference has been made. That was a libel in admiralty upon a policy of marine fire insurance, of which the court said:

"It is to be observed, in the first place, that the policy in question covers property on the water, viz., a tugboat; yet the printed portion of the policy shows that it was intended generally to be used for insuring property on land. A marine policy was made out upon blanks not intended for that kind of insurance. Consequently many of the printed provisions were wholly inapplicable to insurance of property on the water."

In the printed portion was a condition declaring the policy void if, without the consent of the company indorsed upon or added to the policy, the interest of the insured be other than unconditional and sole ownership, or if there be any change in interest or title by the voluntary act of the insured; and in the written portion the insurance was made to run to "Peter Hagan and Company for account of whom it may concern." Before the loss, Hagan, who obtained the policy, sold an interest in the tugboat to another, who held that interest at the time of the fire. The consent of the insurance company to the change in ownership was not obtained. In denying the contention of the company that the sale avoided the

policy, the court referred to the fact that in marine insurance the words "for account of whom it may concern" are used to designate not merely the person taking out the policy, or the owner at the time it is issued, but any person having an insurable interest in the property at the time of the loss who adopts the insurance; and it was said:

"The decision of this case turns upon the significance to be given to the written provision of the policy which provides for insuring 'Peter Hagan and Company for account of whom it may concern.' * * * Where a marine policy is thus taken out upon a blank policy providing by many of its terms for insurance on property or goods on land, it becomes doubly important to keep, and apply with strictness, the rule that the written shall prevail over the printed portion of a policy, as in such case the written, even more clearly than usual, will evidence the real contract between the parties. Courts will not endeavor to limit what would otherwise be the meaning and effect of the written language by resorting to some printed provision in the policy, which, if applied, would change such meaning and render the written portion substantially useless and without application. * * * If the policy were to become void in case of a transfer of all or any part of the interest of the person taking out the insurance unless the company were notified and provided by agreement indorsed on the policy for such change, we do not see that any alteration in its terms and meaning was accomplished by the insertion of the phrase in question. By the interpretation contended for by the company, it would have the same right, if the written provision were contained therein, to refuse to otherwise provide by agreement for the transfer of an interest that it would have if such provision were stricken out, and the terms of the policy would in truth be unaltered by the insertion of that provision. We think this would be a totally different result from that contemplated by the parties. The words 'on account of whom it may concern' do not refer to those interested in the policy simply at the time it is taken out. The terms refer to the future. It is not a question of the persons concerned when it is taken out, but of those who may be concerned when the loss may occur, and who were within the contemplation of him who took out the insurance at the time that he did so. It is on account of those who in the future, at the time of the happening of a loss, have the insurable interest and in regard to whom the policy will be applied. * * * We think the written portion is inconsistent with the printed condition as to change of interest and as to sole ownership, and, there being such inconsistency, the written portion must be held to cover the assignee of a part interest in the tug, as intended at the time by the party taking out the insurance."

The distinguishing features of that case are manifest. Two may deserve special mention at this time. The written portion of the policy did not contain any language evincing a purpose to insist upon and enforce all the conditions of the policy, as does the indorsement here under consideration. The written and printed portions of that policy were so conflicting that a material part of the written portion would be altogether inoperative if effect were given to the printed portion. There is no such conflict in the present case.

The judgment is affirmed.

HOOK, Circuit Judge (dissenting). The case in brief is this: The reduction company, as the owner of certain real and personal property comprising a chlorination mill and consisting of buildings, machinery, and supplies for the operation of the same, procured from the insurance company a policy insuring both the realty

and personalty against loss by fire. The policy contained this clause:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

The agents of the insurance company had no authority to waive this provision, but they did have full authority to assent to a mortgage of the insured personalty by means of written indorsement on or addition to the policy. A month after the insurance was procured, the insured, being indebted to Dodge and Stevenson, gave them as security two mortgages upon the mill property, one upon the realty, which required no assent to preserve the validity of the policy, and the other upon the personalty. Thereupon, at the request of the insured and Dodge and Stevenson, the agents of the insurance company made this indorsement upon the policy: "Subject to all the conditions of this policy, loss, if any, payable to G. B. Dodge and A. M. Stevenson, as their interest may appear." It was positively averred in the complaint to which a demurrer was sustained that the insurance company consented to both mortgages. The insured property was destroyed by fire, proofs of loss were furnished, the authorized representatives of the parties and of other insuring companies met and adjusted the loss, but the defendant company refused to pay. My associates hold that a complaint setting forth these facts does not state a cause of action, and that the plaintiffs may not, by proofs, show what was actually intended by the indorsement upon the policy.

The insurance company contends—and its contention is sustained—that the general averment in the complaint of its consent is referable to the particular indorsement upon the policy by its agents, and that the indorsement cannot be construed as a consent to the chattel mortgage. Out of the latter part of this contention arise the principal questions in the case. In the cases cited in the foregoing opinion (Carpenter v. Insurance Co., 16 Pet. 495, 10 L. Ed. 1044; Northern Assurance Co. v. Building Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; Forbes v. Insurance Co., 9 Cush. 470; Worcester Bank v. Insurance Co., 11 Cush. 265, 59 Am. Dec. 145; Walsh v. Insurance Co., 73 N. Y. 5) there was an entire failure to make indorsements upon the policies, as was required by their terms, and it was sought to supply the omission by oral testimony. The doctrine of these cases is unassailable, but it has merely an indirect bearing upon the case at bar. Here an indorsement was requested. It was made by the authorized agents, and the questions are: What is to be done with it? How should it be construed? If it is ambiguous in its application, is oral testimony admissible to explain it?

In Bates v. Insurance Co., 10 Wall. 33, 19 L. Ed. 882, also cited in the foregoing opinion, the policy contained a clause that, if the insured property be sold or conveyed, or if the policy itself should be assigned, without the consent of the company, the risk

should cease, and the policy become void. The indorsement made and consented to was, "Payable in case of loss to E. C. Bates." It was held that this indorsement indicated neither a sale or conveyance of the insured property nor an assignment of the policy. Justice Miller, in delivering the opinion of the court, said:

"If it could be shown that it had been the course of dealing between these particular parties to recognize the indorsement of the party first assured as evidence of a sale, and the indorsement of the company as a consent to the sale, or if it could be shown that by custom and usage in any particular place these indorsements were so treated, the case might be different; but, in the absence of such usage or custom, we can see in these indorsements nothing more than the direction of Philbrick and the consent of the company that any loss sustained by Philbrick, covered by that policy, should be paid to Bates. As Philbrick did not have any interest in the goods when the fire occurred, he sustained no loss, and the policy covered none."

This case, so far from militating in any degree against the contention of Dodge and Stevenson and the insured is, on the contrary, helpful in its bearing, in that, as applied to the case before us, it tends to limit the indorsement to the scope and purport averred to have been actually within the contemplation of all of the parties. It is not claimed here that the insured property was sold, or that the policy was assigned. On the contrary, it was averred that the insured property of both classes was mortgaged, that the company actually consented thereto; and it is contended that the indorsement which was made is fairly and reasonably calculated to so signify. Scania Insurance Co. v. Johnson, 22 Colo. 476, 45 Pac. 431, is a case like Bates v. Insurance Company; and in Delaware Insurance Co. v. Greer, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137, it was merely held that an indorsement making loss payable to a mortgagee as his interest might appear did not excuse compliance with another and additional provision that the policy should be void if, with knowledge of the insured, foreclosure proceedings be commenced, etc., unless otherwise provided by agreement indorsed on the policy.

In approaching the questions arising in this case it should be borne in mind that the settled rule of construction is that the language of a policy of insurance is the language of the company, and this includes indorsements made by its agents, and it is both reasonable and just that its own words should be construed most strongly against itself. If the policy is so framed, and an indorsement thereon is so worded, as to leave the meaning doubtful or ambiguous, or when the phraseology employed is calculated to mislead the insured, the courts will lean against the construction which would limit or discharge the liability of the company. National Bank v. Insurance Co., 95 U. S. 673, 24 L. Ed. 563; Grace v. Insurance Co., 109 U. S. 278, 282, 3 Sup. Ct. 207, 27 L. Ed. 932; Moulor v. Insurance Co., 111 U. S. 335, 341, 4 Sup. Ct. 466, 28 L. Ed. 447; Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 666, 8 Sup. Ct. 1360, 32 L. Ed. 308; Thompson v. Ins. Co., 136 U. S. 287, 297, 10 Sup. Ct. 1019, 34 L. Ed. 408; London Assurance v. Companhia, etc., 167 U. S. 149, 159, 17 Sup. Ct. 785, 42 L. Ed. 113; Liverpool,

etc., Ins. Co. v. Kearney, 180 U. S. 132, 136, 21 Sup. Ct. 326, 45 L. Ed. 460; McMaster v. Life Ins. Co., 183 U. S. 25, 40, 22 Sup. Ct. 10, 46 L. Ed. 64; Texas & Pacific Ry. Co. v. Reiss, 183 U. S. 621, 626, 22 Sup. Ct. 253, 46 L. Ed. 358; Royal Ins. Co. v. Martin, 192 U. S. 149, 162, 24 Sup. Ct. 247, 48 L. Ed. 385.

In American Surety Co. v. Pauly, 170 U. S. 133, 144, 18 Sup. Ct. 552, 42 L. Ed. 977, it was said:

"If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted; and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers, or agents of the surety company. This is a well-established rule in the law of insurance."

In Liverpool, etc., Insurance Co. v. Kearney, 94 Fed. 314, 36 C. C. A. 265, this court, speaking through Judge Thayer, held that the terms of policies of insurance should receive a reasonable, not a strictly literal, construction. In affirming this case (180 U. S. 138, 21 Sup. Ct. 326, 45 L. Ed. 460) the Supreme Court said:

"A literal interpretation of the contracts of insurance might sustain a contrary view, but the law does not require such an interpretation. In so holding the court does not make for the parties a contract which they did not make for themselves. It only interprets the contract so as to do no violence to the words used, and yet to meet the ends of justice."

In Palatine Insurance Co. v. Ewing, 92 Fed. 111, 114, 34 C. C. A. 236, in discussing the effect of a "rider" upon the provisions of the body of a policy, Judge Severens, of the Sixth Circuit, said:

"But if this conclusion were not so clear as it seems to us to be, and were only a permissible one, there are several established rules of construction applicable to the subject which concur in inducing the same result. One of those rules is that forfeitures are not favored in law, and the courts will seek to find, if fairly possible, such a construction of the contracts of parties as will relieve them from the inequitable consequences arising therefrom. * * * Another rule, which is especially, but not solely, applicable to insurance contracts, is that, when the meaning of the instrument, taken as a whole, is doubtful, its several provisions should be construed favorably to the party to whom the undertaking is made, and most strongly against the party in whose interest the provisions are introduced. * * * Still another rule is that, where a special provision is added to the formal contract, the special provision will be taken to dominate the formal part, upon the principle that it more surely expresses the final purpose of the parties."

In Hoffman v. Ætna Insurance Co., 32 N. Y. 405, 413, 88 Am. Dec. 337, the court, after observing that the terms of the policy that was being considered were not such as would naturally suggest even a query in the minds of the assured whether a transfer of interest as between themselves would work a forfeiture, said:

"It is a rule of law as well as of ethics that, where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. It is also a familiar rule of law that, if it be left in doubt, in view of the general tenor of the instrument and the relations of the contracting parties, whether given words were used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee."

In Utley v. Donaldson, 94 U. S. 46, 24 L. Ed. 54, the Supreme Court approved of the following from the case last mentioned:

"Every intendment is to be made against the construction of a contract under which it would operate as a snare."

As Lord St. Leonards observed in Anderson v. Fitzgerald, 4 H. L. Cas. 510, a policy of insurance "ought to be framed with such deliberate care that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it."

Such instruments are addressed primarily not to the court, but to the comprehension of men who presumably are of average intelligence, and who are not especially skilled in the technicalities of language. It is not meant by this that there is room for construction when plain and unequivocal language is employed, or that the ignorant and careless may be assisted at the expense of an insurance company by subtle distinctions which do not pertain to the substance of things. On the other hand, courts should not be astute to discover grounds for forfeiture that would not occur to men of ordinary intelligence whose minds are alert for the proper protection of their interests. One extreme is as much to be avoided as the other.

The discovery of the intent is the cardinal rule of construction, and in aid thereof courts should, as much as possible, place themselves in the position of the contracting parties, and thereby endeavor to regard the writing in the same light as those who made it.

In Scott v. United States, 12 Wall. 443, 444, 20 L. Ed. 438, a case involving a contract for transportation, the court said:

"In cases like this it is the duty of the court to assume the standpoint occupied by the parties when the contract was made, to let in the light of the surrounding circumstances, to see as the parties saw, and to think as they must have thought in assenting to the stipulations by which they are bound. This process is always effective. When the terms employed are doubtful or obscure, there is no surer guide to their intent and meaning."

Again, another rule is that an exception to the liability imposed by the contract of insurance is not to be liberally construed. Canton Ins. Office v. Woodside, 90 Fed. 301, 33 C. C. A. 63.

Again, it is the settled rule that if in the application of the provisions of a policy of insurance to the subject-matter thereof an ambiguity arises, and a doubt as to what the parties intended, parol evidence is admissible for the ascertainment of their real intention. In summing up the principles announced in Northern Assurance Co. v. Building Ass'n, 183 U. S. 308, 361, 22 Sup. Ct. 133, 46 L. Ed. 213, the court recognized this modification of the principal doctrine of that case; and it was also recognized in the excerpts from some of the cases which were cited. Sheldon v. Insurance Co., 22 Conn. 235, 58 Am. Dec. 420; New York Ins. Co. v. Thomas, 3 Johns. Cas. 1; Franklin Fire Ins. Co. v. Martin, 40 N. J. Law, 568, 29 Am. Rep. 271.

In Fogg v. Insurance Co., 10 Cush. 337, Chief Justice Shaw said:

"When words are doubtful, it is competent for parties to go into proof of the relation in which the parties stood to each other, the acts mutually done

by them, and generally the surrounding circumstances, in order the better to understand the language used by them, and thus ascertain their intent; and under this rule the evidence was admitted."

Turning, then, in the light of the foregoing principles, to the provision of the policy in suit that it should be void in case the subject of insurance was personal property and became incumbered by a chattel mortgage without the consent of the company indorsed thereon, and to the language of the indorsement itself, the inquiry which first suggests itself is as to the scope and purport of the operating clause of the indorsement, "Loss, if any, payable to G. B. Dodge and A. M. Stevenson as their interest may appear." It is sufficiently shown by the authorities cited in the foregoing opinion that its meaning could not be that the insured property had been sold to Dodge and Stevenson, or that the policy of insurance had been assigned to them (see, also, Minturn v. Insurance Co., 76 Mass. 501; Franklin Savings Inst. v. Insurance Co., 119 Mass. 240; Griswell v. Insurance Co., 70 Mo. 654; Froehly v. Insurance Co., 32 Mo. App. 302); and therefore, as there was no sale of the property, and no assignment of the policy, that matter may be dismissed from consideration.

This leaves remaining the inference either (1) that Dodge and Stevenson were general creditors of the insured, or (2) that they held a mortgage or other lien upon the insured property. It will not be profitable to discuss the former at length. It is sufficient to say that such indorsements upon fire policies in favor of mere general creditors without lien upon or interest in the property are not frequent, and that the one before us plainly indicates that Dodge and Stevenson were something more than general creditors. It is a matter of common knowledge that among those having to do with fire insurance either as agents of insurers or as insured such a loss payable clause almost invariably signifies that the persons named have a mortgage or other lien upon the insured property either existing or in immediate contemplation, but that the amount thereof is subject to fluctuation in the future, or may be fully discharged before loss under the policy. Hence the words "as their interest may appear." The term "interest," as ordinarily used in connection with fire insurance, signifies some right that has relation to property, and it would seem to be a misinterpretation of language to say that the interest referred to in the indorsement was solely an interest created by the indorsement itself. But assuming that it is a possibility that the indorsement might mean that Dodge and Stevenson were mere general creditors without lien, the sufficient answer is that the rights of litigants ought not to be determined by general rules of construction applied to possibilities, when the qualifications of those rules and the probabilities of the case lead unerringly to a different result.

But, after all, this is not a vital, or even a very important, matter in the case, as I view it, for it may be assumed without detriment to the position of the insured and Dodge and Stevenson that such an indorsement is broad enough to include general creditors as well as mortgagees. Under all the authorities, and the usages

and customs of the business, and by all rational rules of interpretation the operating clause of the indorsement, if standing alone, would have embraced both mortgages of Dodge and Stevenson—the one upon the personalty as well as the one upon the realty. I do not understand that this is disputed. The words were sufficiently comprehensive for that purpose. They were such as business men would naturally employ, and be satisfied with as evidencing their intention, and as complying with the requirements of the policy. But it is said that by reason of the prefixing of the qualifying words, "Subject to all the conditions of this policy," the specific subject-matter of the operating clause was invaded and so circumscribed that a condition of the policy against a chattel mortgage not consented to was broken, and the policy thereby became void. To this I do not assent. The operating clause of the indorsement was directed to a specific subject-matter among all those contained in the policy, and its obvious and apparent effect was to give consent to the mortgages of Dodge and Stevenson. It is but fair to say that it is more than probable that the parties so intended it. The qualifying clause was a general reference to all the stipulations of the policy which determined or affected the responsibility of the company, and there were about 70 of them, from those pertaining to the management of the insured premises down to those governing the ascertainment and adjustment of a loss. The former was immediately significant and intelligible, and would naturally be at once recognized as being fully adequate for the safeguarding of the rights of the insured and his mortgagees. The operation of the latter was at the best indirect, and implied relation to many subjects and conditions. The construction desired by the insurance company would have required of the insured and Dodge and Stevenson a weighing and an accurate conception of all the consistencies and inconsistencies between the words of the indorsement and the many stipulations in the body of the policy itself, and this in the face of the fact that there were plain words before them, which seemed sufficient for their protection. It would fatally affect them with a hidden and an indirect sense, contrary to one that was of plain and direct import. May it not reasonably be said that a man of ordinary intelligence, knowing the terms of his policy—and it is to such that these matters are first addressed—would naturally have assumed, under the circumstances of this case, that the existence of the chattel mortgage was duly recognized by the indorsement, and that the general reference to all of the conditions of the policy meant simply those conditions that related to other matters which had a bearing upon the risk? Courts themselves not infrequently apply to the construction of the solemn enactments of Legislatures a rule based upon an analogous course of reasoning. And from the opposite standpoint, may it not reasonably be said that in employing the words in question it was the sole purpose of the insurance agents to make sure and to inform the mortgagees that there was no contract of indemnity with them, but that it was still confined to the original parties to the instrument, and that the integrity of the

policy and the rights of Dodge and Stevenson arising from their mortgages and the consent of the company thereto were nevertheless subject to be affected or wholly defeated by the acts or omissions of the insured? If, upon placing ourselves as nearly as possible in the position of the insured and Dodge and Stevenson and the insurance agents, and regarding the words they used in the light of the known circumstances surrounding them, the above inquiries should be answered in the affirmative, then the actual intent of the parties has yielded to a rigid rule of strict construction.

Manufacturing concerns, reduction works, electric light, gas and water works, and the like, are almost always made up of both real and personal property, and mortgages and trust deeds given by their owners in many cases embrace the property of both classes. And I cannot escape the conviction that, having mortgaged both the realty and the personalty of their concerns, the great majority of such owners or their managers, men of intelligence and business affairs, cognizant of the stipulations of their policies of insurance, would, upon applying to the agents of the insuring companies, and fully advising them of the facts, be satisfied with the making of just such an indorsement as was made in this case, and would rest in full faith that their rights had been adequately protected. Suppose the indorsement before us had been: "Subject to all the conditions of this policy, loss, if any, payable to G. B. Dodge and A. M. Stevenson *mortgagees*, as their interest may appear." Logically the contention of the company would then have been that, since the term "mortgagees" might have related to the real estate mortgage, and not to that upon the personalty, the policy was void. It is unfortunate that such precision of thought and expression may not soon be expected in the usual conduct of business affairs. In my opinion, the construction sought by the insurance company is at variance with every rule to which attention has been directed. It contemplates that its own language, fairly open to a different view, be taken most favorably to itself. It seeks the strict application of a rule of law to a condition of fact created by the exclusion of every hypothesis which would make to a contrary conclusion, and avoids those other supplemental and qualifying rules which are equally as well settled. It does not seek the answer to the question which in the construction of contracts in writing should always be asked, "Viewed in the light of the surrounding circumstances as presented to them, what was the real intention of the parties"? The tendency to the unrestrained invasion of the clear terms of policies of insurance by oral testimony which was so destructive of the rights of the companies has been well checked by the decision of the Supreme Court in Northern Assurance Co. v. Building Ass'n, supra; but it seems to me that the present contention of the insurance company tends strongly to the other extreme, and that a rule is sought more rigid than that applied to other written contracts, or even that which obtains in cases involving statutes against frauds and perjuries.

## GUARANTY TRUST CO. OF NEW YORK et al. v. ATLANTIC COAST ELECTRIC R. CO.

(Circuit Court of Appeals, Third Circuit. June 1, 1905.)

Nos. 8 and 9.

1. STREET RAILROADS—MORTGAGES—DATE—CONSTRUCTION.
   Where the authority for the execution of a street railroad mortgage, and bonds secured thereby, not given until October 7, 1896, required the mortgage and bonds to be antedated as of July 1, 1896, and they were so antedated, as between the mortgagor and mortgagee the mortgage would be considered as a conveyance of property on the day the mortgage and bonds were dated.

2. SAME—AFTER-ACQUIRED PROPERTY—LIEN.
   A street railway mortgage given to secure bonds recited the form of the bonds, and declared that they were secured by a mortgage on all the certain railroad and other property, real and personal, and franchises of the railroad company, then owned or thereafter acquired by it. The mortgage conveyance clause limited its lien on after-acquired property to rights acquired by lease from other railroad companies, as "should be connected with or appurtenant to" the railroad of the mortgagor, specifically described. *Held*, that the mortgage lien embraced rights acquired by lease made after its date to the mortgagor by other railroad companies owning roads connected with the mortgagor's railroad and operated in connection therewith, the capital stock of and a lease from a new corporation organized merely for the purpose of holding title to the road of another company similarly operated, all of which was owned by the mortgagor, together with a line of railroad subsequently constructed by the mortgagor, and operated in connection with its system.

3. SAME—SUBSEQUENTLY ACQUIRED LIENS.
   Where a street railway mortgage given to a trustee to secure bonds covered after-acquired property, and the trustee was requested to issue 110 of the bonds so secured for the purchase of the assets of a connecting street railway company sold at a receiver's sale, which it did, and such assets were conveyed to a new corporation, all of the stock of which was delivered to the mortgagor, and operated by it in connection with its system, such trustee was charged with notice that the assets so purchased were, in equity, subject to the mortgage, and hence the trustee could not acquire a superior lien on such assets by a subsequent pledge of the stock of such corporation to secure a loan subsequently made to the mortgagor.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 132 Fed. 68.

Wm. A. Glasgow, for Tracy et al.

Julien T. Davies, Jr., for Trust Co.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. These are cross-appeals from the decree of the Circuit Court of the United States for the District of New Jersey, foreclosing a mortgage made by the Atlantic Coast Electric Railroad Company, a corporation of the state of New Jersey, to the Guaranty Trust Company of New York, a corporation of the state of New York, trustee, dated July 1, 1896, to secure an issue of bonds, known as General Mortgage 5 Per Cent. Bonds, to the amount of $500,000. A committee of these bondholders, who were allowed

to intervene in the Circuit Court, have appealed from a portion of the decree which adjudicates that the Guaranty Trust Company, the mortgagee, has individually, and not as trustee, a lien upon certain shares of stock pledged to it superior to the lien of the mortgage securing said bonds. The defendant railroad company appeals from certain other portions of the decree adjudging that the mortgage is a lien upon certain leasehold interests and upon an extension of the line of railway described in the mortgage.

The material facts as disclosed by the record are as follows:

The general mortgage under foreclosure is dated July 1, 1896. It was acknowledged October 8, 1896, and recorded October 13, 1896. The resolution, authorizing the execution and delivery of the mortgage, was adopted October 7, 1896. On that date, the interest of the Atlantic Coast Electric Railroad Company, the defendant, in the different lines of the system it was operating, was as follows:

(1) The original line owned and operated by it under its incorporation, extended from a point in Asbury Park to the north side of Brighton avenue in Long Branch.

(2) The line of road from Brighton avenue north to Atlantic avenue was that of the West End & Long Branch Railway Company, all of whose capital stock, viz., $100,000, was owned by the defendant company. All the property of the West End Company was leased to the defendant company, by instrument dated August 3, 1896.

(3) A short line with a loop extending from Atlantic avenue to Pleasure Bay Landing, was owned absolutely by the defendant company.

(4) The lines in Asbury Park were those of the Seashore Electric Railway Company, a corporation of the state of New Jersey, 1,500 shares of whose capital stock, out of a total issue of 2,000 shares, were owned by the said defendant company. The property of the Seashore Electric Railroad Company was leased to the defendant company, by instrument dated August 3, 1896.

It will be observed that the leases of the Seashore & West End Railroads, above mentioned, were made August 3, 1896, prior to the execution and delivery of the mortgage on October 7, 1896, but after its date, July 1, 1896. All of the above-mentioned properties were already subject to a first mortgage of the defendant company, dated April 27, 1895, made to the Knickerbocker Trust Company, to secure an issue of first mortgage bonds of the aggregate amount of $1,000,000. With this mortgage, however, we are not here concerned. It appears, therefore, that from and after August 3, 1896, and on until its acquisition of the Asbury Park & Belmar Street Railway Company, in May, 1898, the defendant company substantially owned, controlled and operated a line or system of railways, extending from Pleasure Bay Landing southwardly to the lines of the said Asbury Park & Belmar Street Railway Company. After the last-mentioned date, when, in the manner hereinafter more particularly described, the defendant company acquired the railway of the Asbury Park & Seagirt Railway, there was a further

extension of its line southwardly, and it practically owned and operated the system or line thus extended. It afterwards constructed and owned what was called the Belmar Extension, about a mile and a half long, connecting with what was formerly the Asbury Park & Belmar Road, and constituting a continuation of its line.

At the beginning of the foreclosure suit, therefore, the line or system operated, owned and controlled by the defendant company, extended from Pleasure Bay Landing through the short line owned by the defendant company, to the line of the West End & Long Branch Railway Company, over said line to the original line of the defendant company, then over and through the line of the Seashore Electric Railroad Company in Asbury Park, to the line of the former Asbury Park and Belmar (now the Asbury Park & Seagirt) Road, and then over the Belmar extension of the latter road to its terminus. The subjoined diagram, furnished in the brief of the defendant company, will serve to exhibit the relative positions of these several lines, though not their relative length:

| 6. | 5. | 4. | 1. | 2. | 3. |
|---|---|---|---|---|---|
| Belmar Extension. Constructed and owned by defendant company | Asbury Park & Seagirt Road, all of whose stock has been issued to defendant company and property leased to said company. | Seashore Electric Railway Company, 1,500 shares of whose stock out of 2,000 shares, is owned by defendant company. Leased to defendant company August 3, 1896. | Atlantic Coast Electric Railroad Company (defendant company). | West End & Long-Branch Railway Company, all of whose stock, $100,000, is owned by defendant company. Leased to defendant company August 3, 1896. | Atlantic Coast Short Line from Atlantic Avenue to Pleasure Bay Landing, owned by defendant company. |

The appellants, the intervening bondholders, claim that the lien of the mortgage securing their bonds, covers all the property of the line or system thus indicated and described, whether acquired by the defendant company before or after the date of the mortgage, by virtue of certain after-acquired property provisions in the said mortgage, alleged to be sufficient for that purpose. By the cross-appeal of the appellant company, it is contended that, by a proper construction of the language and terms of the mortgage, its lien only extends to the original Atlantic Coast Electric Railroad Company and to the short line from Atlantic avenue to Pleasure Bay Landing, owned at the time by the defendant company (being Nos. 1 and 3 of the diagram), and to such property as was strictly appurtenant thereto, which, it is contended, would not include the other lines of railway above mentioned, and indicated in the diagram as Nos. 2, 4, 5 and 6.

There is no controversy as to the complainant being entitled, as trustee, to a decree for the sale of the mortgaged property. The only questions to be considered here, as in the court below, relate to the extent of the lien of the mortgage. As we think there was no error in the decree of the court below, so far as it related to those properties embraced in the railway system or line of the defendant company, other than that of the Asbury Park & Seagirt Railway, we cannot do better than refer to, and adopt as our own, that part

of the opinion of the learned judge of the court below, which deals with the mortgage lien on this property. It is as follows:

"Admittedly, the mortgage covers all the properties specifically described in it. But does it also extend to and embrace the following properties acquired by the defendant company after the date of the mortgage—the leasehold interest in the West End & Long Branch Railroad, the leasehold interest in the Seashore Electric Railroad, the leasehold interest in the hotel property at Pleasure Park Bay, the capital stock of and the leasehold interest in the Asbury Park & Seagirt Railroad, and the line of railway extending through Belmar? The defendant insists that none of these last-mentioned properties are subject to the lien of the mortgage; the complainant insists that all of them, except the capital stock of the Asbury Park & Seagirt Railroad, which the complainant claims to hold in its individual capacity as collateral security for the payment of the defendant's promissory note, are subject to its lien; and the bondholders, who are represented by special counsel, insist that all of the properties, including the stock of the Asbury Park & Seagirt Railroad, are subject to its lien.

"Although the authority for the execution of the bonds and mortgage was not given until October 7, 1896, and the mortgage was not recorded until October 13, 1896, the resolution authorizing their execution required them to be antedated July 1, 1896. They were so antedated. As between mortgagor and mortgagee, therefore, the mortgage will be considered as a conveyance of property on July 1, 1896. This was the plain intention of the defendant company, and property acquired by that company between the date of the mortgage and the time of authorizing its execution, or of recording it, as well as that acquired after such authority or record, must be deemed to be future-acquired property. If, then, the mortgage covers any future-acquired property at all, the mere fact that two leasehold interests—one in the West End & Long Branch Railroad Company and the other in the Seashore Electric Railway Company—were acquired after the date of the mortgage but before the authority for its execution was given, will not exclude them from the lien thereof.

"The mortgage is inartistically drawn. Whether it was the intention of the defendant company to subject to the lien of its mortgage after-acquired properties like those above mentioned must be ascertained from an examination of the various clauses in the mortgage concerning after-acquired properties. On such examination it appears that the mortgagor conveyed to the mortgagee 'all the right, title and interest of the railroad company [the mortgagor] now owned, or hereafter in anywise acquired by it, in and to all and singular the lines of railroad and railroad tracks and routes and other property, real and personal, hereinbelow described.' Then follows, first, a specific description of the lines of railroad owned by the defendant company on July 1, 1896. Secondly, the description embraces 'all lands and real estate * * * buildings, improvements, tenements and hereditaments, now owned by the railroad company, or hereafter at any time or howsoever acquired by it, which are or may be connected with or appurtenant to the above described and hereby mortgaged railroad and routes.' Thirdly, the description embraces 'all and every franchise [including the franchise to be a corporation], right, privilege and easement of whatsoever kind or nature, now or hereafter at any time or howsoever owned, acquired, possessed, enjoyed or exercised by the railroad company, either by virtue of any act of the Legislature of the State of New Jersey, or * * * of any contract or lease between the railroad company and any other railroad or other corporation * * * which are or may be connected with or appurtenant to the above described and hereby mortgaged railroad and routes.' The description further embraces 'all and singular the liberties, privileges and franchises connected with or relating to the said railroad, routes and real and personal property hereto [hereby] mortgaged * * * with all and singular the * * * hereditaments, easements and appurtenances to the above described and hereby mortgaged railroad routes and real and personal property, franchises and premises, or any part thereof, now or hereafter belonging or in any wise appertaining.'

"The defendant insists that these clauses relating to future-acquired property are limited to the railways specifically described in the mortgage and to properties appurtenant to such specifically described railways, and that they do not include subsequently acquired leases or stocks, or even the line of railroad constructed through Belmar. To determine the question, the meaning of the words 'connected with or appurtenant to' must be ascertained. The phrases 'connected with' and 'appurtenant to' are not necessarily synonymous. The railroad of the West End & Long Branch Railway Company is physically connected with that of the defendant company at the northerly end of the latter company's main line, and the railroad of the Seashore Electric Railway Company is physically connected with that of the defendant company at the southerly end of the latter company's main line. The defendant company secured leases upon these two lines of railroad and has been operating them in connection with its own road. In Columbia Finance & Trust Co. v. Kentucky Union Railway Co., 60 Fed. 794, 9 C. C. A. 264, it appears that the defendant company in that case executed a mortgage upon its line of railroad, which is specifically described therein, and also upon 'the lands, real estate, telegraph lines, railroad tracks, side tracks, bridges, * * * and all other things of whatever kind, belonging or in anywise appertaining, or which have been or may be acquired or provided for use upon or in connection with said railroad, * * * and also all locomotives * * * and other chattels now or hereafter belonging to or appertaining to said railroad, and all property, both real and personal, of every kind and description, which shall hereafter be acquired for use on said railroad, and all the corporate rights, privileges, franchises and immunities, and all things in action, contracts, claims and demands of the said party of the first part, whether now owned or hereafter acquired, in connection or relating to the said railroad.' Here, it will be observed, the clauses relating to after-acquired property were also limited to the preceding specifically described line of railroad. Yet it was held that the lien of the mortgage covered a leasehold interest in another connecting railroad acquired by the defendant company after the execution of the mortgage.

"In the mortgage now being foreclosed, every 'right' of the defendant company, acquired after the date of the mortgage by lease from any other railroad company, was by express terms included in the lien of the mortgage, provided such 'right' should be 'connected with or appurtenant to' the railroad therein specifically described. As already stated, the defendant company has been operating the leased railroads in connection with its own road. It has been in possession of and has been exercising the rights acquired by the leases. These rights, if not appurtenant to, are, within the fair meaning of the language of the mortgage, 'connected with' the defendant's railroad. Unless such construction be adopted, the clause of the mortgage relating to rights acquired by lease seems to have no force or effect whatever. If there be doubt as to the true meaning of this clause, or of any other of the clauses relating to after-acquired property, the construction put upon them by the parties to the mortgage at the time of its execution, and the acts done by those parties, may be resorted to as aids in ascertaining their true meaning. 1 Gr. Ev. § 293; Bradley v. Packet Co., 13 Pet. 89, 10 L. Ed. 72; Reed v. Merchants' Mutual Ins. Co., 95 U. S. 23, 24 L. Ed. 348. And in Central Trust Co. v. Kneeland, 138 U. S. 414, 11 Sup. Ct. 357, 34 L. Ed. 1014, the court resorted to the language of the prospectus, issued for the purpose of inviting investors to purchase the bonds of the Toledo, Delphos & Burlington Railroad Company, and to the language of the resolution of the directors of the company, authorizing the execution of the mortgage intended to secure those bonds, for the purpose of confirming the construction given by the court to the after-acquired property clause of the mortgage. In the case now in hand we find the resolution of the directors of the defendant company, passed October 7, 1896, embodied in full the form of bonds intended to be secured by the mortgage and expressly approved that form. We also find that the same form of bonds is quoted in full in the recitals of the mortgage. These bonds declared that they were secured by a mortgage conveying to the trustee (the complainant in this case) 'all the certain railroad and other property, real and personal, and franchises of said railroad company, wheth-

er now owned or hereafter acquired by it.' It thus appears that not only were the holders of these bonds informed that their mortgage security was intended to apply to and cover all after-acquired property of the defendant company, but that all other creditors of the defendant company received notice of such information and intention when the mortgage was placed on record. While the language of the mortgage, in its conveyance clauses, seems to restrict its lien upon after-acquired property to such property as is connected with or appurtenant to the railroad lines specifically described, and thus to limit the language of the bonds, the rights acquired by the two leases from the West End & Long Branch Railroad Company and the Seashore Electric Railway Company must, in view of all the facts above stated, be deemed connected with or appurtenant to the specifically described railroad lines of the defendant company, and to be subject to the lien of the mortgage."

It remains to consider the lien of the mortgage, as respects the Asbury Park & Seagirt Railway Company. The railway of this company, as we have seen, is an important link in the system or line of the defendant company between Pleasure Bay Landing and the terminus of the Belmar Extension. Some time prior to March, 1898, a reorganization committee of the bondholders of the Asbury Park & Belmar Street Railway Company had, under a decree of the United States Circuit Court, acquired title to the property rights and franchises of said company, and to its railroad and routes. On the date last mentioned, the directors of the defendant company passed the following resolution, for the purchase of the property held by this reorganization committee:

"Whereas, Messrs. Acton C. Hartshorne and G. B. M. Harvey, acting as a reorganization committee and in representing themselves and other owners of the first and second mortgage-bonds of the Asbury Park & Belmar Street Railway Company, have acquired title under a decree of the United States Circuit Court to the property, rights and franchises of the Asbury Park and Belmar Street Railway Company, and to its railroad and routes; and

"Whereas said reorganization committee have offered to dispose of the same to this company; be it therefore

"Resolved, that this company purchase from said reorganization committee the property above described upon the following terms:

"First. This company to execute and deliver to the Monmouth Trust & Safe Deposit Company, as trustee, a purchase-money first mortgage of the amount of $50,000 upon the railroad and other property so purchased, securing fifty twenty-year gold bonds bearing five per cent. interest of $1,000 redeemable at the option of the company, at 105, the interest thereon to be paid semiannually, on the first days of September and March, and said bonds, when issued, to be delivered to or on order of said reorganization committee.

"This company to deliver to or on the order of said committee, or either of them, 110 of its general mortgage bonds now held in the treasury of the company, and to issue to or on the order of the said committee, or either of them, 5,000 shares of the capital stock of this company."

The mortgage in suit, made by the defendant company to the complainant, contains the following specific provision in regard to the issue of the 500 bonds to be secured thereby:

"Three hundred and fifty of the issue secured hereby shall be certified by the trustee and issued to or upon the order of the railroad company for the purposes of its business from time to time, upon its demand expressed by a resolution of its Board of Directors, and each of such resolutions shall constitute full authority and protection to the trustee in certifying bonds in accordance therewith. The remaining one hundred and fifty of the hereby secured bonds shall be certified and issued only for the purpose of making

payment for additions to and extensions of the railroad of the railroad company, or for a new power house or additional machinery, or any of said purposes, from time to time, upon receipt by the trustee of a resolution of the Board of Directors of the railroad company, stating the amount of bonds required and the purpose for which the same are to be used, and accompanied by a certificate signed by the president and treasurer of the railroad company that the bonds so called for have been disposed of for one or more of the purposes herein mentioned; and each such resolution and certificate shall constitute full authority and protection to the trustee in certifying bonds in accordance therewith."

It is important to observe that the mortgage, accepted and held in trust by the complainant trust company, makes this careful provision concerning the issuance of the $150,000 of said bonds, and that pursuant thereto, on the 20th day of April, 1898, the defendant company passed the following resolution, a copy of which was delivered to the complainant:

"Whereas, by the terms of the general mortgage of this company to the Guaranty Trust Company of New York, as trustee, securing bonds of this company to the amount of $500,000, it is provided that $150,000 of said bonds shall be certified and issued only for the purpose of making a payment for additions to and extensions of the railroad of this company from time to time, upon receipt of the trustee under said mortgage, and by the resolution of the board of directors of this company stating the amount of bonds required and the purpose for which they are to be used, now, therefore, be it

"Resolved, that the amount of said general mortgage bonds of this company now required to be certified and issued is $110,000 or 110 bonds of a thousand dollars each, and that the purpose for which the same are to be used, is the acquisition by this company of the railroad and routes and other property and franchises of the Asbury Park & Belmar Street Railway Company, recently sold under foreclosure and now about to be purchased by this company."

On the same day, the president and treasurer of the defendant company certified to the complainant that the $110,000 of bonds

"Have been disposed of by said railroad company for the purpose of acquiring as an addition to and extension of its railroad, the railroad and routes and other property and franchises heretofore owned and operated by the Asbury Park & Belmar Street Railroad Company, and recently sold under foreclosure proceedings, the same being now about to be acquired by the said Atlantic Coast Electric Railroad Company."

For the purposes set forth in this certificate, the complainant, the Guaranty Trust Company of New York, certified, and on March 29, 1898, delivered, 110 bonds which were used for acquiring the "railroad and other property and franchises" of the "Asbury Park and Belmar Street Railway Company * * * as an addition to and extension of" the railroad of the defendant company. The remaining $40,000 of bonds held by the mortgagee, the complainant company, were, in December, 1899, upon a similar requisition of the defendant company, and similar certificate of the purpose for which the bonds were to be used, delivered by the complainant to the defendant company. These bonds, as before stated, were used for the purpose of acquiring and constructing an extension of the defendant's line from the southern terminus of the line then recently acquired from the reorganization committee of the Asbury Park & Belmar Street Railway Company. After the purchase of the railway of the last-named company by the defendant, to wit, on

April 20, 1898, the president of the defendant company, at a meeting of its board of directors, stated

"That counsel thought it might be advisable, in taking over the Asbury Park & Belmar property, to incorporate a separate company to which the deed held by the reorganization committee shall be transferred, and this company own all of the equity in the property over and above a $50,000 purchase-money mortgage as provided for by resolutions heretofore adopted. Mr. Kroehl then offered the following resolutions, which were duly seconded and unanimously adopted, as follows:

"Resolved, that in the event of counsel finally deciding it to be advisable to take over the Asbury Park & Belmar property heretofore purchased by this company through the ownership of stock in a new corporation to be created for that purpose, the proper officers of this company are hereby authorized and directed to secure the incorporation of such company, and in all other respects to pursue the method proposed by counsel, provided that this company shall own the entire equity in the property subject only to a purchase-money mortgage of $50,000, and be it further

"Resolved, that this company guarantee the payment of principal and interest of bonds to be issued by such new corporation to the amount of $50,000 in gold coin, and be it further

"Resolved, that the proper officers of this company are hereby authorized and directed to sign upon each of such bonds a proper guaranty to that effect, on behalf of this company."

At a meeting of the stockholders of the defendant company, held on the same day, April 20th, the following resolution of ratification was adopted:

"Resolved that the action of the board of directors, in the matter of acquiring from Messrs. Acton C. Hartshorne and G. B. M. Harvey the property rights and franchises of the Asbury Park & Belmar Street Railway Company, as set forth in their resolutions adopted at their meetings of March 29, 1898, and April 20, 1898, be in all things ratified, approved and confirmed."

Accordingly, some time before May 27, 1898, a new corporation was organized under the name of the Asbury Park & Seagirt Railway Company, for the purpose of taking title to the property rights and franchises of the Asbury Park & Belmar Street Railway Company. This new corporation took the title, executed the purchase-money mortgage for $50,000, and all its capital stock was delivered to the defendant company. On August 27, 1898, a lease was executed to the defendant company by this new company, of all its property, for a term of 99 years from September 1, 1898.

The situation, then, was this: The property and franchises of the Asbury Park & Belmar Street Railway Company had been purchased by the defendant company, and paid for by it with $110,000 of its bonds issued for that purpose by the complainant company, mortgagee and trustee for the holders of said bonds, in the manner above described. In addition, there was to be given, as the remaining part of the consideration, a purchase-money mortgage for $50,000, to secure bonds of the defendant company for that amount. The whole consideration, therefore, was paid by the defendant company and the title acquired through the instrumentality of a new corporation created for the purpose, all of whose stock was issued to and owned by the defendant company. When this new company took the title, the bonds last referred to were issued in its

name, and the mortgage to secure the same executed by it, but the defendant company guarantied the said bonds, principal and interest, pursuant to a resolution of its directors and another resolution of its stockholders, authorizing the same to be done; and in the same resolution, it was expressly declared that the whole equity over and above said mortgage, was retained by said company. The defendant company further covenanted to pay the taxes, assessments, license fees and charges imposed on the new corporation, or on the demised property, and an annual rental of $6,000, which, of course, would come back to the defendant company as the owner of all the stock of the new corporation. The new company was incorporated by the name of the Asbury Park & Seagirt Railway Company. To adopt the language of the learned judge of the court below,

"Equity regards the substance of a transaction and not its mere form. In equity, the defendant company must be regarded as the purchaser of the property transferred by the reorganization committee to the Asbury Park & Seagirt Railway Company. The latter company is a corporation practically in name only. It has no assets, and all its liabilities have been assumed by the defendant company. It was created merely to subserve the interests of the defendant company, and with the express understanding that the defendant company should own the entire equity in the property of the new corporation, over and above the purchase-money mortgage of $50,000. The proofs show that the railroad of the new corporation forms a continuation of the roads of the defendant company and the Seashore Electric Railway Company, and that it has been operated by the defendant company as a part of its railway system and in connection with the defendant company's property specifically described in the mortgage given by it."

The learned judge then states his own conclusion, as follows:

"It is clear, therefore, that the lien of the complainant's mortgage extends to and embraces both the capital stock of, and the rights acquired under the lease from, the Asbury Park & Seagirt Railway Company."

In so far as all the stock of this company, and the rights acquired under the lease therefrom, can be held to represent the whole interest and all the rights of the defendant company, in and to the property purchased as aforesaid from the Belmar Company, we agree with the conclusion reached by the court below. As has been shown, there is clearly disclosed in the resolution of the board of directors of the defendant company, passed October 7, 1896, providing for the form of bonds intended to be secured by the mortgage, and also in the mortgage itself, by its recital in full of the said form of bonds, an intention that the said mortgage should cover all after-acquired property of the defendant company, and especially such property as should be acquired by the bonds issued for that purpose by the complainant company, as mortgagee and trustee, under the safeguards of certification and notice, so carefully provided for in the mortgage itself. In view of this intention, so clearly expressed in the instrument itself, the conveyance clauses of the mortgage can, without difficulty, be interpreted, and indeed can only justly and properly be interpreted, to cover all rights, franchises or property thereafter acquired by the defendant company

appurtenant to or in connection with the line of railroad controlled and operated by it. To quote again, the mortgage conveys

"All and every franchise, right, privilege and easement of whatsoever kind or nature, now or hereafter at any time or howsoever owned acquired, possessed, enjoyed, or exercised by the railroad company * * * which are or may be connected with or appurtenant to the above described and hereby mortgaged railroad routes, * * * and real and personal property, franchises and premises, or any part thereof, now or hereafter belonging or in anywise appertaining, * * * and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the railroad company, in and to the same and each and every part and parcel thereof, with the appurtenances."

As shown in the opinion of the court below, all beneficial interest and ownership in the franchises and property of the Belmar Company, were purchased by and resided in the defendant company, the bare legal title being held by the Asbury Park & Seagirt Railroad Company, as trustee, for the benefit and purposes of the defendant company, which had paid the entire purchase price, and which remained the real equitable owner. The mortgage of July 1, 1896, both expressly and impliedly, covered equitable interests in after-acquired property appurtenant to or connected with the line of railroad controlled or operated by it. As soon as this equitable interest and ownership in the Belmar property was acquired, as hereinbefore described, by the defendant company, the lien of its mortgage attached itself thereto and remained upon it, both before, and after the legal title had been placed in the Asbury Park & Seagirt Company. Toledo, Delphos, etc., Railroad v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905; Central Trust Co. v. Kneeland, 138 U. S. 414, 11 Sup. Ct. 357, 34 L. Ed. 1014; Bear Lake Irrigation Co. v. Garland, 164 U. S. 1, 15, 17 Sup. Ct. 7, 41 L. Ed. 327. To hold that this were not so, would be to work a fraud upon the holders of these bonds, who were notified in the bonds themselves, and the declaration is recited in the mortgage, that they were secured by a mortgage conveying to the trustee (the complainant company) "all the certain railroad and other property, real and personal, and franchises of said railroad company, whether now owned or hereafter acquired by it." And not only were the holders of these bonds and all other creditors so notified, but, in an especial manner was the complainant company, the trustee for these bondholders, so notified by this language in the bonds that itself had issued, and in the mortgage that it held in trust to secure the same. Moreover, this complainant company, as trustee, was in an especial manner notified, by certificates made to it by the defendant company (hereinbefore recited) that 110 of these bonds were used in the purchase of this very line, the legal title of which is now held by the Asbury Park & Seagirt Railroad Company.

Such being the situation, on November 11, 1898, the president of the defendant company borrowed, on behalf of the company, from the complainant, the Guaranty Trust Company, mortgagee and trustee as aforesaid, the sum of $100,000, and executed and delivered to the said trust company a note therefor, and deposited with said company, as collateral security for the note, all the shares of

the capital stock of the Asbury Park & Seagirt Company. The transaction was approved by the board of directors on November 18, 1898, and the note and the collateral security have since been and still remain in the possession of the said trust company, the note being unpaid.

As we have seen, the court below, although holding that the real beneficial ownership of and in the franchises and property of the Belmar Company, had been acquired in the manner hereinbefore stated, as an addition to and extension of the line of the said defendant company, and that in consequence, this equitable right and ownership, as well as the legal title in the capital stock of the said Seagirt Company, came under the lien of the mortgage in suit, yet held that the complainant company, by its holding the pledge of all of said stock, under the circumstances as disclosed in this record, had, in its individual capacity, a superior equity to that of the mortgage given to it and held in trust for the bondholders. The learned judge of the Circuit Court thus states his reasons for this conclusion:

"The mortgage does not, in express terms, cover the capital stock. It is held to do so, as between the mortgagor and mortgagee, because the mortgagor company is in equity the owner of the property, the mere naked legal title to which is vested in the Asbury Park & Seagirt Railway Company, and because the only way by which the lien of the mortgage upon that equitable ownership can be enforced is by substituting for the railroad property itself that which fully represents it, namely, the capital stock of and the lease made by the new corporation. But, after the stock had been delivered to the defendant company, it deposited the stock with the complainant, in its individual capacity, as collateral security for the payment of a loan of $100,000. This was on November 11, 1898. The complainant, on March 29th preceding, had delivered to the defendant company mortgage bonds to the amount of $110,000, to be used in the purchase of the property formerly of the Asbury Park & Belmar Street Railway Company. There is no evidence showing, or tending to show, that the complainant at any time before November 11th, received notice, or had any knowledge, that the defendant company had changed its purpose from that declared on March 29th, or that the property of the Asbury Park & Seagirt Railway Company was the same as that formerly owned by the Asbury Park & Belmar Street Railway Company. Neither does it appear that the complainant, before November 11th, had received any information sufficient to put it upon inquiry as to the disposition made of the $110,000 of bonds, or as to the means by which the stock of the new corporation was acquired. The stock was evidently accepted as collateral security by the complainant in good faith, and a decree that the lien of the mortgage is superior to its rights would be inequitable."

In this, we cannot agree. We do not think that the only way by which the lien of the mortgage upon this equitable ownership of the defendant company "can be enforced is by substituting for the railroad property itself that which fully represents it, namely, the capital stock of and the lease made by the new corporation." This ignores altogether the lien of the mortgage upon the equitable ownership itself. The capital stock held by the defendant company and thus pledged, represented the bare legal title of the property, whose full and entire beneficial ownership prior to the conveyance of the said legal title to the Seagirt Company, was in the defendant company, and came, as we have seen, under the lien of the mort-

gage. On the transfer of the bare legal title to the Seagirt Company, this equitable interest in the property remained subject to the lien of the mortgage, and those who held certificates for any or all of the capital stock held subject to such lien. The ownership of any aliquot part, or of all the capital stock of a corporation, confers certain well-understood and legally defined rights upon the owners thereof, such as the right under certain circumstances to dividends, the right to manage the corporation through its agents or boards of directors, etc. But the corporate entity is entirely separate and distinct from the ownership of capital stock, or from the whole body of stockholders. It is this corporate entity that transacts business, contracts obligations, and is subject to liabilities, legal and equitable. None of these liabilities can be affected or changed by any transfer of a part or of all of the stock. No question of notice to the transferee as to such liabilities is material to be considered. One who has a just claim, legal or equitable, against the corporation, is not concerned as to the ownership of the stock, whether it be in many or in few hands, or as to what notice or knowledge such stockholders, whether they be many or few, may have as to the existence of these liabilities. Important equities may arise between the transferror of stock and the transferee, but this cannot affect the existing liabilities, legal or equitable, of the corporation itself. In the case before us, the defendant company, as the owner of all the capital stock of the Seagirt Company, may be estopped to assert a legal or equitable right in itself, as against its pledgee of said stock. The controversy here, however, is not, in this respect, between the defendant company and the pledgee of this stock. It is between the pledgee of this stock and the creditors of the defendant company, who hold, by reason of the mortgage in suit, a lien upon the whole beneficial and equitable ownership of the defendant company in the line of railway acquired by it in the manner above described. If the defendant company had sold a portion of this stock, surely the lien of this mortgage so held in trust for the bondholders, would not have been measurably misplaced by reason of lack of notice to the transferee of the stock, and it is difficult to understand how a pledgee of such stock can be in any different or better position than such a purchaser.

This equitable ownership, being the real and beneficial ownership, and subject to the lien of the mortgage in suit, may be sold under the foreclosure decree, and inasmuch as the Seagirt Company holds the mere naked legal title in trust for the equitable owner, it may be a question whether, as a passive trust, it will not be considered as executed, and the legal title thus pass with the equitable; or it may be a matter for consideration, as to whether any, or what, further proceedings may be necessary to perfect and protect the title of the purchaser. However this may be, no rights were conferred by the pledge of the stock of the Seagirt Company, which were superior to, or could interfere with, the mortgage lien subsisting upon this plenary equitable title for the benefit of the bondholders under the mortgage.

If, however, the individual title of the complainant company to the property interests here claimed for the benefit of the bondholders under the mortgage lien, depended upon its having received the said stock in pledge without notice of said lien, we still think that the complainant was legally affected with such notice. The contention is made in its behalf, and approved by the court below, that inasmuch as the bonds issued by the complainant company and trustee, were upon certificates and requests that related to the purchase of the property and franchises of the Seagirt & Belmar Railway, and no specific notice was given to the said complainant company and trustee, that the title was to be placed for any purpose, in the new corporation, called the Asbury Park & Seagirt Railway Company, it received the stock of the latter company in pledge for its independent loan, free from the equitable title in the defendant company, now claimed for the benefit of said bondholders under the lien of the mortgage. However this might have been in the case of some other and indifferent pledgee, this contention overlooks the fiduciary relation borne by the complainant company to the parties in this litigation. The complainant company was mortgagee in trust for bondholders, under a mortgage which conveyed to it, for the security of said bondholders, the after-acquired property of the defendant company in what was formerly the Asbury Park & Belmar Railway. The court below has decided, and this court affirms its decision in that respect, that the lien of this mortgage attached to the equitable title of the defendant company, as hereinbefore described. Was not the trustee and mortgagee, therefore, bound to know what the mortgage to itself actually covered? What the court has finally said the mortgage covered by its terms, must be taken in legal contemplation to have been cognizable to the mortgagee and trustee from the beginning. It is admitted that the 110 bonds last issued by it, were for the certified purpose of purchasing the very property with which we are here concerned,—that is, the property of the Asbury Park & Belmar Railway.

But it is said on behalf of complainant, that when all the stock of the Asbury Park & Seagirt Company was pledged to it, it was not notified, nor by anything in the transaction was it put upon inquiry as to the fact that the railway franchise and property, the legal title of which was in this latter company, was the very same property that had been purchased by the defendant company with the bonds issued by it for that purpose. But was there indeed no duty resting upon this trustee and mortgagee, in the interest of its cestuis que trustent, to inquire whether a property embraced within the line of the railway covered by the mortgage already held by it, was not covered by the lien of that mortgage? To quote from the bondholders' brief:

"The Guaranty Trust Company knew that one hundred and ten bonds had been delivered by it to purchase additional railroad property, and the fact that the Atlantic Coast Electric Company was in possession of this railroad, operating and using the same, should have put it upon notice, that the railroad of the Asbury Park & Seagirt Railroad Company came under the lien of the mortgage which had been executed to the Guaranty Trust Company."

Columbus, S. & H. R. Co.'s Appeal, 109 Fed. 177, 48 C. C. A. 275, 304.

We think a duty did rest upon this trustee, and that when all the stock of a railway is pledged to it, it must be presumed to know, what it is inconceivable the owner of all the stock of a railroad company should not know, viz., the particular railway represented by such stock. So knowing, this complainant company must be taken to have been aware of the identity of the property of which the Asbury Park & Seagirt Railway had legal title, with that of the Asbury Park & Belmar Railway, purchased with bonds issued by it for that purpose. No special notice under these circumstances was necessary to inform the complainant company of the situation. If this were otherwise, bondholders would be deprived measurably of the protection of faithful guardianship of their interests by the trustee appointed for that purpose. We do not think a court of equity should so view the facts and circumstances of this case, as to make the security of the bondholders depend upon whether notice has or has not been given to the mortgagee, who holds the mortgage as trustee for their benefit. It will be observed that there is nowhere in the pleadings or in the proof, a specific denial of actual knowledge of the transaction, by which the legal title to the property in question came to be in this new corporation, called the Asbury Park & Seagirt Railway Company. If a real equity is to be claimed by reason of the want of such knowledge, prima facie proof at least should have been made by the trustee who sets it up. A court of equity cannot countenance such a discrimination, as is sought to be made in this case, by a trustee, between property of the mortgagor which it holds in trust, and property of the same mortgagor which it claims to hold in its individual capacity. To do so, would be a serious relaxation of the rules, which have for long and uniformly governed the administration of trusts, and measured the responsibility of trustees.

The decree below, therefore, is amended in section 6 of paragraph second, clauses (1)-(c), by adding to the words, "the lease from the Asbury Park & Seagirt Railroad Company, dated August 7, 1898," the following: "Also all of the capital stock of the said last-mentioned company issued to and owned by the defendant company, and all the right, title and interest, legal and equitable, of the defendant company in and to the property and franchises of the said Asbury Park & Seagirt Railroad Company, as were acquired by said defendant company subsequent to the date of said mortgage or deed of trust"; and by striking out paragraph third of said decree, and out of paragraph eighteenth the following: "except, however, in or to the said one thousand shares of the capital stock of the Asbury Park & Seagirt Railroad Company, which the complainant shall not be required to convey, transfer and release until and unless its aforesaid individual equitable lien thereon shall have been satisfied in full"; and by striking out from the nineteenth paragraph thereof the following: "except, however, said one thousand (1,000) shares of the capital stock of the Asbury Park & Seagirt Railroad

Company, the certificates of which the said receiver is hereby directed to deliver to the said Guaranty Trust Company of New York, properly indorsed for transfer."

In other respects, the said decree is affirmed.

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## AMERICAN SURETY CO. OF NEW YORK v. CAMPBELL & ZELL CO.

(Circuit Court of Appeals, First Circuit. June 8, 1905.)

No. 560.

1. ATTACHMENTS—REDELIVERY BOND—RECEIVERS—SURETIES—DISCHARGE.
   Where an attachment bond was executed to the receiver of a corporation, his successors and assigns, in an action by such receiver to realize upon an asset of the corporation, a termination of the receivership control over the action did not discharge the surety on the bond.
2. SAME—PERSONS ENTITLED TO SUE.
   Where, in an action by the receiver of a corporation, a bond to discharge an attachment was given to H., receiver of the C. & Z. Co., a corporation, to be paid to H., "his successors and assigns," and the record in the action was sufficient to advise the surety from the beginning that the corporation was the real party in interest, the term "successor" was not limited to another receiver, but also meant succession in corporate control, so that on the termination of the receivership control over the action, in which the bond was given, the corporation was entitled to prosecute an action on the bond.

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

For opinion below, see 129 Fed. 491.

Henry Wheeler (Hutchins & Wheeler, on the brief), for plaintiff in error.

Byron E. Crowell (Mahoney, Crowell & Sullivan, on the brief), for defendant in error.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

ALDRICH, District Judge. This is an action on behalf of Campbell & Zell, a Maryland corporation, as plaintiff upon an attachment bond under seal. The bond in question was filed to dissolve an attachment in a case pending in the state courts of Massachusetts, in which Charles C. Homer, receiver of the Campbell & Zell Company, was plaintiff, and the Barr Pumping Engine Company was defendant. Subsequently, upon motion of the plaintiff, the writ in the cause in which the bond was filed was amended by striking out the name of Homer as receiver, leaving the action to be maintained and prosecuted to judgment in the name of Campbell and Zell. As a general rule, an action on an attachment bond, as well as upon other bonds under seal, must be in the name of the obligee when the name is clearly defined, and is without addition or descriptive enlargement; but who the real obligee is is often a matter of construction. In this case it is true the condition in the bond is to pay the plaintiff in the action, and the principal question here

relates to the inquiry as to whom the plaintiff and real obligee is. This inquiry must be solved, as observed by the learned judge in the Circuit Court, upon consideration and construction of the whole contract, having regard, of course, to the character of the proceeding to which the bond relates, as the condition in the bond expressly refers to the writ and the plaintiff in the action in which the bond was given, and because the description of the obligee embraces something more than the individual name of Homer. The name of Charles C. Homer was only a part of the description of the obligee. In every substantial sense the real obligee was the Campbell & Zell Company. Homer, as receiver, was simply an official, and an instrument of the law, and as such represented the corporate interest, and in such representative capacity brought an action for the benefit of the company to establish its rights and to recover upon a debt due it as the disclosed beneficiary. The bond was not to Homer individually, or Homer as receiver, in so many words, but to "Charles C. Homer, of the state of Maryland, receiver of the Campbell and Zell Company, a corporation established under the laws of the state of Maryland, in the full and just sum of five thousand dollars, to be paid to said Charles C. Homer, his successors and assigns." His capacity was fully disclosed. The receiver sued not for himself, but officially, and as an instrument of the law, for the corporation, which was temporarily incapacitated from suing; and when the incapacity was removed by the termination of the receivership control over the action the disclosed beneficiary became his successor, and fully succeeded to all rights, in respect to the action and the bond dissolving the attachment which the receiver and instrument of the law had created in its behalf. The writ and the bond itself set out to the surety company full information in respect to the character of the claim and as to the real plaintiff and obligee in interest. The parties contracted with reference to a receivership situation which was liable to be terminated at any moment, the beneficiary thereupon succeeding to all right to carry forward pending legal proceedings for the collection of its just claims. It should be assumed, upon construction, that the parties understood all this, as they undoubtedly did. It is a miscarriage of justice, if a bond discharging an attachment in a suit by a receiver in behalf of a disclosed beneficiary interest which is set out in a description of the party plaintiff, and as a part of the description of the party obligee in the bond as well, is not enforceable by the beneficiary, and an asset is lost, because the receivership control over the action terminates before the action instituted in behalf of the beneficiary is brought to a conclusion.

We need not, however, consider whether, under construction of the whole contract, the interest of Campbell & Zell is so substantial and so apparent, and the corporate name so substantial a part of the description of the obligee, as to entitle the corporation to sue in its own name upon the bond as the expressed obligee. This case may be rested upon the position that the bond expressly runs to Homer in his official and representative capacity, and expressly to his successors as well. This results because the bond itself

contemplates succession. As has already been said, the action in question was by a receiver, who fully disclosed his official capacity and described by name the beneficiary plaintiff. The action was to recover upon indebtedness to the disclosed, but temporarily incapacitated, company. The bond was filed in the ordinary course of judicial procedure, discharged a valid attachment, and was subject to the ordinary course of judicial procedure, including the amendment striking out the representative capacity of Homer, and leaving the action to be prosecuted by Campbell & Zell, the disclosed party in interest, the real plaintiff and beneficiary. As sustaining the general view that the tenor of an attachment bond is to secure the payment of any judgment that may be recovered in the ordinary course of judicial procedure and pursuant to law, see Tapley v. Goodsell et al., 122 Mass. 176, 182; Cutter v. Richardson, 125 Mass. 72; Kellogg v. Kimball, 142 Mass. 124, 128, 7 N. E. 728; Doran v. Cohen, 147 Mass. 342, 17 N. E. 647; Lanahan v. Porter, 148 Mass. 596, 20 N. E. 460; Dalton v. Barnard, 150 Mass. 473, 23 N. E. 218; Townsend National Bank v. Jones, 151 Mass. 454, 24 N. E. 593; Driscoll v. Holt, 170 Mass. 262, 49 N. E. 309; Adams v. Weeks, 174 Mass. 45, 54 N. E. 350; Russia Cement Co. v. Le Page Co., 174 Mass. 349, 362, 55 N. E. 70; East Tenn. Land Co. v. Leeson, 178 Mass. 206, 59 N. E. 639; Jayne's Ex'x v. Platt, 47 Ohio St. 262, 269, 24 N. E. 262, 21 Am. St. Rep. 810; Irwin v. Kilburn, 104 Ind. 113, 3 N. E. 650; Bowman v. Read, 2 Wall. 591, 603, 17 L. Ed. 812. In the absence of the bond, no one would contend that the amendment in the pending proceeding, substituting the corporation for its receiver, would have discharged the defendant's property from the attachment. Without regard to the real plaintiff or the receiver, the defendant exercised its arbitrary right under the statute to discharge its property by filing a bond to pay the judgment. It would be a harsh rule that would make the real plaintiff lose its claim or right of action against the sureties because the bond was given to its receiver, who, as an officer of the law, was safeguarding its interest and the interests of its creditors, and because the receiver was superseded by the real plaintiff, who, by amendment, had succeeded to its original right, before the judgment was recovered which the bond was intended to secure. By operation of law, the moment the receivership control over the action terminated, upon motion of the receiver the corporation, under the terms of the bond, succeeded to all the rights created by the receiver in its behalf during the time in which it was incapacitated from bringing suit. As said in East Tennessee Land Co. v. Leeson, 178 Mass. 206, 208, 59 N. E. 639:

"Since the amendment * * * the suit is being prosecuted for those who, by decree of the court appointing the receiver, are entitled to the proceeds, and for whose benefit it was originally brought. The substitution of the company for the receiver as the party plaintiff was made to comply with the technicalities of our procedure."

In Tyler v. Hand and others, 7 How. 573, 12 L. Ed. 824, an action was maintained in the name of John Tyler, as President, upon bonds given to Martin Van Buren, President of the United States, and

his successors, for the protection of the orphan children of the Choctaw Nation. This was upon the theory that the nominal obligee, under such circumstances, was the official instrument of the law to receive the bond as security for the real party in interest. Such should be the rule as to receivers who, by force of law, officially and temporarily take hold of an incapacitated estate for the purpose of safeguarding and protecting its interest and the interests of its creditors. Bonds which provide for and express the idea of succession in respect to obligees contemplate that whoever succeeds to the right of control over the right of action involving the subject-matter to which the contract relates shall be the obligee, and have a right of action to enforce the obligation. This is the essential idea of succession, and is of the very essence and substance of the contract, and means that the remedy, or right to maintain the suit, runs with the succession in respect to the cause of action to which the contract relates; and in a case like this there is no difference in principle whether the right in the line of succession falls upon a substituted receiver, or whether the expressly named but incapacitated beneficiary is substituted for the receiver, and succeeds to the rights of the receiver and its own original but temporarily suspended right of maintaining its suit and prosecuting the cause of action which the bond was intended to secure. Such a succession is not different in principle from succession in respect to covenants which run with the land, or with a lease of tithes, or of tolls, where the succession in the estate has a right to the benefit of the covenant; and, though not expressly named, may sue for a breach of it. In the case of the covenant running with the land and with the lease of tithes and tolls, the necessary privity results by operation of law, while in the case at bar the necessary privity results from the contract stipulation for successorship and by operation of law. What difference is there in principle between a situation where the right of action under a sealed bond to a given obligee and his representative falls to an administrator as the representative of a deceased party, and a situation where the covenant is to a given obligee and his successors, and where an incapacitated party and expressly named beneficiary is restored to his suspended right, and succeeds a receiver in the right to prosecute the remedy upon the cause of action to which the contract or covenant of indemnity relates? It is not reasonable to assume that the successorship expressed in the bond in question intended only another receiver; on the contrary, the conclusion is unmistakable that what was intended was successorship with respect to the cause of action and the right to prosecute the judgment. The term "successor," in modern acceptation, has a broader significance than succession in respect to the estate of a deceased. It may mean, in a proper situation, succeeding to a place, or a right, or an interest, or a power, official or otherwise. It may mean succession in corporate control. One corporation may succeed to the control of another, and that control may be succeeded by a receiver, and in turn the corporation first surrendering control may succeed the receiver in control. This is the kind of succession that is intended in an attachment bond like

this, which runs to the plaintiff, receiver of a corporation, and his successors, and which is to safeguard the cause of action in the suit in which the bond was given against loss by reason of discharging the defendant's property from attachment. A receiver or a bankrupt trustee succeeds to the right of the owner. Such right results to the receiver under the principles of the common law, and to the trustee in bankruptcy by force of statute and under the principles of the common law. Could there be any doubt of the proposition that, if this suit had been pending in the name of Campbell & Zell, and the bond was existing, running to Campbell & Zell and its successors at the time the receiver was appointed, that the receiver, as successor to the rights and interests in respect to the estate, would have the right to maintain an action in his name, as receiver and successor of Campbell & Zell, to enforce the liability, although his name was not in the minds of the parties at the time the bond was given, and was no part of the name or description of the obligee.

Cases like Flynn v. North American L. Insurance Co., 115 Mass. 449, are not in point, for the pertinent reason that the beneficiary is in no sense named as the obligee, and the bond runs expressly to another person and to his representatives. So as to that class of cases like Henricus v. Englert, 137 N. Y. 488, 33 N. E. 550, where the name of the beneficiary is not disclosed, and where there is no stipulation as to successorship. Likewise such cases as Keller v. Ashford, 133 U. S. 610, 622, 10 Sup. Ct. 494, 33 L. Ed. 667, where the consideration is from, and the promise to, a person other than the plaintiff, and where the plaintiff is a stranger to the transaction contrary to the relation which Campbell & Zell and its interest sustained to the transaction here in question.

Under the circumstances of this case there is no reason upon principle or authority why this action should not be maintained by the real and disclosed beneficiary obligee, who has succeeded under the forms of law to the full position of plaintiff, and to the full right of action in the case in which the bond was given, in place of the receiver and official obligee, who has become functus officio in respect to the cause of action and the bond of indemnity.

The judgment of the Circuit Court is affirmed, with interest, and the defendant in error recovers costs in this court.

BROWN, District Judge. I am unable to concur in this opinion.

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## LYNCH v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. June 5, 1905.)

No. 1,119.

1. PUBLIC LANDS—CUTTING TIMBER—ACTIONS—EVIDENCE—VALUE—PREJUDICE.
Where, in an action by the United States to recover the value of timber alleged to have been wrongfully cut from the public domain, the government's evidence that 500,000 feet of lumber had been cut was uncontradicted, and the jury rendered a verdict in its favor for $500 only, de-

fendant was not prejudiced by the admission of evidence, on the issue of the value of the lumber, that timber had been sold in the vicinity by the state for $2.10 per thousand.

2. SAME—ADMISSIBILITY.

Where, in an action by the United States for the value of timber alleged to have been wrongfully cut from the public domain, a witness asked as to the value of timber in that neighborhood stated that he knew only by the price set by the state, which had been fixed by appraisement made by state officers, as required by Pol. Code Mont. § 3560, and that that price was $2, he was also entitled to testify, in answer to a question of the court as to whether any was sold at that price, that some was sold for $2.10 per thousand.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 416–421.]

3. SAME—CHARACTER OF LAND.

Where defendant's right to cut and remove timber in question from the public domain was dependent on the land being mineral, and not subject to entry except for mineral entry, as provided by Act Cong. June 3, 1878, c. 150, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528], and there was testimony that the region had been prospected, and, though float was found over it, no mineral-bearing veins had been discovered, and that small tracts near defendant's mill were cultivated for crops, evidence that a witness cultivated to crops about three acres of ground on the flat near the creek, on which the land from which the timber in controversy was cut adjoined, and that such ground was suitable for agriculture, was admissible.

4. SAME—EXPERTS.

On an issue as to whether land from which defendant was charged to have unlawfully cut timber belonging to the United States was mineral land, a placer miner of 70 years' experience, and familiar with a creek running through the land, but not shown to have had any knowledge of the locality from which the timber was cut, was not entitled to give his opinion that ground along the "bed of the creek nearest to the place where the timber was cut" contained gold in quantities that would pay to extract; there being no evidence that gold in any quantity had been found in that part of the creek in that vicinity, or where the timber was cut.

5. SAME.

On an issue as to the character of certain land, from which timber was alleged to have been wrongfully cut, the question whether such land was mineral land was not a subject of expert opinion; the jury being competent to determine such issue from the facts on which the opinion was based.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2328.]

6. SAME—CLASSIFICATION OF LAND—RECORDS.

Where, on an issue as to the character of public land from which timber was alleged to have been wrongfully cut, the register of the land office testified as a witness for defendant that the land in question had been classified as mineral land by the classification commissioners appointed to classify lands in Montana and Idaho, to adjust a claim of the Northern Pacific Railroad Company, as provided by Act Cong. Feb. 26, 1895, c. 131, 28 Stat. 683, the United States was entitled to show by the witness, in rebuttal, that the records of his office also showed that certain of the lands in the township in question had been patented as homesteads, and that other lands therein had been entered under the provisions of the forest reserve act, and still others had been selected by the state under its grant and by the Northern Pacific Railroad Company, all of which selections were nonmineral.

7. SAME—CLASSIFICATION ACT—CONSTRUCTION BY LAND DEPARTMENT.

The ruling by the Secretary of the Interior that the classification of land in the states of Montana and Idaho as mineral by land commissioners appointed as provided by Act Cong. Feb. 26, 1895, c. 131, 28 Stat. 683,

did not prevent the land department from making such disposition of the lands as would be proper, on a subsequent showing that the land was not in fact mineral, and that such classification was not conclusive on the United States, was not error.

8. SAME—REQUESTS TO CHARGE.

Requests to charge may be properly refused where they are substantially covered by instructions given.

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

This action was brought by the United States to recover from the defendant, John Lynch, the sum of $4,000, alleged to be the value of 500,000 feet of lumber manufactured from timber cut and removed by the defendant from unsurveyed lands of the United States, which lands, when surveyed, will be within township 16 north, of range 26 west, in the state and district of Montana. The defendant, in his answer, denied that the plaintiff was the owner of the lumber mentioned in the complaint, but admitted that the lumber had been manufactured out of timber or logs cut from lands which will be township 16 north, of range 26 west of the Montana meridian. He denied that the lumber referred to in the complaint was of the value of $5,000, or any sum greater than $2,500, or that any interest the plaintiff might have in the same was of any greater value than $250. For a further and separate defense, the defendant admitted the cutting of the timber, and that he converted the same to his own use, but justified his action by averring that he was a citizen of the state of Montana, and entitled, under the laws of the United States, to enter upon public lands of the United States in the state of Montana, which were strictly mineral in character, and not subject to entry except for mineral purposes, and to cut therefrom certain timber, in accordance with the rules and regulations prescribed by the Secretary of the Interior, to manufacture the same into lumber, and to sell and dispose of the same to residents of said state for use therein for mining purposes. The defendant averred that the land in controversy was such mineral land owned by the United States, and that his action in cutting the timber and converting it to his own use was strictly in accordance with his right under the laws, and was done in good faith.

It appears from the testimony that the defendant had a mill on what will be, when surveyed, section 9 of township 16 north, range 26 west of the Montana meridian, and had cut timber from sections 5 and 8 of the same township; that sections 5 and 9 are within a grant from the United States to the Northern Pacific Railroad Company; that section 8 is the property of the United States. The witness Schwartz, special agent of the General Land Office, testified that he went over the land, counted the stumps, and made an estimate of the amount of timber that had been cut. He found that about 1,000 trees had been cut from section 8, and that these trees would make about 500,000 feet of lumber—the amount of lumber alleged in the complaint as having been taken by the defendant. Testimony was introduced by both parties regarding the character of the land, from which it appears that the ground is broken and mountainous—in places very steep; that a creek runs through the section, along which, from 1870 to 1876, considerable placer mining was engaged in. There was conflicting testimony as to the present character of the land. The register of the land office in that district testified that all of the unsurveyed portions of said township had been classified as mineral by the mineral land commission appointed pursuant to the act of Congress of February 26, 1895, for the examination and classification of certain mineral lands in Montana and Idaho, but, when recalled as a witness for the government, he further testified that certain sections of the township, other than section 8, were entered under the homestead and forest reserve acts, and certain odd-numbered sections were selected by the Northern Pacific Railroad Company under its grant. Testimony was also introduced to the effect that there were patches of cultivated ground, of a few acres each in extent, in the immediate vicinity of the defendant's mill, and along the creek on the land in question.

The case was tried with a jury, resulting in a verdict in favor of the United States in the sum of $500. Judgment was entered thereupon, and the case brought to this court for its reversal.

T. J. Walsh, for plaintiff in error.
Carl Rasch, U. S. Atty.
Edward E. Cushman, Special Asst. Atty. Gen.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The plaintiff called as a witness one Chadwick, who was asked the following questions:

"Q. What is the value of timber in that neighborhood, if you know—in the growing tree? A. I only know that by the price set by the state. Q. State what that is. A. Two dollars. The Court: Q. Do you know whether there was any sold for that? A. Yes, sir; there was some sold at Florence at $2.10, I think."

The defendant objected to this testimony on the ground that it related to specific sales of timber; that the knowledge of such sales did not quality the witness to testify as to the value of the timber. The plaintiff alleged in the complaint that it was the owner of 500,000 feet of lumber cut and removed from land of the United States; that the defendant wrongfully and unlawfully took possession of the same and converted the same to his own use. The defendant in his answer admitted the cutting of the timber, and that he converted the same to his own use, but he justified the cutting and the appropriation upon the ground that he had a right under the law to do so, for the reason that the land upon which the timber in question was cut was mineral land of the United States. There was no question raised by defendant's answer as to the amount of timber cut and removed by the defendant, and the only issue raised as to the value of the timber was that it was not of the value of $5,000 ($4,000), or any sum greater than $2,500, or that any interest in the same was of any greater value than $250. What was meant by the denial that plaintiff's interest in the lumber was of greater value than $250 is not clear. Possibly it had relation to the fact that the Northern Pacific Railroad Company claimed to own the odd-numbered sections in that township, while the government had retained the title to the even-numbered sections, and that the charge in the complaint was that the defendant had cut timber from lands in the township generally. But however that may be, the specific denial was that the 500,000 feet of timber cut and removed by the defendant was of any greater value than $2,500.

The evidence on behalf of the government as to the amount of timber cut was the testimony of Schwartz, the special agent of the General Land Office, who testified that he found that 1,000 trees had been cut from section 8, and that these trees would make about 500,000 feet of lumber. There was also testimony as to the value of this timber in the trees. The witness Vogel, who was the agent of the Blackfoot Milling Company, testified upon direct examination that timber at the railroad station nearest the place where the timber in question was cut was worth $8 per thousand,

and that it would cost $7.50 to cut and manufacture it and place it on the cars ready for shipment. He further testified that timber in the trees was worth $1.50 per thousand. On cross-examination he testified that his company had purchased the stumpage (that is, the right to cut and remove the timber) on all land granted to the Northern Pacific Railroad Company in the vicinity of the lands in question, at 50 cents per thousand feet.

The court instructed the jury that if they believed from the evidence that the defendant had good reason to believe, and in good faith did believe, he had a right to cut and appropriate the timber he manufactured into lumber, described in the complaint, and also found, under the law and the evidence, that he had no such right, then the plaintiff was entitled to recover, not the value of the manufactured lumber, but merely the value of the timber as it stood in the land before being cut, and, if they found that the land from which was cut the timber manufactured into the lumber mentioned in the complaint was not mineral land, they could not find for the plaintiff for the value of any lumber, except such as was cut by the defendant on section 8 prior to May 15, 1902.

As before stated, the only evidence on behalf of the plaintiff as to the amount of timber cut was the testimony of the special agent of the land office, who testified that he found that 1,000 trees had been cut from section 8, and that these trees would make about 500,000 feet of lumber. This evidence was not contradicted. Upon this testimony, and under the instructions of the court, the jury found for the plaintiff, and fixed the damages at $500. It is evident that the defendant was not prejudiced by the testimony of Chadwick that the timber in a growing tree was worth about $2 per thousand, since the only inference that can be drawn from the testimony is that the jury fixed the value at $1 per thousand on the 500,000 feet of lumber cut and removed from section 8, as determined by the examination made by the special agent of the land office. But, aside from this view of the testimony, we think the evidence was properly admitted. The testimony of the witness as to the specific sale made by the state was given after he had stated what the value of the timber was, and was given in answer to a question by the court, "Do you know whether there was any sold for that?" This question was asked for the purpose of ascertaining what knowledge the witness had upon the subject of sales made by the state, and was relevant to the question as to the qualification of the witness, and his answer that some was sold at Florence at $2.10 informed the court as to his knowledge of sales made by the state. His previous answer as to the value of timber in the growing tree in that neighborhood was based upon the price fixed by the state for its timber. Whether this evidence was admissible or not was another question, and was not raised by the objection to evidence of specific sales. However, we think the evidence was admissible. The value here referred to was one fixed by appraisement made by officers of the state under the statutory authorities. 1 Pol. Code Mont. § 3560. If it was not correct, defendant was at liberty to show this fact by other testimony. In fact, as has been stated, the

jury did not accept this valuation, but, upon other testimony furnished by the plaintiff, it fixed a much less valuation.

The plaintiff introduced evidence to the effect that this region had been prospected, and, though float was found over it, no mineral-bearing veins had been discovered, and evidence was submitted to the effect that there was no vein at the place where the evidence of the defendant tended to show that a vein had been discovered. Testimony was introduced to show that a vein bearing copper had been discovered about a mile and a half north of the place where the timber cutting was done. There was also testimony to the effect that four small tracts of land—two embracing about three acres each, and one about ten acres, and one about eight acres, two within 1½ miles above the Lynch mill, and the other about a half a mile below—were cultivated for crops. Plaintiff called one Upham as a witness, who testified that he cultivated to crops about three acres of ground on the flat near the creek, and that such ground was suitable and adapted to agriculture. To the introduction of this testimony the defendant objected on the ground that the same was immaterial, irrelevant, and incompetent. The objection was overruled by the court, and the defendant excepted. The testimony was admitted, and also other testimony to show that various tracts of land along the bed of the creek adjacent to the Lynch mill were cultivated to crops; that the same and more of the flat and of the benches were suitable for and adapted to agricultural purposes. We think the testimony of the witness Upham was properly admitted. The right of the defendant to cut and remove timber from this land was dependent on the land "being mineral and not subject to entry under existing laws of the United States, except for mineral entry." Act June 3, 1878, c. 150, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528]. Was the land mineral, and subject to entry as such under the laws of the United States, or was it agricultural land? The question of the character of land is always one of fact, and what evidence is more satisfactory than the actual use to which it has been placed by those who occupied it and made it a means of livelihood? It may not be conclusive evidence, since there are many instances where valuable mineral deposits have been found in ground devoted to other than mining purposes, and where such deposits were not supposed to exist. But nevertheless this testimony as to the actual use of the land tends to establish its character, and clearly is relative and material for that purpose.

Among other witnesses the defendant called to the stand was one Kline, who testified that he mined on Cedar creek in 1870, and had been engaged in placer mining for many years, and that he had been for many years familiar with the region about the Lynch mill. The defendant offered to prove by this witness that, in view of his acquaintance with the ground and the indications found there, in his opinion the ground along the bed of the creek at the place where the alleged cutting was done contained gold in quantities that would pay to extract. The United States attorney objected to this evidence, and the objection was sustained. The ruling of the court in sustaining this objection is assigned as error. The plaintiff in

error contends that this was expert testimony; that the witness had qualified himself fully to testify; that he had worked as a placer miner on Cedar creek in 1870, and had been engaged in placer mining for a great many years; that he had been for many years familiar with the region about the Lynch mill; and that his opinion was therefore competent evidence. It appears from the testimony that Cedar Creek rises in a range of mountains, and is about 25 miles in length; that gold was discovered on this creek in 1870. The principal diggings were about 18 or 20 miles up the creek, and extended down to the mouth of the tributary known as "Oregon Creek," which empties into Cedar creek about 10 miles from its mouth. A placer claim was patented about the year 1891, extending some distance above the mouth of Oregon creek, and below it to within one-half a mile of the Lynch mill; but, except such as may have been extracted on the doing of the work upon which the claim was patented, of which no evidence was given at the trial of the cause, no gold was ever taken from the gravel below the mouth of Oregon creek. The southeast corner of section 8 touches Cedar creek about 2½ miles above its mouth, where it empties into the Missoula river, and about 7½ miles below the mouth of Oregon creek. It does not appear from the record at what point on Cedar creek the witness had mined in 1870, nor does it appear where he had been engaged in placer mining for many years, or in what respect he was familiar with the region about the Lynch mill. The Lynch mill was located on the northwest quarter of section 9. The timber cutting in controversy was from the slopes of the mountain on the north half of section 8. There is nothing in the record tending to show the knowledge of the witness of that locality, or his experience as a miner in that vicinity. The offer to prove by the witness that, in his opinion, the ground along the bed of the creek nearest the place where the timber cutting was done contained gold in quantities that would pay to extract, assumed that he had a knowledge of that locality and of the locality where the timber was cut which the evidence did not justify, and his opinion that there was gold in the bed of the creek, without evidence that gold in any quantity whatever had been found in that part of the creek or in that vicinity, or where the timber was cut, would appear to be without value. Moreover, he was not an expert in the sense that he had a special knowledge which qualified him to draw conclusions from facts that the jury was not competent to do. Had the jury been informed of the facts upon which the opinion was to be based, they would have been as competent as the witness to draw a conclusion with respect to that question. The ruling of the court was correct.

The act of Congress entitled "An act to provide for the examination and classification of certain mineral lands in the state of Montana and Idaho," approved February 26, 1895 (28 Stat. 683, c. 131), provides for the examination and classification by commissioners appointed by the President of the United States of the lands within the limits of the grant to the Northern Pacific Railroad Company in the states of Montana and Idaho. The classification was

to be with special reference to the mineral or nonmineral character of such lands, and was for the purpose of adjusting the claim of the Northern Pacific Railroad land grant. By the sixth section of the act, the classification, where no protest was filed against the same, and when approved by the Secretary of the Interior, became final, and the tract classified as mineral was excepted from the grant to the railroad company. But this classification did not prevent other disposition of the land by the government when returned as mineral, should subsequent investigation prove certain tracts to be nonmineral in character. The classification was to be considered as of the same effect as the return of mineral lands made by the government surveyor. The Instructions of Secretary of Interior to Commissioner of General Land Office, dated November 30, 1897, 25 Public Land Decisions, 446, 447.

The defendant called as a witness Daniel T. Armes, the register of the United States land office at Missoula, Mont., who testified that all of the unsurveyed portions of township 16 north, of range 26 west, had been classified as mineral by the commissioners appointed under the act above mentioned. This witness was also called by the plaintiff in rebuttal, and was asked what the records of his office showed in regard to entries of lands in this township under acts providing for the entry of nonmineral land. The defendant objected to this testimony on the ground that the fact that entries had been made of lands in the township as agricultural lands outside of the lands in controversy was incompetent, irrelevant, and immaterial. The objection was overruled, and the defendant excepted. The witness testified that certain subdivisions of the township had been patented as homesteads; that certain others had been entered under the provisions of the forest reserve act, and still others selected by the state under its grant; and that the Northern Pacific Railroad Company had selected certain odd-numbered sections under its grant. All these selections were nonmineral. The general classification of the lands of the township as mineral lands by the mineral land commissioners was deemed by the court prima facie evidence that the land was mineral, and that the burden was on the government to show that the land was not mineral. In this aspect of the case, we think it was permissible for the government to show that to this classification there were exceptions, which it had recognized and approved in issuing patents on homestead entries made within the township, and entertaining claims for other sections and subdivisions as nonmineral tracts. If the defendant was entitled to introduce in evidence the action of officers of the government classifying the lands in this township as mineral, clearly the plaintiff was entitled to have in evidence the entire action and record of the government with respect to the character of this land. In other words, the plaintiff was entitled to have the evidence of the entire transaction, and the complete record of the government with respect to this land. It is to be observed further that section 6 of the act of February 26, 1895, required that the records of the local and general land offices should be made to conform to the classification as determined by the commissioners and

approved by the Secretary of the Interior. When the witness Armes testified that all the unsurveyed portions of township 16 north, of range 26 west, had been classified as mineral by the mineral land commission, he was testifying as to what appeared of record in his office as register. The general rule is that records, when used in evidence to prove the facts therein contained, must be produced entire. The reason assigned for it is that the part of the record which is lacking may give the rest a different meaning. McGuire v. Kouns, 7 T. B. Mon. 386, 18 Am. Dec. 187; 3 Wigmore on Evidence, § 2110. The rule is applicable to this case, where the question was as to what the records disclosed as to the character of the land in the township, and this could only be done by the whole record upon that subject.

It is assigned as error that the court refused to instruct the jury that the government was bound by the classification made by the mineral land commission, and could not be heard to impeach such determination by asserting that the land was not mineral. The Secretary of the Interior construed the act of February 26, 1895, very soon after it was passed, as intended to facilitate the adjustment of the grant of land to the Northern Pacific Railroad Company, by enabling the Secretary of the Interior to ascertain without delay what lands within the limits of the grant to said company in the states of Montana and Idaho were mineral in character, and excepted from the operation of the grant. The Secretary also determined that the classification of land as mineral under the act did not prevent the Land Department from making such disposition of the land as would be proper upon a subsequent showing that the land was not in fact mineral. 25 Land Decisions, 446, 447; 26 Land Decisions, 423, 424. This construction of the statute has been the law of that department upon this subject for nearly eight years, and, as far as we are advised, it has not before been questioned. The contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. United States v. Johnston, 124 U. S. 236, 253, 8 Sup. Ct. 446, 31 L. Ed. 389. We find no reason advanced in the defense to this action for holding that the construction placed upon the statute by the Secretary of the Interior is erroneous.

The remaining questions involved in the refusal of the court to give certain specified instructions to the jury, as requested by the defendant, need not be discussed. The court gave instructions covering substantially the same ground, but in different language. So far as they departed from the requested instructions in material substance, we have already sufficiently indicated in this opinion that they are correct.

The judgment of the District Court is affirmed.

## MIOCENE DITCH CO. v. LYNG et al.

(Circuit Court of Appeals, Ninth Circuit. May 29, 1905.)

No. 1,135.

1. EMINENT DOMAIN—PIPE LINES—PUBLIC USE—COMPLAINT.

A complaint to condemn a right of way for a water pipe line alleged that a certain creek from its source to its mouth contained large deposits of gravel containing gold in paying quantities; that, in order that the same might be mined and extracted, it was necessary to bring water in ditches, pipe lines, etc., from a distance as contemplated by plaintiff; that such deposits could not be profitably mined otherwise than with a large volume of water; and that it was necessary to enable plaintiff to convey its water to placer claims on the creek, there to be used for the purpose of supplying the owners of such claims with water, that plaintiff have a right of way across defendant's ground. *Held*, that such complaint was demurrable for failure to show a public need for plaintiff's proposed ditch or the right of way over defendant's ground.

2. SAME—AMENDMENT.

Where a complaint to condemn land for a right of way for a pipe line was demurrable for failure to allege a public use, it might be corrected by amendment.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 523.]

3. SAME—CORPORATIONS.

Alaska Civ. Code (31 Stat. 321–494; chapter 22, § 204) authorizes the condemnation of land, among other things, for the construction of ditches, flumes, aqueducts, and pipes for public transportation of water to supply mines, etc. Section 210 provides that the complaint in proceedings to exercise the right of eminent domain shall contain the name of the "corporation," etc., in charge of the public use for which the property is sought. Section 225 authorizes foreign corporations created under the laws of any state or territory of the United States to do business in Alaska on complying with certain conditions, but there is no provision in the Code for the incorporation of domestic corporations, except towns and cemetery associations. *Held*, that a domesticated foreign corporation organized under the laws of California was entitled to exercise the right of eminent domain in Alaska to acquire land for a public pipe line to supply water for mining.

Appeal from the District Court of the United States for the Second Division of the District of Alaska.

The appellant (plaintiff in the court below) filed its complaint on the 31st day of August, 1903, in the District Court of Alaska, Second Division, at Nome, against the appellees (defendants below), seeking to condemn a right of way across the defendants' property on Dixon creek, in the Cape Nome Mining District, to convey water for the purpose of supplying mines below the defendants' property on the creek. On October 12, 1904, the appellant filed an amended complaint, in which it is alleged, among other things, that the plaintiff is a corporation organized and existing under and by virtue of the laws of the state of California, and is engaged in business and authorized to do business in the district of Alaska; that by its charter the plaintiff is authorized to appropriate water and water rights, to build canals, ditches, flumes, and aqueducts, and to lay pipe lines for supplying mines with water, for the general use of the public in said district of Alaska; that said plaintiff is actually engaged in said business, and has constructed a system of ditches, flumes, and pipe lines conveying water from Nome river and its tributaries to the tributaries of Snake river, and extending along the left limit of Dexter creek, and around and across Deer gulch, a tributary of Dexter creek, across Grass gulch, tributary of Dexter creek, to the left fork of Dexter creek; that the defendants are the owners of a certain placer mining claim situated on said Dexter creek, known as No. 6 Dexter creek

in the Cape Nome Recording District of Alaska, and the defendants are all the owners of said property; that said Dexter creek, from its source to its mouth, contains large deposits of dirt and gravel containing gold in paying quantities, and in order that the same can be mined and extracted therefrom it is necessary to bring water in ditches, canals, and pipe lines from a long distance in the manner as done by the plaintiff; that the natural flow of Dexter creek is entirely insufficient with which to mine said deposits of earth and gravel, and a large portion of the time said Dexter creek contains no water whatever; that said Dexter creek below said No. 6 Dexter creek to its mouth both in the creek bed and on the benches thereof, contains large deposits of gravel and earth with gold in paying quantities therein, and cannot be profitably mined otherwise than with a large volume of water; that it is necessary, in order to enable the plaintiff to convey its water to the placer claims on Dexter creek below said No. 6 Dexter creek, there to be used for the purpose of supplying the owners of said mining claims with water, that plaintiff have a right of way across said No. 6 Dexter creek, the property of defendants.

To the amended complaint the defendants demurred, on the grounds (1) that the amended complaint did not state facts sufficient to constitute a cause of action; (2) that the complaint does not state a public use which will authorize the plaintiff to exercise the right of eminent domain.

The court sustained the demurrer on both grounds, without leave to amend. The case has been brought here by appeal.

Joseph C. Campbell, William H. Metson, Thomas H. Breeze, and Ira D. Orton, for appellant.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts). There is no question but that the court was correct in sustaining the second ground of demurrer. The right of eminent domain can only be exercised in behalf of a public use authorized by law, and in the taking of property necessary to such public use the complaint or petition in such proceedings must show plainly and affirmatively the existence of the statutory authority for the public use, and the necessity of the property for such use. Fork Ridge Baptist Cemetery Ass'n v. Redd, 33 W. Va. 262, 10 S. E. 405, 406. Lewis on Eminent Domain, par. 353, states the law on the subject as follows:

"The petition should show the use or purpose for which the property is desired, and that it is within the statutory powers conferred. It should show a clear right to condemn the property described. Accordingly it must not only show that the property is wanted for a public use, but also that it is the use within the particular statute under which the proceedings are had."

The amended complaint nowhere alleges that the right of way sought to be condemned is necessary for a public use. It is alleged that Dexter creek from its source to its mouth contains large deposits of dirt and gravel containing gold in paying quantities, and, in order that the same may be mined and extracted therefrom, it is necessary to bring water in ditches, canals, and pipe lines from a long distance in the manner done by plaintiff. This may all be true, and still there be no public need for plaintiff's proposed ditch, or the right of way over defendant's ground. For aught that appears to the contrary, the plaintiff may itself own all of the ground it seeks to supply with water, or the owners, whoever they may be, may already be supplied with water from some other source, or they may not care to work the ground, or the ditch may be carried

over other ground. The public need is not stated; at most, it is only implied, and this is not sufficient. It is alleged, further, that it is necessary, in order to enable the plaintiff corporation to convey its water to the placer claims on Dexter creek below No. 6 Dexter creek, there to be used for the purpose of supplying the owners of said mining claims with water, that the plaintiff have a right of way across said No. 6 Dexter creek. This is not a statement that the property is required for a public use. On the contrary, it would seem to be a private enterprise, having no other purpose than supplying the owners of certain mining claims with water. It is true that, taking the whole complaint together, a public use as well as a public need may be inferred. But an inference is not sufficient in proceedings of this character. There must be a clear, positive statement that the property sought to be condemned is necessary for a public use authorized by law, and supported by a statement of facts from which the court can see that the property is intended to be used for that purpose. Pittsburg, etc., R. R. Co. v. Benwood Iron Works, 31 W. Va. 71, 8 S. E. 453, 2 L. R. A. 680.

But this defect in the amended complaint might be corrected by amendment, and sufficient facts stated to meet the requirement of the law in this respect. The court, however, sustained the demurrer without leave to amend. We must therefore consider the first cause of demurrer, namely, that the amended complaint does not state facts sufficient to constitute a cause of action. This ground of demurrer is based upon the allegation of the complaint that the plaintiff is a corporation organized under the laws of California. The court below held that a foreign corporation in Alaska could not invoke the jurisdiction of the court in its effort to condemn private property for a public use.

The general rule is that a foreign corporation can acquire no right to condemn lands in a state unless such right is expressly conferred by statute. But this rule has been so far modified that the power of a domestic corporation to take land by the right of eminent domain has been held to pass by implication to a foreign corporation, as, for example, where it succeeds by deed to the rights and powers of a domestic corporation. N. Y., N. H. & H. R. Co. v. Walsh, 38 N. E. 378, 42 Am. St. Rep. 734; Abbott v. N. Y. & N. E. R. Co., 145 Mass. 450, 15 N. E. 91; Thompson on Corporations, par. 7932.

If, then, the statutory right may be implied in favor of a foreign corporation, the plaintiff in error contends that the corporation plaintiff in this case is entitled to exercise the right of eminent domain under an implied authority conferred by the laws of Alaska. In the Civil Code of Alaska contained in the act of June 6, 1900 (31 Stat. 321–494; chapter 22, §§ 204–224, pp. 522–527), provision is made for proceedings in the exercise of the right of eminent domain. The right is to be exercised in behalf of certain public uses therein named; among others, those provided in section 204, with respect to

—"Wharves, docks, piers, chutes, booms, ferries, bridges of all kinds, private roads, plank and turnpike roads, railroads, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and farming neigh-

borhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable, and sites for reservoirs necessary for collecting and storing water; roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, and sites for reservoirs necessary for collecting and storing water; private roads leading from highways to residences, mines, or farms; telephone or electric light lines; telegraph lines."

In section 210 it is provided that the complaint in the proceedings for exercising the right of eminent domain must contain the name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff. But we fail to find anywhere in the statutes relating to Alaska any provision for the formation of domestic corporations, except for the incorporation of towns (Civ. Code, §§ 198–203), and the incorporation of cemetery associations (Civil Code, §§ 232–239). We do find, however, in the Civil Code, a chapter devoted to foreign corporations (chapter 23, §§ 225–231).

Section 225 of this chapter provides as follows:

"All corporations or joint stock companies organized under the laws of the United States, or the laws of any state or territory of the United States, shall, before doing business within the district, file in the office of the secretary of the district and in the office of the clerk of the district court for the division wherein they intend to carry on business, a duly authenticated copy of their charter or articles of incorporation, and also a statement, verified by the oath of the president and secretary of such corporation, and attested by a majority of its board of directors, showing," etc.

Then follows an enumeration of particulars required to be set forth in the statement, and the following provision:

"Such corporation or joint stock company shall also file, at the same time and in the same offices, a certificate, under the seal of the corporation and the signature of its president, vice president, or other acting head, and its secretary, if there be one, certifying that the corporation has consented to be sued in the courts of the district upon all causes of action arising against it in the district, and that service of process may be made upon some person, a resident of the district, whose name and place of residence shall be designated in such certificate, and such service, when so made upon such agent, shall be valid service on the corporation or company, and such agent shall reside at the principal place of business of such corporation or company in the district."

A similar statute in Missouri has been called an act "domesticating the foreign corporation." So. Ill. & Mo. Bridge Co. v. Stone, 174 Mo. 1, 30, 73 S. W. 453, 63 L. R. A. 301. Thompson on Corporations, par. 7933, refers to state statutes of this character as a mode adopted by the states for the domesticating of foreign corporations.

Was it intended by Congress that these domesticated corporations should have the power of exercising the right of eminent domain in behalf of the public uses named in the statute? It was to be exercised by corporations, but it was evidently not intended that such powers should be exercised by municipal corporations or cemetery associations. Indeed, it is manifest that it was intended that they should not be so exercised, since the public uses generally

granted to municipal corporations are elsewhere enumerated in the chapter, and cemetery associations have no occasion to employ these public uses in the exercise of their corporate powers. By this process of elimination the only corporations we have left capable of exercising these public uses in Alaska would be corporations organized under the laws of the United States, or of a state or of a territory where the formation of corporations is authorized by law; and such corporations, having been domesticated under the Civil Code of Alaska, answer every purpose of a domestic corporation.

The plaintiff is a corporation authorized by its charter to appropriate water and water rights, and to build canals, ditches, flumes, and aqueducts, and to lay pipes for supplying mines with water for the general use of the public in the district of Alaska. Upon complying with the requirements of chapter 23 of the Civil Code, it was authorized to transact business in the district of Alaska; that is to say, it was authorized to build the ditch mentioned in the complaint. Now, it may be made to appear that this ditch was for a public use, as has been attempted in the complaint; and if this public use is made to clearly appear, does it not follow that the plaintiff is entitled to exercise the right of eminent domain under the statute? We think this is the intent and fair construction of the statute, and that the demurrer on this ground should have been overruled. The demurrer must, however, be sustained on the ground first discussed.

The judgment of the court below is therefore affirmed, but with directions that plaintiff have leave to amend the complaint as indicated in this opinion.

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## HALPIN v. AMERMAN.

(Circuit Court of Appeals, Second Circuit. April 26, 1905.)

No. 207.

CIRCUIT COURT OF APPEALS—JURISDICTION.

The Circuit Court of Appeals is without jurisdiction of proceedings in error which involve only the question of the jurisdiction of the Circuit Court in the cause.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 1099.

Review of jurisdiction of Circuit Courts, see note to Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 48 C. C. A. 357.]

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

J. A. Allen, for plaintiff in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. This case involves the single question whether the court below had jurisdiction of the action. That question is one which this court cannot entertain, and which can only be reviewed by the Supreme Court upon writ of error taken direct from the Circuit Court to that court.

The writ of error must consequently be dismissed.

## THE GENESSEE.

(Circuit Court of Appeals, Second Circuit. April 13, 1905.)

No. 145.

TOWAGE—LIABILITY FOR LOSS OF TOW—NEGLIGENCE OF TUG.

Libelant's boat was one of 18 composing a tow being taken by a tug and helper from Perth Amboy to New York in the night. On account of a high wind, the tow lay to outside of another tow at a dock; the tide being then flood, and the wind from the opposite direction. When the tide changed during the night the tow started to swing around, and, under the influence of the wind and tide, a scow in the tier behind overran and sank libelant's boat. *Held*, that the accident was one which should have been anticipated and guarded against by the tug, and, in the absence of evidence that any effort was made in that behalf, she was liable for the loss.

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

H. G. Ward, for appellant.

La Roy S. Gove, for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. This is a case in which a vessel in tow has been lost, without any fault on her part, while in the custody of a tug. The libelant's boat, known as "No. 53," was one of a flotilla of 18 boats arranged by the master of the tug Genessee at Perth Amboy to be taken by that tug and her helper, the tug Ganoga, to New York. The flotilla was made up in tiers of four or five boats each, No. 53 being the outside starboard boat of the third tier. Behind No. 53 (being the outside starboard boat of the fourth tier) was the scow No. 47, attached to the stern of No. 53 by two lines, and also fastened by lines (one from her stern and the other from her bow) to the boat T. L. Rose and the boat Grace F.; the former being next inside the scow, and the latter next inside No. 53. The flotilla left Perth Amboy at midnight. When it neared Bay Wind the wind was so violent that the master of the Genessee deemed it unsafe to proceed, and decided to lay up near the dock there and wait for the wind to subside. Another tug and flotilla were lying next to the dock. The Genessee made fast to the other tug, and consequently the flotilla of the Genessee was obliged to lie outside of the other flotilla, and was exposed to the full force of the wind. The helper, Ganoga, made fast to the outside port boat of the first tier. At the time the tide was running flood, and, notwithstanding the wind was from the contrary direction, the effect of the tide was to stretch the boats out upon their hawsers. Before daylight the tide changed and the flotilla swung around, and under the influence of the wind the boats began to jump and pound against each other with great violence, and the scow No. 47 sank the libelant's boat. It is quite impossible to determine just how the accident happened, because in the dark no one saw or could see accurately what took place. We place no reliance upon the statement of the

captain of the libelant's boat. He was aroused to find his boat sinking. His thoughts were directed to his own safety, and, although he may have thought he saw what he testified to, his testimony has no value. We are satisfied that the scow ran on top of the libelant's boat, riding over her stern and pressing her down into the water until she sank. The scow was a heavily built boat, but was carrying no cargo. Her deck was about 9 feet above the water; her square stem projected at the deck 10 feet beyond the line at her bottom; and she was 33 feet beam. The libelant's boat was of 26 feet beam. She was heavily laden, and her deck was only 2 or 3 feet above the water line. Notwithstanding the scow was fastened by lines to the T. L. Rose and the Grace F., these lines, during the forward movements of those vessels, and while they were forging ahead, would not restrain the scow from running over the libelant's boat. The relative arrangement of the scow with the libelant's boat may have been a reasonably safe one while the flotilla was under way and proceeding against the tide, but when it lay to during the storm, and a change of tide was near, that arrangement involved a risk that just such an accident might happen as actually did happen. Because of the heavy wind behind the flotilla, the libelant's boat, under the circumstances, was exposed to peril from the sharp overhanging bow of the scow, and we think that this was a peril which ought to have been anticipated by those who were responsible for the safety of the flotilla. No effort was made on the part of the tug or of her helper, after the flotilla laid to, to ascertain whether the rear boats of the flotilla were riding safely, or whether anything ought to be done to mitigate the risks to which they were exposed. The case is a proper one for the application of the rule that a presumption of negligence arises against a bailee for hire when it appears that the subject of the bailment has been injured or destroyed while within his custody by an accident such as in the ordinary course of things does not happen when a bailee uses due care.

The decree is affirmed, with interest and costs.

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## PARKS CO. v. CITY OF DECATUR, ILLINOIS.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1905.)

No. 1,385.

1. MUNICIPAL CORPORATIONS—ACTION AGAINST—JURISDICTION.
   A municipal corporation is not suable by attachment in the courts of another state.
   [Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 2195, 2201.]

2. COSTS—POWER TO AWARD—DISMISSAL FOR WANT OF JURISDICTION.
   A federal court has no authority to award costs on dismissal of an action on the ground that the state court from which it was removed was without jurisdiction.
   [Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 16.]

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

D. W. Sanders and Wm. Furlong, for plaintiff in error.

C. C. Walters, J. H. Latham, and Albert S. Brandeis, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. The plaintiff in error, a corporation of Kentucky, instituted this action against the city of Decatur, a municipal corporation of Illinois, by petition conforming to the Civil Code of Practice of Kentucky, in the Circuit Court for Jefferson county in the last-named state, and attached a fund in the German Insurance Bank of Louisville. A warning order was issued summoning the city of Decatur to appear. The writ of attachment was served on the bank, with a notice that the object of the action was to attach all money, choses in action, property, or other evidence of debt in its possession belonging to the city of Decatur. In due season the principal defendant filed its petition and bond for removal of the cause, on the ground of diversity of citizenship of the parties, into the Circuit Court of the United States for the Western District of Kentucky. When the cause reached that court it was assigned to the law docket. The bank filed its answer as garnishee, admitting that it held a fund of $3,000 which was claimed by the city of Decatur by virtue of a check drawn by the plaintiff in favor of the city of Decatur and certified by the bank.

The grounds of the action, as stated in the petition of the plaintiff, were that the plaintiff had on September 16, 1902, made a bid or proposal to the defendant for making an improvement of one of its streets for a certain price, and, as evidence of its good faith, had deposited with the city a certified check for $3,000; that afterwards the board of local improvements of the city declared the said bid null and void, and forfeited said check, and thereupon the city unlawfully, without cause, and without giving to the plaintiff any notice or opportunity to be heard, appropriated the said check to its own use, and thereby deprived the plaintiff of this, its said property, without due process of law. And thereupon the petition proceeds to state, "that, by reason of the facts herein set out, the defendant is justly indebted to this plaintiff for money had and received without consideration therefor, that its said claim is just, that plaintiff ought to recover thereon said sum of three thousand dollars ($3,000), and that the defendant is a foreign corporation of the state of Kentucky." The certified check mentioned in this petition is the same certified check mentioned in the answer of the garnishee.

The cause having been docketed in the court below, the defendant, appearing specially for that purpose, filed a demurrer to the petition, showing cause in the language following: "That this court has not jurisdiction of the person of defendant or of the subject-matter of this suit, or of the res or thing attached herein."

And the defendant moved that the cause be dismissed. Concurrently, the plaintiff moved that the cause be remanded to the state court. The court denied the motions to remand and to dismiss, and overruled the demurrer. Thereupon the defendant, not waiving its objection to the jurisdiction, answered the petition. It is unnecessary to set out the answer in full. It is sufficient for the purposes of the case to say that it claimed to have lawfully forfeited and appropriated the check for $3,000 by virtue of the statutes of Illinois relating to contracts for the making of public improvements by the municipalities of that state. Hurd's Rev. St. Ill. c. 24, as amended by Act May 9, 1901 (Acts 1901, p. 113). Sections 76 and 77, as amended by the act of 1901, provide as follows:

"Sec. 76. * * * All proposals or bids offered shall be accompanied by cash, or by a check payable to the order of the president of the board of local improvements in his official capacity, certified by a responsible bank, for an amount which shall not be less than ten (10) per centum of the aggregate of the proposal. Said proposals or bids shall be delivered to the board of local improvements, and said board shall, in open session, at the time and place fixed in said notice, examine and publicly declare the same. Provided, however, that no proposals nor bids shall be considered unless accompanied by such check or cash.

"Sec. 77. * * * But the checks accompanying such accepted proposals or bids shall be retained in the possession of the president of the said board until the contract for doing said work, as hereinafter provided, has been entered into, either by said lowest responsible bidder or by the owners of a majority of the frontage, whereupon said certified check shall be returned to said bidder. But if the said bidder fails, neglects or refuses to enter into a contract to perform said work or improvement, as herein provided, then the certified check accompanying his bid, and the amount therein mentioned, shall be declared to be forfeited to said city, village or town, and shall be collected by it and paid into its fund for the repairing and maintenance of like improvements; and any bonds forfeited may be prosecuted, and the amount due thereon collected and paid into the same fund."

The default of the plaintiff, upon which the defendant had forfeited and appropriated the check, consisted in the alleged failure of the plaintiff to execute within the stipulated time a proper contract for the performance of the work, and give a proper bond therefor.

A stipulation waiving a jury trial was filed, the facts were agreed upon, and the cause submitted to the court. Because of the judgment finally entered, it is needless to recapitulate the agreed facts. The court made certain findings of law concerning the jurisdictional question as well as the merits. In view of the judgment, these latter—those concerning the merits—may also be passed over. The judgment entered by direction of the court was as follows:

"In consideration of the premises, it is considered and adjudged by the court that the plaintiff's petition be, and it is, dismissed, but that this dismissal is without prejudice to the right of the plaintiff again to sue upon the same cause of action in any court of competent jurisdiction in the state of Illinois. It is further considered and adjudged by the court that the attachment levied on the fund in the hands of the garnishee, the German Insurance Bank, be, and it is now, discharged. It is further considered and adjudged by the court that the defendant recover of the plaintiff its costs herein expended, and may have execution."

To each part of this judgment the plaintiff excepted.

It appears that the opinion of the court in respect to its jurisdiction, given at the hearing of the demurrer, was changed by further consideration, and the question for us is whether its final conclusion is right. The jurisdiction of the court below depended on the jurisdiction of the state court from which the cause was removed. No doubt is entertained that when the defendant is a private citizen of another state, and the plaintiff is either an individual or a corporation having an office and doing business in Kentucky, the statutes of the latter state are sufficient to give the courts of that state jurisdiction of the parties for the purpose of reaching the assets of the defendant within the state and appropriating them to the payment of a judgment which the plaintiff may establish, notwithstanding no personal service of process could be had. But the difficulty here lies in the local and restricted legal habitation of the defendant. In order to maintain the attachment, the plaintiff must obtain a judgment, and his cause of action must be justiciable in Kentucky. The personal presence of the defendant may be dispensed with, but the case must be such that upon actual service of process the court would be authorized to proceed to render a judgment binding the defendant conclusively for all the purposes of a judgment. All defenses are open to the defendant which would be if there were no attachment, and, if the defendant prevails in the principal suit, the attachment fails. The remedy is ancillary merely. 4 Cyc. 398. As elsewhere, the municipalities of Illinois are localized in their sphere of operations. They have no legal presence elsewhere, and its officials do not and cannot ordinarily represent it abroad, certainly not for the purpose of receiving service of process against it, or giving jurisdiction over it, in foreign courts. For this reason, and because of the public inconvenience resulting from carrying on a litigation in a distant forum, the rule has become quite generally recognized that such corporations cannot be sued elsewhere than in the venue of their location; and because the venue of the courts in the counties of England and in the states of the Union is usually, if not universally, coextensive with the boundaries of such counties, the rule is stated in the terms that a suit against a city or town or other limited municipal district must be brought in the courts of the county, and the county itself is only suable there. Pack v. Greenbush, 62 Mich. 122, 28 N. W. 746; Lehigh Co. v. Kleckner, 5 Watts & S. 181; Oil City v. McAboy, 74 Pa. 249; Buck v. Eureka, 97 Cal. 135, 31 Pac. 845; Getman v. New York, 66 Hun, 236, 21 N. Y. Supp. 116; Jones v. Statesville, 97 N. C. 86, 2 S. E. 346; North Yakima v. Superior Court, 4 Wash. 655, 30 Pac. 1053; 14 Encl. of Pl. & Pr. 228, where the rule is stated as follows:

"Actions against municipal corporations, being local and not transitory, must be brought in the courts of the county where such corporations are situated. Courts of other counties have no jurisdiction of suits against them unless such jurisdiction is conferred by express legislative provision."

And this appears to be the law of Illinois concerning its municipalities. Schuyler County v. Mercer County, 4 Gilman, 20; Rock Island County v. State Bank, 31 Ill. 544.

In the federal courts, because the venue from which the jury comes and the bounds of jurisdiction are larger, the amenability of the local municipalities to the service of process is extended correspondingly. But the analogy is complete. In each case the locality of the defendant is within the bounds of the territorial jurisdiction. In Mercer County v. Cowles, 7 Wall. 118, 19 L. Ed. 87, one of the reasons assigned by the defendant why the county could not be sued in the federal court was that a statute of the state required that the action should be brought in the state court of that county. But it was held that such legislation could not defeat the constitutional right of the citizen of another state to bring suit in the courts of the United States. But that was a suit brought in the district of which Mercer county formed a part. The decision furnishes no warrant for holding that Mercer county could have been sued in one of the districts of Kentucky or in any other district of another state. The federal court will, as a general rule, follow the decisions of the state court in regard to such a subject, the exception being that it will not do so where by so doing they would disregard some provision of the Constitution or law of the United States. Cooper v. Reynolds, 10 Wall. 316, 19 L. Ed. 931, is much relied on by the plaintiff. What was there said by Mr. Justice Miller has reference to cases where the action is transitory, and the court would have had jurisdiction if service of process could be had, and not to cases where from the nature of the action it is localized. In Goldstein v. City of New Orleans (C. C.) 38 Fed. 626, before Judges Pardee and Billings, the plaintiff sued the city and several municipalities of Louisiana in the district court of the parish of Jefferson upon obligations which, so far as the city was concerned, were its several obligations, and the law of the state entitled it to be sued in its own parish. The case was removed into the Circuit Court of the United States, the plaintiff being an alien. The city pleaded to the jurisdiction. It was held that the jurisdiction of the federal court depended upon that of the state court, and that, as the state court was without jurisdiction, the federal court had none, and the cause was dismissed.

We do not fail to notice the distinction suggested by counsel for the plaintiff between those obligations of a municipality which result from the exercise of its governmental powers and those which result from the exercise of its rights as a proprietor. But we do not perceive that the distinction is material to the present case. In the cases to which reference has been herein made, the cause of action was generally of a contractual nature, and therefore they are strictly applicable.

It will have been observed that the plaintiff adopts the theory that the defendant has converted the check to its own use, and is liable to the plaintiff as for money had and received; and the plaintiff pursues the fund as one belonging to the defendant, and is seeking to subject it to the payment of a judgment to be obtained for the conversion of the check. The fact that the fund is the subject of the check plays no part in the case. The former ownership of it by the plaintiff is immaterial. The case is the same as if the de-

fendant had acquired it from a stranger. If this $3,000 were a distinct and tangible thing in the possession of the bank, and held by it for the defendant, which the plaintiff claimed to be its own, other conditions would exist, and it may be that the plaintiff could, by a direct proceeding against the bank, recover it. We do not say how this might be. But here the plaintiff abandons all claim to ownership to the defendant, and seeks to subject it to the satisfaction of an obligation which it says the defendant owes it. The essential conditions are therefore the same as if the money in the hands of the bank had come from another source than the plaintiff.

We think the judgment is right, except so much of it as awards costs to the defendant. The suit was properly dismissed because of the lack of jurisdiction in the Jefferson circuit court. If that court had possessed jurisdiction, and the cause had wrongfully been removed to the Circuit Court of the United States, the latter, on remanding it, might have imposed costs against the party procuring the removal under section 5 of the act of March 3, 1875, c. 137, 18 Stat. 472 [1 U. S. Comp. St. 1901, p. 511]. But here there was a lack of jurisdiction from the beginning, and in such case there is no authority for awarding costs.

The judgment will therefore be affirmed, except as to that part of it which awards costs, and as to that it will be reversed. Neither party will recover costs in this court.

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## THE CITY OF BIRMINGHAM.

### OCEAN S. S. CO. OF SAVANNAH v. P. SANDFORD ROSS, Inc.

(Circuit Court of Appeals, Second Circuit, May 6, 1905. On Rehearing, June 2, 1905.)

Nos. 186, 187.

1. COLLISION—STEAMER AND ANCHORED DREDGE—NEGLIGENT NAVIGATION.
   A steamer passing up the Savannah river at night, when 2,300 feet away, saw the lights of a dredge, which indicated that she was anchored to the south of the center of the channel, and that vessels should pass to the northward of her. The night was clear and still, the tide ebb, and there were no unusual conditions to prevent the steamer from keeping on the right-hand side of the channel, where there was 500 feet of deep water north of the dredge and unobstructed; but she failed to make allowance for the effect of the tide, and kept to the south of the range line, coming into collision with the dredge and sinking her. *Held*, that the steamer was clearly in fault.

2. SAME—ANCHORING DREDGE IN NARROW CHANNEL.
   A dredge, anchored at night within 200 feet of the center of the narrow channel of the Savannah river, at a point not far above a sharp bend, and where a 7-foot tide ebbed and flowed, was struck and sunk by an ascending steamer. The dredge was of light draft, and could have anchored in a place of safety entirely outside the channel; the only reason given for not doing so being the inconvenience of moving from the place where she was working. *Held*, that such anchorage obstructed the passage of other vessels, in violation of section 15 of Act March 3, 1899, c. 425, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543], and that the dredge was chargeable with contributory fault for the collision.

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

For opinion below, see 125 Fed. 506.

On appeal from a final decree of the District Court for the Eastern District of New York, holding the steamship City of Birmingham solely at fault for the sinking of Dredge No. 7 in the Savannah river on the morning of April 15, 1902. A cross-libel by the Ocean Steamship Company, owner of the City of Birmingham, against P. Sandford Ross, Incorporated, owner of the dredge, was dismissed. On March 23, 1904, final decree was entered against the City of Birmingham for damages and costs in the sum of $32.688.42 and against the Ocean Steamship Company in the second action for $30.70 costs. The steamship company appeals to this court.

Charles S. Haight, for appellant.

R. D. Benedict, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The salient facts have been carefully collected and concisely stated by the district judge. It is unnecessary to repeat them.

The Steamship.

The negligence of the steamship is clearly established. No difficult problem of navigation confronted her. The night was clear, there was no wind, the tide was ebb, a deep navigable channel in the center of the river was free from all obstructions, and to the north of the range line there was good water for more than 400 feet; no vessel was approaching and the lights on the dredge and the range lights on the shore were all set and burning. The steamship was proceeding up the river to the city of Savannah over a perfectly well known course, her master having been 30 years on the Savannah line. There were no unusual conditions, either external or on board the ship, to contend with. She knew that the dredge was anchored south of the center line of the channel and if she had followed the elementary rules of navigation, namely, gone to the right and north of the center line, she would have passed safely with ample space to spare. There were undoubtedly some difficulties in making the turn at the Oyster Bed, which will be considered later in discussing the conduct of the dredge, but there was nothing which could not have been readily met and surmounted by the exercise of ordinary skill and prudence.

It would be an extraordinary proposition that a steamer whose deepest draft is 15 feet 5 inches can be held blameless for colliding with an anchored dredge, which she should pass port to port, when there is nearly 500 feet of water, 22 feet deep, on the port side of the dredge, the situation being seen and understood when the steamer is half a mile distant.

It is argued that the sweep of the ebb tide renders it difficult to swing a vessel to starboard after making the turn at the Oyster Bed. This is true, but it is not unusual. Such situations are constantly encountered in the navigation of rivers and narrow channels where the tide ebbs and flows. An experienced mariner has no difficulty in dealing with such conditions.

The initial fault of the Birmingham was in making the turn so close to Buoy No. 9. The chart shows this buoy about 300 feet south of the range line. The steamer should have been on the range or north of it and yet she turned with the buoy on her port hand only 40 feet distant and never thereafter got to the northward of the range, or on the range, or even northward of the dredge. The dredge was reported before the steamer reached Buoy No. 9. The distance from this buoy to the dredge was 2,350 feet. The moment the master of the steamer saw the green light under the three white vertical lights he knew, first, that they were the lights of a dredge; second, that the dredge was stationary; third, that she was anchored south of the center of the channel; and, fourth, that he was required to pass to the northward. Knowing all this and also that the tide might sheer his bow to the southward it would seem to be his manifest duty to guard against danger by keeping as far north as possible in making the turn; certainly no justification is shown for making the turn so far south of the range line. It is said that he could not know the precise location of the dredge. Assuming this to be true he certainly could approximate it very closely, for in addition to the facts already stated he had the red lights on the Oyster Bed and Long Island to aid him. He testifies as follows:

"When I was at Buoy No. 9, as I turned that the green light of the dredge was open to starboard of the red light on Long Island. Looked so to me. * * * Looked as though it was open to the northward, to the starboard."

How could any plainer directions have been imparted? If he kept on with the green light opened to starboard he would disregard the signal, disobey the local rule and either run his vessel aground or pass to the south of the dredge. If he got the green and red light directly in range and kept on he would surely end in a head-on collision. If he opened the green light a little to port he would obey every rule of navigation and pass in perfect safety. This he did not do. He never opened the green light to port and was never in a position to pass the dredge to the northward. He did those things which he ought not to have done and he left undone the one supreme thing which he should have done. Before reaching Buoy No. 9 and after making the turn he should have kept on the range or north of the range. No sufficient reason is given for not doing so.

## The Dredge.

The testimony is so conflicting that it is impossible to fix the exact location of the dredge before the accident, but after she sank her position was located with substantial accuracy. She was 90 feet long, 34 feet beam and drew 8½ feet forward when coaled. Prior to the collision she was heading down stream. After the collision she lay almost at right angles to her former position, with her bow 90 feet and her stern, of course, 180 feet from the range or center line of the channel. She sank where the river was between 18 and 19 feet deep at mean low water. The blow was delivered on the starboard bow of the dredge, the tendency being to turn the bow towards the center of the river. The starboard breast line

was broken by the impact, but the starboard quarter line held. It is, therefore, improbable that the stern of the dredge was pushed for any considerable distance towards the center of the river.

We cannot resist the conclusion that if the bow of the dredge as she lay on the bottom of the river had been turned so that she was parallel with the range line, her distance from the line would then have approximated closely to that distance prior to the collision. If the momentum of the steamer merely turned her about with the stern line as a pivot it is clear that she could not have been more than 150 feet from the line. But the steamer was headed about northwest and being over three times the length of the dredge and moving at a speed sufficient to cut through the heavy bow timbers of the latter, the presumption is almost conclusive that she must have pushed the dredge ahead of her in the direction in which she was moving. Indeed, it is hardly disputed that the dredge was moved in a northwesterly direction between 25 and 30 feet. It is true that the tide may have driven her back a short distance before she finally settled on the bottom, but we think it is safe to say that the dredge before the collision was 25 feet farther south from the range line than was the sunken wreck if placed in the position indicated above. The district judge found that the dredge was about 200 feet south of the center line of the channel and we are satisfied that this conclusion is substantially correct. The overwhelming weight of testimony establishes the fact that she could not have been nearer than 150 feet to the center line, or farther than 225 feet from it, and we think this finding sufficiently presents the remaining question, namely, was the dredge at fault in anchoring where she did?

The Savannah river is a narrow, winding stream where a seven-foot tide ebbs and flows. One of the sharpest and most difficult turns is at the Oyster Bed, especially when the tide is ebb, as an ascending vessel receives the full force of the current alternately on her port and starboard bow. The danger is enhanced at night owing to the insufficiency of the ranges and the necessity for reduced speed which increases the liability to sheer. The dredge was moored by means of a central spud and five lines extending to anchors several hundred feet distant. One of these lines extended directly back from the stern and there were two lines on each side, one extending laterally from a point a few feet aft of the bow and the other a few feet forward of the stern. When these lines were taut the dredge occupied practically the entire channel and even when slackened and weighted they were a menace to navigation, sometimes being drawn taut by the action of the elements and fouling the propellers of passing steamers. It is conceded that the dredge, being of light draft, could have removed entirely from the theatre of navigation, beyond the limits of the channel made by the 18-foot curves, and anchored at a point where no deep-draft vessel could reach her. The possibility and the feasibility of such a course is admitted, but it is said that it would have consumed time and would have been inconvenient. It is argued that article 25 of the rules for preventing collisions requires steam vessels

in narrow channels, when safe and practicable, to keep to the right of the center line of the channel, and that the dredge was justified in supposing that she was anchored where vessels coming up the river could not reach her. It seems to us that this contention leaves out of view the important consideration that vessels were going down as well as coming up the river and that they, too, were directed by the signal lights to pass to the north of the dredge. Thus by blocking several hundred feet of navigable water to the southward the dredge limited by so much the space in which to maneuver and, in case of meeting vessels at that point, increased immensely the chances of collision.

The act of March 3, 1899, c. 425, 30 Stat. 1152, § 15 (U. S. Comp. St. 1901, p. 3543), provides "that it shall be unlawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft." It seems to us that a dredge anchored at night 200 feet from the center of the channel of a narrow river, where a seven-foot tide ebbs and flows and within half a mile of a sharp bend, is within the mischief if not within the strict letter of the statute. Such a craft does not prevent navigation in the sense of stopping it altogether, but by crowding all navigation practically into the northern half of the channel she obstructs the passage of other vessels; that is, she hinders, impedes, embarrasses and interrupts their progress. We are not dealing here with the case of a vessel anchored in a wide, straight channel, where there is ample room to pass on either side. In the John H. Starin, 122 Fed. 236, 58 C. C. A. 600, we had such a situation under consideration and, though we did not decide that it was negligence per se, we did hold that the precautions taken by a vessel anchoring in a dangerous position should be commensurate with the perils assumed. The Clara, 102 U. S. 200, 26 L. Ed. 145; The Sapphire, 11 Wall. 164, 170, 20 L. Ed. 127.

The navigation of the Savannah river above the Oyster Bed at night was difficult enough in any circumstances. Placing the dredge within 200 feet of the center line added a new and wholly unnecessary complication to a problem already sufficiently perplexing. The courts should not encourage laxity and shiftlessness by rewarding a master who places his craft in a position of danger simply because it is too much trouble to place her in a position of safety. Where human life and property are at stake, the consequences flowing from a dereliction of duty are so momentous that the courts should not permit considerations based upon convenience alone to be used as an excuse by one who has failed to take every reasonable precaution to insure safety. A finding in favor of the dredge will place a premium on carelessness. Those having such craft in charge will hardly deem it necessary to take the trouble to move them to places of safety. Indeed, it is not easy to see how, in such an event, it will be possible, hereafter, to find a dredge in fault even though she anchors directly on the center line so long as half the channel is left open. The argument is identical, differing only in degree, whether the dredge be on the line or 100 or 200 feet distant from it. We are of the opinion that, in

the circumstances disclosed, a dredge must show some controlling reason for monopolizing the navigable water of the channel.

The foregoing views are in accord with the following authorities: In The Milligan (D. C.) 12 Fed. 338, the court says:

"That each party was in fault, I have no doubt—the sloop for lying at anchor where she did, the bark and tug for failing to keep off. While the sloop was not lying upon the range of lights, she was dangerously near it,—subjecting passing vessels to the exercise of unusual care. The position was not forced upon her; she might have anchored lower down (before reaching it, or by floating back when the tide turned). She would thus have been out of the way, and out of danger. Her anchorage so near the centre of a narrow channel was inexcusable."

In The Itasca (D. C.) 117 Fed. 885, the collision occurred between a steamer and a dredge in the Savannah river. The syllabus is as follows:

"A dredge anchored at night in a navigable channel of a river was sunk in collision with a passing steamer. Owing to her light draught, the dredge might readily and with little inconvenience have anchored further inshore in a place of safety, and she therefore violated the statute (Act March 3, 1899, 30 Stat. 1152, c. 425 [U. S. Comp. St. 1901, p. 3543]) in taking the more exposed position. On the other hand, her lights were burning, and were seen by the steamer, the night was calm and bright, and there was ample room for the steamer to have passed at a safe distance. *Held*, that both vessels were in fault, and the damage should be divided."

See also as bearing on the question involved the following: Strout v. Foster, 1 How. 89, 11 L. Ed. 58; The Maling (D. C.) 110 Fed. 227, 236; The Banan (D. C.) 116 Fed. 900; The Passaic (D. C.) 76 Fed. 460.

We have examined the assignments of error disputing the correctness of the assessment of damages and are of the opinion that there was no error in allowing interest and demurrage and that the amount awarded is not excessive.

It follows that the decree must be reversed, with costs in this court (The America, 92 U. S. 432, 23 L. Ed. 724) and the cause is remanded to the District Court with directions to apportion the damages and the costs in that court equally between the respective vessels.

## On Rehearing.

PER CURIAM. The application for a hearing is denied. We are unable to perceive that the petition suggests any proposition which was not carefully considered.

We do not feel justified in certifying the question, regarding Act March 3, 1899, c. 425, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543], as requested, for the reasons:

First. It is not a question concerning which we desire the instruction of the Supreme Court. We entertain no doubt as to the proper construction of the statute.

Second. Were the question answered in the negative, it would not change the result. Irrespective of the statute, the dredge was at fault in anchoring where she did at night, when there was nothing to prevent her from removing to a position where it would have been impossible for steamers to have reached her.

## OEHRLE et al. v. WILLIAM H. HORSTMAN CO.

(Circuit Court of Appeals, Third Circuit. May 23, 1905.)

No. 5.

PATENTS—INFRINGEMENT—ORNAMENTAL CORDS.

The Oehrle patent, No. 599,191, for an improvement in ornamental ropes or cords, construed, and *held* not infringed.

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

For opinion below, see 131 Fed. 487.

Wm. C. Strawbridge, for appellants.

Henry N. Paul, Jr., for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

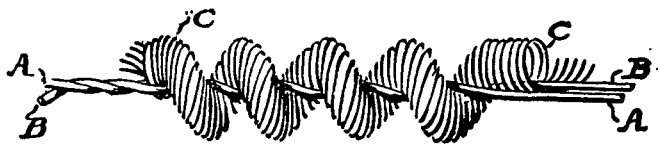
DALLAS, Circuit Judge. Patent No. 599,191, with which we are concerned upon this appeal, was granted to the appellants, as assignees of Franklin W. Oehrle, upon February 15, 1898, for improvements in ornamental ropes or cords. The specification contains these explanatory statements:

"My invention relates to a class of ornamental ropes or cords formed as to their exteriors of colored silk or other ornamental thread, and largely employed in the construction of portières and in connection with curtains.

"It is the object of my invention to produce an ornamental rope or cord of simple and inexpensive construction, but more ornamental in appearance than such devices as heretofore manufactured."

Disregarding the matter of economy in construction, which is not material in the present case, it thus appears that the object of the patentee was to improve the articles to which his invention related by making them more ornamental in appearance; and as the patent is for the improved cord itself, as an article of manufacture, and not for a method of manufacturing it, attention is to be directed to the characteristic ornamental feature which, in its finished state, it embodies. Fig. 1 of the patent (here reproduced) is a view in side elevation of a piece of ornamental rope or cord which is admitted to be of a well-known construction:

*FIG. 1.*




In this figure, as the specification instructs us—

"A B are wires, or twines, formed of hemp or other strong nonyielding material. The strands A B may each of course be composed partly of wire and partly of fibrous material, or one of said strands may be of wire and the other of fibrous material, or both of wire or both of fibrous material, as may be de-

sired, the object being to form a core for the ornamental rope or cord to be produced.

"Ornamental threads which may be of silk, linen, cotton, tinsel, or other material, or a combination of these materials or any of them, are worked up into a 'loop' strand C conveniently by being coiled into the form of a tube of very considerable diameter, the threads being preferably placed so close together as to give said tubular coil a solid appearance or effect.

"To unite said tubular coil to the core, one of the strands A B extends through its hollow interior, as shown in Fgures 1, 2, and 3, so that the wall of said coil is caught and tightly held between said strands A B, with the result that the body of the coil extends laterally away from said strands.

"By reason of the strands A B being twisted upon each other, as shown clearly in Figure 1, the loop strand formed as a tubular coil is caused to assume the form of a continuous spiral, the effect of which is highly ornamental.

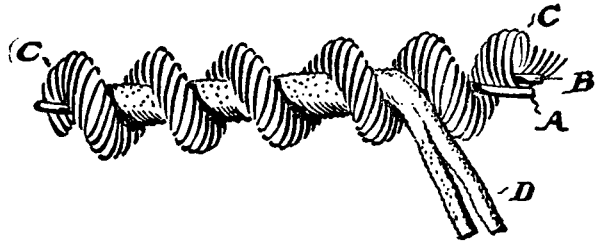
"The structure thus formed, however, is less ornamental than it would otherwise be, by reason of the exposure to view of one of the strands A B throughout the length of the rope, and further because said continuous spiral appears as a hollow or coreless spiral or one not formed on a substantial core, and lacks the appearance of strength or durability."

It was to "overcome both these defects" that the patentee devised his improvement, and this he tells us he accomplished—

"By providing an ornamental cord or group of cords or threads or tape D, which I wind about the structure shown in Figure 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 Figure 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."

Fig. 2, referred to in the immediately preceding extract, is the only one of the patent drawings, other than that already copied, which need be inserted in this opinion. It is designated by the patentee as "a view in side elevation of the cord represented in Figure 1, as modified to embody my invention."

FIG. 2.




The claims are:

"(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.

"(2) 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."

The court below did not pass upon the validity of the patent in suit, and, as it is unnecessary for us to do so, we will not express any opinion upon that subject. The decree appealed from was based solely upon the finding that the charge of infringement had not been sustained, and that finding only will be considered.

The cord shown in Fig. 1 of the patent being admittedly old, it becomes apparent upon reading either of these claims in connection with that figure, and with Fig. 2, which "embodies the invention," that the utmost extent of Oehrle's contribution to the art was an ornamental filling strand wound upon the core "in the spiral space or spaces left between the projecting loops," or (as per claim 2) "in the space not occupied by the tubular coil." This filling strand, and the effect produced by it, are typically and distinctly shown in Fig. 2. It, no doubt, makes the cord "more ornamental in appearance," and does remedy the particular defects which Oehrle said he proposed to overcome. It prevents "the exposure to view of one of the strands A B," and it increases "the apparent strength of the completed cord." For the purposes of this case, then, let it be conceded that the addition of this filling strand to the preexistent ornamental ropes involved invention, and that the owners of this patent are entitled to protection against its unlicensed appropriation. But of anything more than this they could not be accorded a monopoly without depriving the public of the unrestricted use of things of general knowledge and of common right.

In the cords of the appellee the filling strand of the patent is not present. They are made after the manner of the prior art; and without giving to these claims a breadth of construction which, in view of that art, is wholly inadmissible, the appellee's structure cannot be held to conflict with them. It is produced by entwining with the rope shown in Fig. 1 another rope, which, except in color, is but a duplicate of the former, so as to form a single rope of two colors. This, too, may be said to enhance the ornamental appearance of the cord; but it does not do so in any way contemplated by Oehrle, nor by his means. The two-color effect produced by the appellee is attained by a mere duplication of the admittedly old structure, and by entwining the parts which result from that duplication in a manner long practiced and well understood. This construction was not claimed by Oehrle, and if it had been his claim could not have been properly allowed. Walker on Patents, § 34, and cases there cited.

We therefore concur in the learned judge's finding of noninfringement, and accordingly the decree dismissing the bill of complaint is affirmed.

## MURRAY v. ORR & LOCKETT HARDWARE CO.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

No. 1,110.

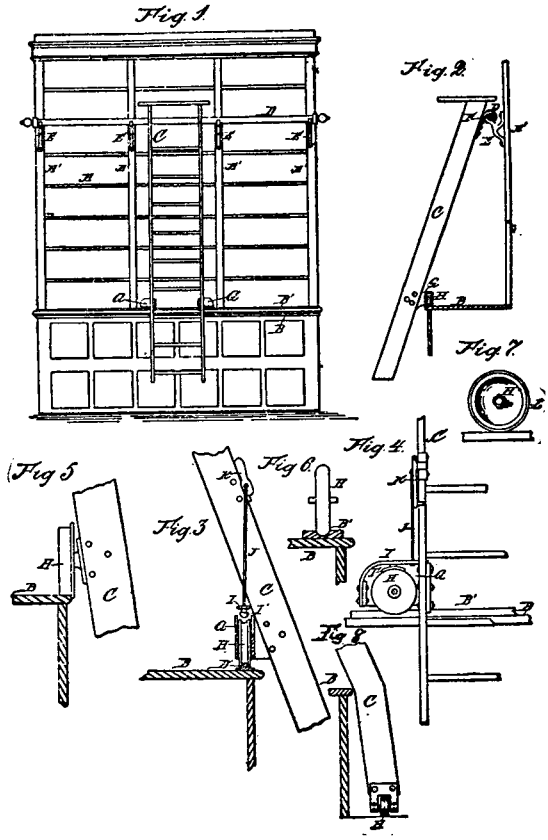
PATENTS—INFRINGEMENT—STORE SERVICE LADDERS.

The Murray patent, No. 442,531, for a store service ladder, in which the weight of the ladder and the person thereon is supported by travelers on the base shelf or floor, and having hooked bearings near the upper end, which engage with a rod, to prevent tilting or displacement, was not anticipated in the prior art, and discloses patentable invention. Also *held* infringed.

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

The bill in the court below was to restrain infringement of letters patent No. 442,531, issued December 9th, 1890, to Murray, for store service ladders. There is no substantial question that defendant's device infringes this patent, for it is practically the same as appellants. The bill was dismissed on the ground that the patent itself was invalid.

The Murray patent, with its drawings, is as follows:



"This invention," says the inventor, "relates to ladders for use in stores, libraries, &c., where it is desirable to reach articles placed too high to be reached from the floor; and the object is to provide a step service combining neatness and cheapness in construction and having in view the greatest ease and safety, not only in ascending and descending with a load of objects, but also of propelling ladder and operator from one part to more or less distant parts of the room. These objects are attained to a high degree in the construction, which I claim to be novel, of reversing the customary order of having the travelers and bearings at the top and the guide-bearings at or near the bottom of the ladder, whereby the travelers are placed beneath and near to the weight of the operator, and in a large degree the guide-bearings are relieved from the weight of the operator.

"The invention further consists in providing a brake for the travelers, thus making a secure immovable base for the ladder when desired.

"In the accompanying drawings, forming a part of this specification, Figure 1 is a front elevation of a device embodying my invention. Fig. 2 is a side elevation of the same, the base and pole or guide-rod being in section. Fig. 3 is a fragmentary side elevation, partly in section, showing the construction of the brake. Fig. 4 is a fragmentary front elevation showing the mounting of the travelers and the arrangement of the brake. Fig. 5 is a fragmentary side elevation showing a modified form of traveler. Fig. 6 shows another modification of the same and its track; Fig. 7, a side elevation; and Fig. 8 is a fragmentary side elevation, showing the traveler mounted at the lower end of the ladder, so as to run on the floor.

"Similar letters of reference indicate corresponding parts.

"Referring to the drawings. A represents a common style of shelving as used in stores, libraries, &c., and B the projecting base-shelf thereof. On suitable posts or columns A' is mounted by brackets E E a horizontal pole or guide-rod D, which may be of wood or metal, (preferably tubular,) as desired.

"C is a ladder provided with hooks F F, engaging loosely the guide-rod. It will be seen that the inner ends of these hooks pass a little below the center of the guide-rod, so that there is no possibility of their being tilted out of engagement with said guide-rod by the operator stepping on the ladder below the lower bearings. To allow for the free passage of the hooks along the guide-rod, that part of the bracket engaging with the guide-rod is made to encircle it somewhat less than half the circumference, as shown in Fig. 2.

"To the lower part of the ladder are secured bearings G G, and in these are mounted travelers H H. These bearings, as will be seen, extend laterally from the ladder, the extent thereof being as much as may be desirable to give stability to the ladder against tilting sidewise.

"In the drawings various forms of travelers are illustrated. Thus in Fig. 3 a grooved traveler is shown running on a convex track B', secured to the base-shelf B. In Fig. 6 the reverse of this is shown, the groove being in the track. The preferred form for use in connection with the base-shelf is illustrated in Fig. 5, being a simple flanged wheel with a flat tread to run on the top of the shelf or on a flat track. (Not shown.) The purpose of the flange is to prevent the ladder from crowding inwardly against the edge of the shelf, as it has a tendency to do. To prevent marring and undue wear of the top of the shelf in case the track with a hard durable surface is dispensed with, and also to deaden the sound which might arise from the movement of the ladder back and forth, the traveler is preferably tired with some non-sonorous and slightly yielding material, as rubber, leather, compressed paper, or the like.

"To hold the ladder firmly in position when occasion requires, it is desirable to provide the travelers, or one of them, with a brake. This is illustrated in Figs. 3 and 4. This consists in a spring I, secured to the bearing or box G and provided with a suitable shoe I', conforming to the tread of the wheel. To the free extremity of this spring is connected a rod J, pivotally connecting at the other end with a pivoted hand-lever K, suitably mounted at the side of the ladder. The natural tendency of the spring is to press the brake-shoe into engagement with the wheel, and thus pre-

vent its turning. By throwing the hand-lever up past the center, as shown in Fig. 3, the brake is disengaged and automatically locked in that position.

"In cases where there is no base-shelf or where for any reason it is desirable not to have the travelers operate on the base-shelf the ladder may be carried nearly to the floor and provided with travelers at the bottom to run on the floor, as shown in Fig. 8. The traveler in this case may be of any of the forms described above, operating with or without a grooved or flanged track.

"It will be seen that practically the entire weight of the ladder and its occupant is supported by the base-shelf or the floor, so that the guide-rod may be of comparatively light material, and the heavy iron track and brackets necessary in the case of a ladder suspended from the upper end are dispensed with. This construction also disposes the weight on the travelers at a point below the hand of the operator, so that in moving the ladder sidewise the hand is placed between the lower and upper bearings of the ladder and at a point where the resistance of such bearings is practically equal. The practical effect of this is to render the movement of the ladder very smooth and easy with no tendency to throw the ladder out of line and displace either traveler.

"This invention, from the nature of the case, is applicable more particularly to ladders which are moved laterally in front of shelves and the like, and not to such ladders as are suspended from above and have travelers at the foot running on the floor, and adapted to carry the ladder forward and backward, considered with respect to the operator or the inclination of the ladder. In all such ladders the friction is necessarily so great that anti-friction rollers must be used above as well as below; but in this invention I dispense with rollers above, saving the expense of their manufacture and avoiding the annoyance due to the dripping of oil from their bearings. In the ordinary operation of the ladder the hooks at the upper end form no necessary part of the ladder's support, since practically the whole weight is carried on the travelers at the bottom, the small proportion due to the inclination of the ladder being carried by the outer face of the guide-rod. Indeed, this inclination of the ladder as ordinarily used in stores, libraries, &c., is so inconsiderable that the weight, with the operator on the ladder, is practically balanced on the travelers, and the slightest possible strain is imposed upon the guide-rod or friction upon the upper bearings. I am therefore able to dispense with the costly rollers and the heavy fixtures commonly used for the upper bearings and use a simple light pole or rod and a hooked bearing on the ladder, which requires no oiling or other attention and is free from the objections before referred to. The hook itself need not even touch the guide-rod ordinarily; but it nevertheless serves the useful purpose of preventing the ladder from tilting outward or sidewise at the top.

"The device, as will be seen and understood, is neat and attractive in appearance and of such a nature as to be quickly and cheaply applied to any place where it may be required.

"Having thus described my invention, what I claim as new, and desire to secure by Letters Patent is—

"1. The combination, with a horizontal guide adapted to form a rest for the upper end of the ladder, of a ladder having hooked bearings near the upper end engaging said guide loosely to prevent tilting or displacement of the ladder, and travelers at or near the foot of the ladder, adapted to support the same and carry it laterally on the base-shelf or floor, substantially as described.

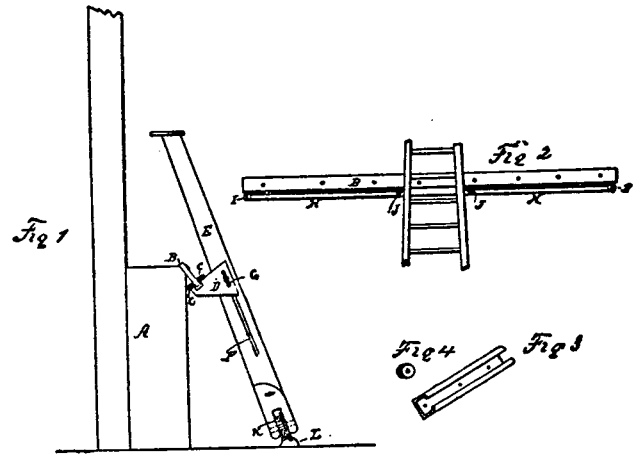
"2. The combination, with a store-service ladder having travelers at or near the lower end, adapted to support the ladder on the base-shelf or floor, of a brake, substantially as described, adapted to engage with one of said travelers, and a hand-lever adapted to disengage the same.

"3. The combination, with a store-service ladder, substantially as described, of a traveler H, spring-brake I, hand-lever K, and connecting-rod J.

"4. The combination, with a suitable track therefor at or near the bottom of the ladder, of a ladder having travelers mounted on bearings extending laterally from the ladder, whereby the ladder is adapted to move laterally

on a base-shelf or the floor and is the better protected against tipping sidewise."

The two patents relied upon, chiefly, as anticipations, are the Smith patent, No. 423,962, and the Shickle patent, No. 312,909. The Smith patent with its drawings, are as follows:




"My invention," says the inventor, "relates to an improvement of step-ladders for stores; and it consists in the combination and arrangement of the parts, hereinafter described, and shown in the accompanying drawings.

"To enable others skilled in the art with which my invention is most nearly connected to make and use it, I will proceed to describe its construction and operation.

"In the accompanying drawings, which form part of my specification, Figure 1 is a view of the ladder attached to the shelves. Fig. 2 is a view of the ladder, showing its connection with ropes for propelling it along the shelves. Fig. 3 is a modified form of a metal groove attached to the floor for a pulley-wheel connected to the lower ends of the legs of the ladder to move in. Fig. 4 is a modified form of a roller to be attached to the lower end of the legs of the ladder.

"In the drawings, A represents the ordinary shelving used in stores. Along the edge of the platform of the shelves is secured an inclined metal strip B, held in position by means of bolts.

"E is the ladder, the legs of which have a slot F, in which an adjustable piece D moves up and down, said adjustable piece being held in the desired position by means of a set-screw G. To this adjustable piece is attached rollers C C, which roll along the upper and lower face of the inclined metal piece B. In the lower end of the legs of the ladder is secured flanged wheels K, working in the groove of the metal piece L, secured to the floor. To each end of the inclined metal piece B is secured pulley-wheels I I, over which runs a rope or cord H, the ends of which are attached to the legs of the ladder by means of hooks J.

"The operation is as follows: The ladder E being placed in position against the shelves A, the adjustable piece D is set to the required height of the platform of the shelves and held in position in the slot F by means of the set-screw G, the rollers C C resting on the upper and lower faces of the inclined metal piece B, the flanged wheel K resting in the groove of the metal piece L. The salesman can, by taking hold of the rope or cord H, transfer himself along the shelving without getting down off the ladder.

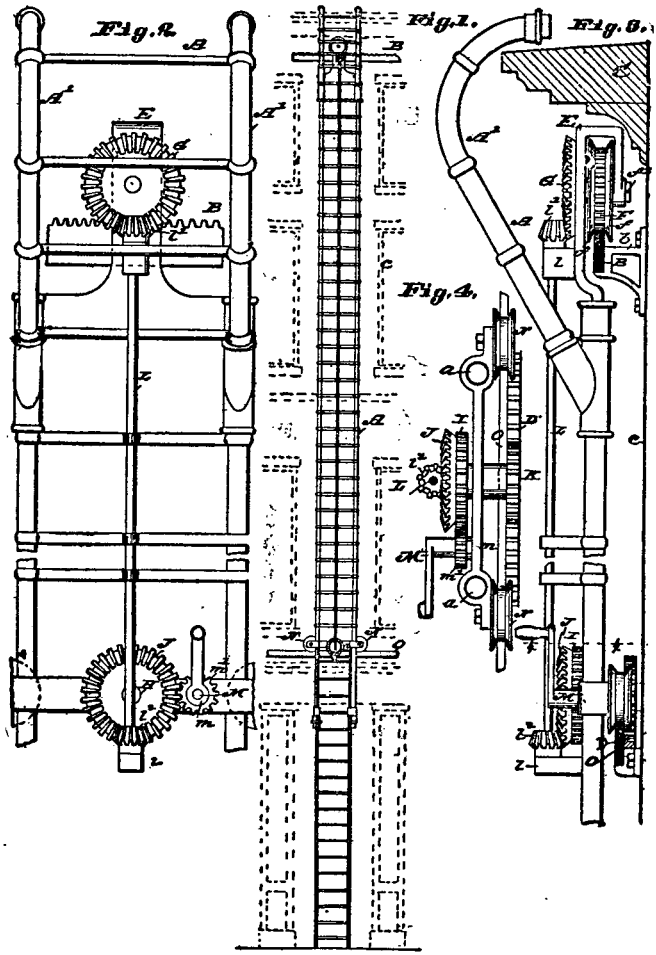
"If desired, the flanged wheel K can be dispensed with and an ordinary roller—such as shown in Fig. 4—be used in its place. In that case the

metal groove-piece shown in Fig. 3 can be attached to the floor for the roller to move in.

"What I claim is—

"In a step-ladder, the inclined metal piece B, rollers C C, adjustable piece D, slots G, flanged wheel K, cord H, pulleys I I, and metallic groove L, combined, arranged, and operating with relation to each other substantially as herein described and shown, and for the purpose set forth."

The Shickle patent with its drawings, are as follows:




"Figure 1 is a front elevation of the improved fire-escape in position, the building-front being shown in broken lines; Fig. 2, a front elevation, upon an enlarged scale, of the escape; Fig. 3, a side elevation of the escape, the building-front being shown in vertical section; and Fig. 4, a horizontal section, upon an enlarged scale, upon the line 4 4 of Fig. 3.

"The same letters of reference denote the same parts.

"The present invention is an improvement in that class of fire-escapes wherein a ladder is permanently attached to the building.

"The improvement relates to the means by which the ladder is attached to and adjusted upon the building.

"A represents the ladder.

"B represents a toothed rail or rack, attached by means of brackets, such as b, to the building C at or toward its top. The rail may extend along the front c, as well as along the sides of the building.

"D represents another toothed rail or rack, which is attached to and extends along the front or front and sides of the building lower down upon the building than the first-named rail.

"The ladder is hung upon the two rails B D as follows:

"E represents a hanger attached to the ladder and provided with a pinion, F. The pinion has flaring flanges f f, and it is attached to a shaft, $f^1$, which passes through the hanger and in front of the hanger is provided with a bevel gear, G.

"Opposite the lower rack, D, a shaft, H, is journaled in the ladder, the shaft extending at right angles to the ladder, and provided in front of the ladder with the gear I and the bevel gear J, and in rear of the ladder with the pinion K. The pinion engages with the lower rack D.

"L represents an upright shaft journaled in the ladder at l l, and provided with the bevel-pinions $l^1$ $l^2$, which engage, respectively, with the bevel-gears G J.

"M represents a crank-shaft journaled in the ladder at m and provided with the pinion $m^1$, which engages with the gear I.

"The ladder is also furnished with the grooved pulleys N N, which are adapted to roll upon a rail, O, which is attached to the building in front of the lower rack, D.

"On rotating the crank M motion is imparted to the upright shaft L, and through it to the pinions F K, and the ladder in consequence is moved laterally along the building front or sides and to the right or left, according to the direction in which the crank-shaft M is rotated.

"The sides a a of the ladder are perferably made tubular, to furnish means for conducting streams of water upward onto the building. The upper end of the ladder is extended at $A^1$ $A^1$, Figs. 1, 3, to enable the water to be thrown onto the roof of the building.

"I claim—

"1. The combination of the rails B and D, the ladder A, the hanger E, the shaft H, and the wheels F K, adapted to be applied to a building, substantially as described.

"2. The combination, as described, of the racks B D, the ladder A, the hanger E, the shaft H, the wheels F K, the gears G I J $m^1$, the shafts L M, the rail O, and pulleys N N, adapted to be applied to a building, substantially as described."

Other patents cited are as follows:

No. 200,844, March 5, 1878, J. Richardson.
No. 259,622, June 13, 1882, A. Williams.
No. 274,855, March 27, 1883, J. F. Treftz.
No. 295,278, March 18, 1884, H. Poole.
No. 312,908, February 24, 1885, F. Shickle.
No. 315,939, April 14, 1885, T. A. Harvey.
No. 345,478, July 13, 1886, W. J. Blundell.
No. 356,375, January 18, 1887, E. A. Perkins.
No. 375,701, December 27, 1887, J. A. Fallgatter.
No. 383,449, May 29, 1888, J. Eiden.
No. 426,983, April 29, 1890, L. Coburn.
No. 443,299, December 23, 1890, C. L. Smith.
No. 499,028, June 6, 1893, E. M. Murray.

Certificate of clerk.

Citation.

The bill was dismissed chiefly on the Smith patent as an anticipation. Further facts are stated in the opinion.

Josiah McRoberts, for appellant.
John G. Elliott, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. The Smith patent is a short store ladder, fastened at about its center to the top of the base shelf, by means of a track and two rollers—the track being a part of the ladder—but adjusted as to height by means of a slot and screw arrangement. The base of the ladder is a roller or wheel, resting in the groove of a metal piece on the floor. In operation, the ladder runs backwards and forwards on two fixed tracks, from neither of which is the weight of the man at any time wholly withdrawn. Nor has the weight of the man anything to do, except incidentally, with the lateral propulsion of the ladder.

The Shickle patent is a fire escape. Shorn of the machinery for its propulsion laterally, it is said to rest wholly upon the rollers at its base. But it is evident that the machinery could not be operated without putting a substantial weight upon the roller at the top. Besides, like the Smith patent, the ladder is permanently and closely adjusted at two points, thus failing to utilize any advantage in operation that may come from the balancing of the man's body, so as to change the center of gravity.

The Murray patent is a store ladder whose weight is wholly upon the rollers upon the floor or base shelf—the upper fastening being a loose one, by means of hooks intended solely to keep the ladder from tipping over. It differs from the Shickle ladder in that it is not perpendicular, thus giving room for base shelves, and also an inclination that makes climbing easier; and it differs from both the Smith and the Shickle patents in that, practically, it runs on only one track, utilizing the balancing of the man's body to propel it laterally without friction. This new thought in the art of ladder making—the utilizing of the man's weight to adjust the center of gravity—clearly was in the mind of the inventor, (letters patent line 40 et seq.) and finds embodiment in the mechanical means adapted to that end.

It is not enough to say that the upper hook of the Murray patent is identical with the upper fastening of the Smith and Shickle patents. They have some offices in common; but the hook has an office that the fixed rollers have not, the yielding itself, without destroying its usefulness, to the balancing motion of the man's body.

It is not enough to say that the Smith ladder, sawed off at or near the upper rollers, would be the Murray patent. Smith did not, in fact, saw off his ladder. But had he done so, preserving the mechanism of the fastening at the upper end, his ladder would have been unyielding to the balancing of the man's body, and therefore would not have accomplished both the mechanical and the practical purpose that Murray achieved. We find from all this, that in the Murray patent there is conception of a new idea, together with its embodiment in appropriate mechanical form, substantially unanticipated, useful, and possessing the quality of invention. The decree of the Circuit Court will therefore be reversed, with the direction to the Circuit Court to enter a decree in complainant's favor for an injunction and an accounting.

## WILLIAMS v. CAMDEN INTERSTATE RY. CO.

(Circuit Court, E. D. Kentucky. September 13, 1904.)

1. WRONGFUL DEATH—STATUTES—FOREIGN PERSONAL REPRESENTATIVE—RIGHT TO SUE.

   Bates' Ann. St. Ohio, § 6133, provides that any executor or administrator duly appointed in any other state or country may prosecute any action or proceeding in any Ohio court in his representative capacity in like manner and under like restrictions as a nonresident may be permitted to sue. Sections 6134, 6135, confer the right to sue for wrongful death on the personal representative, and provide for a settlement of the case after suit brought, conditioned, however, on the fact that the personal representative was appointed in Ohio. *Held*, that a Kentucky personal representative of a deceased person killed in Ohio was entitled to sue a foreign corporation in Kentucky for the alleged wrongful death of his decedent under the Ohio wrongful death statutes.

   [Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 36, 50.]

2. SAME—PUBLIC EXHIBITION GROUNDS—SAFETY—NEGLIGENCE—QUESTION FOR JURY.

   In an action against a railroad company, maintaining public exhibition grounds, for the wrongful death of a spectator, who had paid an admission fee, by being killed by a rotten limb falling from a tree, whether defendant was guilty of negligence in failing to discover and remove such defective limb *held* for the jury.

   [Ed. Note.—Liabilities for injuries to persons at public entertainments or exhibitions, see note to Texas State Fair v. Brittain, 56 C. C. A. 502.]

John W. Woods and J. F. Stewart, for plaintiff.

John F. Hager, J. W. M. Stewart, Z. T. Vinson, and I. R. Johnson, for defendant.

COCHRAN, District Judge. The defendant has filed a motion for a new trial, and also for an arrest of judgment. I will dispose of the latter motion first.

The ground of it is that this is an action in Kentucky on the Ohio wrongful death statute, and that plaintiff, a Kentucky personal representative, had no right to bring it. The question as to the right of a foreign personal representative to sue on a wrongful death statute in the jurisdiction of his appointment has been much litigated in this country, and there is considerable conflict of opinion in the decisions. The earlier decisions were against the right; the later ones have, as a rule, been in favor of it. It will serve no good purpose to cite these cases and show their application to the question.

Looking at the matter solely from the standpoint of principle, I am of the opinion that the right of the foreign personal representative to maintain the action is dependent upon his right to maintain it in the jurisdiction of the statute. If he has not the right to maintain it there, then he has not the right to maintain it in his own jurisdiction in any contingency whatever. The converse of this, to wit, if he has a right to maintain it in the former jurisdiction, he has also the right to maintain it in the latter, is also true, but subject to two qualifications. One is, if he is prohibited by the statute of his own jurisdiction from bringing the action, then he cannot do so. The other is, if the machinery of procedure in

the jurisdiction of his appointment is not adequate to the enforcement of such right as he has in that of the statute, then he has no right to bring an action in the former jurisdiction. What is thus said of a wrongful death statute conferring a right of action on the personal representative of the decedent is true of every wrongful death statute. Whoever has any rights thereunder in the jurisdiction of the statute, and none other, has such rights as he has thereunder, and no more, in any other jurisdiction, provided there is no statute in the foreign jurisdiction prohibiting him from so having, and the machinery of procedure in such jurisdiction is adequate to the enforcement of such rights therein.

If this position is correct, it is entirely irrelevant to a determination of the question whether a foreign personal representative has a right of action on a wrongful death statute in the jurisdiction of his appointment what affirmative powers are conferred upon him in such jurisdiction by the statutes thereof. The statutes thereof could not confer upon him a right of action for a wrongful death caused in a foreign jurisdiction. For them so to do would be for them to have an extraterritorial effect, which they cannot have. And it is not necessary to rely on any such statutes for him to have a right of action in the jurisdiction of his appointment, if he has a right of action in the jurisdiction of the statute. For such right in the jurisdiction of the statute is sufficient basis in and of itself for his having a right of action in the jurisdiction of his appointment. To so hold is not to give the wrongful death statute an extraterritorial effect. The position is not that the foreign personal representative has a right of action in the jurisdiction of his appointment because the statute confers on him a right to bring an action there; but it is that he has a right to bring the action there simply because he has a right to bring it in the jurisdiction of the statute, and he has the right to bring it in such jurisdiction because the statute so provides and could lawfully so provide.

So much, then, from the standpoint of principle, as I look at it, as to the governing consideration in determining whether in any given case a foreign personal representative has a right of action on a wrongful death statute in the jurisdiction of his appointment. According to it, he cannot bring an action in such jurisdiction if he has no right to bring it in the jurisdiction of the statute. But there is very high authority—authority that is controlling upon me—to the effect that under some circumstances he can bring such an action although he has no right to bring it in the jurisdiction of the statute. I refer to the case of Stewart v. Baltimore & Ohio R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. That was an action for a wrongful death caused in Maryland, brought by a District of Columbia personal representative in the District of Columbia. The Maryland wrongful death statute did not confer the right of action on the personal representative, but upon the state for the benefit of certain named beneficiaries. It is certain that the District of Columbia personal representative could not have sued on that statute in Maryland. Yet the Supreme Court held unanimously (opinion by Mr. Justice Brewer) that the action could

be maintained. It would perhaps be presumptuous on my part to attempt a refutation of the correctness of this decision. It will certainly do no good; for, right or wrong, I am bound by it. But I cannot refrain from alluding to some considerations, that will have to be weighed in determining its correctness, which may be an aid to an elucidation of the real truth of the matter.

An action brought by a foreign personal representative on a wrongful death statute in the jurisdiction of his appointment gives rise to two questions. One is whether the right of action on the statute is transitory and enforceable by the right person in the foreign jurisdiction; the other is whether the foreign personal representative is the right person to enforce it in such jurisdiction. These two questions are separate and distinct. Each is dependent on a different consideration for its determination, and hence, in disposing of them, each should stand on its own bottom. Single-mindedness here, as everywhere else, is essential to seeing things as they are. The opinion of Mr. Justice Brewer impresses me with the notion that he confused these two questions, and passed from the one to the other without consciously recognizing that in so doing he passed from the one territory to the other. The result was that he disposed of the question whether plaintiff had a right of action on the Maryland statute under the bias and coloring influence of his view in regard to the question as to the transitoriness of the right of action on the Maryland statute by the right person, which was that the right of action was transitory. He seems to have thought that, if the plaintiff could not maintain the action, no action on the statute could be brought thereon in the District of Columbia, and hence in this way the transitoriness of the right of action created by the statute would be affected. It was not suggested or considered whether the action could have been brought in the District of Columbia by the state of Maryland for the benefit of the named beneficiaries, or, if this could not be done, whether it could not be brought in the name of the beneficiaries. Hence it would seem that he took too depreciatory view of the relation of the state or personal representative to a wrongful death statute which conferred the right of action on it or him for the benefit of certain named beneficiaries, and likewise of the office or function of the statute itself. He characterized such a plaintiff as a "nominal plaintiff." In view of this, it was not an unnatural thing for one to think that the jurisdiction of the federal courts in such a case depended on the requisite diversity of citizenship between the beneficiaries and defendant, and not between the personal representative and defendant. We find, therefore, that this position was shortly afterwards taken in two different cases, to wit: Cincinnati H. & D. R. Co. v. Thiebaud, 114 Fed. 918, 52 C. C. A. 538, and Bishop v. Boston & M. R. Co. (C. C.) 117 Fed. 771. It was held in both cases, however, that the position was not well taken, and the tendency of the case in this direction was thus curbed. In the Thiebaud Case Judge Severens said:

"We are unable to distinguish the case in this respect from those in which it has been repeatedly held by the federal courts that the trustee is the legal

representative of the beneficiaries, and that his citizenship is the only one to be considered in determining the jurisdiction in respect to that side of the controversy."

In the Bishop Case, Judge Lowell, who seems not to have been aware of the Thiebaud Case, hesitated, on account of the Stewart Case, to hold as he did. He said:

"With considerable doubt I have determined to follow the practice of this court, which seems to be approved in Railroad Co. v. Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193, rather than the somewhat vague language of the Supreme Court in Stewart v. Railroad Co."

Likewise, as stated, a too depreciatory view of the office or function of the wrongful death statute seems also to have been taken. It is regarded as simply doing away with an obstacle to the enforcement of an existing cause of action caused by the death of the decedent. That obstacle is the maxim, "Actio personalis moritur cum persona." That maxim, however, has application only to cases where the decedent himself might have brought an action, not to cases where the basis of the action is the death of the decedent. In those cases no right of action passes from the decedent to his personal representative. There is a new right in favor of the personal representative, created by statute. The statute, therefore, does not remove an obstacle to the maintenance of a right of action already in existence. It creates a new right of action which had no existence before the death.

Again, several decisions of the Supreme Court before and since the Stewart Case seem to be against its correctness, according to the inferences to be drawn from them. In the case of Dennick v. Central R. Co., 103 U. S. 11, 26 L. Ed. 439, it was held that a New York personal representative had a right to bring an action in New York on the New Jersey wrongful death statute. The decision was expressly based upon the position that the statute provided that he might bring an action thereon. The reasonable inference therefrom is that if the statute had not so provided, and therefore he could not have sued in New Jersey, he had no right of action in New York. In the case of Northern Pacific R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958, an action by a Minnesota personal representative in Minnesota on the Montana wrongful death statute, it was held that the limit of recovery prescribed by the Montana statute governed. This was approved in Slater v. Mexican Natl. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900. Analogous to this is the holding in Railroad Co. v. Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193, that the time prescribed in a wrongful death statute within which an action may be brought on it controls in a suit on the statute in a foreign jurisdiction. If the statute is controlling as to damages and to time of bringing action in the foreign jurisdiction, the reasonable inference therefrom would seem to be that it is also controlling as to the person who should sue on it. Hence we find a number of decisions to the effect that, if the wrongful death statute confers the right of action on the beneficiaries directly, the personal representative cannot sue in the foreign jurisdiction, and vice versa. In the case of

Slater v. Mexican Nat. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900, it was held that an action could not be maintained in Texas on the Mexican wrongful death statute, because that statute did not provide for the recovery of a lump sum, but in installments, like a pension or alimony, and the machinery of procedure in Texas was not adequate to give such relief. If the statute cannot be enforced in a foreign jurisdiction save in the manner it provides for payment of damages, it would seem to be reasonable to infer that it cannot be enforced there by any other than whom it says may enforce it. Mr. Justice Holmes, in his opinion, says that the wrongful act is not subject to the law of the forum "with regard either to its quality or its consequences," and that the law of the place of the act "determines not merely the existence of the obligation, but its extent." Is not the person who may sue a part of the consequences of the act and of the extent of the obligation?

These several considerations cause me to doubt the correctness of the decision in the Stewart Case. Others also have not been entirely satisfied with it. Judge Lowell, in the quotation from his opinion in the Bishop Case, made above, refers to its language as vague. In the case of Sanbo v. Union Pac. Coal Co. (C. C.) 130 Fed. 52, Judge Hallett said that he did not know of any decisions amongst those he had seen, which had been quite numerous, that "go so far as this case"—in the direction of holding that the beneficiaries might possibly, under some circumstances, bring an action without a personal representative as plaintiff. Minor on Conflict of Laws, p. 477, note 1, says that, if the division of torts adopted in the Stewart Case is recognized generally, the whole basis upon which the principles of private international law touching torts now rests would probably be revolutionized. But the decision has never been disapproved, much less overruled. I therefore consider myself bound by it. There was greater difference in the wrongful death statutes of the two jurisdictions involved in that case than in the two involved herein. The Maryland statute provided that the action should be brought by the state, and the amount recovered should be apportioned amongst the beneficiaries by the jury. The District of Columbia statute provided that the action should be brought by the personal representative, and the amount recovered should be distributed according to the laws of the distribution of a decedent's estate. Here the statutes of both Ohio and Kentucky provide that the action shall be brought by the personal representative, and under each the recovery is for the benefit of the two infant children of the decedent. If, then, the personal representative could recover in the Stewart Case, when he could not have sued in Maryland, ought not plaintiff have a right to sue here, even though he could not have sued in Ohio?

But I am not content to let the matter rest here. I think that plaintiff had a right to have brought his suit in Ohio, and that the courts of that state would have permitted him to sue therein. The wrongful death statute of Ohio confers the right of action on the personal representative. It is not limited to a domestic personal representative. It is contained in sections 6134 and 6135, Bates' Ann.

St. Ohio. In the last sentence of section 6135 provision is made for a settlement of the case after suit is brought. This provision is made conditional. That condition is, "if he [personal representative] was appointed in this state." This seems to imply that, under the right of action conferred by the preceding part of the section, a personal representative who was not appointed in Ohio might bring the action. But, however this may be, it is expressly provided by section 6133 that "any executor or administrator duly appointed in any other state or country may commence and prosecute any action or proceeding in any court in this state in his capacity of executor or administrator in like manner and under like restrictions as a non resident may be permitted to sue." In view of this broad provision, what ground is there for limiting the wrongful death statute, in so far as it confers the right of action on the personal representative generally, i. e., without any limitation whatever, to a domestic personal representative? In the case of Southwestern R. Co. v. Paulk, 24 Ga. 356, it was held that a foreign personal representative could not sue in Georgia on the Georgia wrongful death statute, because the statutory provision of that state empowering foreign personal representatives to sue in that state did not cover the case in hand. This is a decision to the effect that such statutory provision must be broad enough to cover an action on the wrongful death statute in order for a foreign personal representative to have a right of action thereon. In the case of Maysville S. R. & T. Co. v. Marvin, 59 Fed. 91, 8 C. C. A. 21, it was held that a foreign personal representative could not sue in this state on section 1, c. 57, Gen. St., one of the then existing wrongful death statutes of Kentucky, because the statutory provision empowering foreign personal representatives to sue thereon was not broad enough to cover an action on said statute. That provision authorized him conditionally to sue herein to recover debts due the decedent. A cause of action on said statute was not a debt, and it was not due the decedent. Hence said provision was not broad enough to cover an action on the statute. The recovery on that statute, however, was an asset, and was therefore liable to payment of debts. The condition on which foreign personal representatives were permitted to sue and recover debts due the decedent was the execution of a bond to secure Kentucky creditors. The argument was that the language of the wrongful death statute conferring the right of action on the personal representative generally could not have been intended to include foreign personal representatives, for such a construction would permit them to remove this particular kind of assets without first securing home creditors, when ordinary debts due decedent could not be recovered without securing such creditors. It was not involved therein whether, if the recovery had been for the benefit of widow and children and other next of kin, the general language of the wrongful death statute would not itself be sufficient to confer the right of action on the personal representative, notwithstanding the other statute was not broad enough to cover an action on the statute. In the cases of Kansas Pac. R. Co. v. Cutter, 16 Kan. 568, and Dennick

v. Central R. Co., 103 U. S. 11, 26 L. Ed. 439, it was held that the general language of the wrongful death statute itself was sufficient to take in a foreign personal representative, without more. It so happened, however, that in both cases the statutory provision empowering foreign personal representatives to sue in the jurisdiction of the statute was broad enough to cover an action on that statute. The action in one case was by a Colorado personal representative, on the Kansas wrongful death statute, brought in Kansas. In the other case it was by a New York personal representative, on the New Jersey wrongful death statute, brought in New York. The Cutler Case was subsequently qualified by the case of Limekiller v. Hannibal, etc., R. Co., 33 Kan. 83, 5 Pac. 401, 52 Am. Rep. 523, where it was held that, if the foreign personal representative had no right of action in the jurisdiction of his appointment on the wrongful death statute thereof, he could not sue on the statute out of which the obligation sought to be enforced arose. In this case, however, the statute of Ohio empowering foreign personal representatives to sue therein is broad enough to cover an action on the wrongful death statute. The general language of that statute, therefore, should be held broad enough to include a foreign personal representative. An authority to this effect, in addition to the Cutler and Dennick Cases, is the case of Jeffersonville R. Co. v. Hendricks, 41 Ind. 49.

But it is urged by defendant's counsel that it has been held by the Supreme Court of Ohio that a foreign personal representative cannot sue on the wrongful death statute of that state. Of course, if this is true, this construction of that statute is binding upon us. The case relied on is Woodard v. M. S. & N. I. R. Co., 10 Ohio St. 121. This case, however, did not involve a construction of the Ohio statute, much less did it involve the question whether a foreign personal representative could sue on the Ohio wrongful death statute in Ohio. It was an action in Ohio by an Ohio personal representative on the Illinois wrongful death statute. It is true that it is said in the statement of facts preceding the opinion that the Illinois wrongful death statute and foreign personal representative statute were both very similar to the like statutes of Ohio, and there is a basis, therefore, for claiming that the decision is an indirect construction of the Ohio statutes. It is certainly no more. But this decision was rendered before the Civil War, when wrongful death litigation was in its infancy. It is the pioneer case involving the question involved herein. The court was not at the proper standpoint in which to construe the Illinois statute correctly. The standpoint from which one views a thing often makes a very great difference whether he sees correctly. The proper standpoint from which to have construed the Illinois statutes was from the bench of an Illinois court, just as here the proper standpoint from which to construe the Ohio statute is from the bench of an Ohio court. The Ohio Supreme Court construed the Illinois statutes from its own bench. The danger in so doing was that it would think that the only way in which plaintiff's action

could be sustained would be by giving the Illinois wrongful death statute an extraterritorial effect, which could not be done lawfully. And the opinion shows that the court did so think. The real ground of the opinion is that, inasmuch as the Illinois statute could not lawfully impose a duty or trust on an Ohio personal representative, it did not intend to do so. The court did not consider whether the Illinois statute should be construed as giving the Ohio personal representative a right of action in Illinois, and, because it did so, whether he should not be permitted to bring an action in Ohio. Had the case before it been an action on the Ohio wrongful death statute by a Kentucky personal representative, it cannot be said from this opinion that it would have been held that the action could not be maintained. Judge Thompson had just such a case before him in the case of Popp v. Cincinnati & C. R. Co. (C. C.) 96 Fed. 465, save that plaintiff was an Indiana personal representative, and it was held that he had a right to bring the action. Indeed, defendant's Ohio counsel expressly concedes that plaintiff could have brought an action in the state of Ohio to recover damages for the death of his intestate. He directs attention to the fact that in the Dennick Case it was held that the New York personal representative might bring an action on the New Jersey wrongful death statute, and that the right so to do was not limited, as the lower court had held, to a new Jersey personal representative. He then adds:

"We have never questioned this proposition, and don't now. The administrator appointed in Kentucky can bring suit in Ohio upon this same cause of action."

If this is so, then why can he not maintain this action in Kentucky? The only possible ground for his not having the right to do so is that the cause of action is not transitory. But as to that, there can be no question. In the Dennick Case it was held not only that the New York personal representative had a right of action on the New Jersey wrongful death statute, but he had a right to bring his action in New York, and hence that the cause of action was transitory. There was a time, perhaps, when it was an open question whether the cause of action on a wrongful death statute was transitory, and it was held in some jurisdictions that, in order for it to be so, it was essential that there be a substantially similar statute in the foreign jurisdiction. In Ohio the decision in the Woodard Case, which was really based upon the proposition that an Ohio personal representative had no right of action on the Illinois wrongful death statute, seems to have been treated as holding that a right of action on a wrongful death statute of a foreign jurisdiction was not transitory and enforceable in Ohio unless there was an express statute in that state permitting its enforcement there. It would seem that it was upon such idea that section 6134a of Bates' Annotated Statutes of Ohio was passed, which provides that a right to maintain an action and recover damages for a death caused by wrongful act, neglect, or default in another state, territory, or foreign country, given by a statute thereof, may be enforced in Ohio "in all cases where such other state, territory or

foreign country allows enforcement in its courts of the statute of this state of the like character, but in no case shall the damages exceed the amount authorized to be recovered for a wrongful neglect or default in this state causing death." But I think it safe to say that in no jurisdiction where it is an open matter would it now be held that the cause of action is not transitory, or that it is essential that there be a substantially similar statute in the foreign jurisdiction in which the wrongful death statute is sought to be enforced in order to the enforcement there. The correct rule on the subject is thus stated by Minor on Conflict of Laws, p. 492:

"The present tendency of the more recent decisions is to advance still further towards liberality, and to throw open the courts to litigants whose cause of action has arisen in other states and under the laws thereof, even though not actionable at common law, or not actionable if it had arisen in the forum, provided the enforcement of the lex delicti would not seriously contravene the established policy of the forum. The presumption is in favor of the right to sue, and the burden rests upon the party objecting to show that the enforcement of the 'proper law' would be inconsistent with the domestic policy."

This is the federal position, as evinced by the Dennick and subsequent cases decided by the Supreme Court. Under it, it seems to me that the only limitations upon the right to sue in the foreign jurisdiction is the existence of a statute in such jurisdiction prohibiting it, or the absence there of adequate machinery of procedure. The fact that Ohio has a different rule has no relevancy to this case. This is not a suit in Ohio on a foreign wrongful death statute. It is a suit in Kentucky on the Ohio statute. There is no statute in this state prohibiting such a suit. Its machinery of procedure is adequate to the enforcement of the right. If then, as is thus conceded, plaintiff had a right to have brought an action in Ohio, there is no possible reason for his not having a right to bring this action.

Counsel for defendant suggest as a reason why plaintiff should not be allowed to maintain this action that it is liable to another action by an Ohio personal representative. I do not think there is any such liability. If the plaintiff had brought this action in Ohio, it could not be claimed that thereafter another action could have been maintained against him there by a domestic personal representative. The fact that he has brought it in Kentucky can make no difference. Counsel for defendant rely on the case of Sanbo v. Union Pac. Coal Co. (C. C.) 130 Fed. 52. That was an action in Colorado by a Colorado personal representative on the Wyoming wrongful death statute. It was held that the action could not be maintained. The ground upon which it was so held was that under the Wyoming statute the amount recovered was a fund to pay debts. It was conceded that, if the statute had been like the Ohio statute, the action could have been maintained.

My conclusion, therefore, is that under the Ohio statute plaintiff had a right to have brought his action in Ohio, and, having that right, he had a right to bring it in Kentucky, irrespective of the Stewart Case.

The motion for arrest of judgment is therefore overruled.

Then, as to the motion for new trial. The main ground relied on is the refusal to give a peremptory instruction to the jury to find for the defendant at the close of all the evidence. It is urged that the defendant was entitled to such an instruction, because the cause of action was not transitory and enforceable in Kentucky. I have disposed of this contention in what I have had to say on the preceding motion. Then it is urged that the evidence was not sufficient to entitle plaintiff to have the cause submitted to the jury. The nature of the case was this: The defendant, on Labor Day in September, 1902, and for some time prior thereto, owned and was managing Beechwood Park, in or near the city of Ironton, Ohio. On that day the laboring men had a celebration in the park, to which the public were invited. The decedent, as one of the public, attended this gathering, and paid for admission, as did the rest, the receipts going to defendant. Whilst sitting under a black gum tree listening to the speakers at the band stand, and when hardly a breath of air was stirring, a large branch separated from the main body of the tree at its connection therewith and fell, striking her on the head and killing her instantly. The petition charged that the branch was dead, unsound, and rotten on top at and near its connection with the main body of the tree where it gave way, that this defective condition was patent and knowable by the defendant by the exercise of ordinary care, that it carelessly and negligently allowed the branch to remain upon said tree and failed to remove it, and that by reason thereof the injury complained of was occasioned.

As to the claim that the branch was dead, unsound, and rotten on top at and near the connection with the main body of the tree where it gave way, I think there was evidence tending to show that such was the case; at least, sufficient to justify the jury in passing upon the question. There was likewise evidence tending to show that it was patent to one who might have climbed the tree for the purpose of examining it and seeing if it were safe. The evidence did not warrant the conclusion that it was patent to one examining the tree from the ground, and I so told the jury. The claim, then, that it was knowable by the defendant by the exercise of ordinary care, and that it negligently failed to remove it, depended upon whether a person of ordinary prudence, with such knowledge as he would have from an inspection of the tree from the ground—it is not denied that ordinary care required an examination of the tree from the ground—would not have climbed the tree for the purpose of making a more careful examination of this branch, would have discovered the defective condition of the branch by making such examination, and with such knowledge would have removed the branch and thereby have prevented the injury. I think that the evidence was such as to demand a submission of these questions to the jury for their determination. The evidence showed clearly that the tree was a large old tree; that it leaned towards the band stand somewhat; that the branch in question was 30 or 40 feet up in the

air, was a large one, being as much as 13 inches in diameter at its connection with the tree, and extended out almost horizontally from the tree for a distance of about 30 feet over the place where persons would be standing or sitting listening to the speaking from or exercises being carried on at the band stand; that a portion of the outer end had been broken off, and for a distance of one or two feet the outer end as left was dead, and that through the lap of the branch there were dead limbs. Then one witness testified, if I remember correctly, that there was a snag of a branch somewhere on the body of the tree from which a branch had formerly broken. Besides, there was the testimony of Baldwin, and perhaps two or three others, to the effect that a point some five or six feet from the body of the tree the branch in question had a swelled appearance, and a hole or defective place near the top that was apparent to one examining the branch from the ground. It is true that this testimony was contradicted by other witnesses, and that its value was affected by their further testimony that it was at this point the branch gave way, which is against the decided weight of the testimony; but still it was for the jury to say whether this defective condition was there or not, and, if so, to determine whether it would have any effect on the course of action of a person of ordinary prudence. On the other hand, the evidence was quite strong to the effect that apparently the branch was sound otherwise than as above stated. The bark and sap on the outside all around, except as to the place on top at and near the connection of the branch with the main body of the tree, was green, and the limbs and foliage constituting the lap of the branch was pretty generally green. But in view of all the evidence, I think there was room for difference of opinion amongst fair-minded men as to whether a person of ordinary prudence would not have climbed the tree to make a closer examination as to the safety of the branch, and would not have discovered the defective condition on top of the branch at and near its connection with the body, and removed the branch had he done so. This is a case where it seems to me that the following remarks of Mr. Justice Lamar, in the case of Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, are particularly appropriate, to wit:

"There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in the case was such as would be expected of reasonably prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reason-

able men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

These questions have been submitted to two juries composed of intelligent and fair-minded men, and in each instance they have found against the defendant, and I think the last verdict should be allowed to stand.

The motion for new trial is overruled.

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## WOOLFORD et al. v. DIAMOND STATE STEEL CO.

## MADEIRA, HILL & CO. et al. v. SAME.

(District Court, D. Delaware. May 27, 1905.)

Nos. 122, 123.

1. INVOLUNTARY BANKRUPTCY—INSUFFICIENT PETITION—AMENDMENT.

Where two petitions in involuntary bankruptcy were filed in the district court of the United States for the district of Delaware against a corporation April 12, 1905, each alleging only one and the same act of bankruptcy, namely, the appointment because of its insolvency of receivers and putting them in charge of the property of the corporation December 12, 1904, by the circuit court of the United States for the same district, and each of the petitions was substantially defective, although curable by amendment; and where it further appeared that all of the petitioning creditors in each petition before the appointment of receivers by the circuit court took part in procuring or consented to and approved the appointment of receivers and, thus, aided and assisted in the commission of the act on which their petitions in bankruptcy were founded; and where it further appeared that there was no evidence that the corporation was insolvent within the meaning of that term as used in the bankruptcy act; and where it further appeared that the estate of the corporation was in course of administration by the circuit court through its receivers, and that the receivers had faithfully, diligently and efficiently discharged their duty, and that whatever delay may have occurred was the result of causes over which they had no control; and where it further appeared that the throwing of the corporation into bankruptcy would cause unnecessary expense, delay and confusion in the proper administration of its property: *Held*, that applications to amend the petitions should be denied and motions for the dismissal of the petitions should be granted.

2. SAME.

If the petitions had not been defective, the petitioners would have had a right under the bankruptcy act to proceed to support them by evidence and, if successful, to have the corporation adjudged bankrupt, regardless of any delay, confusion or expense attending such a course. But the petitions being fatally defective, leave to amend should not be granted, thereby withdrawing the administration of the property from the circuit court, unless for cogent reasons, not appearing in this case.

(Syllabus by the Court.)

In Bankruptcy.

Robert H. Richards, Franklin S. Edmonds, Horace G. Knowles, and Dwight M. Lowry, for petitioning creditors.

H. H. Ward, A. C. Gray, and C. L. Ward, for the bankrupt.

BRADFORD, District Judge. Two petitions in involuntary bankruptcy were filed April 12, 1905, against The Diamond State Steel Company, a corporation of Delaware; one of them, being No.

122, purporting to have been signed and verified by or on behalf of Napoleon B. Woolford, the Sloss-Sheffield Steel and Iron Company, the Wilmington Oil Company and John R. Kilmer, and the other, being No. 123, by or on behalf of Madeira, Hill & Company, assignees of the George B. Newton & Company, the William H. Perry Company, and John J. Caine, Jr., Howard M. Plitt and George L. Plitt, trading as Caine & Plitt. In each of these petitions the commission of only one act of bankruptcy is alleged, namely, that December 12, 1904, and within four months next preceding the filing of the petition in bankruptcy, James P. Winchester and Howard T. Wallace were, because of the insolvency of The Diamond State Steel Company, appointed receivers and put in charge of the property of that company by the circuit court of the United States for the district of Delaware under a law of that state, pursuant to an order or decree in a suit in equity brought against the company by the firm of Henry A. Hitner's Sons. Appearances having been duly entered for the alleged bankrupt, a motion was by leave of the court made in each case that the petition be dismissed. Among the grounds upon which the motion in No. 122 is based the first is as follows:

"That it doth not appear by said petition, or by the record in said cause, that this court hath jurisdiction to adjudge the said The Diamond State Steel Company a bankrupt, in that it doth not appear either that said company hath had its principal place of business, resided or had its domicile within the territorial jurisdiction of said court for the six months, or the greater portion thereof, preceding the date of filing said petition, or that said company did not have its principal place of business, reside or have its domicile within the United States, but had property within the jurisdiction of said court, or that said company had been adjudged a bankrupt by a court of competent jurisdiction without the United States and had property within the jurisdiction of said court."

The averment in the petition in this connection is as follows:

"That The Diamond State Steel Company, a corporation created and existing under the laws of the State of Delaware, is engaged principally in manufacturing pursuits and owes debts to the amount of one thousand dollars and over and is insolvent."

The motion in No. 123 assigns six grounds, the first of which is as follows:

"That it doth not appear by said petition or by the record in said cause that this court hath jurisdiction to adjudge the said The Diamond State Steel Company a bankrupt, in that it doth not appear that said company is a corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits."

The allegation in the petition to which the above ground applies is as follows:

"That The Diamond State Steel Company, a corporation organized under the laws of the state of Delaware, in the said district, has for the greater portion of six months next preceding the date of filing this petition had its principal place of business at the City of Wilmington, in the County of New Castle, and State and district aforesaid, and owes debts to the amount of $1,000.00."

Each petition omits an essential averment. The petition in No. 122 does not set forth facts to satisfy the requirements of section 2

(1), and that in No. 123 fails to disclose a case coming within section 4b of the bankruptcy act, of July 1, 1898, c. 541, 30 Stat. 545, 547, [U. S. Comp. St. 1901, pp. 3420, 3423]. The defect in each petition is substantial and, while not an incurable one, is fatal unless cured by amendment. The other grounds assigned relate to the verification of the petitions, but, while not doubting the sufficiency of some of them, need not be discussed. During or at the conclusion of the argument on the motions to dismiss the counsel for the petitioning creditors asked leave to amend the two petitions in such manner as to cure their defects, and thereupon a hearing was had upon this application. Thereafter it was suggested by the court to counsel that, as no affidavits or exhibits had been presented during the hearing bearing upon the propriety of allowing the proposed amendments, the court was not in possession of the facts necessary to an exercise of sound discretion in deciding the question of amendment. Leave was accordingly granted to counsel on both sides to produce affidavits and exhibits in support of or opposition to the application, and the application was fully heard May 15 and 16, 1905, on voluminous affidavits and exhibits. The hearing included the application in each case and was had on the same proofs, it having been agreed by counsel in open court that all affidavits and exhibits produced, whether entitled in one case or the other, should be treated as evidence in both so far as applicable in their nature. Both applications may conveniently be considered in one opinion. The records of this court show that an involuntary petition in bankruptcy, No. 105, against The Diamond State Steel Company was filed August 9, 1904, and that another involuntary petition in bankruptcy, No. 106, against the same company was filed August 10, 1904. In No. 105 Howard T. Wallace and James P. Winchester were appointed temporary receivers in bankruptcy August 13, 1904, and duly qualified. They were, among other things, authorized to conduct the business of the alleged bankrupt until the dismissal of the petition, the qualification of a trustee, or the further order of the court, and directed forthwith to make and file an inventory of all property which should come into their possession as receivers, together with a list of debts and credits due from and to the estate in their charge. The two cases were consolidated August 15, 1904. An inventory, as of August 15, 1904, was filed by the receivers September 20, 1904, showing that the par value of the preferred stock of The Diamond State Steel Company was $2,250,000.00, and of its common stock $2,000,000.00; that its issue of mortgage bonds was $1,000,000.00, on which there was some accrued interest; that the real estate of the company was valued on its books at $4,608,905.99; that the mortgage bond issue of $1,000,000 covered the real estate and works of the company which, in the opinion of the receivers, were worth, for the purpose of its business, considerably more than the amount of the bond issue; that, in addition to the real estate and plant of the company, its assets amounted to $511,537.71, and its liabilities, other than mortgage bonds, to $385,979.83. The Diamond State Steel Company, having filed its answer to the consolidated petitions denying insolvency, which was essential to the main-

tenance of each of the petitions, the consolidated petitions were set for a hearing November 25, 1904, and on the next following day, the counsel for the petitioning creditors having abandoned the prosecution of the cases, the court removed the receivers and ordered that due notice of the proposed dismissal of the proceedings in bankruptcy be given to creditors; that the receivers forthwith deliver the entire estate in their hands to The Diamond State Steel Company, except the amount allowed to them for their compensation and for counsel fees, and that within ten days they file an account of all their transactions. After due notice to creditors, including 228 mailed written notices and public notice by advertisement to all creditors of the company, the consolidated petitions were, December 12, 1904, in the absence of objection from any source, dismissed for want of prosecution; the court retaining jurisdiction for the purpose of passing upon the account of the receivers. The account was filed December 6, 1904, and subsequently was favorably reported on by the master, save in one comparatively unimportant particular, satisfactorily explained by the master, and was approved by the court. The account furnishes strong evidence of the capacity and diligence of the receivers and their fidelity to the trust imposed upon them, and that under their management the interests of the company and its creditors had been conserved and promoted in the face of adverse circumstances. From the time of their appointment in December, 1904, in the suit of Henry A. Hitner's Sons the receivers have had the charge and management of the property and business of The Diamond State Steel Company under the orders and decrees of the circuit court.

The granting of leave to amend the petitions, which might result in throwing The Diamond State Steel Company into bankruptcy, is a subject which has received careful consideration. In a suit between two individuals where one of them has made a slip in his pleadings, fatal unless corrected, the court usually will allow an amendment on or without terms, if not calculated to subject the other party to undue hardship or prejudice. Under such circumstances to refuse an amendment may and probably would not be an exercise of sound discretion. But there are cases in which leave to amend should be denied in the exercise of such discretion, owing to the character and relationship of the persons and interests to be affected. In one of the pending bankruptcy cases three alleged unsecured creditors, and, in the other, four, seek to have a large estate, real and personal, in which hundreds of creditors are interested, now in custodia legis and in course of administration by the circuit court, pursuant to the desire of an overwhelming majority of creditors holding an overwhelming proportion of the amount of unsecured claims, turned over to this court for administration in bankruptcy. If the petitions were not defective, the petitioners would have a right under the bankruptcy act to proceed to support them by evidence, and, if successful, to have The Diamond State Steel Company adjudged bankrupt, regardless of any delay, confusion or expense attending such a course. But the petitions being fatally defective, leave to amend should not be granted and

the administration drawn from the circuit court unless for cogent reasons. It should at least appear that a clear preponderance of the interests of the unsecured creditors, to say nothing of the holders of mortgage bonds, would better be conserved or promoted by proceedings in bankruptcy than by the administration of receivers acting by authority of the circuit court. It is material to allude to the circumstances which led to the bringing of the suit of Henry A. Hitner's Sons and the appointment of receivers in December, 1904. Joseph G. Hitner, a member of the firm of Henry A. Hitner's Sons, in his affidavit states in substance, among other things, as reasons for his joining in the bill of complaint in the circuit court, that Wallace, subsequently appointed as one of the receivers, represented to him that by permitting the affairs of The Diamond State Steel Company to be administered under a general receivership, the best interests of the creditors would be preserved; that a greater opportunity would be given to Wallace to perfect certain plans for the reorganization of the company, involving a sale of its plant, about which he was then negotiating; that by such reorganization the creditors would be paid in full; that the policy of the said receivership would be one of quick and profitable liquidation and an early payment of all the claims of the general creditors; that all the plans for such reorganization could be more quickly and surely accomplished under a general receivership than under the bankruptcy proceedings. Hitner further states that in December he was of opinion that by reason of the then condition of the market, it would not be advisable to sacrifice the assets of the company in bankruptcy proceedings at that time, and that if a general receiver should be appointed under the state law, with power to operate the plant, "by the time the spring came, a more advantageous sale of the said assets could be made, and the interests of the creditors thereby protected." Louis C. Madeira, Jr., Edward Page, Joseph G. Hitner, John J. Caine, Jr., Allen R. Hoffer and Eugene W. Stirlith, in a joint affidavit, state in substance, among other things, that they are the duly authorized representatives of creditors of The Diamond State Steel Company; that deponents used their influence with the creditors of the company to secure a discontinuance of the bankruptcy proceedings instituted in August, 1904, relying, in so doing, upon the representations of Wallace that the personal assets of the company were sufficient to pay all of its general creditors, and that by proceedings under a general receivership there would be a quick and profitable liquidation of such assets. Frank W. Todd in his affidavit states in substance, among other things, that for several years he has been acting treasurer of The Diamond State Steel Company; that pursuant to a call for the holding of a meeting of the unsecured creditors of the company, which was sent to all of its unsecured creditors, a meeting of such creditors was held in Wilmington, Delaware, November 22, 1904. It further appears from Todd's affidavit that upwards of two-thirds in amount of the unsecured creditors of the company were present at the meeting, so called and held, either in person or by duly authorized representatives; such creditors being 229 in number, whose claims aggregated

$93,526.02; that at the meeting the following resolution, after discussion and explanation, was adopted without a dissenting vote:

"Resolved, That it is the opinion of this meeting that a dismissal of the bankruptcy proceedings now pending against The Diamond State Steel Company, and the appointment of general receivers for said Company is the course best calculated to protect the interests of the creditors of said company, and that it is the desire of this meeting that this result shall be brought about if possible."

The call referred to in the above affidavit was dated November 18, 1904, issued by Wallace, addressed to the creditors of the company, and was in part as follows:

"The writer is positive that the Company has sufficient assets to pay all creditors in full, providing the affairs of the Company can be liquidated in a manner which will enable fair prices to be obtained for them. He is equally convinced that if the affairs of the Company must be liquidated through bankruptcy, it will mean a material loss to the creditors. Since the temporary receivers in bankruptcy have been in charge, the writer has diligently labored to have an agreement reached between creditors which would permit the dismissal of the bankruptcy proceedings and the appointment of general receivers, the object of this being, not that the adjustment of the Company's affairs may be delayed, but rather that this may be facilitated. You are doubtless aware of the present market conditions in iron and steel lines, and of the fact that both the personal and real property of such a Company as this is of much greater value to-day than it was even three months ago, and that the opportunities now presented for the adjustment of the Company's affairs, which would involve the speedy payment of creditors without waiting for liquidation through sales of material, are easily within the range of the probable. Under the circumstances I consider it essential to have a general meeting of the creditors of the Company, to determine what course they desire shall be pursued. Therefore a meeting of the creditors is called to be held at the office of the Company, * * * on Tuesday, November 22d, at 1.30 p. m., to consider the situation, and determine the best course to be pursued under the circumstances. I earnestly request that you be personally present at this meeting if possible, or, if not, that you be represented by some person with power to act."

Wallace in his separate affidavit states:

"That the claims of the creditors present or represented at said creditors' meeting and of the creditors who thereafter indicated their consent to or acquiescence in the appointment of said general receivers and approving the action of said meeting amount to a total of about $129,411.10 out of about $145,927.01, the total indebtedness of said defendant company to unsecured creditors."

Wallace and Winchester in their joint affidavit state:

"That subsequent to said meeting of creditors and prior to the 12th day of December, 1904, in response to a letter written by the said Howard T. Wallace, as president of said company, many other creditors of said company who had not been represented at said meeting signified their consent and approval of the action taken at said meeting looking to the final dismissal of said pending bankruptcy proceedings and the proposed securing of the appointment, if possible, of a general receiver for said company. That prior to the said 12th day of December, 1904, all of the unsecured creditors of said company, except a very small residue thereof, either through said meeting of creditors or through said letters thereafter received, had given their consent and approval to the proposed application to secure the appointment of said general receivers of said company."

From the affidavits, wholly uncontradicted in this respect, it appears that at least three fourths of all the unsecured creditors of

The Diamond State Steel Company holding between eighty eight and ninety per cent. of the total unsecured indebtedness of that company, advocated, consented to, approved of or acquiesced in the termination of the original bankruptcy proceedings and the appointment by the circuit court of receivers for that company. Under these circumstances Wallace and Winchester were appointed receivers by the circuit court. It is stated in substance by Winchester and Wallace in their joint affidavit, and by Wallace in his separate affidavit, that all of the petitioning creditors in the pending bankruptcy cases were either present or represented at the creditors' meeting above referred to, or thereafter by letter signified their consent to the proposed appointment of receivers. This statement is substantially, if not literally, correct. It appears that of the four petitioning creditors in No. 122 two, namely, the Wilmington Oil Company and John R. Kilmer, were present or represented at the meeting of creditors November 22, 1904, which adopted without a dissenting vote the resolution that it was the opinion of the meeting that the dismissal of the former bankruptcy proceedings and the appointment of general receivers for said company "is the course best calculated to protect the interests of the creditors of said company, and that it is the desire of this meeting that this result shall be brought about if possible." Napoleon B. Woolford, another of the petitioning creditors, who did not attend that meeting, consented in writing November 28, 1904, to the appointment of receivers. It further appears that at that meeting the remaining petitioning creditor, the Sloss-Sheffield Steel and Iron Company, was represented by counsel who declined to vote for or against the resolution advocating the appointment of receivers. The affidavits show that December 12, 1904, Henry C. Conrad, Esq., representing the Sloss-Sheffield Steel and Iron Company, was present at the proceedings in the circuit court which resulted in the appointment of receivers, and was one of the counsel who conferred with the judge of that court in chambers on the same day relative to the personnel of the receivers, and suggested names of certain persons for appointment to that office, and thereby, in behalf of the Sloss-Sheffield Steel and Iron Company, consented to and acquiesced in the appointment of receivers. Thus all of the petitioning creditors in No. 122 consented to the appointment of receivers. It further appears that of the three petitioning creditors in No. 123 the George B. Newton & Company, represented in the petition by Madeira, Hill & Company, as assignees, and John J. Caine, Jr., Howard M. Plitt and George L. Plitt, trading as Caine & Plitt, were also present or represented at the creditors' meeting just mentioned; and that the William H. Perry Company, the remaining petitioning creditor, through its manager duly authorized in that behalf, consented in writing December 9, 1904, to a circuit court receivership, saying in a letter to The Diamond State Steel Company, among other things:

"Replying to your favor of the 7th instant, would say that we are in favor of having general receivers appointed to settle up the affairs of your company; and would like very much to see your president, Mr. H. T. Wallace, appointed receiver."

It therefore appears without contradiction that all of the petitioning creditors in both of the pending bankruptcy cases before the appointment of receivers by the circuit court either took part in procuring or consented to and approved the appointment of receivers; and by so doing aided and assisted in the commission of the act on which their petitions in bankruptcy are founded. It is at least questionable whether persons who procure or connive at the commission of an act of bankruptcy are competent to maintain proceedings in bankruptcy on account of that act. In re Romanow (D. C.) 92 Fed. 510; Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 643, 37 C. C. A. 210; Simonson v. Sinsheimer, 95 Fed. 948, 954, 37 C. C. A. 337; In re Miner (D. C.) 104 Fed. 520; Durham Paper Co. v. Seaboard Knitting Mills (D. C.) 121 Fed. 179; Clark v. Henne & Meyer, 127 Fed. 288, 62 C. C. A. 172; Lowenstein v. Henry McShane Mfg. Co. (D. C.) 130 Fed. 1007; Moulton v. Coburn (C. C. A.) 131 Fed. 201. It is true that such an objection, although presented in argument, was not included among the grounds assigned in the motion to dismiss the petitions. Should, however, the proposed amendments be allowed, the objection undoubtedly would be raised by answer. This circumstance may be entitled to some weight in the determination of the application for leave to amend. But, aside from any participation by the petitioning creditors in a course intended and calculated to result in an act of bankruptcy, there are grounds of a broader nature on which must be determined the propriety or impropriety of allowing the amendments sought.

It is material to consider the grounds on which it is desired by some of the unsecured creditors to terminate the receivership and throw The Diamond State Steel Company into bankruptcy. In the joint affidavit of Louis C. Madeira, Jr., and others, already referred to, it is stated:

"That on or about January 10th, A. D. 1905, your affiants joined with other unsecured creditors of the said company in calling a meeting of all of the general creditors of the said company, whereof all of the said general creditors were duly notified, to be held at the Real Estate Trust Building, in the City of Philadelphia, on the 20th day of January, A. D. 1905. That the said meeting was duly held, at the time and place indicated in the said notices, and was attended either in person or by attorney, by a majority of the creditors both in number and amount."

The deponents further aver that at the meeting they were elected a committee to represent the creditors of The Diamond State Steel Company, and authorized to collect information concerning the affairs of the company and advise the creditors about the same. They then proceed as follows:

"That, at said meeting, the said Howard T. Wallace presented a suggestion for the liquidation of all claims through the sale of the plant of the company to parties with whom the said Howard T. Wallace alleged that he was negotiating. That, after said meeting, said committee met from time to time, and conferred frequently with the said Howard T. Wallace. That although frequently urged to do so, said Howard T. Wallace did not, would not, and has not, presented any plan to said committee which promises a reasonable and proper liquidation of the claims of the general creditors of the said company. That the said committee called a second meeting

of the general creditors of the said company, by mailing a notice of the same to each of the said creditors, which said meeting was held on the 16th day of March, 1905, at the Real Estate Trust Building in the city of Philadelphia, at which meeting the said committee presented a general report; after which a resolution was unanimously adopted as follows:

'Resolved: That the creditors of The Diamond State Steel Company, here present, hereby express their appreciation of the work of the creditors' committee appointed at the last meeting and so far as in their power, hereby authorize the committee to continue its inquiry, and to take such steps as in its judgment may be deemed advisable to bring about a prompt settlement of existing difficulties.'

That, being advised by counsel that the last day upon which a petition in bankruptcy could be filed against the said The Diamond State Steel Company was the 12th day of April, A. D. 1905, said committee held several meetings immediately prior to that date, in order to determine if the best interests of the creditors would necessitate a renewal of the bankruptcy proceedings. That, after mature deliberation, the said committee concluded that during the four months of the general receivership, there had been no material progress in the solution of the difficulties of the said company; that the vague plans and propositions which had been occasionally referred to by the said Howard T. Wallace were too elusive and indefinite to warrant consideration as business propositions; that there was reason to believe that the said Howard T. Wallace was endeavoring to prevent a quick liquidation of the assets of the said company in the hope of receiving some proposition for the purchase of the plant of the said company which would secure a return to the stockholders of the said company of a part at least of their investment. That, in addition to the reasons above set forth, the said committee of creditors, after a careful examination of the conditions of business, feel that the personal assets of the said company should have been sold during the early part of April, 1905, when high prices for such articles, as make up the larger portion of the said assets, prevailed; and that the said committee cannot commend the policy which involved the said Receivers in such litigation as prevented the disposition of said assets at the time indicated. That it is the belief of the said committee, after conferring together and after having the advice of counsel, and after giving a very careful consideration to the subject, that the interests of all the creditors will be more thoroughly protected, if the estate of the said The Diamond State Steel Company is administered by a trustee or trustees elected by them in bankruptcy proceedings; that by electing a trustee in whom they have confidence and upon whose administration they can rely with feelings of security, the claims of the creditors will probably receive a larger dividend than they would under the pending receivership. That the creditors, in bankruptcy proceedings, will have a more direct voice in the administration of the estate and in the disposal of its assets, than in the pending receivership; and by occasional or frequent meetings before a referee in bankruptcy, every important action and proposal concerning the estate can receive the thoughtful deliberation, consideration and vote of the creditors; the trustee will have the benefit of the opinions, suggestions and wishes of the creditors, who are business men, familiar with the business and assets of the bankrupt company; and that the administration in bankruptcy will be more speedy and expeditious and will probably save the creditors a large amount in costs and legal expenses. That, in consideration of the earnest requests of the said Howard T. Wallace, and of the allegations made by him concerning propositions which he had received for the purchase of the plant of the said company, which provided for the payment of the creditors in full, the said committee delayed taking any action leading to the institution of bankruptcy proceedings until the last possible date, in order that every possible opportunity might be given to the said Howard T. Wallace to consummate the negotiations which he alleged were pending for the sale of the plant of the said company, and pay off the creditors in that manner. That upon the 11th day of April, 1905, the said Howard T. Wallace having failed to present a definite plan for the purchase of the plant of the said company, and considering the facts above set forth, the said committee of creditors

instructed their counsel to institute bankruptcy proceedings in order that the control of the assets of the said company may be vested in such trustee or trustees as the creditors of the said company may elect."

Joseph G. Hitner, one of the complainants in the suit in which Wallace and Winchester were appointed receivers, and also one of the joint affiants, and a member of the committee of creditors, in a separate affidavit, among other things, states:

"That the said receivers were appointed by the said United States Circuit Court upon the 12th day of December, A. D. 1904, and that from that date until the present time, the said receivers have done practically nothing toward a liquidation of the assets of said company, and a payment of the claims of the creditors of the said company. * * * That said committee had many meetings, at which the said Howard T. Wallace was often present, and although requested to do so, the said Howard T. Wallace did not and has not presented to the said committee any plan which is in any way definite in its nature, or providing a reasonable and prompt liquidation of the claims of the creditors. That by reason of the inability of the said committee to obtain any definite plan from the said Howard T. Wallace providing for the payment of the claims of the creditors, the said committee called another meeting of the creditors, and presented its report to the meeting held on the 16th day of March, 1905. Upon the report of the committee a resolution was unanimously adopted authorizing the committee to take such steps on behalf of the creditors as they might deem best. That from that time until the 12th day of April, A. D. 1905, the committee and the said affiant personally, endeavored to obtain from the said Wallace information concerning a definite plan for reorganization of the said company which would protect the interests of the creditors. That the plans presented by the said Howard T. Wallace were too vague and elusive to be seriously considered as business propositions; that the policy of the said Wallace seemed to be one of delay for reasons unknown to your affiant, and not a policy tending to a sale for the interests of the creditors. That the market for the assets of said company in April of 1905 was such that had there been a sale of the assets of the said company, the best possible prices would have been obtained, and the interests of the creditors thereby advanced. That the policy of delay on the part of the receivers is one which will result in a material diminution of the value of the assets of the said company, and hence a loss to the said creditors. That the said affiant is therefore of opinion that the best interests of the creditors will be preserved by the election of a trustee in bankruptcy, in order that there may be a liquidation of the assets of the said company, at some time in the near future, when highest prices for the said assets can be obtained. That the said affiant heartily endorses the action of the creditors' committee in instituting proceedings in bankruptcy, believing that the administration of the estate of the said company in the bankruptcy proceedings will result far more advantageously to the creditors than by proceedings under the present receivership."

In addition to the foregoing affidavits in support of the application to amend there are affidavits severally made by Robert M. Cunliffe, Robert K. Cassatt, Frank Toomey, J. S. W. Holton, J. V. S. Bishop, Simon Weil and William J. Cooley, being or representing general creditors of The Diamond State Steel Company. In each of these affidavits the only averments material in this connection are in the following language:

"That he endorses the policy of the creditors' committee. * * * That, from knowledge, information and belief, your affiant is of opinion that the interests of all the creditors will be more thoroughly protected if the estate of the said The Diamond State Steel Company is administered by a trustee or trustees elected by them in bankruptcy proceedings and that the most simple and expeditious manner of liquidating the assets of the said company for the benefit of the creditors will be through bankruptcy proceedings in

the United States District Court; and that under said proceedings the claims of the creditors will probably receive a larger dividend than they would under the pending receivership."

In the affidavits of Charles R. Bachman, Napoleon B. Woolford and John R. Kilmer, the two latter being petitioning creditors in No. 122, it is averred in substance that the affiants are of the opinion that the best and most effective method of administering the assets of The Diamond State Steel Company would be by proceedings in bankruptcy and not through the receivership. In none of these three affidavits does the affiant disclose any facts supporting his opinion. The principal affidavits in opposition to the granting of leave to amend, on this branch of the case, are the joint affidavit of Wallace and Winchester and the separate affidavit of the former in each of the pending bankruptcy cases. In the joint affidavit, among other things, it is stated:

"That for several years prior to the month of August, A. D. 1904, the said Howard T. Wallace was, and at all times since said time, hath continuously been, the president of The Diamond State Steel Company, the above named defendant. That on the ninth and tenth days of August, A. D. 1904, two petitions in involuntary bankruptcy were filed in this court against the said The Diamond State Steel Company, being Nos. 105 and 106 in bankruptcy. * * * That The Diamond State Steel Company appeared in and made defenses to said petitions in bankruptcy and such proceedings were had thereunder, that on the thirteenth day of August, 1904, a decree was entered therein appointing said Howard T. Wallace and James P. Winchester, these deponents, receivers in bankruptcy of the said The Diamond State Steel Company. That said petitions were, upon motion and upon the order of the court, about the date last aforesaid, consolidated into one petition, known as No. 105 and 106 consolidated in bankruptcy. That these deponents duly administered the estate of said The Diamond State Steel Company from the time of their appointment until the 26th day of November, A. D. 1904, and on the 20th day of September, 1904, filed a report as such receivers showing the assets, liabilities and financial condition of said company, by which report it appeared that the personal assets of said company exceeded the unsecured liabilities thereof by upwards of $125,000. * * * That on the said 26th day of November, 1904, the petitioning creditors in Nos. 105 and 106 consolidated in bankruptcy, in open court abandoned the prosecution of said petitions, and the court thereupon ordered that ten days' notice of the proposed dismissal of said proceedings in bankruptcy be given to the creditors of said company; and it was thereupon ordered that the said Howard T. Wallace and James P. Winchester, said receivers, be removed from their said office, and their office as receivers as aforesaid be thereupon ended and determined. That on the 12th day of December, A. D. 1904, said consolidated petition Nos. 105 and 106 in bankruptcy was in due course dismissed by this court, no creditor of said defendant company appearing in opposition thereto. * * * That on the said 12th day of December, 1904, in compliance with the said resolution of creditors and with the subsequent consents thereto as aforesaid, a bill in equity was filed in the circuit court of the United States for the district of Delaware by Henry A. Hitner and Joseph G. Hitner, trading as Henry A. Hitner's Sons, against the said The Diamond State Steel Company, being No. 260 in equity, for the appointment of general receivers for said company. To said bill in equity the said company thereupon filed its answer, admitting the averments of said bill. * * * That thereupon the court by its decree, on the 12th day of December, A. D. 1904, in accordance with the prayer of said petition, appointed these deponents, the said James P. Winchester and Howard T. Wallace, general receivers of said company, which said receivers have from thence, hitherto, been continuously in charge of the assets, property and estate of said The Diamond State Steel Company under the order and direction of the said

circuit court of the United States. That under the order of the said circuit court and within the period of three months after their appointment, to wit, on or about the 11th day of March, 1905, these deponents, as said general receivers, filed their report showing in detail the assets, liabilities and general financial condition of said company. That by said report it appears that the personal assets of said defendant company, upon a fair valuation, exceed the unsecured debts and liabilities of said company by a large sum of money, to wit, the sum of upwards of one hundred and forty eight thousand dollars ($148,000). * * * That upon the qualification of said receivers and the assumption of their duties as such, objection was raised by a creditor of said defendant company against any further sales by the Philadelphia Warehouse Company of personal property of said defendant company upon which the said Philadelphia Warehouse Company claimed a lien conferring the right of such sale. By reason of such condition the receivers felt it their duty first to secure a determination by the court of the right of said receivers to in due course liquidate the debts of said company by a sale of its personal assets, and of the right of said Philadelphia Warehouse Company to control or interfere with such sale and liquidation. That thereafter, as appears by the certified copy of said record of said cause in equity, two several applications were made by said receivers for orders of said court authorizing them to make sales of the personal property of said defendant. That the larger part of the personal property of said defendant was covered by said alleged lien of said Philadelphia Warehouse Company, and the lots of personal property were so divided between the personal property unpledged and personal property alleged to be covered by the pledge of said Philadelphia Warehouse Company that said receivers were unable to advantageously dispose of any large portion of said personal property until the respective rights of said receivers and of said Philadelphia Warehouse Company had been defined by said court. That almost continuous negotiations were carried on between the said Philadelphia Warehouse Company and said receivers subsequent to their appointment, looking to either an amicable adjustment of the rights of said respective claimants to said property or to the bringing of a suit by said Philadelphia Warehouse Company against said receivers to determine the rights of said Philadelphia Warehouse Company, until on the first day of March, 1905, said Philadelphia Warehouse Company brought its suit against said receivers and against the said The Diamond State Steel Company, for the purpose of determining its right to the disposal of said personal property alleged to be covered by its said lien. That promptly on the filing of the bill in equity of said Philadelphia Warehouse Company as aforesaid, in the circuit court of the United States for the District of Delaware, these deponents as receivers as aforesaid, and said defendant company filed their joint and several answer to which replication has been filed and said cause is now at issue. That the said claim of said Philadelphia Warehouse Company under its said lien was the sole cause which has prevented these deponents as receivers as aforesaid from hitherto disposing of the personal property of said defendant company. That the issues raised by the said bill of complaint of said Philadelphia Warehouse Company and the answer of the defendants thereto must be first tried and determined before any effective steps can be taken for the disposal of said personal property. That the disposal of said issues would, in the judgment of these deponents, be more speedy if the general receivership of said company could be allowed to continue than would be possible under bankruptcy proceedings. * * * That a few days before the expiration of four months after the appointment of said general receivers as aforesaid, to wit, early in April of the present year, said creditors' committee" (appointed in Philadelphia January 20, 1905) "communicated through their counsel to said general receivers of said company a demand that said receivers should consent to and co-operate in the appointment of a third co-receiver by said circuit court, to be selected by said creditors' committee, and coupled with said demand a declaration of their intention, in default of the appointment of said co-receiver by said court, with the co-operation of these deponents as such receivers, to file an involuntary petition in bankruptcy against said defendant company, alleging as the act of bankruptcy

in said petition the said appointment of these receivers as general receivers as aforesaid. That these deponents, having in mind the interests of all of the creditors of said company and believing that the liquidation of the affairs of said company under said general receivership would be beneficial to said creditors as compared with a liquidation of said company's affairs in a court of bankruptcy, were induced by said demand and threat of bankruptcy proceedings to consent to said proposed plan. That upon the insistence of said creditors' committee, through their counsel as aforesaid, that the judge of said circuit court should be consulted prior to the 12th day of April, 1905, (which was the last day of said four months after their appointment as receivers as aforesaid), as to the willingness of said judge to appoint said third co-receiver under the circumstances aforesaid, the counsel of these deponents, receivers as aforesaid, together with said counsel of said creditors' committee conferred with the judge of said court and laid before him the said demand of said creditors' committee and its accompanying expressed intention to file petitions in bankruptcy as an alternative in case such third co-receiver were not appointed, with a view to ascertaining whether the judge of said court would favorably entertain an application for the appointment of said third co-receiver under the circumstances aforesaid. That the said judge of said circuit court wholly declined to consider the question of the appointment of such third co-receiver in advance of a formal application to him therefor. That said conference with said judge took place upon the eleventh day of April, 1905. In default of any definite information on the part of the judge of said court as to what his action would be upon such application for said third co-receiver, the pending petitions in bankruptcy against said The Diamond State Steel Company, being Nos. 122 and 123 in bankruptcy, were on the following day, the 12th day of April, 1905, filed in this court. These deponents aver that each and all of the petitioning creditors in said causes in bankruptcy, Nos. 122 and 123 in this court as aforesaid, had notice and knowledge not only of the intention to apply for the appointment of general receivers for said company upon the dismissal of the proceedings in bankruptcy, Nos. 105 and 106 consolidated in this court, but also of the actual appointment of said receivers on or about the date of said appointment. That the filing of said petitions in bankruptcy was by said petitioners delayed until the last day of the four months provided by the bankruptcy act within which, after the alleged act of bankruptcy, advantage could have been taken of said alleged act, by way of such petitions in bankruptcy. That during all of said four months, lacking one day, these deponents as general receivers of said company, as aforesaid, have been constantly engaged in caring for and in administering the estate of said defendant company, have necessarily expended money and entailed large expense in and for the performance of their duties as such receivers, and have produced such results in the direction of the final liquidation of the affairs of said company as, by due diligence, and under the circumstances of the case, as above detailed, they have been able. That the allowance of the proposed amendment of the petition in bankruptcy filed in this cause, if it should eventuate in the final adjudication of the bankruptcy of defendant company, would result in the loss of the said four months time in the liquidation of said estate, of the position now attained under said receivership toward said liquidation, and of the expenditures made and expenses incurred in and for said general receivership. That efforts have been made by these deponents during said receivership to procure such a reorganization of the said company and such a disposition of its assets, as would result in the complete payment of all creditors of said company, and such efforts have resulted in most encouraging conditions. That negotiations are now pending which seem likely to bring about such desired end and such a disposition of the assets of the company as will not only pay and satisfy all of the company's debts, but also secure some return to the stockholders of the company. That the pendency of the proceedings in bankruptcy against said company materially interfere with, if they do not wholly destroy, the chances of bringing such negotiations to a successful conclusion."

The joint affidavit of the receivers in No. 123 is mutatis mutandis similar to that in No. 122. The separate affidavit of Wallace in each

case is in accord with the joint affidavits of Winchester and himself. The gross impropriety on the part of the committee of creditors, or its counsel, in attempting, April 11, 1905, to coerce the judge of the circuit court under the threat of bankruptcy proceedings, to appoint a third receiver for The Diamond State Steel Company "to be selected by said creditors' committee"—no formal application for the appointment of such third receiver having been made to the court—needs no comment, save that it was a clear breach of the code of professional ethics which has obtained in this judicial district, and I assume elsewhere. It is, however, fairly to be inferred from the incident, just alluded to, that if the court had abdicated its function of selecting and appointing receivers, and complied with the request made to the judge at chambers, the pending petitions in bankruptcy would not have been filed. This certainly affords strong circumstantial evidence that the creditors' committee did not so much desire the institution of proceedings in bankruptcy on the next following day as a continuance of the general receivership with the addition of a third receiver of its own selection. The receivers had acted harmoniously with each other in all respects. The suggestion of the appointment of a third receiver to co-operate with the two already appointed, who, as above stated, were harmonious in their policy and management of the estate, seems unreasonable. It is hardly to be supposed that a third receiver selected by a creditors' committee hostile to the present receivers could have controlled their action, or, indeed, that such result could have been realized by the appointment of less than three additional receivers, largely increasing the expenses of administration through compensation to the receivers and counsel fees. The receivers are men of character and standing; one of them for a number of years having been president of The Diamond State Steel Company and thoroughly acquainted with the operation of its works and the details of its business, and the other the president for many years of one of the principal national banks in Wilmington, skilled in figures and accounts, who in other cases in equity in the circuit court in this district has most acceptably discharged the office of receiver. Had they or either of them been guilty of any official dereliction, whether of commission or omission, it was open to creditors or other persons in interest to bring the matter to the attention of the court for proper action. Yet the records do not disclose that any person at any time prior to the filing of affidavits on this hearing made any complaint to the court of any alleged incompetency, fault or inattention to duty, on the part of them or either of them. Nor do the affidavits as a whole show that the receivers have in any manner merited unfavorable criticism. In one or two of the affidavits on the part of the petitioning creditors there are averments, which without explanation, seem to reflect upon them. But these averments are fully met and explained by the exhibits as well as other affidavits. Copies of the record of the suit of Henry A. Hitner's Sons against the Diamond State Steel Company and of the suit of the Philadelphia Warehouse Company against the receivers, are before the court as exhibits attached to and made part of some of the

affidavits. On careful examination of these records I have found nothing suggesting undue delay in the administration of the estate or indisposition on the part of the receivers or either of them to care for the interests of creditors or others interested in the company. On the contrary it appears from the records that they have faithfully, diligently and efficiently discharged their duty, and that whatever delay may have occurred was the result of causes over which they had no control and of the action of certain unreasonably dissatisfied creditors or their counsel in the institution of the pending proceedings in bankruptcy. The bill of Henry A. Hitner's Sons was filed November 28, 1904, the subpœna being returnable on the first Monday in January, 1905. The company did not avail itself of the delay allowed by law, but entered an appearance and made answer December 12, 1904, the same day the receivers were appointed. March 11, 1905, the receivers filed their report, which was elaborate and involved much time and labor, showing in detail the assets and liabilities and general financial condition of The Diamond State Steel Company, from which it appeared that the personal assets of the company, on a fair valuation, exceeded its unsecured debts and liabilities by more than $148,000; while by their report as temporary receivers in bankruptcy filed September 20, 1904, such excess was about $125,000. It does not appear by the record that any exception or objection to the correctness of this showing has ever been made by anyone. The receivers, January 17, 1905, only a little more than one month after their appointment, applied by petition for leave to sell a portion of the personal property at private sale, stating, among other things:

"That the market for the manufactured products of said company and for the unmanufactured material of said company is at this time more favorable than it hath heretofore been, and your petitioners are of the opinion that it would be for the best interests of the creditors and other persons interested in the assets of said company that certain portions of the personal property belonging to said company, manufactured and unmanufactured, should be sold. * * * That certain portions of said personal property of said corporation are subject to the lien of the Philadelphia Warehouse Company, and now remain upon certain lands of The Diamond State Steel Company, leased to said Philadelphia Warehouse Company."

After averring that the personal property on which the Philadelphia Warehouse Company claimed a lien, covering the larger portion of the personal property of The Diamond State Steel Company, was so similar to the other personal property sought to be sold and "so equally the subject of profitable present sale that, in the judgment of your petitioners, any order directing the sale of any of said personal property should cover both the property subject to lien and that not subject to lien," the petition proceeded:

"Your petitioners are of the opinion that said property should be disposed of, or offered for sale, by your petitioners as receivers of this court, at private sale, believing that thereby the best market prices can be obtained and such sales effected with least loss. At such private sale such property can also be sold in such parcels or quantities as to insure best prices therefor."

The prayer of the petition was in part as follows:

"Your petitioners therefore pray the court for the order and direction of the court, authorizing your petitioners to sell any part or all of the personal

property included within the said schedules C and D hereto appended, from time to time, at private sale, at the best prices that can by them be obtained therefor, according to the state of the market; and upon the making sales of property so covered by said lien, to keep in a separate account the proceeds of said sales of property covered by said lien, subject to the future disposition thereof under the orders of the court, upon the determination of the validity of the lien of said Philadelphia Warehouse Company."

At the expiration of a rule to show cause why the prayer of the petition should not be granted the Philadelphia Warehouse Company, January 28, 1905, appeared and filed an answer, objecting, among other things, to the form of procedure and a private sale by the receivers of the property on which the Philadelphia Warehouse Company claimed a lien. A hearing was had February 4, 1905, and an order was made authorizing the receivers to sell personal property of The Diamond State Steel Company not covered by the alleged lien of the Philadelphia Warehouse Company. March 1, 1905, leave was granted to the latter company to file a bill against the receivers touching the validity and enforcement of the alleged lien, and accordingly on the same day the bill was filed and a subpœna issued returnable on the first Monday in April. The receivers, not waiting for the expiration of the time allowed by law, filed their answer March 29, 1905; and the Philadelphia Warehouse Company filed its replication April 8, 1905, four days before the commencement of the pending proceedings in bankruptcy. April 4, 1905, the receivers applied by petition for the sale of personal property of The Diamond State Steel Company, part of which had been pledged to the Philadelphia Warehouse Company and part unpledged. On the same day leave was granted to the Philadelphia Warehouse Company to plead, answer or demur to the above petition by April 11, 1905. On the last named day leave was granted to the receivers to abandon without prejudice their petition of April 4, 1905, and to file a new petition in lieu thereof, which was accordingly done on the same day. And also on the same day leave was granted to the Philadelphia Warehouse Company to file an answer to the last named petition of the receivers, which was forthwith done and a hearing had the same day on the petition and answer. The above mentioned facts, aside from other applications made by the receivers, as disclosed by the records, clearly sustain them in the statement that such delay as has occurred was caused by the litigation touching the alleged lien of the Philadelphia Warehouse Company and a private sale by the receivers of the property covered by such lien. The receivers were in nowise responsible for the embarrassing position with which they were confronted. I have no doubt that there has been much disappointment owing to the failure of expectations of an early winding up of the property and affairs of The Diamond State Steel Company, although the space of four months between the appointment of the receivers and the filing of the pending petitions in bankruptcy is by no means an unreasonable time within which to accomplish the desired result, or that such disappointment is shared by the receivers as well as by the creditors. This is evident from the affidavits. Some of the affiants on the part of the petitioners charge the receivers with failing to give

creditors a statement of any definite and satisfactory plan for the liquidation and payment of claims, and with giving to them on that subject only vague and indefinite information. Were such the case, it would be fully accounted for by the pendency of the litigation with the Philadelphia Warehouse Company, which involved a very large amount of the property of The Diamond State Steel Company. This litigation could not be avoided by the receivers without dereliction on their part. And it must be borne in mind that the receivers are not the officers of any creditors' committee, but of the circuit court; and that if cause of complaint existed it should have been brought to the attention of that court. While it would be improper to state any negotiations or proposals in the case of the Philadelphia Warehouse Company against The Diamond State Steel Company which are not disclosed by the record, I have no reason to doubt that an arrangement may shortly be made by which the property covered by the alleged lien of the former company may be sold at private sale at such time or times as to command satisfactory prices, and the proceeds of sale, or enough to pay the claim of that company, paid into court, subject to its further order on the adjudication of the case. The receivers in their affidavit say that their "efforts have resulted in most encouraging conditions;" that "negotiations are now pending which seem likely to bring about such desired end"—the reorganization of the company—and that "the pendency of the proceedings in bankruptcy against said company materially interfere with, if they do not wholly destroy, the chances of bringing such negotiations to a successful conclusion." This court would not, in my opinion, be justified in allowing the proposed amendment which might, but not necessarily would, result in throwing The Diamond State Steel Company into bankruptcy. There are several reasons strongly supporting this view. It does not appear from the affidavits and exhibits that at the time of the filing of the pending petitions The Diamond State Steel Company was insolvent within the meaning of § 1a (15) of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]. From the proofs it cannot be inferred that the aggregate of the company's property, exclusive of any property which it may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay its creditors, was not at a fair valuation, sufficient in amount to pay its debts. On the contrary the evidence is strong that the company was not insolvent as defined in the act. While by legal possibility insolvency on the part of the company might be shown on a trial in bankruptcy, the present showing is entitled to much weight in considering what the exercise of a sound discretion requires with respect to the allowance of the proposed amendments. Again, the petitioning creditors on a trial in bankruptcy would be met with the fact, which might or might not prove fatal, that all of them either procured or consented to the appointment of receivers who for four months carried on the business, involving large expenditures as well as receipts. Should the petitioning creditors fail to have the company adjudged bankrupt, certainly no good would result from the

granting of leave to amend. On the other hand, should an adjudication of bankruptcy be secured, it would, in my opinion, necessarily prove harmful, if not disastrous, to the creditors of the company. An adjudication in bankruptcy certainly would not facilitate an early termination of the litigation with the Philadelphia Warehouse Company, or promote the most advantageous sale of the property covered by the alleged lien of that company; but, on the contrary, would be calculated to cause delay in the accomplishment of these desirable ends. It would interrupt and introduce much confusion and embarrassment in the administration of the estate of The Diamond State Steel Company. If no temporary receivers were appointed in the bankruptcy proceedings the present receivers would be left in charge of the affairs, property and business of the company for an indefinite period measured, perchance, by the time taken by an appellate tribunal in hearing and deciding the case on appeal or petition of review taken or filed before the appointment and qualification of a trustee; and during all that time the receivers would be embarrassed or hampered by the provisions of the bankruptcy act. If, on the other hand, temporary receivers were appointed, they might or might not be the existing receivers. If they were not, much expense would be involved in their compensation and the fees of their counsel on account of acquiring the knowledge of and experience in the management of the affairs of the company now possessed by the existing receivers, and much time be consumed to attain that end. If the temporary receivers were the existing receivers their plans for the reorganization of the company and the payment of its debts would doubtless seriously be interfered with and possibly or probably defeated. In any event troublesome questions would arise which would not be presented under the existing receivership. I can perceive no possible advantage to the creditors of the company to be derived from the prosecution of the bankruptcy proceedings and am convinced that such proceedings could enure only to their detriment. An administration of the property of the company under the present receivership, I have no doubt, will be advantageous to its creditors and possibly to its stockholders.

For the reasons given the granting of leave to amend would not, in my opinion, be a proper exercise of judicial discretion. It follows that such leave must be denied, and consequently, that the motions to dismiss the petitions must be granted.

## LORING v. AMERICAN TRANSP. CO.

(Circuit Court, D. Massachusetts. June 16, 1905.)

No. 1,951.

CORPORATIONS—INSOLVENCY—RECEIVERS—FRANCHISE TAX—LIEN

Where a receiver of mortgaged personalty belonging to an insolvent corporation was appointed on the application of the mortgagee, the commonwealth was not entitled to priority of payment of a claim for a franchise tax assessed against the corporation, as provided by St. Mass. 1903, pp. 450–452, c. 437, §§ 75, 78, 83, as such tax did not create a lien on such mortgaged personalty superior to that of the subsequent mortgage.

In Equity.

John Noble, Jr., for complainant.
Frederick H. Nash, Asst. Atty. Gen., for defendant.

LOWELL, Circuit Judge. The defendant corporation was organized under the laws of Maine September 6, 1902. In September, 1903, a franchise tax became due by the defendant to the commonwealth of Massachusetts by virtue of St. Mass. 1903, pp. 450–452, c. 437, §§ 75, 78, 83. On October 6, 1903, a part of the corporation's property was mortgaged to the complainant. On March 29, 1904, this court appointed receivers of the corporation. The collection of the tax was referred by the treasurer and receiver general to the Attorney General April 21, 1904. The corporation is insolvent, and in the distribution of its assets by the receiver the commonwealth claims priority for the franchise tax over the claim of the mortgagee. The receivers ask the instructions of the court.

In Fuller v. Day, 103 Mass. 481, the Supreme Court of Massachusetts decided that personal property mortgaged after it had been assessed for taxes could not be sold for nonpayment of the taxes, so as to deprive the mortgagee of his right therein. That case appears to be decisive of this. If a tax on personal property does not create a lien thereon superior to the lien of a subsequent mortgage, a franchise tax upon a corporation does not create a lien upon its property superior to that of a subsequent mortgage. Hence it follows that, if there had been no receiver appointed in this case, the commonwealth could have sold only the equity in the mortgaged property to pay the franchise tax. The appointment of a receiver does not necessarily subordinate the otherwise prior claim of a mortgagee to the claim of the commonwealth. Here the receiver was appointed upon the application of the mortgagee, and under some circumstances the court might have provided in the decree of appointment for priority of payment to the commonwealth out of the proceeds of the mortgaged property. This provision was not made, however, and at the argument the claim of the commonwealth to priority of the tax was not urged on that ground.

Claim of the commonwealth of Massachusetts disallowed.

## JOHNSON v. LEHIGH VALLEY TRACTION CO.

(Circuit Court, E. D. Pennsylvania. June 12, 1905.)

No. 16.

1. STREET RAILROADS—LEASES—FORFEITURE—RETURN OF PROPERTY.
A consolidated electric railway company, composed of several independent companies, leased its lines to defendant; the lease providing that defendant, in addition to rentals, should expend $100,000 for improvements within two years, so that at all times the roads and rolling stock should be at least of equal efficiency and value as at the date of the lease; and at the termination of the lease defendant agreed to return the property to the consolidated companies in as good condition and repair as it was at the date of the lease, together with all the improvements, additions, betterments, enlargements, and extensions which were made during the lease. *Held*, that on defendant's insolvency and cancellation of the lease, the receivers were bound to return equipment to each subordinate company equal in value and efficiency to that which was received, and not merely equipment equal in value and efficiency to that received under the lease as a whole.

2. SAME—SET-OFF.
The excessive value of equipment returned to one of such companies could not be set off against the claim of another company for return to it of cars of equal value and efficiency.

3. SAME—EQUITABLE AND LEGAL RIGHTS.
Where a lease of the lines of a consolidated street railway company to defendant provided for a return of equipment, on cancellation of the lease, to each company, of equal value to that received by the lessee, the lessor's claim for return of specific cars on behalf of certain of the consolidated companies on termination of the lease by the insolvency of the lessee was an equitable right enforceable against property in the hands of its receivers by petition for surrender of specified cars; but the lessor's claim, under a betterment clause in the lease, for a share of cars purchased by the lessee which had not been appropriated to such lines, was a legal claim, allowable only as a claim against the proceeds of a sale of all of the insolvent's property by the receivers.

In Equity. Referring report back to master for further finding of facts.

Henry C. Boyer, for exceptions.
J. W. Bayard, opposed.

HOLLAND, District Judge. The Easton Consolidated Electric Company—a holding company—organized under the laws of New Jersey, purchased a majority or more of seven street railway companies and one illuminating company, in and about Easton, in the state of Pennsylvania, called in this proceeding the "Easton Companies." All these companies, excepting two, were subject to a mortgage at the time they were acquired by the Easton Consolidated Electric Company, and by it a trust mortgage was created, covering all of them, subject, however, to the prior mortgage created by them in their individual capacity. This holding company also issued stock to the amount of $450,000. These several Easton Companies were being operated in connection with each other by the Easton Consolidated Electric Company, when, on the 1st day of December, 1900, a lease of all of them was executed between it

and the Lehigh Valley Traction Company, with the assent of the stockholders of the separate companies, "each acting in respect to its own property and assets," wherein the Lehigh Valley Traction Company agreed to pay certain rentals to the holding company; to expend $100,000 "for the improvement and betterment of the demised property" within two years from the date of the lease; to "make such improvements, alterations, and additions to said roads and rolling stock," etc., "so that at all times the same shall be of at least of equal efficiency and value" as at the date of the lease, and, at the termination of the lease for any reason, it "agrees to return the property to the Easton Companies in as good condition and repair" as they were at the date of the lease, "together with all the improvements, additions, betterments, enlargements and extensions" which were made during the lease. The Easton Companies were operated by the defendant, in connection with its lines, from the date of the lease, for a period of about two years and five months, when, on May 4, 1903, the Lehigh Valley Traction Company went into the hands of receivers. During the time the Easton Companies were under the management of the defendant corporation, extensive changes were made in the equipments of the Easton Companies, for improvement and betterment of the demised property, amounting to about $77,606. The tracks of the Easton Transit Company were changed from broad to a standard gauge, and much of the rolling stock was replaced by new cars. There were also changes made in the equipment and rolling stock of the other companies included in the Easton Companies, and some of the cars of the Easton, Palmer & Bethlehem Street Railway Company were disposed of, and new cars substituted; but at the time of the appointment of the receivers there were nine of the old cars of this latter company still in their possession, which they hold at this time. The defendant company became embarrassed and failed in the performance of some of its obligations, and the Easton Companies filed a petition in this court on April 30, 1904, setting forth certain defaults in the payment of rentals under their lease dated December 1, 1902, and praying a cancellation of the same and a surrender of the demised property, including certain specified cars. The court subsequently decreed a cancellation of the lease, and the Easton Companies were returned to the former owners, together with certain improvements and betterments, but the rolling stock and equipments returned were not in all instances the same as those received by the defendant company when the lease was executed. Subsequently a petition was presented to this court, reciting the cancellation of the lease and the surrender of certain specified cars, and averring that the receivers of the Lehigh Valley Traction Company have not surrendered and refuse to surrender certain other cars and car bodies in their possession, and used on other railways of which they are receivers, and that the petitioners (the plaintiffs herein) are without sufficient cars to operate their railway and for its public service, and that their rights in the premises should be speedily determined, in advance of other questions in dispute, and praying for a rule on the

receivers to show cause why the said additional cars and all other cars and car bodies of the petitioners in the receivers' possession or control, or for which they are accountable, should not be immediately returned, or payment of their value made, prior to any other claims, out of the receivership funds, as well as damages for such detention. To this the receivers filed an answer in which they aver that they had not delivered the said additional cars and car bodies to the petitioners as claimed; that they are not the petitioners' property; that they are not all in the receivers' possession; that the petitioners are not, under any circumstances, entitled to said delivery, and they have sufficient cars to operate their lines sufficiently; that that is not a pertinent consideration in the present issues; and that they have received all the cars and car bodies which the receivers are required to return, or for which they should account to them. This petition and answer were referred to a master to take testimony to be submitted to him, and to inquire into the facts and report the same, and to report to this court as to the right of the petitioners in the premises.

The petitioners made the following claims before the master on behalf of the Easton, Palmer & Bethlehem Company, to wit: (1) Nine open bench cars now in the possession of the receivers; (2) in addition to a return of sufficient cars to the Easton, Palmer & Bethlehem Company to make an equipment of equal value and efficiency to that which the defendant received from this company, a return of such number of double-truck cars of the 70 purchased during the life of the lease under the betterment account as to which it would be entitled; (3) or of an immediate payment to the petitioners out of the general funds in the receivers' hands, arising from all sources, of an amount to enable them to equip the Easton, Palmer & Bethlehem Company with cars of equal value and efficiency to those turned over to the defendant, together with an amount to which they would be entitled under the improvement and betterment clause in the lease.

The master's report, with the evidence, was filed in this court May 5, 1905, together with a form of decree recommending the dismissal of the petition without prejudice, in order that the plaintiffs may renew their petition on final distribution. The facts found by the master material to the disposition of the case at this time are as follows: That the Easton Transit Company—one of the Easton Companies' lines—operated three smaller companies and a broad-gauge line in the city of Easton when it was taken into the combination known as the "Easton Companies," and was the owner of 26 open cars, 23 closed cars, and 2 St. Louis convertible cars, of broad gauge, making, in all, 51 cars on the entire system, which were passed over to the defendant company at the time of the execution of the lease to it. Another of the subordinate companies in the system known as the "Easton Companies" was the Easton, Palmer & Bethlehem Company, which was the owner of 5 closed cars and 9 open cars, making a total of 14 cars, which were also passed over to the defendant company as part of the property transferred by the Easton Companies at the time the lease was executed. The broad

gauge of the Easton Transit Company was changed to the standard gauge, and many of the old cars were replaced by new ones; and the receivers, upon cancellation of the lease, surrendered 52 cars to the Easton Transit Company, which they claim are more valuable and efficient than the old cars. The receivers also returned to the Easton, Palmer & Bethlehem Company 4 new St. Louis double-truck cars. These were a part of the 70 new cars of that type purchased by the defendant company during the life of the lease. But the master finds that these 4 cars alone are not a car equipment of equal value and efficiency to the car equipment which at the time of the lease was on the Easton, Palmer & Bethlehem line, but he is unable to determine from the evidence the extent of the deficiency. He further finds that the contention before him by the petitioners is that the excess of equipment returned to the Easton Transit Company, over and above what the defendant company received from it, cannot be set off against a deficiency in return equipment to the Easton, Palmer & Bethlehem Company, as compared with what the defendant company received from the Easton, Palmer & Bethlehem Company. In other words, the defendant company is required to return to each subordinate company of the Easton Companies an equipment equal in value and efficiency to that which it received from the respective companies. The master, however, if I understand him correctly, finds that, in his opinion, the defendant, under the lease, is only required to return an equipment, as a whole, equal in value and efficiency to that which was received, as a whole, under the lease, with whatever improvements that were made and apportioned under the betterment clause, but that, in his opinion, there were no apportionments of betterments made by the company prior to the cancellation of the lease, and therefore the plaintiffs are not entitled to the seven cars and car bodies as their share of betterments under the betterment clause; and he further finds that there is not sufficient evidence submitted to show whether or not the lessors have received, as a whole, upon all their lease lines, a car equipment of equal value and efficiency to that which was transferred to them under the lease, considering that obligation to include the questions of their respective market values, carrying capacities of the cars, their adaptabilities to the traffic for which they are to be used, the speeds at which they can be run, the cost of their operation, and their relative comfort for passengers, and therefore recommends a decree dismissing the petition, without prejudice to the rights of the petitioners to present their claims before the audit of the final accounting of the receivers of the defendant company, wherein all parties interested will have the opportunity of being heard, and a proper disposition of the petitioners' claim made. He further states that the claim of the petitioners, on behalf of the Easton, Palmer & Bethlehem Company, for a return of cars of equal value and efficiency to the cars received by it under the lease, is an equitable remedy, and can properly be considered in this proceeding, but that the claim of the petitioners to a return of additional cars under the equipment and betterment clause of the lease is a common-law right, and cannot be enforced in this

proceeding, as it is a claim against the entire fund in the hands of the receivers, and should be presented hereafter, when the receivers make a final accounting of the assets, and when all parties will be before the court and have an opportunity to be heard?

I do not agree with the master in his finding that, upon a cancellation of this lease, a return of the car equipment equal in value and efficiency to those received under the lease as a whole would be just and equitable, under all circumstances; and I am further of the opinion that the lease was drawn in such a way as to compel, in case of cancellation or abandonment, a return of equipment to each subordinate company equal in value and efficiency to that which was received. In other words, a return of the 52 cars to the Easton Transit Company may be required, in order that the efficiency on that company's lines would be equal to the efficiency of the cars received from that company, and yet the value of those cars returned may be in excess of the value of the cars which the defendant received from it. This excessive value cannot be set off against a claim of the Easton, Palmer & Bethlehem Company for a return of cars of equal value and efficiency to it, or else it might be possible for the property of the Easton, Palmer & Bethlehem Company to be depreciated through the action of this lease, by the return of less property than was taken from it under the lease. If, however, the owners of the Easton, Palmer & Bethlehem Company are identically the same persons with the owners of the Easton Transit Company, and these two companies can be operated together, and the cars of both used interchangeably, and that, so used, the cars which were returned are of equal value and efficiency to those disposed of under the lease, another question might arise; but there is not sufficient evidence nor findings of fact in the report of the master to ascertain the exact rights and equities between the parties, or what effect it would have upon the property of the Easton, Palmer & Bethlehem Company and the Easton Transit Company if no more cars were returned. In other words, both the Easton Transit Company and the Easton, Palmer & Bethlehem Company are entitled to a car equipment equal to that which was leased to the defendant, and the facts should be sufficiently ascertained to enable the court to make a decree accomplishing that result. These facts cannot be ascertained from either the evidence or the master's report.

The master, however, I think, is clearly right in holding that the claim for a return of specific cars on behalf of the Easton, Palmer & Bethlehem Company, equal in value and efficiency to the car equipment leased, is an equitable right. If, therefore, the evidence had been sufficient to enable the court or master to specifically find the relative situation of the two subordinate corporations, to wit, the Easton Transit Company and the Easton, Palmer & Bethlehem Company, it might be disposed of in this proceeding; but, as to the other part of plaintiffs' claim, the fact that the master finds that none of the new cars purchased by the defendant company during the life of the lease was appropriated during that time, the claim for their share of these cars under the betterment clause is no more than a common-law claim, and should be presented, as suggested

by the master, at the final hearing, and share with the other claimants in the entire fund of the defendant's property.

As to the claim for the original equipment, the plaintiffs are entitled to a return of specific cars, sufficient to make an equipment for each—the Easton Transit Company and the Easton, Palmer & Bethlehem Company—equal in value and efficiency to that which each transferred to the defendant under the lease; and, in case the specific property is not returned, it would seem that each company is entitled to an award out of the general fund in an amount which will enable them to equip their respective roads with cars equal in value and efficiency to those which were transferred under the lease. So that, in order that the claims of the petitioners may be properly disposed of, it will be necessary that this report should be referred back to the master to take further testimony and report further findings of fact. Before that can be done a sale of the property will have taken place under the decree of this court, and the cars claimed by the Easton, Palmer & Bethlehem Company will have been sold.

In order that the property about to be sold may be clear of any claims or incumbrances, and the rights of the petitioners may be preserved, a decree will be entered as follows: And now, to wit, June 10, 1905, the petition and answer in this case, together with the report of the master thereon, are referred back to him, without prejudice to the rights of the petitioners or the receivers of the Lehigh Valley Traction Company to take further testimony and to find additional facts hereinabove suggested, and further to report the same, together with a distribution to the claimants out of the general fund which the receivers will receive as the proceeds of the find additional facts hereinabove suggested, and further to report sale as shall be equitable under the facts as found.

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## In re L'HOMMEDIEU.

(District Court, E. D. New York. June 13, 1905.)

1. WILLS—TRUSTS—CREATION.

Where testator devised all his property to his son, to lease the real estate, and invest the personal property, and receive the rents, income, and profits, and after paying taxes, insurance, etc., to apply the residue to the maintenance of testator's wife, unmarried daughters, and minor children, etc., until two of his daughters should arrive at the age of 21 years, and, on the happening of such event, to distribute the trust property in the manner specified, etc., he created an express trust, under New York Real Property Law, § 76, subd. 3 (Laws 1896, p. 571, c. 547), authorizing a trust to be created to receive the rents and profits, and apply the same to the use of any person for life or for any shorter term.

2. SAME—BENEFICIARIES—TERMINATION.

The beneficiaries of the trust were the testator's wife, unmarried daughters, and minor children, who were entitled to the income of the trust estate until the death of testator's two minor children, or their arrival at the age of 21 years, when the trust terminated.

3. SAME—ESTATE OF TRUSTEE—RIGHTS OF DISTRIBUTEES.

Where testator bequeathed his real and personal property to his son in trust to apply the rents and profits to the maintenance of his wife

and minor children until two of them died or became of age, when the trust should cease and the property be divided among testator's children, and authorized the trustee, in his discretion, to sell the testator's real estate, the trustee's rights in such real estate were limited to the purposes of the trust; and hence the distributees under the will took title to real property as to which the trustee's power of sale was not exercised as remaindermen, vested as of the death of the testator.

4. SAME—POWER OF SALE.
The grant of the power of sale merely authorized the trustee to sell in pursuance of the power and not as trustee, and therefore did not enlarge the trustee's estate.

5. SAME—JUDGMENTS—LIEN.
Where testator devised all of his real and personal property in trust to use the income for the benefit of his wife, unmarried daughters, and minor children until two of them died or became of age, after which he directed that the estate be distributed among his children, the vested remainder to which one of such children was entitled at testator's death was subject to the lien of a judgment properly docketed against him, which lien, in case of a sale of the real estate under a power contained in the will, attached to the proceeds.

6. SAME—EQUITABLE CONVERSION.
A provision of a will empowering testator's executor, in his own discretion, and at such time or times as he shall deem proper, to sell either at public or private sale any and all of testator's real estate, was a discretionary and not an imperative power, and therefore did not constitute an equitable conversion of testator's realty into personalty.
[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Conversion, §§ 38–43.]

7. SAME—LIENS—PRIORITY—EQUITY—PARTIES.
Where, in a proceeding to determine the validity and priority of certain liens, the assignees junior in time sought to have an alleged senior lien annulled for usury, but the holder of such lien made no claim on the fund in controversy when brought into court against his will, and filed no pleadings, and the proceedings of the other claimants established that he was prima facie entitled to payment from the fund, and thereupon attempted to show that his title was avoidable for usury, such adverse claimants were not entitled to have the fund released from such senior lien without paying the holder thereof the consideration received by the debtor.

Pierre M. Brown, for bankrupt.
William H. Ford, for trustee.
James S. Darcy, for Russell and another.
Carter, Ledyard & Milburn, for King.
John D. Kaps, for Jenner.
William R. Willcox (Robert D. Murray, of counsel), for Gilman.

THOMAS, District Judge. The bankrupt's father died in 1892, leaving a will of real and personal property, and, upon settlement of his estate, certain moneys accruing to the bankrupt under such will were delivered to the trustee in bankruptcy for purposes hereafter considered. Several persons claim portions of the fund by virtue of specific liens or assignment, as follows: Russell and another by virtue of a judgment docketed January 21, 1897, in Queens county, where certain of the testator's land was situated; Hewlett, Gilman, and Jenner, severally, by virtue of assignments executed in October, 1891, November, 1901, February and July, 1902.

The validity of the assignments to Hewlett, King, and Jenner is not attacked, and these claims are payable in the order of their priority of execution; but all claims are subject to the payment of the Russell judgment, if it is a lien; and the claims of Hewlett, King, and Jenner are also subject to the assignment of Gilman, except so far as the same may be avoided for usury. The Russell judgment has priority, if it became a lien on certain real estate of which the testator died seised, and out of which the fund arose. The lien is denied upon the grounds that the will vested in the bankrupt no estate in land, upon which a judgment lien could attach, and that it converted the real estate into personalty. The will provides:

"First. I give, bequeath and devise all my property, whatsoever and wheresoever, to my son George A. L'Hommedieu, his successor or successors and assigns, in trust, however, for the following purposes, to wit:

"To lease my real estate and invest my personal estate and to receive the rents, income and profits of my real estate and the interest, income and profits of my personal estate, and, after paying the taxes, insurance, and costs of necessary repairs thereon and the expense of the administration of the trust, to apply the residue of the rents, income, interest and profits to the support and maintenance of my wife, unmarried daughters and minor children, and to the education of my minor children, during the minority of and until my daughters, Ida M. L'Hommedieu and Florence L'Hommedieu, shall each have attained to the age of twenty-one years, but no longer; and I set apart and establish my present residence as the place of residence and home for my said wife, unmarried daughters and my minor children, during the continuance of the trust, unless sooner sold by said trustee.

"Second. When my said daughters, Ida M. and Florence, or the survivor of them, shall have attained to the age of twenty-one years, or in case of the death of both of them under twenty-one years of age, then upon the decease of the longest liver of them, whichever event shall first happen, I direct the said trustee to distribute the trust estate in the following manner, viz.:

"(1) In case my wife shall then be living, to her the portion she would take, at the time of my decease, by law, in case I had died intestate, and this in lieu of dower.

"(2) The residue, or in case my wife shall then be deceased, the whole trust estate to and among my children share and share alike, the descendants of any deceased child or children to take the share the parent would take, if living.

"Third. Inasmuch as I have already advanced to my son James H., the sum of ten thousand dollars on his note, five per cent. interest per annum, to enable him to engage in business, therefore, I authorize and empower the said trustee to, and it is my will that he shall, in his best discretion, in like manner advance to each of my other sons, provided I shall not have done so before my decease, out of the trust estate, such sum or sums, not exceeding, however, in all, the sum of ten thousand dollars to any one of them as, in his best judgment, shall be requisite to enable each of them to engage in legitimate nonspeculative business; and, in case my son George A. shall desire to succeed to my business, or the business of my firm, in case the same shall be conducted by a firm, at the time of my decease, then I authorize and empower him to employ so much of the trust estate therein as he, or in case he shall organize a firm to carry on the said business by associating with him my son John K., that being my wish, or any other partner, then the said firm shall require to successfully carry on the said business, not exceeding, however, the sum of sixty thousand dollars, at the like rate of interest, the said trustee to complete all unfinished contracts, if any, binding upon my estate at the time of my decease, for the benefit of the trust estate, and, in case the interest on any sum or sums advanced, or employed, as authorized in this paragraph, shall fall in arrears and remain unpaid, I direct that the said trustee immediately call in the principal and collect the same with all unpaid interest.

"In case the money so advanced, either by me in my lifetime or by my said trustee thereafter, and the money so employed by my son George A., shall not have been repaid with the interest thereon, before the final distribution of the trust estate, then the same, or the unpaid portion thereof, with all unpaid interest shall be added to the trust estate and deducted from the share of the one of them to whom it was advanced, with all unpaid interest thereon.

"Fourth. It is my will and I accordingly direct the said trustee to support and maintain my wife, unmarried daughters and minor children during the continuance of the trust estate, in my present residence, in the same manner and style as I have done, and to make such allowance in money, aside from their support, to each of them as the income of the estate, in his best discretion, will permit, without prejudice to the support, maintenance and education hereinbefore provided for.

"Fifth. I hereby nominate and appoint my son, George A. L'Hommedieu sole executor of and trustee under this will and empower him, in his own discretion, at such time or times as he shall deem proper, to sell either at public or private sale, any or all of my real estate and to give good and sufficient deed or deeds for the effectual conveyance thereof."

The will creates an express trust, under subdivision 3, § 76, of the real property law of the state of New York (Laws 1896, p. 571, c. 547). The beneficiaries under the trust are the testator's wife, unmarried daughters, and minor children, not including the bankrupt. The trust terminates upon the death of two minor children, or their arrival at the age of 21 years, when the trustee should distribute the whole trust estate as follows: To the widow, if living, the portion she would take in case the testator had died intestate, "and this in lieu of dower," and the residue, or the whole trust estate, should she be dead at the time of this distribution, to the testator's children, share and share alike; the descendant of any deceased child taking the parent's share. The personal estate was about $170,000, and the real estate was $6,782.68 sold prior to January 1, 1896, and $70,685 subsequent to January 1, 1896. Very little real property was sold until 1903. The real estate consisted of vacant land, houses, and cottages, and the house occupied by the family, all located in Queens county, except one piece at Lake Placid, which sold for $3,496. The will, exclusive of the power of sale, did not authorize the trustee to sell the land, but the power did authorize such sale in the trustee's discretion.

If the power of sale were not exercised, who would take the real property? The persons described as distributees would take it, and it is considered that they would take it as remaindermen, by a title that vested in them at the death of the testator. There was a life estate carved out of the property. The trustee took an estate commensurate with the life estate, inasmuch as the declared purpose of the trust required that no greater estate be vested in him. Manice v. Manice, 43 N. Y. 305. The right acquired by the trustee was merely for the purposes of the trust, and nothing beyond that. Embury v. Sheldon, 68 N. Y. 235. He took no interest in the land not embraced in the trust. Stevenson v. Lesley, 70 N. Y. 517. He had an estate for the lives or minority of two children, and it was this estate, and this only, which vested in him. Matter of Tienken, 131 N. Y. 391, 30 N. E. 109; Losey v. Stanley, 147 N. Y.

568, 42 N. E. 8. In this regard it should be sufficient to read in connection sections 80, 81, and 82 (page 572) of the real property law. Section 80 of the real property law vests the legal estate in the trustee, subject only to the execution of the trust, and the beneficiaries, of whom the bankrupt was not one, did not take any legal estate or interest. Sections 81 and 82 provide:

"Sec. 81. The last section shall not prevent any person, creating a trust, from declaring to whom the real property, to which the trust relates, shall belong, in the event of the failure or termination of the trust, or from granting or devising the property, subject to the execution of the trust. Such a grantee or devisee shall have a legal estate in the property, as against all persons, except the trustees, and those lawfully claiming under him.

"Sec. 82. Where an express trust is created, every legal estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to, the person creating the trust or his heirs."

The trust was not to sell. There was a grant of power to sell, but the grantee of the power, as such, and not as trustee, would sell. It did not enlarge the trustee's estate. Matter of Tienken, 131 N. Y. 402, 30 N. E. 109. The trust was merely to lease real estate; to receive rents, income, and profits of real estate; to invest personal estate; to receive the interest, income, and profits of personal estate; and apply the net amount of moneys so obtained for the support and education of designated beneficiaries during the minority of two persons, unless they earlier died. In such case the quantity of the trustee's estate is coincident with the beneficial right of the cestuis que trust, and when their right ceases the purpose of the trust and the estate of the trustee ceases. Losey v. Stanley, 147 N. Y. 560, 42 N. E. 8; Real Property Law, § 89. Such an estate in the trustee obviously did not exhaust all estates in the land. Stevenson v. Lesley, 70 N. Y. 512; Matter of Tienken, supra; Losey v. Stanley, supra. Life estates were carved out and supported by a trust of equal duration. But what became of the estate of inheritance which the testator had, and out of which by his will he created the estate for life? It went somewhere. Matter of Tienken, 131 N. Y. 401, 404, 30 N. E. 109. Who took it? Certainly the trustee did not take it. Either as a remainder it vested in the distributees, of whom the bankrupt was one, or, undisposed of by will, it went to the testator's heirs, of whom the bankrupt was one. Matter of Tienken, 131 N. Y. 401, 30 N. E. 109. The will directs that after the termination of the trust estate the trustee shall "distribute the trust estate" to the wife and children. But an express trust cannot be created for the mere purpose of distribution. The provision for distribution pointed out the persons to whom the trustee should deliver the property when his estate ceased, and what part of the estate he should deliver to each of such persons. The expiration of the trust necessarily preceded the distribution, and thereafter George A. L'Hommedieu acted as the grantee of the power; but the title was in the distributees or heirs, and for present purposes it is immaterial how the bankrupt took. It is true that when the trust terminated the life estate that had been carved out of the fee had been rejoined to it. Had there been a direct life

estate to the present beneficiaries, and remainder given to the children without the interposition of a trust, no one would doubt that a child's interest in the remainder would become subject to the lien of a judgment properly docketed against him in the proper county, even though the executor had a power of sale, nor that, if the executor exercised the power of sale, the lien would be transferred to the proceeds. Sayles v. Best, 140 N. Y. 368, 35 N. E. 636. In that case there was no trust, while here a trust intervenes between the life estate and remainder. But the creation of a trust does not of itself prevent the creation of a remainder vesting at the death of the testator. Embury v. Sheldon, 68 N. Y. 235; Stevenson v. Lesley, 70 N. Y. 517; Losey v. Stanley, 147 N. Y. 568, 42 N. E. 8. While it may not be important to inquire whether, pending the termination of the life estate, the bankrupt took by the will or as an heir, yet it is considered that the will intended that he should take a remainder vesting at the testator's death. If he took any remainder under the will, he took one vested or contingent, and, as to the real property, no element of a contingent remainder is present. When the testator directed the trustee to distribute the estate, he meant that an equal share of it should be delivered to each of his children. The will does not say "children then living." There is nothing in the language that indicates intention to limit the gift to those surviving at the time of distribution, and hence the usual rule would apply—that the children intended were those living at the death of the testator. Goebel v. Wolf, 113 N. Y. 405, 413, 21 N. E. 388, 10 Am. St. Rep. 464; Matter of Tienken, 131 N. Y. 391, 403, 406, 30 N. E. 109. If a child died before the testator, his descendants, if there were such, would take "the share the parent would take if living." But observe what such share would be. The will states that an advance had been made to the testator's son James H. on his note, and authorizes similar advances to other sons. This was in the nature of a loan, but the will provides that, if it were not repaid, it should be deducted from the share of the one to whom it was advanced. If it was not the intention to vest the son borrowing during the life estate with a share, it could not be expected that its repayment would be secured by deducting it from that share. Matter of Tienken, at pages 407, 408, of 131 N. Y., page 112 of 30 N. E. There are cases where a direction to pay or distribute has been held to vest no estate in the distributee until the arrival of the event upon which the distribution depended had happened. But that rule only aids interpretation. Matter of Tienken, at page 409 of 131 N. Y., page 112 of 30 N. E. In such cases there have been present facts that were deemed worthy to demand its application. In Delafield v. Shipman, 103 N. Y. 463, 464, 9 N. E. 184, the trustees were directed, upon the death of the testator's widow, to make division "between my children then living, and the descendants of any deceased child * * * so that such descendants of any deceased child will receive the same share which their parent would have received if living." It was held that a child dying before the widow took no vested estate, in the absence

of words showing a direct gift. In Smith v. Edwards, 88 N. Y. 92, there was no trust created. Judge Finch said:

"It has been often held that, if futurity is annexed to the substance of the gift, the vesting is suspended; but where the gift is absolute, and the time of payment only is postponed, the gift is not suspended, but vests at once. Critically examined, this is little more than stating the same problem in another form of words, and amounts practically to saying that, if the gift is future, it is not present; but nevertheless it has been useful in drawing sharply the distinction between a gift presently given and its deferred payment. 1 Jarman on Wills, 759; Warner v. Durant, 76 N. Y. 136. Out of that distinction has grown a rule which bears directly upon the present case—that, where the only gift is in the direction to pay or distribute at a future time, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift. 1 Jarman on Wills, 762. The cases cited as holding this doctrine were instances in which the gift was conditioned upon an event to be determined in the future. Leake v. Robinson, 2 Mer. 363; Ford v. Rawlins, 1 Sim. & Stu. 328; Taylor v. Bacon, 8 Sim. 100. In such cases, until the happening of the future event, it must necessarily remain uncertain whether a gift would exist at all, and that could not be said to have vested which was not certainly given. So far the rule is undoubtedly established, and rests upon evident and sound reasons. It is decisive as to that portion of the bequest of the special fund which the testator directed should be paid at the period of final distribution to the grandchildren who should be living at that date. The condition of survival attached to the gift itself. Who the legatees would in fact prove to be, depended upon a future contingency. Those who were to take in the prescribed event were uncertain until it happened, might not be any one of those in esse at testator's death, and might prove to be a grandchild born twenty years later. The ultimate vesting of this portion of the principal of the special fund was therefore plainly postponed for twenty years, and not during designated lives in being, and must be declared invalid. Schettler v. Smith, 41 N. Y. 334."

It was further held that another bequest should not be construed as vesting, and one ground of the conclusion was that the whole interest was not given, but some part of it was diverted for the purposes of the estate. In Shipman v. Rollins, 98 N. Y. 311, the terms of the will, and the testator's presumed knowledge of the incapacity of the legatees to take, save in the future, were held to show an intention not to vest the legacies.

But the language of the present will, and the circumstances to be considered in connection therewith, do not prevent vesting, as in the cases noticed, and it is considered that the mere omission of technical words expressing a present gift did not prevent the vesting of the remainder at the death of the testator. Goebel v. Wolf, 113 N. Y. 405, 412, 413, 21 N. E. 388, 10 Am. St. Rep. 464; Matter of Tienken, 131 N. Y. 391, 408, 30 N. E. 109.

But it is urged that the power to sell worked an equitable conversion of the realty into personalty, and precluded the judgment from attaching as a lien upon the land. The fifth subdivision of the will reads:

"I * * * empower him, in his own discretion, at such time or times as he shall deem proper, to sell either at public or private sale, any or all of my real estate."

The power is not, in terms, imperative, but its exercise is in the discretion of the trustee. The discretion cannot be limited to the

time of sale, for the other words, "as he shall deem proper," relate to the selection of the time or times of sale. Moreover, the trustee is not directed to sell all the real estate, but "any or all." To constitute conversion, it must be the duty of the grantee of the power to sell in any event; and this duty is to be determined by the terms of the grant, or from the whole will, as where the purposes of the will require such a sale, or a legal performance of the duties enjoined upon the grantee of the power could not be otherwise had—for instance, in the present case, by a distribution of the property in specie. Chamberlain v. Taylor, 105 N. Y. 185, 11 N. E. 625.

The citation or discussion of the numerous decisions upon this subject is unnecessary. The general rules are not in doubt. Their application is a matter of judicial judgment in a given case. It is considered that in the present instance the power was given to aid the executor in case he found it necessary or helpful to exercise it. Whether the conditions would demand the execution of the power, the testator could not foresee. Hence he left the grantee of the power unconstrained. If he found that such sale was convenient or necessary to enable him to give to each person his proper share, he was authorized to make it. Matter of Tienken, at pages 391, 408, of 131 N. Y., pages 109, 112, of 30 N. E.

The remaining question relates to the validity of the Gilman assignment. The referee has found that the contract between Gilman and the bankrupt was usurious, and that Gilman is not entitled to any part of the money. But Gilman insists that, as regards this proceeding, he is in the position of a defendant against whom relief is asked for the annulment of his assignment; that he has made no application affirmatively for a delivery of a portion of the fund to him; that he has presented no claim, has offered no evidence, but that he has been brought in uninvitum, to the end that junior assignees may have his assignment annulled. He does not object to such status, and is willing to submit his assignment to the adjudication of this court, provided he may be regarded as a defendant. On the other hand, the assignees junior in time assert that Gilman does stand in the position of a person affirmatively claiming a portion of the fund, but point to no written application or pleading interposed by Gilman. Such a condition of the record illustrates the impropriety of submitting the question now at bar to a referee without order of the court, and without pleadings duly filed and exchanged. The fund was placed in the hands of the trustee, to be by him distributed "as directed by the court or courts having jurisdiction thereof." But this court in this proceeding has no jurisdiction of Gilman unless he voluntarily appears and submits to its jurisdiction, and neither the court nor the parties could demand that he should become an applicant for the funds without his consent. So far as appears, he has not applied for any portion of the fund, but has litigated the question whether his assignment is effectual to carry any portion of the fund; stating, however, that he litigates that question only as a defendant. If his assignment is usurious, he, as an applicant, is not entitled to recover any portion of the fund; but, even if it is usurious, and he stands merely in the

position of a defendant in a suit in equity brought for the purpose of annulling his assignment, the trustee and junior claimants must return to him the consideration received by the bankrupt, before there can be a decree annulling the assignment. The court has not created this situation, but finds decision embarrassed by the absence of pleadings raising a definite issue.

If this court had original jurisdiction to distribute the fund, it could direct all persons to appear and claim it; and, in such case, if Gilman failed to demand payment to him, he could be defaulted. But the court has not possession of the fund, nor is it placed in the hands of the trustee for the general purposes of the bankruptcy estate. He seems to have been selected as a depositary who shall pay out the money when a court competent to direct its payment should have done so. The referee obtained such jurisdiction as was conceded to him. He had none originally. He had no power to direct Gilman to appear and assert a claim to the fund, nor had he any power to enter his default, and distribute the fund to others in case Gilman failed to claim payment from the fund. A court that had original jurisdiction to distribute could, upon proper procedure, do this. But the referee was powerless to bring Gilman in at all, and much less to put him in the position of a claimant of the fund. Gilman filed no claim. He offered no evidence. Other claimants made it fully appear that Gilman was prima facie entitled to payment from the fund, and thereupon attempted to show that his title was avoidable for usury. Gilman was asserting nothing. He was passive. But the other claimants disclosed that the Gilman assignment must be paid or eliminated, and thereupon attempted to eliminate it. The difficulty has arisen from the referee taking cognizance of a matter over which he had no jurisdiction, without pleadings defining the status and claims of the parties. But the record is taken as it is. It does not show that Gilman has applied for the fund. It does show that other claimants have tried to annul his assignment, which affected their priority. Gilman seems to have been willing to meet that issue. The referee has decided that the assignment was tainted with usury. There is sufficient evidence to sustain the finding, and it is not the duty of this court to take up the evidence de novo. But if the referee became a court of equity, entertaining a suit to avoid the assignment as to a person who demanded nothing affirmatively, he was bound to observe the rule of equity that requires the borrower's assignee of the property pledged for the usurious loan to return whatever the borrower received. This was $1,800. The premiums paid on the policy of insurance were not received by the borrower, but were paid by the creditor at his own instance and for his own benefit, to continue policies that were pledged to him as security. Hence the $1,800 must be repaid, as a condition of avoiding the assignment.

An order pursuant to the above views will be entered.

## THE GRAND REPUBLIC.

(District Court, E. D. New York. June 6, 1905.)

1. MARITIME LIENS—REPAIRS—EVIDENCE OF AGREEMENT FOR LIEN.
While the fact that the charges for repairs to a vessel were made to the owner on the books, and that a bill was presented to the owner, is some evidence that the work was done on the credit of the owner, and not that of the vessel, it is not conclusive, and will not defeat the right of the repairer to a lien when an agreement therefor is shown.
[Ed. Note.—Liens for supplies and services, presumptions as to credit to vessel, The George Dumois, 15 C. C. A. 679.]

2. SAME—ESTOPPEL—SUIT AGAINST OWNER.
The repairer of a vessel is not estopped from claiming a lien by the fact that he first brought suit against the owner in personam to recover for such repairs.
[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Maritime Liens, § 78.]

In Admiralty. Suit to enforce lien for repairs.

James J. Macklin, for libelant.
Wingate & Cullen (T. Ellett Hodgskin and George Albert Wingate, of counsel), for claimant.

THOMAS, District Judge. The libel is filed to recover compensation for repairs to the Grand Republic. She is owned by a New York corporation, and is registered at the port of New York. The repairs were done in New Jersey, and were specifically pointed out by the ship's captain, who was aboard. The agreement that the vessel should be sent to the libelant for repairs was made by Barnaby, the president of the owner, in the city of New York, who ordered the vessel to go to the dock in New Jersey for that purpose. The books show that the repairs were debited to the owners, and a statement thereof was rendered to the owners, although the final bill was rendered in the name of the vessel. An action in personam was brought against the owners for the repairs of this vessel, and also for the repairs on the General Slocum, owned by the same company. O'Neill, who solicited business for the libelant in the city of New York, had interviews with Barnaby, the president, and Atkinson, the secretary, of the owner, respecting these repairs, but an estimate of a certain part of the repairs was prepared and submitted by the president of the libelant. Barnaby testified that he had a conversation with O'Neill, pursuant to which the repairs were made, and that he said the work was to be done under the superintendence of Pease, the captain of the boat, and that his company would want time until the vessel "got into earnings," or "possibly to the end of the season," before making payment, and that O'Neill agreed to this. Atkinson, the secretary, says that Barnaby told O'Neill that the company must have time, so as to make payment from earnings. As to this, O'Neill states:

"Q. Tell us what happened after that? A. After that Mr. Atkinson introduced me to Mr. Barnaby, and he said that he thought we had a good reputation, and it was his idea to send the boats over there and have them put in

first-class condition, and that he thought the reputation we had there wouldn't be any doubt about the bills, and I assured him that was the case. Q. Was there anything said about waiting until the end of the season? A. He said, 'How about payment?' I said, 'As matter of fact, we do not push people.' And he said, 'What is your terms?' I said, 'We like to have payments after thirty days.' He said, 'The boats don't go in commission; might not go in immediately.' I said, 'When can you pay?' He said, 'Just as soon as they begin to run.' Q. Anything else said? A. That is all. Q. Did he say they were not in a position to pay when the repairs were completed—did Mr. Barnaby? Tell what was said in regard to payment? A. That is about all I said to him— 'Of course, we don't look to any company for payment of bills. We always hold the boats.' Q. What did he say to that? A. He said he understood that."

Atkinson said he did not hear the statement as to holding the boats. Barnaby does not specifically deny it, but does not include it in his narration of the conversation with O'Neill. It seems to have been the practice of the owner to pay bills from the future earnings of the vessels, and all the bills of the previous season had not been discharged at the time this contract was made. The boats of the company were heavily mortgaged, and the company was otherwise in debt, and probably unable to meet its obligations. It had a small amount of money in bank. The libelant's president testified that he did the work on the credit of the vessel, and it does seem that so large a credit would not have been given to a foreign corporation that announced that it relied on future earnings to meet the cost of repairs. In any case the evidence of O'Neill outweighs the negative evidence of Barnaby and Atkinson, and it is not to be inferred that, having made a contract for the security of the vessel, the libelant failed to rely upon it. The manner in which the books are kept is some evidence whether the person performing the services relied on the credit of the ship, but it is not conclusive. It is a matter of bookkeeping, and naturally the account is kept with the owner, and in the usual course of business the statement would be sent to the owner. When the repairer makes the charge to the owner on his books, and asks the owner to pay, he fails to interpret with technical accuracy the agreement for a lien. But however the account is kept or the statement rendered, undue significance should not be attached to the mere form of the charge and the bills. The action in personam does not estop the libelant from his present remedy. The previous libel states that the repairs were made at the request of the owner, and so they were, but this is not inconsistent with a pledge of the vessel. The earlier suit illustrates that the libelant conceived that he had a cause of action in personam. His attempted assertion of such alleged right is not a concession that he had no lien.

The libelant should have a decree.

## THE ASBURY PARK.

(District Court, E. D. New York. June 7, 1905.)

SHIPPING—INJURY TO TOWS FROM SWELL—NEGLIGENT NAVIGATION OF STEAMER.

A large steamer passed a tug with two mud scows in tow in New York Harbor at a distance of from 300 to 500 feet, and caused such a swell that the scows were thrown against each other and one was injured. It was shown that when the speed of the steamer was properly reduced and when she passed at a proper distance from a tow she produced no injurious swell. *Held*, that the fact that she did so on this occasion showed that she was not navigated with proper care, and that she was liable for the injury caused.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 345.]

In Admiralty. Suit for injury to scow.

Peter S. Carter, for libelant.

De Forest Bros. (R. D. Benedict, of counsel), for claimant.

THOMAS, District Judge. The tug Brown was going to sea, having in tow the mud scow McGirr No. 22, and, eight or ten feet aft thereof, the scow No. 38E. When in the middle of the channel, and 1,500 to 2,000 feet below the fort at Governor's Island, the swells of a steamer passing on the tow's starboard side so disturbed the scows that the stern of scow No. 22 got under the timber across the bow of No. 38 and lifted it, and for such injury the libel is filed.

The master of scow No. 38 was not produced, as he was in California. Pirro, master of No. 22, testified that a steamer "going rather fast" passed the tow 200 or 300 feet away, and "made the sea big, swell, and it went under the stern of the scow 38." Erickson, captain of the tug, says that the Asbury Park passed the tug 400 or 500 feet off; that she was going about 12 miles an hour, although he would not swear that she was going more than 10 miles; that when he looked back the scows were "jumping in the sea, in the swell," and that the steamer was then 2,000 feet aft the tow; and that, using glasses, he saw her name under the stern. The captain and pilot of the steamer state that the name is under the fantail, and that when the propeller is in motion it would be very difficult, if not impossible, to see the name at a considerable distance. The captain of the tug places the accident between 3:30 and 4 p. m. Anderson, the engineer of the Brown, confirms the captain's statement that the tug slowed down, and that shortly he got a bell to stop and to go ahead again, and that as he went about he did not see the steamer, but did see the swells breaking all over the scows. The claimant's witnesses, Braisted, the captain, and Martin, the pilot, of the Asbury Park, gave evidence to the effect that the Asbury Park left Atlantic Highlands at 2:33 p. m., and reached the pier in New York at 3:35 p. m., passing Governor's Island about 3:28. Neither of them have any recollection of the tug and scows or of the accident. They state that in the neighborhood in question, before reaching such a tow, and when two, three, or

four lengths away therefrom, they customarily reduce their full speed of 18 or 19 miles an hour to 8 or 10 miles an hour, and pull away as far as they can get from her, and that with such speed the swells are not injurious to tugs and tows.

The evidence establishes (1) that swells did affect the dumpers so as to cause the injury; (2) that the swells were caused by the Asbury Park; (3) that if the speed of the Asbury Park is properly reduced, and if she passes at a proper distance from a tow, she produces no injurious swell. As she did cause an injurious swell, it is inferable that she was not observing the customary care which she had theretofore deemed requisite for safety.

The claimant bases an argument upon discrepancies in the statements of the libelant and its agents and servants as to time. But experience teaches that misstatement of time and distance is a common error, and departure from accuracy in such regard in this case is not sufficient to override the evidence that the offending vessel was the Asbury Park.

The libelant should have a decree.

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## HARTFORD & N. Y. TRANSP. CO. v. UNITED STATES.

(Circuit Court, D. Connecticut. June 13, 1905.)

SALVAGE—LIABILITY OF UNITED STATES—ASSISTING BURNING AMMUNITION SHIP.

A tug which went to the assistance of a United States vessel having on board ammunition for delivery to a war ship, in answer to her signal for help, and aided in putting out a fire which had broken out on such vessel, at considerable risk to the tug and crew on account of the nature of the cargo, the service lasting half an hour, *held* entitled to a salvage award of $500 on an implied contract, under the provisions of the Tucker act of March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752].

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

Wilcox & Green, for libelant.
F. H. Parker, U. S. Atty.

PLATT, District Judge. The petition in this proceeding was filed to recover a judgment for $5,000 for salvage services rendered by the steam tug Sachem to the United States vessel Pontiac and government property on board the latter, under the circumstances set forth in the findings of fact hereinafter made. It has been determined that services of this character give rise to an implied contract, within Act Cong. March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], commonly known as the "Tucker Act." U. S. v. Morgan, 99 Fed. 570, 39 C. C. A. 653; Cornell Steamboat Co. v. The United States (D. C.) 130 Fed. 480. The facts herein establish a claim which would sustain a suit in admiralty for salvage against a vessel owned by a private party, and, under the authorities above cited, the petitioner is entitled to a judgment in its favor.

The following findings of fact and conclusion of law are made, as required by the act referred to:

Findings of Fact.

1. The petitioner is a corporation organized under the laws of Connecticut, is a resident of that state, and at the times hereinafter mentioned owned the steam tug Sachem, which was equipped with fire and wrecking pumps, and had a crew of nine besides the master.

2. In the morning of August 21, 1903, said tug was off Tompkinsville, Staten Island, in the upper bay of New York, and the steam vessel Pontiac, owned by the United States and used for the transportation of ammunition by the navy department, was lying about a quarter of a mile away from the Sachem, with a red flag flying from her foremast. The flag indicated that the Pontiac had explosives aboard, and it was dangerous for other vessels to approach her. She was carrying a quantity of ammunition which was intended for delivery to a United States war ship lying off Tompkinsville.

3. While the Sachem and the Pontiac were in said relative positions a fire broke out aboard the Pontiac, and thereupon several blasts were given by her as a signal for assistance, and those on board the Sachem saw smoke issuing from her. The Sachem at once went to the Pontiac and assisted in extinguishing the fire.

4. Although the time consumed by the Sachem did not exceed half an hour from the time the alarm was given by the Pontiac, the services which she rendered were meritorious, and were extended under circumstances which justified the Sachem's crew in believing that they were exposing both themselves and their tug to grave danger because of the nature of the merchandise which the Pontiac was carrying.

5. Under all the circumstances, $500 will be a fair sum to allow for such services.

Conclusion of Law.

The petitioner is entitled to judgment against the United States for the sum of $500, but without interest or costs.

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## THE BELLINGHAM. THE DODE. THE FLYER.

(District Court, W. D. Washington, N. D. June 7, 1905.)

Nos. 2,610, 2,604.

1. COLLISION—STEAMERS CROSSING IN SEATTLE HARBOR IN FOG—EXCESSIVE SPEED AND NEGLIGENT NAVIGATION.

The steamboat Bellingham, with a tow alongside, left the docks at Seattle in the morning in a dense fog, and, after two or three stops, straightened out on a course to the northwest. At about the same time the Flyer, a fast passenger steamboat, making four regular trips daily to Tacoma and return, left the docks further to the north, and took her usual course to the southwest, attaining a speed of not less than 10 miles an hour in 3 minutes, when a collision occurred between her and the Bel-

lingham and tow, which struck her on the port side with great force. Both vessels were sounding fog signals, but when they first saw each other the Bellingham was about 85 feet from the point of collision, making a speed of 3 knots or more, and the Flyer was about 140 feet from the same point. The master of the Bellingham knew the position of the Flyer's slip, her time of departure, and her usual course across the bay, and also heard her whistle for starting. *Held*, that both vessels were in fault—the Flyer for excessive speed in a fog in a bay where there were other vessels moving and anchored, and the Bellingham for failing to take warning of the Flyer's approach and to wait for her passage before approaching her course; that the Flyer was liable for one half the damages, and the Bellingham and her tow (which belonged to the same owner) for the other half, including damages for injury to an anchored vessel which was struck by the Flyer in consequence of the collision.

[Ed. Note.—Collision rules, speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532].

2. SAME—EXCESSIVE SPEED—RULES APPLICABLE TO REGULAR PASSENGER STEAMERS.

The law makes no exception in favor of passenger steamers running regularly on schedule time on an established route, and, for injuries resulting from excessive speed in violation of the rules prescribed to insure safety to vessels and passengers, they must render compensation to the injured.

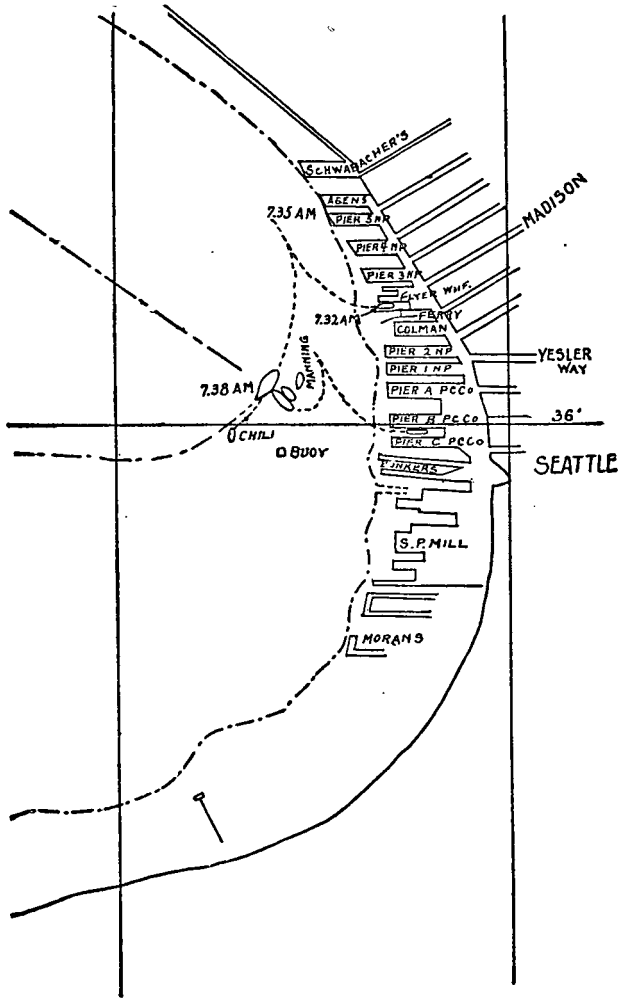
In Admiralty. Counter-suits for damages on account of collision. Decision on the merits, and decree for a division of damages.

E. M. Carr, for owner of the Flyer.

Charles F. Munday, for owner of the Bellingham and the Dode.

HANFORD, District Judge. The proctors for the respective parties have taken extraordinary pains in the preparation and argument of these cases. The arguments, both oral and written, were very able and complete in discussing all the minute details of the testimony, and the propositions of law contended for. They have not, however, succeeded in obscuring or in excusing the mutual faults, which appear to be glaring, in the light of the testimony of every important witness. The simple facts are that on a foggy morning the steamboat Bellingham (having the steamboat Dode in tow) and the steamboat Flyer started to make their way out of Seattle Harbor on crossing courses, and a collision happened, by which all three of the steamers and the ship Chili, which was moored to a buoy in the harbor, were injured. For convenience, the Bellingham and the Dode will be hereafter referred to as if they were one vessel, as they were lashed together and commanded by one captain, and the Dode was without independent motive power. The Bellingham was the first to get away. Leaving her berth at the Colman Dock, she proceeded to where the Dode was moored, on the north side of Pier C, which is south of the Colman Dock. Then, with the Dode secured by three lines on her starboard side, the Bellingham backed out into the harbor sufficiently to clear the dock in making the turn necessary to come around on her course out of the harbor, which was west by north, her destination being Bellingham. The fog was very dense at the time, so that objects could not be seen at a greater distance than about 200 feet. After backing sufficiently to get away from the dock, she made a horse-

shoe curve partly around the revenue cutter Manning, which was anchored at the place indicated upon the annexed outline map of the harbor:




A period of from 10 to 12 minutes elapsed while the Bellingham was executing her movements in backing and curving after hooking on to the Dode, and before the collision occurred. This consumption of time is accounted for by the fact that she made three full stops after having started her engine to working ahead, and while the Manning was visible from her pilot house. During this time diligent use was made of her whistle, giving the blasts required to be given in foggy weather by a steamer burdened with a tow. When the Flyer came into view, the Bellingham had completed her curve, and was headed on her own course, and at right angles to

the Flyer's habitual track, and not a greater distance from it than 85 feet, and the Flyer was proximately 170 feet distant from her starboard bow. The Bellingham is 137 feet in length, and the Flyer 171.11 feet, so that each vessel had less than her own length of distance from her stem to the point where their paths crossed. At that moment the captain of the Bellingham was signaling to his engineer for full speed ahead, but before the order could be executed it was changed, and the proper signal given to reverse and work the engine full speed astern, and several blasts of the whistle were given as a warning of danger. The engineer acted promptly in obeying the order to reverse, and the engine was working full speed astern when the collision occurred.

The Flyer is a passenger steamer, and a fast one, making at full speed 18 knots an hour; but she responds to her helm slowly, and for that reason is obliged to make a long curve to get on her course out of the harbor after backing away from her berth at the dock. She has for many years made four round trips per day on her regular run between Seattle and Tacoma, and maintained a reputation for punctuality on her schedule time, regardless of fogs and all hindrances, and on this occasion all her movements were executed with her habitual celerity. Her regular time for departure on her first trip was 7:30 a. m. Pursuant to her invariable custom, notice of her intended departure was given by the blowing of her whistle at 7:15, and repeated at 7:25. At 7:32 her lines were cast off, and she commenced to back out, and at the same time gave a short toot of her whistle. She backed away to the northward until she was about opposite Pier No. 5. At 7:35 her engine was reversed, and she started ahead on a port helm, curving to starboard sufficiently to give good clearance to the Manning on her port side. As she went ahead in the fog, the required signals were given by blasts of her whistle at short intervals. Her captain heard and noted the signals given by the whistle of the Bellingham, which indicated her position to the southward, and he erroneously assumed that she was making towards a landing at some point further southward. This error can be easily accounted for by the fact that the first whistle noted was given when the Bellingham was at the northern extremity of her backward movement, and when the Flyer was backing to the northward, and the next whistle was heard when the Flyer was still backing, and the Bellingham was working ahead, so that the distance between the two vessels had increased during that interval. Having in this manner mentally disposed of the Bellingham, the captain gave no further heed to her movements until she became visible, which was probably at the moment when her captain commenced to give an alarm upon discovering the position of the Flyer. No effort was made to check the speed of the Flyer when the danger of a collision was imminent, but I do not hold this to be an error, for the reason that her captain judged rightly that the only possible chance which she then had to escape was by maintaining her speed, and running past the point where the courses of the two vessels crossed before the Bellingham could reach it. I am convinced that, with her speed, the Flyer would have passed

unharmed if the Bellingham's rate of speed at that time had been less than three miles an hour. The testimony introduced in behalf of the Bellingham justifies the conclusion that her travel ahead after discovering the Flyer did not exceed 85 feet. The distance from the Flyer's stem when she was discovered by the captain of the Bellingham to the point where the lines intersected was not greater than 140 feet, and that distance plus her length is the travel required of the Flyer to have passed clear. She stopped backing, and started ahead at 7:35, the collision occurred at 7:38, and in the intervening 3 minutes she traversed a distance of at least half a mile, so that she had developed a speed of something more than 10 miles an hour. According to the excellent table for calculating speed and distances annexed to the brief furnished me by the proctor for the Bellingham, the Flyer, at the rate of 10 knots an hour, should have made the required distance of 311 feet necessary to have crossed ahead of the Bellingham in a fraction less than 19 seconds, and the Bellingham, going at the rate of 2½ knots, would have traveled but 80.18 feet in the same time, and, if she had been going at the rate of 3 knots, the reversing of the engine should have checked her speed in time to have enabled the Flyer to pass clear; but the fact is that the Dode and the Bellingham both rammed the port side of the Flyer at a point 110 feet abaft of her stem. Therefore the actual travel of the Flyer was only 250 feet, which, according to the table referred to, at her rate of speed, should have been made in the number of seconds required for the Bellingham to go 75 feet at the rate of 3½ knots. Considering the force with which the Flyer was struck, the Bellingham's speed could not have been less than 3 knots; and if her travel was less than 85 feet, and the Flyer's travel correspondingly greater than 140 feet, the three vessels would have bumped noses, instead of the Flyer being struck on her side abaft of amidships. In reaching my conclusion with reference to the position of the different vessels at the moment when they became visible from each other, and the speed of each, I give credence to the testimony of the captain of the Flyer to the effect that when he first saw the other vessels they seemed to be headed towards his pilot house, and the line of his vision ranged between their two smokestacks, which proves that the Flyer's position th. n was very little to the eastward of the colliding vessels. Both the Dode and the Bellingham rammed the Flyer with great force, cutting deeply into her hull, and caused her to swing to port, and in consequence of that deflection from her course she ran into the ship Chili, which was moored to a buoy a short distance from the place of the collision, doing serious damage to that vessel, for which the libelant was obliged to pay damages.

The fault of the Flyer in violating the law by running at a rate of speed of 10 knots in foggy weather across a harbor in which vessels were anchored and moored to buoys, and others were in motion, is so obvious and inexcusable that I deem it unnecessary to make further comment upon her management. In her behalf it has been urged that, for the convenience of the traveling public, it is necessary for a passenger steamer to meet her appointments

with punctuality and regularity. But the law makes no exception in favor of passenger steamers running regularly on schedule time on an established route, and for injuries resulting from their violations of the laws prescribed to insure safety to vessels and passengers they must render compensation to the injured.

The captain of the Bellingham knew the Flyer's time of departure, and her track across the harbor, and her habits; and he was warned by the blowing of her whistle, which he also knew, of her intended departure before he ventured out into the fog, and of her approach before he turned to cross her path with the vessels under his charge, and he could have avoided the collision. To have kept out of danger, it was only necessary for the Bellingham to have prolonged her third stop one minute to let the Flyer pass. She was then in a safe position to the southward of the Flyer's track, she was not groping to find her position in the fog, for the Manning was in sight on her starboard side, and there were no conditions existing to cause serious inconvenience by waiting for the Flyer to pass. The Flyer had no superior claim to the right of way, but, on the other hand, she was not an overtaking vessel, and heed should have been given to her fog signals indicating her approach on a course crossing the Bellingham's course; but the testimony of the captain of the Bellingham and all the circumstances of the case prove that he gave no heed to the Flyer, and that he disobeyed the law by unnecessarily going ahead into known danger. I do not assent to the proposition advanced in behalf of the Flyer, that she is to be regarded as a ferryboat making regular trips across the harbor, and for that reason entitled to peculiar privileges. But I am disposed to make a practical application of a familiar rule strongly urged upon my attention by the proctors for both parties, viz., every boat should be navigated cautiously in foggy weather, and their movements should be governed with respect to all the conditions known to exist. The collision between the three steamers and also the collision between the Flyer and the Chili were consequences of mutual faults, and the case is one for a division of damages. The Flyer must be held liable for one-half of the aggregate amount, and the Bellingham and the Dode together liable for one-half, including the amount paid in settlement for the injury done to the Chili.

The damages proved and allowed by the court are as follows:

| | |
|---|---|
| The Flyer's expenses for repairs | $3,313 46 |
| Demurrage for nine days' detention of the Flyer at $100 per day, including wages of her crew | 900 00 |
| The amount paid in settlement for damages to the Chili | 375 00 |
| The Dode's expenses for repairs | 905 73 |
| The Bellingham's expenses for repairs | 295 17 |
| Demurrage for five days' detention of the Bellingham at $50 per day, including wages of her crew | 250 00 |

The total damages amount to $6,039.36, and I direct that a decree be entered in favor of the Columbia River & Puget Sound Navigation Company for the amount of the difference between one-half of said total and the aggregate of the last three items. Each party may tax costs, and the total will also be divided equally.

## In re JERSEY ISLAND PACKING CO.

(Circuit Court of Appeals, Ninth Circuit. June 5, 1905.)

No. 1,204.

1. CORPORATIONS—TRUST DEEDS—CHARACTER OF CONVEYANCE—BANKRUPTCY —RIGHTS OF TRUSTEE.

Where a corporation executed trust deeds for all of its property to secure debts not then due, such deeds were not absolute conveyances, but the grantor retained an interest in the property conveyed, which passed to its trustee in bankruptcy, for the benefit of unsecured creditors.

2. SAME—ELECTION.

Where property of a corporation was subject to a trust deed at the time a petition in bankruptcy was filed against it, the trustee was entitled either to refuse to take possession of the mortgaged property if its value, over and above the incumbrance, was not sufficient to justify an attempt to administer it, or assume possession and sell the same for the benefit of general creditors after satisfying the lien.

3. SAME—FORECLOSURE OF DEED—SALE—INJUNCTION—JURISDICTION.

Where, on the filing of a bankruptcy petition against an insolvent corporation, it was alleged that one of its officers was about to sell all its assets under trust deeds given to secure debts to him and his wife, which sale would result in their securing the property for the amount of their debts, but that, if the property was administered in bankruptcy, its proceeds would be sufficient to pay all the corporation's indebtedness, the court had jurisdiction to restrain such sale under Bankr. Act July 1, 1898, c. 541, § 2, cl. 15, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], declaring that the courts of bankruptcy shall have power to make such orders and issue such process in addition to those specifically provided for as may be necessary to enforce the provisions of the act.

Petition for Revision of an Order of the District Court of the United States for the Northern District of California.

J. C. Campbell and Walter H. Linforth, for petitioners.

Frank & Mansfield, for respondents.

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

GILBERT, Circuit Judge. Myra E. Wright, William H. Wright, and W. L. Cobb have presented their petition under the provision of the bankruptcy act which gives to this court jurisdiction in equity to superintend or revise in a matter of law the proceedings of the several inferior courts of bankruptcy, and they seek to revise an order of the District Court whereby they were enjoined from selling property of the Jersey Island Packing Company, a corporation, which property they were about to sell under the power of sale given to them in certain trust deeds. The District Court made such a restraining order upon a petition of certain unsecured creditors of said corportion, which was filed in the District Court but three days before the date of the proposed sale, at the same time with a petition that the said corporation be adjudged a bankrupt. The former petition presented to the District Court, in substance, the following allegations: That the assets of said alleged bankrupt consist of about 4,000 acres of land described in the petition, together with the improvements, machinery, implements, and tools thereon

situated, all of the value of $400,000; that on February 14, 1902, a mortgage on said property was executed to the Mercantile Trust Company, a corporation, to secure $100,000, represented by bonds of said corporation; that, as the petitioners are advised and believe, the issue of said bonds was and is illegal and void, for the reason that they were not used for purposes and objects of the company, and were issued neither for money paid, labor done, nor property actually received; that on December 11, 1902, said corporation executed to the Germanic Trust Company, afterwards known as the Central Trust Company, a conveyance and assignment of all the property of said corporation, and on April 27, 1905, said Central Trust Company transferred all of said property to William H. Wright, who in said transfer was alleged to be the owner and holder of a note for $30,000 issued by said Jersey Island Packing Company, and secured by said deeds of trust; that on September 19, 1903, there was filed for record in Contra Costa county, Cal., another deed of trust, executed by said corporation to William H. Wright and Myra E. Wright, to secure the payment of $100,000; that in said deeds of trust it is provided that notice of a sale thereunder shall be published in a newspaper in the city and county of San Francisco, as well as a newspaper published in the county in which the property is situated, and petitioners aver that notice has been published under said provisions, and that the time of sale under said notices is May 22, 1905; that William H. Wright is the treasurer of said Jersey Island Packing Company, and that, as petitioners are informed and believe, he has attempted to conceal from said company and others interested the intended sale of said property; that, unless restrained by this court, said sale will be made on May 22, 1905, to the irreparable loss and injury of all unsecured creditors, and said trustees under said deeds of trust will be the only bidders at said sale, and will bid in the property for the amount of the indebtedness mentioned therein; that, if all the property of said alleged bankrupt is disposed of as a whole in this court, it will realize sufficient to pay all its indebtedness, secured and unsecured; and that the unsecured claims aggregate about $140,000.

It is earnestly insisted on behalf of the petitioners that the District Court had no jurisdiction to make the order enjoining the sale; that the deeds of trust are absolute conveyances of the property of the alleged bankrupt, and the right of the trustees thereunder to sell upon default is not and cannot be affected by the proceedings in bankruptcy. Upon the proposition that the trust deeds are absolute conveyances, the petitioners rely upon Powell v. Patison, 100 Cal. 234, 34 Pac. 676, and Moore v. Calkins, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128. The first of these cases goes no further than to recognize the established distinction between a defeasible and an absolute trust, and to say that the latter is a conveyance of property to a trustee for the purpose of selling it to pay debts, the effect of which is to pass the title unconditionally to the trustee, and to vest it in him unconditionally and indefeasibly for the purposes of the trust. The second case held only that the instrument then under consideration was a trust deed; that it conveyed to the

grantee, who was a creditor of the grantor, the legal title, and conferred on him the power to sell the property thus conveyed, and transmit the legal title to his grantee. The trust deeds of the alleged bankrupt's property in this case are clearly not in the nature of an absolute conveyance. They are conveyances to secure debts of the grantor not then due. "Like the mortgage at common law, the trust deed passes the legal title to the grantee in those jurisdictions where a mortgage passes such interest, and leaves in the grantor the equity of redemption only. Likewise in those states where it is held that the legal title remains in the mortgagor the same rule is generally applied in favor of the grantor in a trust deed." 28 Am. & Eng. Enc. of Law (2d Ed.) 753. The grantor of these trust deeds undoubtedly retained an interest in the property conveyed, which in bankruptcy would pass to its trustee for the benefit of its unsecured creditors. In re Union Trust Company, 122 Fed. 937, 59 C. C. A. 461. The filing of a petition in bankruptcy is in substance and effect an attachment and an injunction, and it places the property of the bankrupt constructively in the custody of the court of bankruptcy. Loveland on Bankruptcy, § 150; In re Weinger, Bergman & Co. (D. C.) 126 Fed. 875. Property on which there is a mortgage or other lien passes to the trustee in bankruptcy, and is therefore in the custody of the court of bankruptcy. In re Rochford, 124 Fed. 182, 59 C. C. A. 388; In re Kellogg, 121 Fed. 333, 57 C. C. A. 547; Chauncey v. Dyke Bros., 119 Fed. 1, 55 C. C. A. 579; In re Booth (D. C.) 96 Fed. 943. And the beneficial interest of a bankrupt in property held in trust passes, also, in all cases where that interest might have been transferred to another by the bankrupt, or might have been levied upon under judicial proceedings against him. Stanford v. Lackland, 2 Dill. 6, Fed. Cas. No. 12,312; Spindle v. Shreve, 111 U. S. 542, 4 Sup. Ct. 522, 28 L. Ed. 512. The trustee in bankruptcy has the election to refuse to take possession of mortgaged property, if its value, over and above the incumbrance, is not sufficient to justify an attempt to administer it. It is true that the bankruptcy act provides that liens such as the lienholders had under the trust deeds in this case shall not be affected by bankruptcy, but that is far from saying that such lienholders may, after the commencement of proceedings in bankruptcy against the debtor, proceed to enforce their liens or contracts in the manner prescribed in the instruments which create them; and this is true whether such lien is an ordinary mortgage, or a deed of trust with provision for a strict foreclosure by a notice and sale. The provision of the bankruptcy act that such a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lienholder's contract. It does not have reference to his remedy to enforce his right. The remedy may be altered without impairing the obligation of his contract, so long as an equally efficient and adequate remedy is substituted. Every one who takes a mortgage, or deed of trust intended as a mortgage, takes it subject to the contingency that proceedings in bankruptcy against his mortgagor may deprive him of the specific remedy which is provided for in his contract.

The petitioners cite and rely upon the decision in Re Snell et al. (D. C.) 125 Fed. 154. That was a case in which the District Court dissolved an order which it had theretofore made staying proceedings in an action pending in a state court. There was no dispute that the creditor of the bankrupts in that case had obtained a valid attachment upon the property of the bankrupts more than four months prior to the commencement of the bankruptcy proceedings. The court held that he should be permitted to prosecute his action to judgment, and satisfy the same by an execution sale of the attached property. This was held on the authority of Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, and In re Beaver Coal Co., 113 Fed. 889, 51 C. C. A. 519. In Metcalf v. Barker it was held that a lien obtained upon the property of a bankrupt by proceedings in the state court more than four months prior to bankruptcy was superior to the title of the trustee, and that the District Court of the United States has no jurisdiction to enjoin the enforcement of such a lien. Said the court:

"The state courts had jurisdiction over the parties and the subject-matter, and possession of the property. And it is well settled that, where property is in the actual possession of the court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control."

In the present case there was no jurisdiction over the property of the bankrupt in any other court. The only jurisdiction was in the court of bankruptcy. The interest of the bankrupt in the mortgaged property will pass to the trustee when he is appointed, and in the meantime it is under the protection of the bankruptcy court.

The petitioners also cite In re Browne (D. C.) 104 Fed. 762. In that case McPherson, District Judge, while declining to pass on the question whether the court had jurisdiction to interfere and prevent a fraudulent or oppressive exercise of the right of sale of personal property which had been pledged by the bankrupt more than four months prior to bankruptcy, in a case where it had been agreed that the creditors intended to deal fairly with the property pledged, and to make an honest offer to sell for the best prices that could be obtained, was of the opinion that the bankruptcy act gave the court no authority to interfere between the creditors and the exercise of their right to sell given them by the collateral notes. It may be remarked in this connection that the interest of a pledgee differs from that of a mortgagee. The pledgee has a special property in the thing pledged, which entitles him to the possession, to protect which he may mantain detinue, replevin, or trover, and the interest of the pledgor is not subject to execution. The decision in Re Browne may be accepted as authority for the proposition that a District Court will not interfere with a sale by a pledgee of the thing pledged, under the power of sale given by the terms of his contract, when there is no claim that such power is exercised in a fraudulent or oppressive manner.

The bankruptcy act provides (Act July 1, 1898, c. 541, § 2, cl. 15, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]) that courts of bankruptcy shall have power to make such orders, issue such process, and enter such judgments, in addition to those specifically pro-

vided for, as may be necessary for the enforcement of the provisions of the act. Under this provision the court may, upon proper application and cause shown, restrain not only the debtor, but any other party, from making any transfer or disposition of any part of the debtor's property, or from any interference therewith. Beach v. Macon Grocery Co., 116 Fed. 143, 53 C. C. A. 463. In that case creditors who had filed an involuntary petition in bankruptcy against their debtor filed therewith an ancillary bill in equity, alleging that a third person claimed possession and ownership of property which was in fact a part of the bankrupt's estate. The Circuit Court of Appeals for the Fifth Circuit held that the court had the power to issue an injunction restraining such person from selling or incumbering the property pending the hearing on the petition, and, in case an adjudication of bankruptcy were made, until the trustee could proceed adversely against the claimant to determine the title to the property.

We are of the opinion that the District Court had jurisdiction to make the restraining order. Of the propriety of that order, assuming that the court had the power to make it, there can be no question. All the property of the alleged bankrupt was about to be sold, at the instance of its treasurer, to obtain satisfaction of debts owing to him and his wife, secured by the trust deeds. These facts evidently came to the knowledge of unsecured creditors but a few days before the proposed sale. They had no time in which to bring the creditors together, or to secure bidders for the property, or otherwise to protect their interests. The sale of the property under the trust deeds would have extinguished the equity of redemption. By selling the property under the direction of the bankruptcy court, the interests of all parties may be protected, and the trustees of the trust deeds will not be injured. They will be entitled to the proceeds of the sale to the same extent that they would have been if they had themselves made the sale under the power of sale given them by the trust deeds.

The order of the District Court is affirmed.

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## ÆTNA LIFE INS. CO. v. DUNN.

(Circuit Court of Appeals, Eighth Circuit. May 11, 1905.)

No. 2,078.

1. ACCIDENT POLICY—INJURY SUSTAINED IN A GIVEN OCCUPATION.

Where a party obtains a policy of insurance against injury by accident, specifying the occupation of the assured to be that of a druggist, deemed to be a select risk, and that of a farmer or supervising farmer only is specified as a more hazardous risk, calling for a larger premium, and thereafter the drug store of the assured was destroyed by fire, whereupon the assured moved upon a tract of land entered as a homestead, into a house built by him thereon, which he thereafter occupied with his family as his home, and superintended the construction of a barn thereon, and caused to be fenced and broken and cultivated 40 acres of the land thereof, under his supervision, for a period of six months; and

was preparing for further cultivation of the land at the time of his injury, and for eight months prior to such injury had no connection with the business of a druggist, his occupation was that of a supervising farmer, and not that of a druggist, within the meaning of the policy.

[Ed. Note.—Accident insurance, risks, and causes of loss, see note to National Acc. Soc. v. Dolph, 38 C. C. A. 3.]

2. SAME—OCCUPATION.

The term "occupation," as employed in the policy, implies simply that which at the time of the accident constitutes the assured's principal business or pursuit; that which engages his attention and time, as destinguished from that which is incidentally connected with the life of men in any or all occupations.

3. SAME—CONTINUANCE.

The fact that the assured for some time after the destruction of his drug store was engaged in proving and collecting a claim for loss under a policy of insurance on the drugs, and from time to time attended to the collection of accounts connected therewith, and entertained the purpose to resume the business of a druggist after he had made sufficient improvement on and had occupied his homestead for a sufficient length of time to enable him to sell his homestead right, did not have the effect to continue during such time his occupation as a druggist, or affect the designation of his occupation as that of a supervising farmer only.

4. SAME—ABANDONMENT.

The correct test in such cases is not so much as to whether the assured had in fact abandoned the occupation stated in the application and policy, but whether or not at the time of his injury he was in fact engaged in another occupation, not merely incidental, but as a business, of a more hazardous classification.

(Syllabus by the Court.)

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

Arthur W. Lane (Halleck F. Rose, on the brief), for plaintiff in error.

A. S. Tibbets (W. L. Anderson, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. This is an action on an insurance policy known as a "Twentieth Century Combination Accident Policy," issued by the Ætna Life Insurance Company of Hartford, Conn., on the 9th day of December, 1901, in favor of William Henry Harrison Dunn. In the month of May, 1901, said Dunn was engaged in business as a druggist at the town of Mangum, in the territory of Oklahoma, when he made application to the insurance company for said policy. In his application he stated that he was a druggist, not chemist by occupation, and that as such he desired to be placed in the classification designated as "select," which occupation was deemed less hazardous, and required the payment of a less premium, than one engaged in the occupation of a farmer or a supervising farmer only. The policy was accordingly issued for a period of three months, covering the specified accidents. In case of death occurring within the terms covered by the policy, the

amount of recovery was to be $5,000. The policy contained the following provision:

"The policy is issued and accepted subject to the following conditions: * * * If the insured is injured in any occupation or exposure classed by this Company higher than the premium paid for this policy covers, the principal sum insured and weekly indemnity shall be only such amounts as said premium will purchase at the rate fixed for such increased hazard."

Within a short time thereafter, in the same month, the drug store of the assured was destroyed by fire. On the 26th day of September, 1902, the assured received an injury by being thrown from his buggy, which resulted in his death the next day thereafter. His widow, the defendant in error, as the beneficiary, brought suit on the policy to recover the full amount of $5,000.

The defense interposed to this action is that at the time of the accident the occupation of the assured was not that of a druggist, and had not been for six months or more previous thereto, but that in the preceding spring he had taken up the occupation of a farmer or supervising farmer only, in which business he was engaged at the time of the injury, which occupation at the time of the application and issue of the policy was classified as "hazardous," and not as "select," and called for a higher rate of premium than that of a druggist; and therefore said change in occupation, according to the contract, increased the hazard, and entitled the claimant, under the proper classification, to recover not exceeding the sum of $1,562.50. It is conceded, however, by plaintiff in error that under the proofs the defendant in error is entitled to recover the sum of $2,500. On a trial to a jury the plaintiff below recovered judgment for the full sum of $5,000, with interest.

The question to be decided is whether or not, on the whole evidence, the trial court should have instructed the jury that the plaintiff below was not entitled to receive the sum of $5,000 under the policy. The answer to this involves the question of fact, as affected by rules of law, whether or not at the time of the accident the occupation of the assured was that of a druggist, or of a farmer or supervising farmer only. The court below treated this question as one for the determination of the jury. If, however, all the essential facts give but one reasonable, sensible character to the assured's occupation at the time of his injury, the plain office of the court was to declare what that occupation was, and direct judgment accordingly.

The evidence shows that some years prior to 1900 the assured resided in the state of Nebraska, engaged in the superintendency of a large farm, of about 2,000 acres, owned by his brother. Thereafter he conducted a drug store in northeast Missouri. In May, 1901, he opened a drug store at Mangum, in the territory of Oklahoma, which he conducted until it was burned the 8th day of December, 1901. Between that time and his death, about September 27, 1902, he neither owned nor conducted a drug store or dealt in drugs. He was occupied more or less constantly between one and two months after the loss of his drug store in settling up the business connected therewith, and from time to time thereafter gave attention to the

matter of collecting some scattered accounts growing out of the business of said drug store. As that store was not run over six months, in a small country town, in a newly opened territory, the number and amount of such accounts, it may reasonably be presumed, were not large. He also gave attention after the fire to making proofs of loss under the policy of insurance covering his drugs, and adjusting the claim. In August, 1901, he had, by lot, acquired the right to enter for homestead purposes 160 acres of land in said territory, which he located about 20 miles from Mangum. He began in the early part of 1902 the erection of a dwelling house on said land, into which he moved with his wife, who constituted his family, in February, 1902. He then removed from northeast Missouri, his former home, a lot of horses to this homestead. Except one used by him to ride and drive, the horses were claimed by the wife as her separate property. But he looked after them in the pasture as if his own; either watering them himself, or having it done, salting them, and occasionally feeding them with corn or kaffir raised on the farm. He had fenced about 40 acres of this land, and, under his direction, caused to be cultivated thereon corn and kaffir. In the spring of 1902 he built a barn on this land. While he had this work done under contract, and part by day labor, he assisted a little about the work and superintended it, just as any other supervising farmer would have done. From February, 1902, to the day of his death, he and his wife occupied the house on this homestead, and had no other home. On the very day he met with his fatal accident, he was engaged in driving about in his buggy, from which he was thrown by his vicious horse, to see about obtaining men and machinery to put in a crop of wheat on the farm, and to get a man to attend to the horses on the farm while he was absent on a contemplated trip for the next day or so.

The defendant in error, before this suit was brought, in letters written to the adjusting agent of the plaintiff in error, stated that:

"My husband, Mr. Dunn, was by profession a druggist. While in the drug business in Mangum, Okla., he drew a very fine claim when this country was thrown open to settlement. When fire destroyed the building in which his drug store was located, Mr. Dunn decided that he would prove up on his claim, and sell it before again opening up a drug store, as the town of Lone Wolf did not offer a good opening for a store, and at the same time he could not prove up on his claim here until November 1st. * * * My husband did not keep a hired hand all the time, as the work did not require it, but when it did then he employed help. * * * The afternoon of the day of the accident Mr. Dunn was making arrangements for putting in his fall wheat. Together we drove to a farmhouse to see about renting some machinery for putting in the wheat. Then we drove to Lone Wolf to get our mail, and then home again. At the house I got out of the buggy and Mr. Dunn was going to drive on to a farmhouse where a gentleman lived whom Mr. Dunn often hired to assist in our work."

In her testimony at the trial she stated that:

"On the 25th of September Dr. Dunn and I lived on a claim in Oklahoma. It was a government claim. He had lived there from the 25th of February up to the time of his death, on the 26th of September. * * * Prior to the time that we moved out on the claim near Lone Wolf, the store was destroyed by fire. That occurred the 8th of December. During the remainder

of the time that he was in Mangum after the destruction of the drug store by fire, the doctor was settling up his business, as far as he could, with the insurance company, and his indebtedness, and getting ready to take possession of his claim; getting so that we could live on it. * * * At the time we moved out on it, in the latter part of February, 1902, there was no improvement on it at all, except what we put on ourselves. We built a house and put some fencing on it; did what the law required. * * * I think there was about forty acres broken upon the place at the time of the doctor's death. * * * A part of this forty acres was planted in sod corn, and there was some kaffir corn, I believe. After we moved to this place on the claim, Dr. Dunn watched over the work, and directed what he wanted done. He had no machinery of his own, and no horses that were broken, and all work done he had to hire done. He was doing very little, if anything."

Further on she said:

"When he was on the farm his principal occupation was looking after the affairs of the farm. He looked after it. He didn't do the work himself. I looked after a good deal of it, too."

The only matters relied upon by her to parry the force of these designating facts are that during the time they occupied this homestead her husband looked after the collection of the insurance claim and his accounts, writing letters, and going to the post office, and his declarations to her that it was his purpose, after he had made the required proofs to establish his homestead right and could sell it, to resume the drug business, if a suitable location could be had, coupled with the fact that at one time, while they were returning from a visit to Missouri, he made some inquiry about a place near Newton, Kan., as to its suitability for the drug business.

The term "occupation," as employed in the policy, implies simply that which at the time of the accident giving the cause of action constituted the assured's principal business or pursuit; that which engaged his attention and time, as distinguished from that which is incidentally connected with the life of men in any or all occupations. Was the assured engaged in the business of a druggist at the time of the accident, when he had not conducted a drug store or had anything to do with one for eight months? Was he still a druggist because now and then he sought to collect some outstanding accounts connected with the former business? Was he engaged in the occupation of a druggist because he harbored in his mind a desire or purpose at some time in the future to resume such business, dependent upon several conditions, which would enable him to engage therein at some indefinite time and at some unascertained place? The very questions suggest answers in the negative.

Suppose, on the other hand, that this defendant in error were seeking to recover on this policy, with the conditions reversed, on the ground that her husband, at the time of his injury, was engaged in the occupation of a supervising farmer; could any court or jury hesitate to say, on the evidence in this record, that she was entitled to recover? He had not owned or conducted a drug store for eight months, and within the six months preceding his death he had founded a home on a tract of land claimed as a homestead. There he had lived as the head of a family; there he built the barn to shelter their stock, erected or caused to be erected fences, broke or

caused to be broken the wild land, and subjected it to the uses of husbandry, and was arranging for still further extension of his agricultural pursuits by sowing a crop of wheat, which, in its nature, would not be garnered before the next season. Separate from this visible, constant occupation any information of the fact that eight months prior thereto he had been engaged at a town 20 miles distant in the business of a druggist, would any neighbor who saw him living in that home, erecting a barn and fences, with fields planted and cultivated, and making preparation for further extension of his agricultural operations, just as any other settler, arrive at any other conclusion than that his occupation, as that of any other granger in Oklahoma, was that of a farmer or supervising farmer only? His collection now and then of accounts growing out of a former drug business and settling up an insurance loss thereon, must be regarded as merely incidental to the life of any business man, in no degree altering or interrupting his visible, established agricultural pursuit.

The authorities cited in behalf of defendant in error do but illustrate the common vice of a failure to discriminate between the facts of the case made and extraneous facts used for illustration. The case of Stone v. United States Cas. Co., 34 N. J. Law, 371, was that of a person insured as a school-teacher, and while temporarily out of employment as such, let a contract for two buildings on his premises, and while overlooking the work he fell from the building and was killed. He had not changed his occupation for another, and was only overlooking the construction of a building—a thing incidental to any man of affairs, which in no degree suspended his regular occupation, any more than if during "school days" he had gone out to look over the work being done for him.

The case of Johnson v. London Guarantee & Accident Co., 115 Mich. 86, 72 N. W. 1115, 40 L. R. A. 440, 49 Am. St. Rep. 549, is of a like class. In the application the assured had represented that he was engaged in the business or occupation of secretary and treasurer of Hull Bros. Company, grocers, under the classification "select," and the policy contained the same language. At the time of the application, and until the accident, he resided on his farm. The policy provided that, if injured while engaged in work or duty classed as more hazardous than his stated occupation, he should be entitled to recover only such amount as the premium paid would purchase at the rates fixed for such increased hazard. The policy was twice renewed. He had a contract with said Hull Bros. for employment, which did not expire until some time after the injury, and received a salary up to a week before the accident, but was not receiving any salary at the time, because there was no money. A part of his business was raising cattle on the farm, and he kept a bull. Seeing one day the bull break through a fence into a pasture kept for calves, he undertook to drive him out, when the bull turned upon and injured him. He engaged in no actual work of farming. In that case there was not even a request made by the defendant for the direction of a verdict for the defendant. Both parties tried the case upon the theory that it was a question for the jury. The only question was

whether he was engaged in the occupation of a farmer, and nothing more. The court held that merely living upon the farm, carried on through others, did not make him a farmer, within the meaning of the term. There was not even in the case the question of his being engaged in the occupation of a supervising farmer.

In Fox v. Masons' Fraternal, etc., Ass'n, 96 Wis. 390, 71 N. W. 363, the occupation of the assured was represented to be that of a mill owner, overseeing only. At the time of the injury he was superintending a small portable sawmill, temporarily located in the woods for the purpose of cutting logs into lumber for use in a planing mill owned by him. It was held that such occupation did not, as matter of law, make it other than that of a mill owner, overseeing only, or place him in the classification including the more hazardous occupation of "a lumberman in the woods." After the policy was issued he notified the company that he had changed his occupation to that of a part owner in a sawmill at Big Falls, and that his duties would be generally supervising the business, which would require him to be around the mill, lumber yard, office, and store. Afterwards he notified the insurance company of another change in his occupation, to the effect that he had changed his residence to another place, where he was associated with another party, as owner, in the operation of a planing mill, dealing in lumber, sawing, etc.; that his duties would consist of supervising the yard and mill, with a probability that he might necessarily, for an hour or two, from time to time, be required to operate some of the machinery, which was consented to by the insurer. While so engaged he went into the woods to look after the progress of their operations, and attempted with an ax to cut away a tree top that interfered with getting to some logs, and, in so doing, cut his foot. The court in that case said that it did not change his occupation; that the evidence sufficiently sustained the finding that the party was a mill owner, superintending only; that a sawmill is such, whether great or small; that neither its size nor the place of its location determined its character; that a mill in a settled community obviously does not change its character because located in the timber, at a distance from town or village. The court further said that, under that policy, acts and exposures were not classified, but only occupations. It was held that a particular exposure, under such contract of insurance, though not in pursuit of it and as part of it, did not affect the business or occupation mentioned in the certificate, and that as his occupation when injured was that of a mill owner, overseeing only, it came clearly within the terms of the written contract.

The correct test in these cases is not so much as to whether the assured had in fact abandoned the occupation stated in his application and policy, but whether or not at the time of his injury he was in fact engaged in another occupation, not merely incidental, but as a business, of a more hazardous classification. In Standard Life & Accident Ins. Co. v. Taylor, 12 Tex. Civ. App. 387, 34 S. W. 781, the application and the policy stated the occupation of the assured as that of a blacksmith. The evidence showed that at the date of

the application, and continuously thereafter, the assured also acted as switchman and car coupler—an occupation classed as more hazardous than that of blacksmithing—and that he received his injuries while coupling cars. It was held that recovery could only be had according to the increased hazard, and that the charge given by the trial court was incorrect, "in requiring, in order to reduce the recovery, not only that the insured should have engaged in a more hazardous occupation, but that he should have quit that of blacksmith. But regardless of this, it was a part of the regular employment of the deceased to do just such acts as that which he was doing when he was killed. When he stated that his occupation was that of blacksmith, he did not 'fully describe' all of his occupations. And when he continued to couple and uncouple cars, he only continued to perform duties which his employment imposed upon him. Unquestionably, he was engaged, when killed, in an occupation classed as more hazardous than that mentioned in the policy, and, by the terms of the contract, his beneficiary was entitled only to the sum allowed for risks in that class." So that if, at the time Dr. Dunn made his application for and took out his policy of insurance, he had been regularly engaged in supervising a farm, which occupied most of his time and his attention, and he received his injury while engaged therein, he would not have been entitled to recover the full amount of the select policy as a druggist. Loesch v. Union C. & S. Co., 176 Mo. 655, 75 S. W. 621.

In National Accident Society v. Taylor, 42 Ill. App. 97, the assured was classified as a supervising farmer, with the specification that for an injury sustained while doing any act or thing pertaining to any occupation, or exposure classed as more hazardous than that, he or his beneficiary would be entitled to recover only such amount as the society pays for such increased hazard. Among the specifications more hazardous was that of pile driver. While the assured was engaged in repairing a private bridge on his farm, in driving a post in the bed of a stream, by means of an ax and sledge, he met with an accident which caused his death by drowning. The evidence showed that the assured occasionally did odd jobs about the farm, such as salting cattle, feeding stock, mowing out fence corners, righting up gates, fences, and the like, when out of repair; and that he superintended his farm. It was contended that the supervision of a farm meant overseeing, inspecting, and directing, merely, without any personal action or manual labor. The court held that:

"The supervision of a farm includes in its care and oversight the doing of such incidental things as may be required for keeping it in order, and does not mean absolute idleness, as far as physical labor is concerned."

The court further said that:

"A pile driver is a machine for driving piles by raising, by means of power applied to the machinery, a heavy weight, and dropping it upon the pile. It is manifest that one who drives a post by means of an ax or sledge is not engaged in the occupation of a pile driver. Besides, there was no change of occupation or business on account of this act of repairing the bridge. He had not gone into the bridge business."

It would follow, however, that if such a supervising farmer had entirely abandoned his farm for eight months, and for six months had engaged in the independent business of building bridges, and received an injury while engaged therein, he would not have been engaged in the occupation of a supervising farmer when he received such injury.

On the evidence in this case the court should have directed the jury, as requested by defendant below, that the plaintiff was not entitled to recover the sum of $5,000, but "only such amount as said premium (which was paid) would purchase at the rate fixed for such increased hazard," which the plaintiff in error concedes to have been $2,500.

It results that the judgment of the Circuit Court must be reversed, and the cause remanded, with directions for further proceedings in conformity with this opinion.

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## In re CHANDLER.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

BANKRUPTCY—PETITION FOR REVOCATION OF DISCHARGE—SUFFICIENCY.

An averment in a petition for revocation of the discharge of a bankrupt merely that petitioners are "creditors" of the bankrupt is insufficient to show that they are "parties in interest," entitled to object to the discharge or to file such petition under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411]. The petition must show that they had provable debts which were affected by the discharge.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 709.]

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

In Bankruptcy. Petition to review and revise in matter of law. See 135 Fed. 893.

On October 27, 1902, the bankrupt was discharged from his debts by the court below. On October 23, 1903, a petition was filed by William H. Rhodes, John Gray, and Edward G. Pauling to revoke the discharge upon certain grounds therein stated. The only allegation in the petition with respect to the character of the petitioners is "that they are creditors of Frank R. Chandler, who has heretofore been adjudicated a bankrupt." To the petition a demurrer was interposed, and sustained by the District Court, and the petition dismissed. The proceeding here is to review and revise that ruling of the District Court.

Frank H. Culver, for petitioners.

George Burry, for respondent.

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

HUMPHREY, District Judge. Section 14b of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], provides that objections to discharge of bankrupts may be made by "parties in interest." The averment in the petition that the objectors are creditors is not such a statement as shows to the court

that the petitioners are "parties in interest," within the meaning of the law. The petition does not make such a showing that the court can say that the rights of the petitioners were affected by the discharge. No facts are averred which would justify the legal conclusion that the petitioners are "parties in interest." It is not averred that they were creditors at the time of the bankruptcy. The character of their debt is not shown. It is not averred that their debt was provable in bankruptcy or was proved in the proceedings. The debt or debts they represent, from all that appears from the petition, may have been created since the discharge, or they may have become purchasers of the debts which were discharged, without right to attack the discharge. We are of opinion that the petition should have shown that the petitioners had at the time provable debts against the bankrupt, which were affected by the discharge of the bankrupt. Otherwise they are not "parties in interest," within the meaning of the statute.

A somewhat analogous case may be found in the statute for the removal of causes from the state to the federal court. The statute provided for the removal of a suit in which there shall be a controversy between citizens of different states, and it was ruled by the ultimate tribunal that, in order to confer jurisdiction upon the federal court, the petition filed in the state court must not only show that the parties at the time of filing the petition had a diverse citizenship, but that such diverse citizenship existed at the time of the commencement of the suit; that such objection to the jurisdiction is available at any stage of the cause, and might be raised by the party filing the faulty petition. So, here, it may well be that the petitioners are creditors of the bankrupt; but it may also well be that they were not creditors at the time of the discharge, and in no way entitled to contest that discharge. Allegations of such facts are necessary to a good petition, and their omission is fatal. This conclusion renders it unnecessary to consider the other questions arising upon the record and discussed at the bar.

The decree is affirmed.

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## SOUTHERN RY. CO. v. CARROLL.

(Circuit Court of Appeals, Fourth Circuit. May 29, 1905.)

No. 582.

1. RAILROADS—CROSSING ACCIDENT—SIGNALS—QUESTION FOR JURY.

Where, in an action for injuries to a traveler at a railroad crossing, the evidence as to whether the railroad company gave statutory signals at the crossing was conflicting, such question was for the jury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1161, 1162.]

2. SAME—CARE REQUIRED.

A traveler approaching a railroad crossing is bound to give way to a train which is in sight or hearing, and moving so rapidly as to make it doubtful whether he can cross in perfect safety.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1080, 1081.]

8. SAME—CONTRIBUTORY NEGLIGENCE—STATUTES.

Where a traveler, knowing of the existence of a railroad crossing, approached it at night, in a carriage with drawn side curtains, without looking or listening for the approach of a train, which was within sight and hearing, and he took no precautions with reference thereto until he was on the track, he was guilty of "willful contributory negligence" precluding a recovery, within a state statute declaring that, if a person is injured by collision with a railroad train at a crossing, and it appears that the railroad neglected to give statutory signals, which contributed to the injury, it shall be liable for damages, unless the person injured, in addition to a mere want of ordinary care, was guilty of gross or willful negligence which contributed to the injury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1043–1070.]

In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

C. P. Sanders, for plaintiff in error.

Jos. A. McCullough (J. C. Wallace and H. J. Haynsworth, on the briefs), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. John L. Carroll, the plaintiff below, brought this action against the Southern Railway Company, the defendant below, alleging that whilst he was in the act of driving, with his horse and buggy, across the railroad of the defendant, at a public crossing in the suburbs of Union, S. C., on the 2d of April, 1900, at 9 or 10 o'clock at night, the said defendant, by its servants and employés, negligently caused a locomotive drawing a train of cars on its railroad to run against, into, and upon him, the plaintiff, killing his horse, breaking his buggy, and injuring him in person; and in his suit the said plaintiff seeks to recover damages for the alleged injury both to himself and his property. The cause was tried in the Circuit Court for the District of South Carolina, at Charleston, before a jury. A verdict was rendered in favor of the plaintiff, assessing his damages at $900, and judgment accordingly rendered. The case comes to this court by writ of error sued out by the Southern Railway Company, the defendant.

Several exceptions were taken in the course of the trial, and to the charge of the court, all of which appear of record, and assignments of error thereon have been presented by counsel for our consideration. We are of the opinion, however, that, in order to dispose of the case, we need only to pass upon the question as to whether or not the plaintiff, upon his own statement, was entitled to recover. At the close of the testimony the defendant's counsel requested the court to direct a verdict for the defendant, on the ground, in substance, that plaintiff's evidence was not sufficient in law to warrant his recovery. The court declined to give this instruction, to which refusal the defendant's counsel excepted. The plaintiff, John L. Carroll, who was a witness in his own behalf, testified substantially: That in the spring of 1900 he was engaged in grading foundations for the Buffalo Cotton Mills, about three or

three and a half miles from the town of Union, S. C. That during the time he had been engaged in the work, which was three or four weeks, he had been to the town of Union on several occasions, and had crossed the Southern Railway tracks, about the corporate limits of the town, six or eight times. That on the 2d of April, 1900, he came to Union on business, about 4 or 5 o'clock in the afternoon. He traveled in a top buggy, drawn by one horse. He met some friends in Union that afternoon, and went with them to the 7:45 p. m. train, on which they were leaving, to see them off. Some half or three-quarters of an hour later he hitched his horse to the buggy, and started home. The night was very cloudy, the wind was blowing, and the side curtains to the buggy were buttoned down. That he had bought some sardines and crackers, which were on the seat by his side, and he does not remember whether at the time of the accident he was eating them or not. That he was driving along the public road in a "dog trot," when all at once he heard a train, and just as he saw the headlight he discovered that his horse was on the track, and that he did not have time to cross. He undertook to pull his horse to the left, down the track, but before he could do this the engine struck him, killing the horse, knocking the top off the buggy, and otherwise injuring it, and throwing the plaintiff out upon the ground. Upon cross-examination the plaintiff admitted that he knew the railroad was there, about the limits of the town; that he had crossed it several times in the daytime at the same place, where he was attempting to cross that night. He further admitted that he drove steadily along in a "dog trot," as he described it, and did not look or listen to see whether he was approaching the railroad, or whether there was a train nearby; and that his horse was on the railroad track before he saw or heard the train, which was then so closely upon him that he could not escape. It was a fact, undisputed on the trial, that the headlight upon the engine of the train was burning.

The principal point of contention at the trial seems to have been whether or not the engineer complied with the provisions of a South Carolina statute which requires that a bell shall be rung or a whistle sounded upon all moving trains at the distance of at least 500 yards from the place where a railroad crosses any public highway, or street, or travel place, and be kept ringing or whistling until the engine has crossed such highway, or street, or travel place; and a further statute of South Carolina which provides that, if a person is injured in his person or property by collision with the engine or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury. There were several wit-

nesses introduced, both by the plaintiff and the defendant, who testified in regard to the ringing of the bell and sounding of the whistle on the train which came in collision with plaintiff's horse and buggy. The witnesses in behalf of the plaintiff principally gave testimony of a negative character upon this point—that is, they stated that they lived in the vicinity, but did not hear the bell or the whistle upon the train—though some of them stated that they heard the roaring of the train when it was half a mile away, and another that she heard the noise of the train at least five minutes before it reached the crossing. On the other hand, the engineer on the train testified directly that he sounded the whistle and rang the bell as required, and his testimony was corroborated affirmatively by other witnesses who were in the vicinity at the time of the accident. But, although it seems to us that the weight of the testimony as to the fact whether or not the proper signals were given was with the defendant, it is not our province, nor was it the right of the judge presiding at the trial, to determine this question; that being a matter for the jury. Assuming that the engineer failed to give the proper signals in approaching the crossing where plaintiff was injured, is the latter entitled to recover? The relative rights of railway companies and of persons traveling on a highway at a point where it crosses a railroad on the same grade are well settled. The traveler is required to give way to any train which is in sight or hearing, and moving so rapidly as to make it doubtful whether he can cross in perfect safety. Both parties are equally bound to use ordinary care to avoid or prevent injury. It is made incumbent upon the engineer approaching a highway crossing to be on the lookout, and to give sufficient signals of the approach of the train by ringing the bell, or sounding the whistle, displaying headlights, or in such other way as may be usual; and statutes which require that bells shall be rung and whistles sounded in approaching a highway crossing have been upheld as reasonable and necessary regulations in the operation of railroads, and the failure to observe them has been held to be negligence. Whilst these duties devolve upon the railroad company, it is a rule of law that a traveler who knows, or who has had reasonable opportunity to know, and ought to know, that he is about to cross the track of a railroad, must look and listen for approaching trains before even attempting to cross the track, and he must begin to look and listen at such distance from the track as to enable him to stop in case he hears an approaching train. Shearman & Redfield on Law of Negligence, vol. 2, § 476. "If the unexplained evidence shows that the injured person could certainly have seen the train in ample time to avoid it if he looked, it is conclusively to be presumed that he did not look, or did not heed, and he is to be held negligent as a matter of law. It is no excuse for failure to look and listen that the traveler did not think just then about the railroad, or its danger, or that his attention was diverted by some trivial matter. Schofield v. Chicago, etc., R. R. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224. "Nor is it an excuse that the usual or statutory signals of approaching trains were not given."

Shearman & Redfield on Law of Negligence, vol. 2, § 476. And the same authors lay it down that:

"A traveler, driving in a covered carriage, is not thereby excused from looking and listening for trains. It is negligence to approach a crossing without thinking of it, driving fast, with the carriage top up. Instead of being excused from the duty of looking, under such circumstances a traveler is rather bound to the use of greater vigilance because of the obstructions with which he has surrounded himself."

In Railroad Company v. Houston, 95 U. S. 697, 24 L. Ed. 542, it is held that:

"The neglect of the engineer of a locomotive of a railroad train to sound its whistle or to ring its bell on nearing a street crossing does not relieve a traveler on the street from the necessity of taking ordinary precaution for his safety. Before attempting to cross the railroad track, he is bound to use his senses, to listen and to look, in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if, in using them, he sees the train coming, and, instead of waiting for it to pass, undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain. If one chooses, in such a position, to take risks, he must suffer the consequences."

In the opinion of the court in this case the learned judge Mr. Justice Field says:

"The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employés in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others."

And the same principle is declared in Schofield v. Chicago, Milwaukee & St. Paul Railway Company, above cited. It seems needless, however, to quote authorities in support of a principle which has been so frequently declared, and so generally accepted as the law; that is, that, although the defendant was negligent, yet if the plaintiff, under the circumstances, by exercising ordinary and reasonable care, could have prevented the accident, the failure to use such care is such contributory negligence as to prevent the plaintiff's recovery. In other words, that the negligence of the plaintiff was the proximate cause of the injury, and but for it the accident would not have occurred.

Now, let us apply these principles to the facts in the present case. There being no evidence to the contrary, we have a right to assume that the plaintiff was in the full possession of his faculties of seeing and hearing. He says that he knew that the railroad was there about the corporate limits of the town; that the road he was traveling crossed it; and yet with this knowledge, on a dark and cloudy night, when the wind was blowing hard, seated in his vehicle with the curtains down, with his luncheon of sardines and crackers

spread upon the seat beside him, he drove heedlessly along in a trot, never stopping, listening, nor even looking, until he was upon the railroad crossing, immediately in front of a moving train. The evidence was uncontradicted, and came from the plaintiff's own witnesses, that those who were listening heard the train coming when half a mile away, and also that the headlight was displayed. It was further in evidence that the situation was such that a train approaching the crossing could be easily seen and heard at a safe distance. Under such conditions, for plaintiff to drive upon the railroad, without taking any precautions whatever, showed a wanton disregard, not only of his own safety, but of the safety of those on board the train which struck him, whose lives he jeopardized by his reckless conduct. He was thus guilty of willful and inexcusable negligence, and even under the statutes of South Carolina is not entitled to recover.

In Grand Trunk Railway Company v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, the Supreme Court holds the law to be that:

"When a given statement of facts is such that reasonable men may differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one of law for the court."

Upon the undisputed and admitted facts in the case now under consideration, in our opinion there can be but one reasonable conclusion, and that is that the injury to plaintiff and his property was due to his own culpable negligence, and but for it he would not have suffered. We hold, therefore, as a matter of law, that the defendant was entitled to the instruction requested, and that it was the duty of the Circuit Court, upon the uncontroverted facts in the case, to charge the jury that the plaintiff was not entitled to recover, and to direct a verdict for the defendant. The judgment of the Circuit Court is reversed, and the case remanded, to the end that judgment may be rendered for the defendant.

Reversed.

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## DONALDSON v. J. W. PERRY CO.

(Circuit Court of Appeals, Fourth Circuit. May 24, 1905.)

No. 565.

1. SHIPPING—ACTION FOR DAMAGE TO CARGO—EVIDENCE.
   In an action to recover for damage to cargo from leakage of the vessel, evidence that directions as to the manner of loading were given the agents of the vessel by libelant, which directions were not followed, was competent.

2. SAME—LEAKAGE OF BARGE—UNSEAWORTHINESS.
   Where, during the unloading of a barge in the usual manner, which caused an uneven keel for a few hours, she sprang a leak, and the remaining cargo was damaged by water, such damage was not caused by fault or error in the management of the vessel within section 3 of the

Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), but from unseaworthiness, or from negligence, fault, or failure in proper loading within section 1, for which the vessel is liable.

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

Edward R. Baird, Jr., for appellant.

W. L. Williams, for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

GOFF, Circuit Judge. The barge Robert Donaldson was in July, 1903, when in the port of Alexandria, Va., loaded by the Bryant Fertilizer Company with a cargo of ground plaster, consigned to the J. W. Perry Company, at Norfolk, Va. On the 20th of July the barge reached Norfolk, and by the direction of her consignees took place at the dock of the Norfolk Warehouse Association. A portion of the cargo was discharged by the libelant on the 21st of that month, the same being removed from the forward hatch. When the work of removing the cargo was resumed the next day, it was discovered that the aft part of the barge had water in it, and that because thereof a part of the cargo was damaged. After discharging the cargo, the consignees thereof—the J. W. Perry Company—filed its libel asking to be allowed damages because of the exposure of the cargo to water. The court below decreed in favor of the libelant. The appeal now being considered was prayed for and allowed.

It is assigned as error that testimony was admitted over the objection of respondent that libelant, previous to the loading, had notified the agents of the barge to use dunnage when placing the cargo. The appellant insists that the parties to whom such notice was given were not in fact agents of the barge, and that, therefore, the master was not informed either of the directions of libelant or of the character of the cargo he was to carry. The testimony was pertinent, and was properly admitted by the court. It related to the facts connected with the chartering of the barge, and it had direct connection with the making of the contract and the execution of the bill of lading by the master. The court found that the barge at the time of sailing was unseaworthy, and assessed damages against her. The appellant claims that the barge was improperly unloaded; that a portion of the cargo was removed from one part of the vessel, and thereby she was left on an uneven keel, with the result that a leak was sprung. The cargo was unloaded in the usual way. It is quite evident that the barge was not seaworthy, and that she was not able to withstand the dangers incident to the voyage she had undertaken. The water causing the damage entered through an opening three inches long in the bottom of the barge. A vessel leaking because of the removal of a portion of its cargo, whereby an uneven keel was caused for a few hours, can hardly be classified as seaworthy. A cargo of plaster loaded without dunnage would inevitably be damaged from such a leak. The damage to the cargo

in this case was not because of "faults or errors in navigation or in the management of" the barge, as claimed by appellant, in which case the owner would have been exempt from liability by section 3 of the Harter act, but was "loss or damage arising from negligence, fault or failure in proper loading, storage, custody, care or proper delivery of merchandise under section 1 of that act, in which case exemption by stipulation is not permitted." Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; The Germanic, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610.

The decree complained of is without error and the same is affirmed.

## THE A. DENICKE.

(Circuit Court of Appeals, Fourth Circuit. May 10, 1905.)

No. 587.

SHIPPING—BREACH OF CHARTER TO CARRY LUMBER—MEASURE OF DAMAGES.

Libelants chartered space in a barge for the carriage of 250,000 feet of lumber from Norfolk to Baltimore, but the barge loaded only about 160,000 feet. Libelants had sold the lumber to be delivered in Baltimore, and by reason of their failure to make delivery were compelled to pay damages to the purchaser. The owners of the barge, however, had no knowledge of the sale. *Held*, that the amount so paid by libelants did not constitute the measure of damages recoverable by them for breach of the charter, since it could not have been in the contemplation of the parties when the charter was made, but that the measure of damages was the market value in Baltimore of the 90,000 feet of lumber not taken at the time it should have been delivered there, less its market value in Norfolk, with the freight charge added; and that, in the absence of evidence introduced by libelants from which such amount could be determined, only nominal damages were recoverable.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk, in Admiralty.

R. M. Hughes, Jr. (Hughes & Little, on the brief), for appellant.

J. D. Hank, Jr., and Thomas J. Randolph, for appellees.

Before GOFF and PRITCHARD, Circuit Judges.

GOFF, Circuit Judge. The court below rendered a decree in favor of the libelants in a suit in which a breach of contract of charter was charged. In November, 1903, W. J. Wilson, owner of the barge A. Denicke, chartered space therein to the libelants, M. McKann & Co., for the purpose of carrying 250,000 feet of lumber from Norfolk to Baltimore. Early in December following, the barge loaded, taking only 159,308 of the 250,000 feet contracted for with M. McKann & Co. The libelants charged, in substance, in the libel, that, because of the barge's failure to carry 90,692 feet of the lumber contracted for, the firm of M. McKann & Co. had been unable to comply with its contracts, and that damages had resulted because thereof. The case came on to be heard, when the decree referred to was entered by the court below, from which the appeal now under consideration was allowed.

It appears that in October, 1903, M. McKann & Co. had sold to Radicke & Lewis 250,000 feet of lumber, and to the Canton Box Company 125,000 feet, the delivery thereof to be made in Baltimore not later than in January, 1904. When the barge was being loaded, M. McKann & Co. advised the Canton Box Company by letter that their lumber was being shipped for delivery by the barge A. Denicke. After the barge had been loaded, and it was ascertained that only 159,308 feet had been taken on for M. McKann & Co., that firm then consigned the entire amount of said shipment to Radicke & Lewis as part of the 250,000 feet sold to them. The 90,692 feet of lumber owned by M. McKann & Co., and not loaded on the barge, was sold by that firm at Norfolk, before January 1, 1904. The barge left Norfolk on the 16th of December, 1903, and arrived at Baltimore two days thereafter. The Canton Box Company, not having received any of the lumber so contracted for, and not hearing from M. McKann & Co. concerning it, in April, 1904, made a demand on that firm for the difference in price between what they had agreed to pay for the lumber and the market price of lumber in Baltimore at the time of such demand. Certain negotiations were had, resulting in a compromise and an adjustment of the differences between the Canton Box Company and M. McKann & Co., and then followed the filing of the libel against the barge. So far as this record is concerned, no claim was made by Radicke & Lewis because of the balance of cargo due them. The appellant had no knowledge of the sales of lumber made by M. McKann & Co. to either Radicke & Lewis or to the Canton Box Company, nor was appellant informed concerning the terms of such sales; and therefore the parties could not, when making the contract, have contemplated any liability beyond that which would ordinarily arise from a breach of contract of such charter. If, under the circumstances disclosed by the record, the libelants were entitled to damages, such damages were of the character contemplated by the parties at the time of making the contract, or such as reasonably might have been expected to follow its breach. That the burden of proving such damages was on the libelants will not be controverted. So far as the barge was concerned, the damages incurred by it were fixed on the 18th day of December, 1903, when she reached the port of Baltimore carrying only 159,308 feet of the 250,000 feet of lumber contracted to be delivered. While M. McKann & Co. had sold the Canton Box Company 125,000 feet, the delivery of which could have been made at any time not later than in January, 1904, nevertheless the contract with the barge was limited to one voyage, and to 250,000 feet of lumber, and the libelants' damages therefor related solely to the barge's failure to carry and deliver 90,692 feet of lumber, which should have been delivered at the end of the voyage before mentioned.

In this case, under the circumstances attending the transactions, including the contract of charter, the failure to carry the lumber referred to, and its subsequent sale, the measure of damages was the market value of the lumber at the port of Baltimore at the time

it was contracted to be delivered, less its value at Norfolk, where the barge agreed to receive it, and less also the freight agreed to be paid. What was the market price of such lumber at Baltimore on the 18th of December, 1903? On that point the testimony is unsatisfactory. What was the value of such lumber at Norfolk at the time when the barge should have received it under the contract for transportation to Baltimore? The record does not tell us clearly, although it appears that M. McKann & Co. sold it before January 1, 1904. The freight rate, as shown by the contract, was $1.35 per thousand. The amount of damages mentioned in the decree appealed from seems to have been based on the sum paid by the libelants in compromise of the claim submitted by the Canton Box Company, in connection with the damages alleged to have been caused by the nondelivery of the lumber purchased by that company. It does not follow that the liability of M. McKann & Co. to the Canton Box Company for the nondelivery of the lumber sold to it was the same as the liability of the barge to M. McKann & Co. for its failure to carry and deliver the lumber mentioned in the contract of charter. In connection with the propositions of law involved in this case, see Harvey v. Connecticut & Passumpsic Railroad, 124 Mass. 421, 26 Am. Rep. 673, and cases there cited; Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171; The Rossend Castle (D. C.) 30 Fed. 462; The Oregon, 55 Fed. 666, 5 C. C. A. 229.

There is no evidence in the record that M. McKann & Co. sold the lumber not taken by the barge for less than the market price at Norfolk, and it is a fair presumption that such price with the freight charge added, would at least have covered the amount at which the lumber was sold to the Canton Box Company in Baltimore, which, so far as this case is concerned, was the market value of such lumber at Baltimore at the time the barge contracted to deliver its cargo at that port. If the situation had been otherwise, the libelants should have shown it. In the absence of such testimony, the damages were, as we have seen, nominal.

The decree appealed from will be set aside, and this cause will be remanded to the court below, with directions to enter a decree for nominal damages.

Reversed.

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## GEORGE DELKER CO. v. HESS SPRING & AXLE CO.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1905.)

No. 1,398.

1. SALES—ACTION BY SELLER FOR DAMAGES—CERTAINTY OF CONTRACT.

Contracts for the sale and purchase of steel axles and springs, to be manufactured, which definitely specify the quantity and the price of each, are not rendered so uncertain that an action will not lie by the seller for their breach by a provision requiring the purchaser to specify the sizes and styles wanted.

2. SAME—CONSTRUCTION OF CONTRACT—NECESSITY OF ELECTION.
Contracts for the sale and purchase of axles and springs for vehicles, to be manufactured by the seller, required the purchaser to specify the styles and sizes from time to time as deliveries were to be made, and provided that "any goods named in this contract, for which the buyer shall neglect or refuse to specify, may, at the option of the seller, be regarded as sufficiently specified above, or, at the option of the seller, such neglect or refusal to specify may be treated as a lawful tender of all undelivered goods, and a refusal to accept same by the buyer, but shall not be construed as a waiver of any rights by the seller." *Held*, that such provision did not make an election necessary on a refusal by the buyer to specify, nor operate as a waiver of any rights the seller would have in its absence, but merely dispensed with the necessity of a tender.

3. SAME—MANUFACTURING CONTRACT—MEASURE OF DAMAGES FOR BREACH.
Contracts by which plaintiff, which was a manufacturer of vehicle axles and springs, agreed to sell and deliver to defendant within a year certain quantities of springs and axles, the styles and sizes to be specified by defendant from time to time, provided that strikes of workmen should excuse performance on the part of plaintiff, and that, in consideration of the purchase by plaintiff of steel for their manufacture, defendant should take the full quantity of springs and axles covered by the contracts, without rebate in price, in the event of a decline in the market. *Held*, that such contracts were for the manufacture of the articles sold, and not merely for the sale of products on hand or to be purchased in the market, and that the measure of damages recoverable by the seller on the refusal of the purchaser to make further specifications thereunder was the difference between the contract price of the articles contracted for and not taken and the cost of their manufacture and delivery.

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

The defendant in error (plaintiff below), hereinafter called the "plaintiff," was engaged in the business of manufacturing vehicle springs and axles at Carthage, Ohio, and on the 3d day of November, 1899, entered into two contracts with the plaintiff in error (defendant below), hereinafter called the "defendant," who was engaged in the business of manufacturing vehicles at Henderson, Ky. One of these contracts was to furnish 2,500 sets of axles, and the other to furnish 35 tons of springs, during the succeeding year, and the defendant agreed to accept and pay for the same. For the breach of these contracts the plaintiff brought an action, which was tried to the court without a jury, and the court found the following facts:

"(1) The plaintiff and the defendant at the date mentioned therein entered into the following:

" 'Contract for Axles.

" 'Made in duplicate at Carthage, Ohio, Nov. 3rd, 1899.

" 'The Hess Spring & Axle Company, of Carthage, Ohio, agrees to sell, and the George Delker Co., of Henderson, Ky., agrees to buy the quantity at the prices and upon the terms and conditions stated herein.

" '1. Quantity. Not less than 2,500 sets, and not more than 2,500 sets of Nos. 11 and 12 Half Patent Axles in sizes up to and including 1 1-2 inch.

" '2. Prices. 60 per cent. discount from "Revised Standard List" with extras as per "list of extras" all attached hereto and forming part of this contract.

" '3. Terms. Note or acceptance maturing 60 days from date of invoice or 2 per cent. discount for cash if paid within 20 days from date of invoice. Settlements to be made monthly (no later than the 10th day), for previous month's shipments.

" '4. Delivery. All goods F. O. B. Carthage, Ohio, with freight allowance at ruling rate per hundred pounds to Henderson, Ky. No freight allowance on less than 250 pounds.

" '5. Specifications. The buyers agree to specify for the minimum quantity above mentioned, in approximately monthly installments.

" 'The buyers agree that not less than 80 per cent. of the amount is to be specified for, for delivery, not later than May 1st, 1900, and balance, if any, to be specified for prior to August 1st, 1900, and an option of 25 per cent. additional, if specified for delivery within each period named.

" 'Any goods named in this contract for which the buyer shall neglect or refuse to specify, may, at the option of the seller, be regarded as sufficiently specified above, or at the option of the seller, such neglect or refusal to specify may be treated as a lawful tender of all undelivered goods, and a refusal to accept same by the buyer, but shall not be construed as a waiver of any rights by the seller.

" '6. Exceptions. This agreement is contingent upon fires, strikes of workmen, accidents or other causes beyond the control of the sellers.

" 'Note:—Claims for errors, deficiencies or imperfections will only be entertained by the seller, when made within 10 days after receipt of goods.

" 'It is especially agreed that in consideration of the sellers covering on the necessary steel to go into these goods, that the buyers bind themselves to take not less than the minimum amount mentioned, without rebate in the price, in the event of a decline in the price of steel during the life of this contract.

" 'Accepted, Accepted,

" 'The George Delker Co., The Hess Spring & Axle Co.,

" 'C. P. Schlamp. Per W. J. Haldeman, Agt.

" 'Nov. 25, 1899.

" 'Pads gratis.' "

To which contract there was appended as part thereof a price list referred to in the contract, and set out in full in the findings.

"(2) The defendant knew at the time of making the said contract that the plaintiff was engaged in the business of manufacturing such axles, and defendant's president, having visited plaintiff's establishment, was in a position to know that the plaintiff would manufacture the axles.

"(3) The defendant specified for 1,440 sets of said axles, all of which were made by the plaintiff and shipped to the defendant at Henderson, Ky., though after some delay in respect to a large proportion of them; and all of the said 1,440 sets of axles were received and accepted by the defendant, and were duly paid for by it by the 1st day of May, 1900.

"(4) The defendant did not specify for the remaining 1,060 sets of said axles. It did, however, prior to January 1, 1900, leave with plaintiff the paper set forth in paragraph 3 of its amended answer to plaintiff's first cause of action, filed herein on February 10, 1904, but without intending said paper to be a specification for axles, within the meaning of that phrase as used in the contract.

"(5) The plaintiff was at all times able, ready, and willing to manufacture and supply the said 1,060 sets of axles, and in July, 1900, notified the defendant of the deficit in specifications, and requested defendant to make specifications to cover the same.

"(6) Thereafter, viz., on August 2, 1904, the defendant notified the plaintiff that it (the defendant) would not specify for any more of the axles.

"(7) The defendant had supplied to the plaintiff in a previous year, when a practically similar contract was in operation between them, a model of the character of axles defendant required for its trade, and which it used therein, and the character of the axles thus modeled was the one always made for and supplied to the defendant by the plaintiff, up to and including the 1,440 sets of axles specified for under the contract above set forth; but it does not expressly appear that the 1,060 other sets would have been specified for, or ordered to be of that sort. The list price of that sort of axles was $5.50 per set, and the price under the contract sued on was 40 per cent. thereof, namely, $2.20 per set, or a total for the 1,060 sets of $2,332. The lowest price for any axles that might have been specified for under the contract was $4.50 per set, the contract price of which was 40 per cent. thereof, namely, $1.80 per set, or a total for the 1,060 sets of $1,908. The cost of manufacturing, supplying, and shipping the former (that is to say, the $2.20 axle) to the defendant at

Henderson, Ky., would have been 95.6 cents per set, or a total of $1,013.36, to which should be added the sum of $60. the amount of freight thereon from Carthage, Ohio, to Henderson, Ky.—in all, $1,073.36—the difference between which and the agreed price of such axles being $1,258.64. The cost of manufacturing, supplying, and shipping the latter (that is to say, the $1.80 axle) to the defendant at Henderson, Ky., would have been 77.6 cents per set, or a total of $822.56, to which should be added the sum of $60, the amount of freight from Carthage, Ohio, to Henderson, Ky.—in all, $882.56—the difference between which and the contract price for this class of axles being $1,025.44.

"(8) Estimated as if this were a contract merely between a buyer, as such, and a seller, as such, upon the defendant's theory of this case the damages of the plaintiff on the 1,060 sets of axles not specified for would have been and would be $200.

"(9) The plaintiff and defendant at the date mentioned therein also entered into the following:

"'Contract for Springs.

"'Made in duplicate at Carthage, Ohio, Nov. 3rd, 1899.

"'The Hess Spring & Axle Company, of Carthage, Ohio, agrees to sell, and the George Delker Company, of Henderson, Ky., agrees to buy the quantity at the prices and upon the terms and conditions stated herein.

"'1. Quantity. Not less than 35 tons, and not more than 35 tons of Standard Springs, such as Elliptic, Platform, Concord Brewster, Jaxon, Longitudinal and Top.

"'2. Prices. Black, .....; Half Bright, $5.15 per cwt. Bright, .....; Extras, 25 per set on Plain Open Heads, $1.00 per set on Open Head Rubber Bush.

"'3. Terms. Note or acceptance maturing 60 days from date of invoice, or 2 per cent. discount allowed for cash if paid within 20 days from date of invoice. Settlements to be made monthly (not later than the 10th day) for the previous month's shipments.

"'4. Delivery. F. O. B. cars at Carthage, Ohio, with freight allowance at tariff rate per hundred pounds to Henderson, Ky. No freight allowed on less than 250 pounds.

"'5. Specifications. The buyer agrees to specify for the minimum quantity above mentioned in approximately equal monthly installments.

"'The buyers agree that not less than 80 per cent. of the amount is to be specified for, for delivery, not later than May 1st, 1900, and the balance, if any, to be specified for prior to August 1st, 1900, and an option of 25 per cent. additional, if specified for delivery within each period named.

"'Any goods named in this contract for which the buyer shall neglect or refuse to specify, may, at the option of the seller, be regarded as sufficiently specified above, or at the option of the seller, such neglect or refusal to specify may be treated as a lawful tender of all undelivered goods, and a refusal to accept same by the buyer, but shall not be construed as a waiver of any rights by the seller.

"'6. Exceptions. This agreement is contingent upon fires, strikes of workmen, accidents or other causes beyond the control of the seller.

"'Note:—Claims for errors, deficiencies, or imperfections will only be entertained by the seller when made within 10 days after receipt of goods.

"'It is especially agreed that in consideration of the sellers covering on the necessary steel to go into the goods that the buyers bind themselves to take not less than minimum amount mentioned, without rebate in price, in the event of a decline in the price of steel during the life of this contract.

| | |
|---|---|
| "'Accepted, | Accepted, |
| "'The George Delker Co., | The Hess Spring & Axle Co., |
| "'C. P. Schlamp. | Per. W. J. Haldeman, Agt.'" |

All of the findings in regard to the contract for axles are repeated in regard to the contract for springs, except that it is stated that defendant specified for 22,490 pounds of springs, and did not specify for the remaining 47,510 pounds, and then follow the findings that:

"The contract price of the said 47,510 pounds of springs was $5.15 per hundred pounds, or a total of $2,446.76, and the cost of manufacturing, supply-

ing, and shipping same to the defendant at Henderson, Ky., would have been $2.64 per hundred pounds, or a total of $1,254.26, to which should be added $90, which would have been the freight cost to Henderson, Ky.—in all, $1,344.26. The difference between the contract price of said springs and what it would have cost the plaintiff to manufacture and ship the same to the defendant, including the freight thereon, would have been $1,102.50. Estimated as if this were a contract merely between a buyer, as such, and a seller, as such, upon the defendant's theory of this case, the damages of the plaintiff on the 47,510 pounds of springs not specified for would have been and would be $350."

After these findings the court found the following:

"Conclusions of Law.

"(1) That, in failing to specify for the axles and for the springs as stipulated in the contracts, the defendant was guilty of a breach of each of said contracts.

"(2) That the contracts sued on herein were not, nor was either of them, so indefinite and indeterminate as to the kind and variety of the articles embraced therein, and the prices to be paid therefor, as to be unenforceable.

"(3) That the defendant, being bound to make specifications whereby it would clearly designate which of the several varieties it would take, cannot avoid the contracts, or either of them, by failure to do what the defendant therein stipulated to perform in respect to such specifications.

"(4) That the proper measure of damages to be applied in this case is not that which would be appropriate to ordinary contracts of sale, namely, the difference between the contract price of the article and the market price thereof at the time fixed for the performance of the contract.

"(5) That whatever might have been the opinion and conclusion of the court in the premises if it could have looked alone to the opening paragraphs of the two agreements sued on, yet, when all of each of those papers and all the surrounding facts are considered in the light of the opinion of the Circuit Court of Appeals of the Seventh Circuit in the case of Western Hardware Co. v. Bancroft-Charnley Co., 116 Fed. 176, 53 C. C. A. 548, especially as it is supplemented by the opinion of the Supreme Court of the United States in Hinckley v. Pittsburg Steel Co., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967, the court must conclude that the plaintiff is entitled to recover under each contract sued on the difference between the agreed price of the articles and what it would have cost the plaintiff, including freight to Henderson, Ky., to manufacture, supply, and deliver the axles and springs, respectively, though, if a superior court should be of a different opinion, this court has ascertained the damages resulting from the breach of the contracts upon defendant's theory of the case.

"(6) That the difference between the contract price and the cost of production and shipment of the springs contracted for is easily ascertainable, but there is more difficulty as to the axles. Although the model of the latter was furnished, and although all axles actually delivered conformed to it, and were of the $2.20 variety, still the defendant was not bound to specify for them only; and the court concludes that, while it must hold that there was a breach of the contract respecting the axles, it must also hold, in the absence of other facts, that it was that form of breach which would be the least injurious to the defendant, and not the one which would be most so, and therefore as to the axles it will adjust the recovery on the basis of a breach of the contract in respect to the $1.80 axle.

"(7) That, the proof not showing expressly such election by the plaintiff as the contracts gave him the right to make upon the failure to specify as therein required, the court concludes that such an election was made by the institution of this action on the 4th day of May, 1901, and by the averments then made in plaintiff's petition. While this finding may not be very material, the discretion of the court as to allowing interest may make the time of beginning the suit and making the election also the period for beginning the interest.

"(8) That neither of the two papers left by the defendant with the plaintiff, and described in the two paragraphs of the amended answer filed herein on

February 10, 1904, and each of which paragraphs is described as a third paragraph of said amended answer, was a sufficient or adequate specification either for the axles or for the springs referred to, and neither of them was ever intended by the defendant to be so, and neither of them was ever accepted as such by the plaintiff.

"(9) That the plaintiff is entitled to recover as shown in the following:

"Judgment.

"Upon the facts hereinbefore ascertained and stated, it is considered and adjudged by the court that the plaintiff, the Hess Spring & Axle Company, recover of the defendant, the George Delker Company, the sum of twenty-one hundred and twenty-seven and $^{94}/_{100}$ dollars, being the aggregate amount ascertained to be due from defendant to the plaintiff by reason of the defendant's breach of each of the two contracts sued on herein, together with the interest thereon from the 4th day of May, 1901, until paid, and also plaintiff's costs herein expended, and may have execution therefor."

The defendant brings the judgment to this court for review by a writ of error.

George W. Jolly (Malcolm Yeaman, of counsel), for plaintiff in error.

Ernst, Cassatt & McDougall and R. D. Hill, for defendant in error.

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

WANTY, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The defendant claims that the facts found by the judge below do not support the judgment rendered, because, first, the contracts are so indefinite as to lack mutuality; second, the plaintiff should have given notice of its election under the clause in the contracts giving it the option to consider the specifications sufficient, or that the neglect to specify might be considered a lawful tender of the undelivered goods and a refusal of acceptance; and, third, that the measure of damages should have been the difference between the contract price and the market price.

1. These contracts are definite as to the quantity of springs and axles, and as to the price and time of delivery, and nothing remained but the specification by the defendant of the sizes and varieties. A failure on the part of the defendant to keep its agreement to make these specifications as provided is the only way in which the contracts could be rendered uncertain; and it would be illogical to hold that by a breach of that part of the contracts the defendant could relieve itself of all the obligations it had assumed, and take the springs and axles only so long as the price of steel advanced, and, by failing to specify when the market declined, throw the loss upon the plaintiff. These were not options given to the defendant, but definite agreements by it for the purchase of the property mentioned, and the provisions for the specifications to be furnished did not make them so uncertain that an action did not lie for their breach. Hinckley v. Pittsburg Steel Co., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; Kimball Bros. v. Deere, Wells & Co., 108 Iowa, 676, 77 N. W. 1041; Ault v. Dustin, 100 Tenn. 366, 45 S. W. 981;

Minn. Lumber Co. v. Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529. The defendant cites many cases which are claimed to sustain its view, but they lack the agreement to take a quantity of goods, which is made certain by the contract itself, or could be made certain by evidence; thereby differing from the contracts here, where a definite quantity is fixed, and only its apportionment is to be made by the defendant.

2. We think that when the defendant refused to specify under the contract it became liable in an action for its breach, and that the clause providing that "any goods named in this contract for which the buyer shall neglect or refuse to specify, may, at the option of the seller, be regarded as sufficiently specified above, or at the option of the seller, such neglect or refusal to specify may be treated as a lawful tender of all undelivered goods, and a refusal to accept same by the buyer, but shall not be construed as a waiver of any rights by the seller," did not give any other or different remedy than the law, and therefore did not make notice of an election necessary. It only dispensed with the necessity of a tender, and by its terms this clause was not to be construed as a waiver of any rights the plaintiff had in its absence. This was not a case where the seller of the goods, after tender, elected to resell, and was obligated to give notice to the purchaser of such election.

3. The contention most strongly urged by the defendant is the failure of the trial judge to apply as a measure of damages the difference between the contract price and the market price, instead of the difference between the contract price and the cost of manufacture and delivery. The damages for the breach of these contracts is compensation, and, in arriving at what will accord compensation to the plaintiff, it is always necessary to look into the situation of the parties, as well as to all the provisions of the contract broken. If these were contracts of purchase and sale, as their opening clauses indicate, then the measure of damages contended for would be correct, and the recovery should have been on that basis, for, if it was contemplated by the parties that the plaintiff should have these springs and axles in stock, or go into the market and purchase them for delivery to the defendant, that would be the rule of compensation; but, if these goods were to be manufactured as the specifications were received, then such a rule would not be one which would afford compensation. The facts found by the trial judge indicate clearly that these were understood to be manufacturing contracts by the parties according to their former dealings, and the contracts themselves, when taken in their entirety, bear that interpretation. The provisions that specifications should be given from time to time, that strikes of workmen should excuse performance on the part of the plaintiff, that the plaintiff should purchase steel necessary for their manufacture, and defendant should take the full amount of springs and axles covered by the contracts, without rebate in price in event of a decline in the market, all point to a purpose of manufacturing the articles from time to time as specifications should be received from the defendant, and not to a sale of a manufactured product on hand, or to be purchased in the

market. If these were manufacturing contracts—and we agree with the court below, holding that they were—then the measure of damages is the difference between the cost of manufacture and delivery and the contract price as applied by the Circuit Court. Hinckley v. Pittsburg Steel Co., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; Kingman & Co. v. Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489.

The court below took those articles which could have been specified under the contracts upon which the plaintiff would have received the smallest profit, and therefore reduced the damages to the lowest amount compatible with the facts, of which course the defendant could not complain.

The judgment will be affirmed.

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## CAZIER v. MACKIE-LOVEJOY MFG. CO. et al.*

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

No. 1,117.

1. PATENTS—INFRINGEMENT—SUBSTITUTION OF PARTS.
   Where the real invention covered by a patent lies in one element of a combination, the others being old, and material only in putting into use that which is new, one who appropriates such novel feature cannot avoid infringement by substituting a different form of one of the nonessential parts.

2. SAME—TROUSERS-HANGER.
   The Cazier patent, No. 696,940, for a trousers-hanger having the clamping-jaws of spring metal arched so as to engage the fabric near the ends and stretch the same in closing together, discloses invention in such feature, and is valid. Claim 5, also, *held* infringed.

3. SAME—INFRINGEMENT BY CORPORATION—LIABILITY OF OFFICERS.
   Infringement by a corporation gives no right of action against one of its officers individually, unless he has acted beyond the ordinary scope of his office.

   [Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 459.]

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

Appellant failed in his suit to enjoin infringement of letters patent No. 696,940, issued to him on April 8, 1902, for a trousers-hanger.

The claim said to be infringed is the fifth, as follows:

"(5) A trousers-hanger comprising two opposed elongated clamping-jaws formed of spring-metal strips, arched from end to end so as to engage the interposed fabric near their ends, said jaws being adapted in closing together to stretch the fabric in the direction of the length of the jaws, a V-shaped suspending-spring, upon the ends of which said clamping-jaws are mounted, a hook at the apex of the suspending-spring, and a link or clasp adapted to slide over the arms of the suspending-spring to confine the same and hold the jaws closed upon the fabric."

The record contains the following prior patents: No. 36,100, August, 1862, to Meacham; No. 233,964, November, 1885, to Bear; No. 422,059, February, 1890, to Nichols; British No. 6,866, to Killick, 1889; British No. 453, to Burden, 1890; British No. 8,670, to White, 1896; and Swiss No. 3,253, to Schweizer, 1891.

Other facts are stated in the opinion.

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*Rehearing denied May 11, 1905.

De Witt C. Tanner, for appellant.
Thomas F. Sheridan, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. The hook, the suspending spring, and the locking link, in combination with clamping jaws for trousers-hangers, were all old. The novelty of this claim, if any exists, must be found in the particular clamping jaws. Schweizer and Killick are the strongest references. Schweizer used wooden clamping jaws, arched or hollowed out in the middle, for the purpose of accommodating the seams of the trousers. Killick disclosed clamping jaws of sheet metal—straight strips except for a rectangular recess at the center for accommodating the seams. He also claimed wooden jaws with the same recess. Neither of these patents mentions any spring action. It is manifest that, if the arch of these reference jaws were flattened by pressure at the center, the ends would spread apart. The clamping jaws of the claim in suit are required to be of spring metal, arched from end to end so as to engage the interposed fabric near their ends. As the arch is flattened, the bearing surface is gradually increased, and the elongation of the jaws smooths out the ends of the trousers legs. The construction was new; the result was new; and the claim evinces, we think, an original idea, neither a plagiarism nor a mere selecting and combining of others' thoughts.

Appellees' expert denies the utility of clamping jaws "adapted, in closing together, to stretch the fabric in the direction of the length of the jaws." Overstretching would be injurious, but the amount performed by appellant's device, we are satisfied, is advantageous. The record shows a large and prosperous business built up on appellant's invention. And the appellee company, failing to use any of the older forms of clamping jaws, and seizing upon appellant's success, is hardly in a position to question the utility of the novel feature.

We have carefully examined the file wrapper and contents, and find nothing therein to limit the claim to less than its obvious reading. Acquiescence in the rejection of "arched clamping jaws" is no graver than the concession in appellant's specification that "the arched form of the clamping jaws is not broadly new." Both were required by the prior art. But that could not prevent appellant from making a narrower claim. And there is no occasion for appellant to seek to enlarge the claim in suit or to invoke the doctrine of equivalents with respect to the clamping jaws, for the appellee company has them identically.

At first the appellee company made and sold an exact copy of appellant's device in all of its parts. Before suit was brought, a change was made; and it is contended that this change obviates infringement. Instead of appellant's V-shaped suspending spring, the appellee company uses V-shaped suspending arms, hinged at their apex. In Killick's patent, both forms of suspending arms are shown. In the operation of a trousers-hanger both perform

these essential services: At their apex they unite with the hook by which the whole device, with the trousers, is hung up; at their lower ends they sustain the clamping-jaws within which the trousers legs are grasped; and along their diverging sides works the locking link by which the jaws are held firmly closed. Killick disclosed an incidental superiority in having at the apex a spring instead of a hinge, namely, that the spring "keeps the jaws open for the reception of the trousers."

In claim 5, appellant's whole invention lay, it must be remembered, in the novel form and function of his clamping jaws. Having devised them, he could go to Killick, say, for the other elements of the combination, the hook, the suspending arms, and the locking link—old elements that were material only to the putting into use of the real invention. Appellant took Killick's preferred form of suspending arms—those with a spring instead of a hinge. May the appellee company appropriate the novel clamping jaws by using with them the less desirable form of suspending arms? We think not; most decidedly not. To hold otherwise would be to rob an inventor by a blind literalism.

The case is quite similar in this aspect to that of Adam v. Folger, 120 Fed. 260, 56 C. C. A. 540. One element in Folger's combination was "a supplemental regulating valve arranged in the plug of the main valve." Folger's invention lay in conceiving and putting into workable form "the idea of regulating separately the flow of the water while preserving the unity of action of the supply valves for water and gas." The real invention could be put to use, but in a less desirable way, by arranging the supplemental regulating valve (which was essential) outside of the plug of the main valve. But we held that such a change did not avoid infringement, saying:

"It is well settled that there is no infringement if any one of the material parts of the combination is omitted, and that a patentee will not be heard to deny the materiality of any element included in his combination claim. * * * But form, location, and sequence of elements are all immaterial, unless form or location or sequence is essential to the result, or indispensable, by reason of the state of the art, to the novelty of the claim."

Here, the invention consists not at all in the form of the suspending arms, and can be utilized with either form. See also King Ax Co. v. Hubbard, 97 Fed. 795, 38 C. C. A. 423.

The appellee company, a corporation, can act only through its officers and agents. We find nothing in the record to show that the appellee Deknatel acted beyond the ordinary scope of his office. No cause of action against him is made out. United Nickel Co. v. Worthington (C. C.) 13 Fed. 392; Hose Co. v. Star Rubber Co. (C. C.) 40 Fed. 168; Hutter v. De Q. Bottle Stopper Co., 128 Fed. 283, 62 C. C. A. 652.

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

## MARCONI WIRELESS TELEGRAPH CO. OF AMERICA v. DE FOREST WIRELESS TELEGRAPH CO.

(Circuit Court, S. D. New York. April 11, 1905.)

PATENTS—INFRINGEMENT—WIRELESS TELEGRAPHIC APPARATUS.

The Marconi reissued patent No. 11,913 (original No. 586,193), for improvements in transmitting electrical impulses and signals, and in apparatus therefor, while for a combination of elements all of which were taken from the prior art, discloses the first practical wireless telegraphic system, and shows invention of a primary character, which entitles it to a broad construction and a liberal range of equivalents. As so construed, it is not limited to receiving conductors wholly insulated from the earth at both their upper and lower ends, nor to the suspended plates described, but covers also conductors consisting of aerial wires having an earth connection at the bottom. Claim 1 of the reissue in attempting to claim broadly every form of imperfect contact device in the receiver, goes beyond the original patent, and cannot be sustained, in view of the prior art. Claims 3 and 5 *held* infringed by the apparatus of the De Forest and Smythe patents, which cover an equivalent, imperfect contact device. Claims 8, 10, and 24 *held* not infringed.

Frederic H. Betts, for complainant
Philip Farnsworth, for defendant.

TOWNSEND, Circuit Judge. This suit, by bill and answer, raises the questions of the validity, and of infringement by defendant, of complainant's reissued patent No. 11,913, granted to Guglielmo Marconi June 4, 1901, for improvements in transmitting electrical impulses and signals and in apparatus therefor. This patent is the reissue of the fundamental Marconi patent, No. 586,193, dated July 13, 1897, for transmitting electrical signals. The issues involved relate to the art of wireless telegraphy, and more especially to its latest development, sometimes termed "spark telegraphy."

Prior to 1887 the dreams and forecasts of electric telegraphy without wires found realization and tangible shape in apparatus which utilized either the conductive properties of earth or water, or the principle of induction. The Dolbear system and apparatus of 1884 will be separately considered. The conduction system was preferably employed on the banks of bodies of water, and comprised primary and secondary circuits on the opposite banks, consisting of wires stretched along the bank on either side, and connected to the ground or water, and provided with batteries and galvanometers or telegraph or telephone instruments. By means of such apparatus currents of electricity generated by the battery in the primary circuit, on one side of a stream, for example, passed to the terminal of the wire in the secondary circuit, on the other side of the stream, and, by means of circuit making and breaking connections, signals were transmitted to the receiving apparatus. The distances covered by this system were limited to one or two miles. The second method depends on the principle of induction, or the influence of one conductor on another through an insulator, based on the discovery that, if two circuits—one having a battery and being the primary

circuit, the other being the secondary circuit—are parallel with one another, a current made or broken in the primary circuit induces a transient or momentary current in the secondary circuit. This system was utilized by apparatus similar to that employed in the conduction method, and for about the same distances. The Dolbear system—so called from the name of its great inventor, Prof. Dolbear, of Tufts College—appears to have utilized the induction principle. By means of elevated conductors, vertical wires, and grounded connections, he caused electrical impulses to extend or stretch out, perhaps by means of magnetic lines of force, from a transmitting to a receiving station, and thus accomplished, for short distances, the feat of sending signals through the air without wires. These prior experiments are only relevant at this time as showing the use of batteries, telegraph keys, telephones, and circuit interrupters or breakers in wireless systems, and the discovery and disclosure, especially by Dolbear, of certain properties of electricity utilized by later inventors, and of the desirability of using elevated conductors.

The means for the later developments of wireless telegraphy were furnished in the proof by actual experiment of the correctness of certain theories promulgated by Prof. Maxwell, of Cambridge, in 1865, that electricity, like light, traversed space through the medium of ether, and that, if a spark be created by a disruptive discharge, it will spread out in waves or undulations. These waves are known as "Hertz waves" or "Hertz oscillations," from the name of their discoverer, Heinrich Hertz. He produced these waves by the use of an apparatus consisting of a radiator and a receiver equipped with rods having small metallic knobs on the ends, and separated a short distance from each other. This separation is the spark-gap, by means of which the Hertzian waves or oscillations are produced. When the transmitter or radiator is connected with a Ruhmkorff coil, or any source of high electric tension, such as an induction coil, with mechanical vibrator, or a producer of electric current, such as a dynamo, a charge of electricity is sent through the circuit which includes the spark-gap, and a spark passes across the spark-gap and creates the electrical vibration or wave called the "Hertz wave." The characteristics of these waves are explained by Dr. De Forest as follows:

"The radiations are through the ether, not the air. They are therefore independent of wind or weather, and can penetrate all substances which are not conductors. They speed outward from the transmitter, in ever widening circles, with the velocity of light. They skim over the surface of land and sea, and hence reach stations lying far below the horizon. When these waves strike an upright conductor a portion of their energy is cut out, and generates high frequency electric currents of minute power, which run down the antenna wire to earth in traversing the receiving detector. By common consent, then, such vibrations detached or traveling over a conducting surface have most appropriately been styled 'Hertzian waves.' Most certainly also are they 'oscillating currents' when traversing conductors. This was Hertz' demonstration. * * * But when an electrical system discharges, having so small a time constant that the pulsations occur at a rate of millions per second, we have very different conditions from those ordinarily classed with

alternating or oscillatory currents. * * * A large portion of the energy is electrostatic, and the force there involved may be conceived as lines of electric displacement perpendicular to the conducting surface, traveling along it away from the source of energy, following any zigzag path, rounding corners, reflected wholly or in part at all such sudden changes in shape or nature of the conductor."

Marconi has fully and accurately described the peculiarities of these oscillations as follows:

"The main character or feature of Hertzian waves is that they can be transmitted and received through space and through certain bodies, and that they follow the same laws which govern the propagation of light waves. They obey the laws of diffraction, reflection, and refraction, and, when following on an electrical conductor, produce certain electrical phenomena on or in the said conductor. They differ from ordinary electromagnetic induction in the fact that they become and are detached from the place or instrument of origin, and travel through space like light from a lamp or sound from a bell. Their speed is exceedingly great—in fact, the same as the speed of light; approximately 186,000 miles per second. They are thus similar to light waves, so far as they become detached from the radiator or producer, but possess the property, not possessed in the same degree by light waves, of traveling around obstacles or corners, such as mountains or the curvature of the earth, which curvature exists to such a large extent between any two positions situated, say, a thousand miles apart. Hertzian waves present the peculiarity of being reflected by electrical conductors and conducted by electrical insulators. Thus a sheet of glass or ebonite, which is called an electrical insulator, is transparent to Hertzian waves, and will let them through with perfect ease, whilst a sheet of metal or other conducting substance will reflect or absorb these waves. For this reason it is rather difficult to carry out tests or experiments concerning the propagation of electric waves or wireless telegraphy across rooms or halls, for the reason that these waves are reflected or absorbed in certain cases by the metallic fittings in the room, such as metal pipes or gilded paper or metallic picture frames, etc. Some of the special characteristics of these waves, which one encounters with them when experimenting in laboratories, tends rather to make it difficult to understand how they can be controlled with such certainty and regularity when applied for the purpose of transmitting reliable messages through space in the manner I have already explained in answer to the other questions. * * * In order that there may be radiation in the form of a Hertzian wave or true electric wave into space, the frequency of the electrical oscillations set up in the conductors must be so high as to be reckoned at least in hundreds of thousands, or perhaps, rather, millions, per second. An analogy of this is to be found in the case of a sound wave through air. In order that this air wave may be produced, and therefore the sound, some object must strike the air with a certain rapidity or frequency. Thus, for instance, the swinging of a bell in a church steeple to and fro through the air will produce no air waves, and therefore no sound; but, if the rim of the bell is struck suddenly with a hammer, the whole bell vibrates at the rate of some hundreds or thousands per second, and affects the air with suddenness to create an air wave or sound, which is the sound of the bell which we hear. Therefore, in the same way, if the conducting bodies are simply connected to the producer of ordinary alternating currents or high tension electricity, no Hertzian wave or any other wave is produced; but, if a spark is caused to pass to or from or off said conductors in a suitable manner, then at each discharge or at each spark Hertzian waves, which are oscillations of a frequency of millions or hundreds of thousands per second, are produced and radiated into space. Hence it appears absolutely clear to me that there is no Hertzian wave telegraphy without the essential feature for producing Hertzian waves, which is the Hertzian spark."

It thus appears that, so far as known, these waves are produced only by a disrupted electrical discharge across a spark-gap; that

these oscillations are characterized by some conditions similar to those of electric waves, and others peculiar to light waves; that they differ from the impulses of the prior art, in that, while those stretched out in horizontal lines from the transmitting source of energy to the receiver, these waves are detached from the point of production, and travel through or are propagated in the ether, and around, through, or over the surfaces of intervening objects. While, however, they pass through materials which operate as insulators for electric currents, and are arrested by conductors of electric currents, yet, when they once impinge upon a receiving wire, they exhibit in their conduct and the laws of their operation the manifestations of electrical currents of high frequency oscillations. The present systems of spark telegraphy owe their origin and practical commercial development to this great discovery by Hertz.

Marconi, referring to his apparatus, says:

"According to this invention, electrical signals, actions, or manifestations are transmitted [through the air, earth, or water] by means of oscillations of high frequency, such as have been called 'Hertz rays' or 'Hertz oscillations.' All line-wires may be dispensed with."

And referring to the prior art, he says:

"I am aware of the publication of Professor Lodge of 1894, at London, England, entitled 'The Work of Hertz,' and the description therein of various instruments in connection with manifestations of Hertz oscillations. I am also aware of the papers by Professor Popoff in the 'Proceedings of the Physical and Chemical Society of Russia' in 1895 or 1896. But in neither of these is there described a complete system or mechanism capable of artificially producing Hertz oscillations, and forming the same into and propagating them as definite signals, and capable of receiving and reproducing telegraphically such definite signals; nor has any system been described, to my knowledge, in which a Hertz oscillator at a transmitting station and an imperfect-contact instrument at a receiving station are both arranged with one terminal to earth and the other elevated or insulated; nor am I aware that prior to my invention any practical form of self-recovering imperfect-contact instrument has been described.

"I believe that I am the first to discover and use any practical means for effective telegraphic transmission and intelligible reception of signals produced by artificially formed Hertz oscillations."

These means comprise a transmitting and a receiving station equipped with signaling apparatus, which are shown by the following copies of figures 1 and 4 of the patent drawings:

Fig. 1.

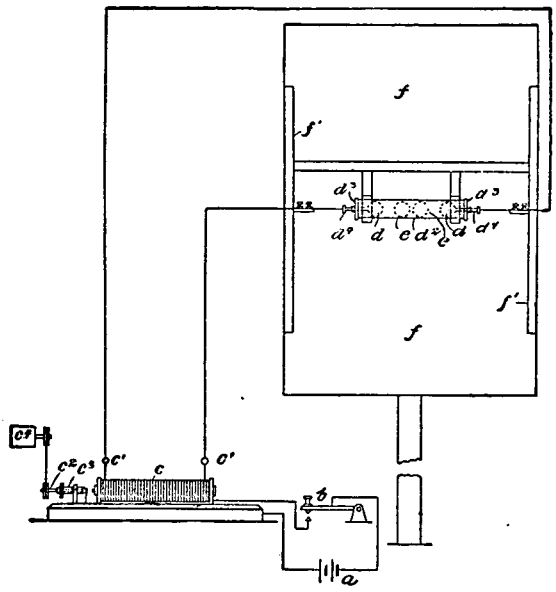
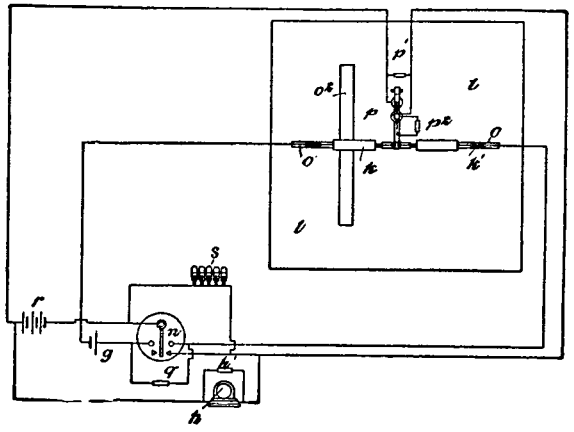



Fig. 4.



The patentee says:

"Referring now to Fig. 1, a is a battery, and b an ordinary Morse key closing the circuit through the primary of a Ruhmkorff coil, c. The terminals, c', of the secondary circuit of the coil are connected to two metallic balls, d, d, fixed by heat or otherwise at the ends of tubes * * * of insulating material. * * * e, e, are similar balls fixed in the other ends of the tubes, d', * * * through which pass rods, $d^4$, connecting the balls, d, to the conductors. One (or both) of the rods, $d^4$, is connected to the ball, d, by a ball and socket joint, and has a screw head upon it working in a nut in the cover, $d^3$. By turning the rod, therefore, the distance of the balls, e, apart can be adjusted. * * * The balls, d and e, are preferably of solid brass or copper, and the distance they should be apart depends on the quantity and electromotive force of the electricity employed; the effect increasing with the distance so long as the discharge passes freely. With a coil giving an ordinary eight-inch spark, the distance between e and e should, to assure good results, be from one twenty-fifth to one-thirtieth of an inch, and the distance between d and e about one and one-half inches. Other conditions being equal, the larger the balls the greater is the distance at which it is possible to communicate. I have generally used balls of solid brass of four inches diameter, giving oscillations of ten inches length of wave. If a very powerful source of electricity, giving a very long spark, be employed, it is preferable to divide the spark-gap between the central balls of the oscillator into several smaller gaps in series. This may be done by introducing between the big balls smaller ones of about half an inch diameter, held in position by ebonite frames."

A trembler-break and connections on the Ruhmkorff coil, $c^2$, $c^3$, $c^4$, breaking the direct current into an alternating current, is not involved herein. "In Fig. 4, g is the battery, and h a telegraphic instrument on the derived circuit of a relay, n." That is, this device comprises a battery circuit, which includes in its circuit an ordinary tape recording telegraph instrument, and the vertical pin of a sensitive relay—a circuit opener and closer—and which has only slight capacity for the production of an induced current. j is a circuit-closer or coherer, upon the effectiveness of which the whole operation of the system depends. It consists of a glass tube about 1½ inches long and one-tenth of an inch in diameter, containing a column of loose metallic powder, consisting of nickel and hard silver filings, with or without mercury. The column is connected at each end to a metallic plate, k, "of suitable length to cause the system to resonate electrically in unison with the electrical oscillations transmitted." Between the powder and plate are tight-fitting pieces of silver wire joined to pieces of platinum wire, and the tube is closed and sealed on the platinum wires. The patentee states that "the tube, j, may be replaced by other forms of imperfect electrical contacts." The plates, k, are "preferably of such a length as to be electrically tuned with the electric oscillations transmitted." These plates communicate with the local circuit through two very small "choking-coils," k'. "The object of these choking-coils is to prevent the high-frequency oscillation induced across these plates by the transmitter from dissipating itself by running along the local-battery wires, which might weaken its effect on the sensitive tube, j." s, h', p', and $p^2$ are resistances. On the circuit actuated by the relay is the battery, r, and the trembler, p, which is constructed and operates like the arm of an electric bell to automatically tap the powder in the tube; such tapping being produced by means of

the current passing through the tube. The operation of the tube and its connections is thus explained by the patentee:

"When no oscillations are sent from the transmitting station, the tube, j, does not conduct the current, and the local-battery circuit is broken; but, when the powder or tube is influenced by the electrical oscillations from the transmitter, it conducts and closes the circuit. I find, however, that when once started the powder in the tube continues to conduct even when the oscillations from the transmitter have ceased; but, if it be shaken or tapped, the circuit is broken. A tube well prepared will instantly interrupt the current passing through it at the slightest tap, provided it is inserted in a circuit in which there is little self-induction and small electromotive force."

That is, the powder in the tube, j, when in its normal condition, offers such an amount of resistance that the local-battery current will not pass through it. But when the high-frequency oscillations or waves fall upon it, and surge up and down the elevated conductors, they effect such a transposition in the arrangement of the grains of powder, in a manner not entirely understood, as to weld them together, as it were, the result of which is that the grains resolve themselves into conductive paths, and the current passing through them attracts the vertical arm of the relay, n, which, contacting with the two points below n, permits the current to pass around through the battery, r, to the telegraph instrument, h, which records the dash or dot as transmitted and received from the transmitting station. In order to prepare the powder in the tube for the transmission of another signal, the filling must be shaken back into its nonconducting state. This is accomplished by the trembler, p, which taps the tube, and causes the grains of powder to separate and return to their normal state of high resistance.

The operation of the system and apparatus in communicating signals is described by the patentee as follows:

"The Ruhmkorff coil or other source of high tension electricity capable of producing Hertz oscillations being in circuit with a signaling instrument, such as a Morse key, for instance, the operator, by closing the circuit in the way commonly employed for producing dots and dashes in ordinary telegraphy, will cause the oscillator to produce either a short or more prolonged electric discharge or spark or succession of sparks, and this will cause a corresponding short or more prolonged oscillation in the surrounding medium, corresponding in duration to the short or longer electrical impulse which in ordinary telegraphy produces a dot or dash. Such oscillations of defined character will thereupon be propagated as such throughout the medium, and will affect a properly constructed instrument at a distant receiving station. At such station the imperfect-contact instrument is in circuit with a relay, and, when oscillations from the transmitting station reach and act upon such imperfect-contact, its resistance is reduced, and the circuit is thereby closed during the continuance of the oscillation, and for a length of time corresponding thereto. The closing of the relay-circuit causes the sounder or other signal apparatus to act in accordance with the particular oscillation received, and the oscillation also immediately starts the action of the shaking or tapping device, which so shakes the powder in the imperfect-contact instrument as to cause it to break circuit as soon as the oscillation ceases which has closed the circuit and produced a movement of the signaling instrument corresponding thereto. I am therefore enabled to communicate signals telegraphically without wires by thus artificially forming oscillations at the transmitting station into definite signals by means of a signaling instrument, and receiving and reading the same at a receiving station by an imperfect-contact instrument, which, when acted upon by such defined oscillations, oper-

ates, first, to close the circuit in accordance with the received oscillation, and produce a corresponding movement of the receiving instrument, relay, or sounder; and also to operate a shaking device to automatically reopen the circuit immediately after the reception of each oscillation, thereby preserving the results of its defined character in the action of the receiver. All the details specified herein of construction of the sensitive tube and its connections are desirable for great efficiency, but the fundamental features of my system of transmission are not restricted to such details."

Other portions of the specifications and other drawings describe and illustrate other transmitters and receivers for long-distance service, comprising metallic plates elevated from the earth by means of insulating suspenders. These features will be considered in connection with the discussion of the issue of infringement.

The claims in suit are the following:

"(1) In an apparatus for communicating electrical signals by means of a producer of Hertz oscillations, and a signaling instrument, the combination, in the receiver, of an imperfect electrical contact, a circuit through the contact, and a receiving instrument, operated by the influence of such oscillations on said contact, substantially as and for the purpose described. * * *

"(3) The combination, in an apparatus for communicating electrical signals, of a spark-producer at the transmitting station, an earth connection to one end of the spark-producer, an insulated conductor connected to the other end, an imperfect electrical contact at the receiving station, an earth connection to one end of the contact, an insulated conductor connected to the other end, and a circuit through the contact, substantially as and for the purpose described. * * *

"(5) The combination, in an apparatus for communicating electrical signals, of a spark-producer at the transmitting station, an earth connection to one end of the spark-producer, an insulated conductor connected to the other end, an imperfect electrical contact at the receiving station, choking-coils connected to each end of the contact, an earth connection to one end of the imperfect contact, an insulated conductor connected to the other end, and a circuit through the coils and contact, substantially as and for the purpose described. * * *

"(8) The combination, in an apparatus for communicating electrical signals, of a spark-producer at the transmitting station, an earth connection to one end of the spark-producer, an insulated conductor connected to the other end, a tube containing metallic powder at the receiving station, an earth connection to the powder, and an insulated conductor also connected therewith, and a circuit through the powder, substantially as and for the purpose described. * * *

"(10) The combination, in an apparatus for communicating electrical signals, of a spark-producer at the transmitting station, an earth connection to one end of the spark-producer, an insulated conductor connected to the other end, a tube containing metallic powder at the receiving station, choking-coils connected to the powder, an earth connection to the powder, and an insulated conductor also connected therewith, and a circuit through the coils and powder, substantially as and for the purpose described. * * *

"(24) The combination of a transmitter capable of producing electrical oscillations or rays of definite character at the will of the operator, and a receiver located at a distance and having a conductor tuned to respond to such oscillations, a variable-resistance medium in circuit with the conductor, whose resistance is altered by the received oscillations, means, controlled by the received oscillations, for restoring the resistance medium to its normal condition after the reception of such oscillations, and means for rendering the received oscillations manifest."

The specific infringement complained of consists in the installation and use by defendant of its stations between New York City and Staten Island. The construction of its apparatus is shown by

the Bradfield diagram. Its system, known as the "De Forest System," takes its name from Dr. Lee De Forest, who is prominently identified with the history of wireless telegraphy, and who, in connection with E. H. Smythe, has obtained several patents for various improvements in the wireless or spark telegraph art. The De Forest apparatus comprises transmitting and receiving stations equipped with high vertical wires, insulated at the top. At the transmitting station are a dynamo, directly producing an alternating current, primary and secondary coils, a Morse telegraph key, a spark-gap, and a condenser—a most valuable adjunct to the practical operation of wireless telegraphy, but not directly involved in this suit. The high-frequency oscillations created or produced as in the Marconi system are radiated from the vertical wires of the transmitter, and, traveling across to the receiver, impinge upon its wires and travel down to a so-called detector or variable-resistance conductor, closely corresponding in function and result to the coherer of the patent in suit, and claimed to be its equivalent. The normal condition of the receiving apparatus and its subsequent operation are thus described in patent No. 716,203, granted December 16, 1902, to De Forest and Smythe:

"Under ordinary conditions when the receiving apparatus thus shown and described is not in operation the current generated by the local battery passes through the circuit including the signaling device, the choke-coils, and the variable-resistance conductor; no material resistance to the passage of the current being offered by the choke-coils or by the variable-resistance conductor, the resistance of which under such conditions is at its lowest limit. Upon the receipt of an electric impulse through the aerial conductor the resistance of the choke-coils to the passage of the wave forces it to pass by way of the ground connection, E, to the ground, and thus insures its passage through the variable-resistance conductor. The passage of the wave through the conductor greatly increases its resistance, and, since the variable-resistance conductor is in the local circuit, this change of resistance is indicated by the telephone or other signaling device, which is also in the local circuit. Our use of the variable-resistance conductor having the construction shown and described has been sufficient to demonstrate not only its extreme sensitiveness, but also its remarkable rapidity of action. The variation of resistance of the conductor due to the passage of successive electric impulses is plainly marked, no matter how rapidly the impulses may succeed each other, and in fact the only limit to the distinct indication of the passage of successive impulses is the recording capacity of the signaling device, or the capacity of the senses for distinguishing separate signals. This capacity for rapid repetition of the variation of resistance in the conductor is a consequence, as well as a demonstration, of the fact that the passage of the electrical impulse through the liquid interposed between the electrodes produces no change of conditions therein, except such as is instantaneously and automatically counteracted; the conductor being thus restored to its condition of normal resistance immediately after the passage of each impulse. This rapidity of action of the variable-resistance conductor is of great practical importance, for the reason that it makes it possible to distinguish perfectly between impulses generated with predetermined frequency at a transmitting station and other electrical impulses following each other at a different rate. This apparatus operates equally well, therefore, under varying electrical conditions, its action being perfect in the presence of atmospheric electric disturbances, in the sense that the impulses from a transmitting-station have a uniform frequency of impulse, whereby they may be readily distinguished from other and accidental impulses. In fact the signaling device may be placed in a suitably tuned circuit, and may be thus made to respond auto-

matically to similarly tuned impulses, and to no others; the signaling device being thus made to automatically select impulses transmitted at a predetermined frequency."

The material differences between the De Forest system and that of the Marconi patent, barring the questions relating to elevated conductors, are found in the different construction and operation of the receiving device. The De Forest detector or electrolytic receiver comprises a glass tube containing two metal pins or electrodes extending into the tube, between which is placed an electrolytic paste, consisting of various chemicals, constituting a fluid mixture. In this condition the resistance of the device is so slight that current from the local battery applied to the electrodes passes through this mixture, and, by what is known as electrolytic action, decomposes it so that it becomes a conductor, and the resistance of the device is practically eliminated, as explained in the portion of the specification of patent No. 716,203, quoted above. When the Hertzian oscillation traverses the detector or receiver, the additional current passing through the minute particles in the paste causes a generation of gas bubbles therein, which break up and separate the conducting particles, and so increase their resistance that the battery circuit is broken, and the breaks are transmitted to the telephone, and manifested in the form of a series of clicks. The Marconi apparatus transmits the dots and dashes to its recording telegraph instrument by opening a normally closed local battery circuit; the De Forest transmits its sounds by the closing of a normally open battery circuit. But the defendant does not rely upon this reversal of current operations alone to support its claim of noninfringement, but upon other differences in the light of the prior art, to be hereafter considered.

Certain of the claims in suit, namely, claims 5 and 10, cover "choking-coils." The patentee describes them as "formed by winding a few inches of very thin and insulated copper wire around a bit of iron wire." Their essential function, as stated by the patentee, is to prevent the shunting or dissipation of the high-frequency oscillations. Complainant claims that defendant's resistances, c and r, in the receiving station are the equivalent and an infringement of the choking-coils of the patent. Defendant's resistances consist of coils wound on wooden spools. Defendant argues that their sole function is to reduce the flow of the battery circuit through the very sensitive chemical. Dr. De Forest testifies, as the result of certain experiments conducted by him, that he does not think they have any tendency to act in a choking capacity. He also testified as follows:

"Q. 27. Do these resistances act as choking coils for the received oscillations? A. The normal resistance of the receiver is so small that choking coils in the circuit are unnecessary, there being no tendency of the Hertzian oscillation to seek the shunt path around the receiver in preference to going through the receiver direct. * * * XQ. 123. Referring to Complainant's Exhibit Bradfield Diagram, do the resistances, r and C, correspond in function and mode of operation with the resistances, C, C', shown in the drawing of De Forest and Smythe patents, 716,000 and 716,334? A. They perform the same function."

In said patents the resistance coils are referred to as self-induction or choke-coils. And in the specification of patent No. 716,000 the following passage is found:

"To cause the electrical oscillations generated in the aerial receiving-conductor, as far as possible, to traverse only the part of the local circuit containing the responsive device, self-induction or choke-coils are included in that part of the local circuit which would otherwise shunt the responsive device with respect to the received oscillations."

The experts for complainant agree that these resistances act, to a certain extent, at least, as choking-coils, and give their reasons for such agreement. The fact that they also diminish the flow of the battery circuit merely shows that they perform both functions. In these circumstances, the weight of evidence, based upon the expert testimony and Dr. De Forest's admissions and the statements in his patents, is sufficient to establish infringement of the choking-coils of the patent.

This question of infringement has been discussed here because its disposition does not require a consideration of the prior art. The condenser of defendant's apparatus, which stimulates or increases the effectiveness of the spark and its resultant oscillations, is not involved in this suit, and will not be discussed. The disposition of the other questions of infringement requires an examination of the history of the prior art.

Several of the claims cover the insulated conductors used when transmitting across long distances. In his specification, Marconi describes them as metallic plates suspended by wires on poles. He further says:

"When transmitting with connections to the earth or water, I use a transmitter as shown in Fig. 10. I connect one of the spheres, d, to earth, E, preferably by thick wire, and the other to a plate or elevated conductor, u, carried by a pole, v, and insulated from earth, or the spheres, d, may be omitted, and one of the spheres, e, be connected to earth, and the other to the plate or conductor, u. At the receiving station, Fig. 11, I connect one terminal of the sensitive tube, j, to earth, E, also by a thick wire, and the other to a plate or elevated conductor, 2, preferably similar to u. The plate, w, may be suspended on a pole, x, and must be insulated from earth. The larger the plates of the receiver and transmitter, and the higher from the earth the plates are carried, the greater is the distance at which it is possible to communicate. When using the last-described apparatus, it is not necessary to have the two instruments in view of each other, as it is of no consequence if they are separated by mountains or other obstacles. At the receiver it is possible to pick up the oscillations from the earth or water without having the plate, w. This may be done by connecting the terminals of the sensitive tube, j, to two earths preferably at a certain distance from each other, and in a line with the direction from which the oscillations are coming."

He suggests the use of balloons or kites instead of poles to carry the plates, or to serve as conductors instead of plates by being covered with tin foil. The defendant does not use plates. It employs at both stations elevated vertical wires as conductors, which are insulated from the earth at the top, but are not insulated from the earth at the other end.

Prof. Dolbear in 1882 applied for a patent, which issued in 1886 as No. 350,299, for a mode of electric communication without wires,

and in 1886 he published in the Scientific American a description of his system and of its operation. For reasons hereafter to be stated, it would serve no useful purpose to enter into the details of his patented apparatus. It comprised transmitting and receiving instruments connected with the ground, equipped with a battery, induction coil, and telephones. He used in his experiments a Morse key and vertical elevated wires, and capacity conductors or gilt kites, and states that communication by this method is practical to a distance of more than half a mile. The statement that he operated successfully over a distance of 13 miles appears to be mere hearsay. The defenses to the Dolbear patent, that it is inoperative, and that, even if operative, it operates by virtue of radically different electrical laws and phenomena, are both sustained. The Hertz waves had not then been discovered; the principle applied was apparently that of electrostatic induction, already explained, although the operation was claimed by Dolbear to depend upon impracticable differences and variations of potential between the stations. The consequent method of transmission, so far as this record shows, was the old one of electrical lines of force stretching out from one station to the other, as contrasted with that of the Hertz detached oscillations, which principle or mode of operation was necessarily limited to short distances. It used neither spark-gap, imperfect contact, nor coherer. Dolbear, however, does suggest the use of an induction coil with an automatic break, with which he says he produced louder and better effects; and it is possible that by this apparatus he may have produced, without knowing it, oscillations similar to those afterwards discovered and developed by Hertz. The evidence introduced to prove that apparatus constructed in accordance with Dolbear's disclosures has been successfully operated is utterly insufficient, because, inter alia, it rests upon the testimony of a single witness, Shoemaker, except in the case of the Galilee test; because the apparatus used differed essentially from that described in the Dolbear patent; and because, on the only occasion when a test was made in the presence of representatives of complainant—the last Galilee test—it was a failure. Edison patent, No. 465,971, for a wireless system, applied for in 1885, granted in 1891, and purchased by complainant after this suit was brought, and the Kitsee patent, No. 550,510, described the desirability of elevated induction capacity plates or devices, carried on poles or the masts of ships, or on balloons connected with the earth. The defenses to Dolbear, considered above, apply to these patents.

This discussion brings us down to the state of the art in 1894. It may be assumed that prior to that date no practical device had been produced by any system, and no means had been discovered for utilizing the 1887 Hertz waves in transmitting signals. In 1892 Prof. William Crooke had published an article showing the position of the scientific world in this matter, in which he says as follows:

"Whether vibrations of the ether, longer than those which affect us as light, may not be constantly at work around us, we have until lately never seriously inquired. But the researches of Lodge in England and of Hertz

in Germany give us an almost infinite range of ethereal vibrations or electrical rays, from wave-lengths of thousands of miles down to a few feet. Here is unfolded to us a new and astonishing world—one which it is hard to conceive should contain no possibilities of transmitting and receiving intelligence. Rays of light will not pierce through a wall, nor, as we know only too well, through a London fog. But the electrical vibrations of a yard or more in wave-length of which I have spoken will easily pierce such mediums, which to them will be transparent. Here, then, is revealed the bewildering possibility of telegraphy without wires, posts, cables, or any of our present costly appliances. Granted a few reasonable postulates, the whole thing comes well within the realms of possible fulfillment. At the present time experimentalists are able to generate electrical waves of any desired wave-length from a few feet upwards, and to keep up a succession of such waves, radiating into space in all directions. It is possible, too, with some of these rays, if not with all, to refract them through suitably-shaped bodies acting as lenses, and so direct a sheaf of rays in any given direction; enormous lens-shaped masses of pitch and similar bodies have been used for this purpose. Also an experimentalist at a distance can receive some, if not all, of these rays on a properly constituted instrument, and, by concerted signals, messages in the Morse code can thus pass from one operator to another. What, therefore, remains to be discovered is, firstly, simpler and more certain means of generating electrical rays of any desired wave-length, from the shortest, say of a few feet in length, which will easily pass through buildings and fogs, to those long waves, whose lengths are measured by tens, hundreds, and thousands of miles; secondly, more delicate receivers, which will respond to wave-lengths between certain defined limits, and be silent to all others; thirdly, means of darting the sheaf of rays in any desired direction, whether by lenses or reflectors, by the help of which the sensitiveness of the receiver (apparently the most difficult of the problems to be solved) would not need to be so delicate as when the rays to be picked up are simply radiating into space in all directions, and fading away according to the law of inverse squares. Any two friends living within the radius of sensibility of their receiving instruments, having first decided on their special wave-length and attuned their respective instruments to mutual receptivity, could thus communicate as long and as often as they pleased by timing the impulses to produce long and short intervals on the ordinary Morse code. * * * This is no mere dream of a visionary philosopher. All the requisites needed to bring it within the grasp of daily life are well within the possibilities of discovery, and are so reasonable and so clearly in the path of researches which are now being actively prosecuted in every capital of Europe that we may any day expect to hear that they have emerged from the realms of speculation into those of sober fact. Even now, indeed, telegraphing without wires is possible within a restricted radius of a few hundred yards, and some years ago I assisted at experiments where messages were transmitted from one part of a house to another without an intervening wire by almost the identical means here described."

In June, 1894, Prof. Lodge published a lecture entitled "The Work of Hertz," which has a most important bearing on the issues herein. In it he describes the Hertz researches and the character and operation of the waves, and states various problems involved in their radiation and absorption. He says: "The two conditions —conspicuous energy of radiation and persistent vibration electrically produced—are at present incompatible." He discusses the different methods employed in detecting electrical radiation; describes what he calls a "coherer"; says that "a tube of filings, being a series of bad contacts, works on the same plan"; states that, when an electrical surging occurs, the film breaks down, more molecules get within each other's range, and the momentary electric quiver acts as a flux or electric welding. He then explains the use of tappings to restore the contact to its original high-resistance

sensitive condition, and observes that this breaking down of cohesion by mechanical tremor is an ancient process, giving illustrations. He says:

"When working with the radiating sphere at a distance of forty yards out of [my] window, I could not, for this reason, shout to my assistant, to cause him to press the key of the coil and make a spark, but I showed him a duster instead; this being a silent signal, which had no disturbing effect on the coherer or tube of filings. I mention 40 yards, because that was one of the first outdoor experiments, but I should think that something more like half a mile was nearer the limit of sensitiveness. However, this is a rash statement, not at present verified."

In January, 1896, Popoff published an article at St. Petersburg, in which he refers to the reproduction of Lodge's experiments, and says:

"The result was that I arrived at the construction of an apparatus serving for objective observations of electrical vibrations useful both for lecturing purposes and for registration of the electrical perturbations which take place in the atmosphere."

He discusses the coherer, previously disclosed by Branley, and his modifications thereof, and states that to shake the tube with filings he uses a telegraph relay and ordinary bell, both for disclosing the action of electric vibrations upon the filings and for the destruction of conductivity. He then illustrates and describes the apparatus used by him, including choking-coils, a coherer filled with metal filings, and a tapper operating both to de-cohere the particles in the coherer and to sound the bell so as to produce signals, and short vertical wires, 2 to 5 meters in length. The assertion that he used in this apparatus earth connections and high vertical aerial wires, so far as it is based on Popoff's affidavit, is not sufficiently supported by proof. Popoff, however, says:

"The apparatus possessing such sensitiveness may serve for different lecture experiments with electric vibrations, and, being furnished with a metallic cover, may be conveniently adapted for experiments with electric rays. * * * Another application of this apparatus, which may give more interesting results, will be its capacity to record electric vibrations which take place in the conductor connected with the point A or B (see schematic drawing) in the case when the conductor is subjected to the action of electromagnetic perturbations arising in the atmosphere. For this purpose it is sufficient to connect the apparatus, protected from other actions, with an aerial conductor placed afar from telegraphs and telephones, or else with the core of the lightning rod. * * * Upon the building of the Institute, among other adjustments appointed for observation of the direction and force of the wind, there was placed a small wooden mast, which overtopped by about 4 sajen (7 feet) the fixtures of the anemometers and weathercocks, and which was furnished at the top with an ordinary ferrule of the lightning rod. This ferrule, by means of a wire carried first on the wood of the mast, and further stretched across the yard on the insulators into the meteorological cabinet, was connected with the apparatus at point A; the point B was connected to the conductor common with other meteorological apparatuses, leading into the ground by means of the water work net."

This apparatus was apparently used to register the force and direction of the wind and the vibrations of thunderstorms.

Popoff concludes his article as follows:

"On the ground of the results obtained at the above-described experiments, it is desirable that the persons interested in observations concerning thunder-

storms should subject the apparatus to more continuous and careful observations. In conclusion, I can express the hope that my apparatus, with further improvements of same, may be adapted to the transmission of signals at a distance by the aid of quick electric vibrations, as soon as the source of such vibrations, possessing sufficient energy, will be found."

Harry Shoemaker testifies that in April, 1895, when he was a boy of 16, he constructed and used a complete system of wireless telegraphy, which, as now described, is a complete anticipation of the patent in suit. His testimony is so utterly unsupported and insufficient and improbable that it will not be discussed.

Marconi testifies that in 1895 he constructed apparatus by which intelligible messages were successfully transmitted and received up to a distance of two miles. In this discussion, however, in the absence of satisfactory corroboration of said testimony, the date of invention will be considered as that of the filing of the British patent, June 2, 1896. The application for the original of the reissued patent in suit was filed December 7, 1896. In February, 1896, Marconi arrived in England, and made tests in the summer and autumn at the invitation of the government in the presence of its representatives. He testifies that in these tests he used elevated wires, with and without plates and earth connections, and that he was able to obtain signals on his Morse recorder up to 1¾ miles, to the satisfaction of the Government's representatives. The success of the apparatus is evidenced by the statements made in a lecture delivered by Sir William Preece, the Engineer in Chief of the British Post Office. Marconi testifies that in March, 1897, with similar apparatus, he carried out further tests at Salisbury Plain before the representatives of the government, extending the distance to 6 or 7 miles, in May to 9 miles, and in September to 10 miles. In 1898 a distance of 35 miles was attained, and the system was commercially applied by the Dublin Daily Express to report the Kingston yacht races. The distance of communication was continuously increased until in 1901 a signal was sent from the Poldhu station in Cornwall, England, to Signal Hill, near St. Johns, Newfoundland. Later, messages were successfully sent between this country and England.

If now we examine the patent in suit in the light of this discussion, we shall find that every element of the claims in suit is taken from the prior art. The signaling and receiving instruments are common to the various apparatus from Dolbear, in 1882, to Popoff, in 1895; the Morse key is specifically referred to by Dolbear, Edison, and Kitsee, and is suggested by Lodge; the spark-gap, invented by Hertz for producing the Hertz oscillations, is found in Lodge and Popoff; the 1891 Branley coherer or "imperfect electrical contact," comprising a tube with filings, and its operation by means of a tapper, are elaborately explained in Lodge's lecture, and utilized by Popoff in his experiments; and "choking-coils" are illustrated and described by Popoff. The "insulated conductors," described and shown as comprising elevated plates suspended on wires, were shown in Dolbear, Edison, and Kitsee. It further appears that Marconi's apparatus at first worked imperfectly, and that up to 1898

or 1899, when he introduced various improvements, some of which involved radical changes, he failed to establish communication for greater distances at most than 30 or 40 miles.

Counsel for defendant argues that said prior disclosures, imperfect operation, and subsequent improvements and their effect, deprive the original patent of all claim of novelty, except for "specific improvements on various parts of prior existing complete systems." That this contention is not well founded, but that the foregoing facts serve to support the claim of the exercise of a high degree of inventive ability, is apparent from a consideration of the record. No prior existing system was complete, or had been shown or conceived to be commercially operative. The Dolbear tests, conducted by defendant's experts, were a failure. Lodge thought he might signal half a mile, but he afterwards made the following admission:

"Although the method of signaling to a moderate distance through walls or other nonconducting obstructions by means of Hertz waves emitted from one station, and detected by Branley filing tubes at another station, was practiced by the author and by several other persons in this country, it was not applied by them to actual telegraphy. The idea of replacing a galvanometer, which was preferably a well-damped or speaking galvanometer, by a relay working an ordinary sounder or Morse, was an obvious one; but, so far as the present author was concerned, he did not realize that there would be any particular practical advantage in thus with difficulty telegraphing across space, instead of with ease by the highly developed and simple telegraphic and telephonic methods rendered possible by the use of a connecting wire. In this nonperception of the practical uses of wireless telegraphy he undoubtedly erred."

He describes Marconi's successful development of his system, deplores the uncertainty of the operation of the coherer at times, and adds as follows:

"Let us hope that these latter times will become less frequent, and that the whole thing will become quite dependable before long. The pertinacious way in which Mr. Marconi and his able co-operators have, at great expense, gradually worked the method up from its early difficult and capricious stage to its present great distances and comparative dependableness, is worthy of all praise."

As complainant's expert Flemming says:

"In this lecture Lodge describes the principal discoveries of Hertz, and his epoch-making investigations on the mode of production in the ether of what are now called 'Hertzian waves.' Lodge also described some of his own investigations, and the manner in which an imperfect contact of two metals, which is now called a 'coherer,' is sensitive to these electric waves. The chief object of the lecturer was to demonstrate the production of Hertzian waves in space, and to show that these waves could be reflected and refracted like rays of light. There is not in the lecture the smallest suggestion that these Hertzian waves could be applied for the purposes of telegraphy or the transmission of intelligible signals, nor that the Hertz oscillator or the Branley or Lodge coherers could be used as telegraphic instruments, or that the coherer could be used as an extremely sensitive relay to set in operation some telegraphic instrument."

Although Prof. Lodge is alive, he has not been called by defendant to sustain its contentions as to the scope of his disclosures.

The Popoff publications disclosed the first experimental antici-

pations of a wireless system afterwards successfully developed. They disclosed the construction and practical operation of a coherer in a receiver such as was covered by the original Marconi patent. That they did not disclose a practical wireless telegraphic system has been proved by the limitations in Popoff's description already discussed, by his vague statement of the hope that his apparatus, "with further improvements, might be adapted to the transmission of signals when a sufficiently energetic source of quick electric vibrations should be found," and by the failure of defendant to introduce any evidence on the part of Popoff to support the extravagant claims now asserted as to the broad scope of his invention as an anticipation.

It is true that Marconi, prior to 1898, was only enabled to transmit signals for a few miles. But in the Telephone Cases, 126 U. S. 1, 535, 8 Sup. Ct. 778, 782, 31 L. Ed. 863, the Supreme Court said:

"It is quite true that when Bell applied for his patent he had never actually transmitted telegraphically spoken words so that they could be distinctly heard and understood at the receiving end of his line, but in his specification he did describe accurately and with admirable clearness his process —that is to say, the exact electrical condition that must be created to accomplish his purpose—and he also described, with sufficient precision to enable one of ordinary skill in such matters to make it, a form of apparatus which, if used in the way pointed out, would produce the required effect, receive the words, and carry them to and deliver them at the appointed place."

It would seem, therefore, to be a sufficient answer to the attempts to belittle Marconi's great invention that, with the whole scientific world awakened by the disclosures of Hertz in 1887 to the new and undeveloped possibilities of electric waves, nine years elapsed without a single practical or commercially successful result, and that Marconi was the first to describe and the first to achieve the transmission of definite intelligible signals by means of the Hertzian waves.

The exact contribution of Marconi to the art of spark telegraphy may be stated as follows: Maxwell and Crookes promulgated the theory of electrical oscillations by means of a disruptive discharge. Hertz produced these oscillations, and described their characteristics. Lodge and Popoff devised apparatus limited to lecture or local experiments, or to such impracticable purposes as the observation of thunderstorms. Marconi discovered the possibility of making these disclosures available by transforming these oscillations into definite signals, and, availing himself of the means then at hand, combined the abandoned and laboratory apparatus, and, by successive experiments, reorganized and adapted and developed them into a complete system, capable of commercially utilizing his discovery.

This review of the prior art discloses what the public already had, what it still required, what the patentee sought to accomplish, what was the measure of his success, and what was the character of the means by which it was achieved. If it appears that the public has only received from a patentee such improvement in means or result as it might have procured by presenting its wants to a skillful me-

chanic, provided with the appropriate appliances and knowledge, then there is no reason why such patentee should be permitted to demand a monopoly as the price of a construction which would naturally have been disclosed in the ordinary development of the art. But if the results of the skill of the mechanic or the ingenuity of prior inventors still leave the barrier of impracticability between the end sought and the result attained, an interval between theory and practice, a limitation upon further development, while a later inventor, by the exercise of a discriminating faculty, detects and distinguishes the difficulties, and estimates their proportions, and breaks down the barrier, or bridges the interval, or stretches beyond the limitation, by an instrumentality which, in the very facts of its construction and operation, and by the adaptation of its mechanism to the end sought, suggests original and creative design, then, by his contribution of the essential idea in tangible shape, he has invented a new instrumentality, and his monopoly should be sustained. It has been well said that there is no affirmative test of invention. But if there be one test which more than others is helpful in adjusting the sense of perspective, and in promoting a realization of due relation between mechanical skill and invention, it is to be found in the appreciation of unexpected possibilities of adaptations to meet exigent demands which result in successful operation and effect. Other inventors, venturing forth on the sea of electrical movement, met the rising tide of the Hertzian waves, and allowed them to roll by, without appreciating that this new current was destined to carry onward the freight and traffic of the world of commerce. They noted their manifestations, suspected their possibilities, disclosed their characteristics, and hesitated, fearing the breakers ahead; imagining barriers of impracticable channels and shifting sand bars. Marconi, daring to hoist his sail and explore the unknown current, first disclosed the new highway.

It is argued that Marconi's subsequent improvements, made in 1898, whereby he achieved more substantial success, were borrowed from others, and are such a wide departure from the original invention as to constitute an abandonment. These changes consist in the elimination of the suspended plates, leaving the vertical wires to act as conductors, the connection of said wires with the earth at the lower end through transformers, and the addition of a condenser. The "insulated conductors" of the patent in suit are described and illustrated as metallic plates suspended by poles on wires, and insulated from earth. The conductors of the 1898 system are aerial wires insulated at the top, but connected to earth at the bottom.

Marconi, in his Society of Arts lecture, says as follows:

"The new methods of connection which I adopted in 1898—i. e., connecting the receiving aerial directly to earth instead of to the coherer, and by the introduction of a proper form of oscillation transformer in conjunction with a condenser so as to form a resonator tuned to respond best to waves given out by a given length of aerial wire, were important steps in the right direction."

And referring to these changes, he quotes from a later patent as follows:

"According to this invention the conductor (aerial) is no longer insulated, but is connected to earth through the primary of an induction coil, whilst the ends of the imperfect contact (or coherer) are connected to the ends of the secondary one of the connections passing through a condenser."

Great stress is laid by defendant upon these statements. In view of this change in insulation, it is forcibly argued that, even if it be assumed that Marconi made a great invention, which entitled him to a wide range of equivalents, he is confined to what he discovers or invents and describes, and he cannot prevent others from using means substantially different from what he has described. O'Reilly v. Morse, 15 How. 62, 14 L. Ed. 601. And it is argued that the new construction is so revolutionary in character, depending for its successful commercial operation upon new inventions of others appropriated by Marconi, and upon the abandonment of old constructions originally claimed to be essential, that it cannot be held to be the invention of the patent in suit. It is claimed that the following facts are admitted or proved: That Marconi, by the term "insulated conductors," meant insulated at both ends from the earth; that conductors, not insulated from, but connected to, earth, were old; that Lodge suggested and Braun originated the transformer in connection with a condenser; and that the present system depends for its commercial success upon the 1898 departures.

The proposition of defendant may be thus stated: The defendant is entitled to the use of the appliances of the prior art, including therein the elevated wires, for example, of Popoff, connected to earth. It has the right to substitute in the old apparatus the spark-gap for the production of Hertz waves, and thus to transmit signals by means of old electrical devices, including the old Morse key. It is argued, therefore, that the Marconi invention disclosed a spark telegraphy system limited, as to conductors, to means consisting of elevated metallic plates—the larger and higher and further removed from each other the better—necessarily disconnected from the earth at bottom, in order to confine the oscillations to the plates acting as capacities and radiators, and that as defendant discards these disclosures, and substitutes for metallic plates suspended on wires and insulated at both ends naked aerial wires insulated at the top, but with earth connections at bottom, as their capacities and radiators, it does not infringe the claims covering the conductors of the patent. The answer of complainant to these arguments is as follows: The whole contention, confining the term "insulated" to absolute insulation at the bottom of the conductor, is based on a careless expression used by Marconi in his lecture in 1901 replying to certain criticisms of his invention. That it is a mere afterthought of counsel is shown by the fact that it is not referred to by defendant's witnesses in their examination. That it is immaterial whether the conductor is or is not insulated appears from Dr. De Forest's admission. That it is not well founded is proved by the patent in suit and by Marconi's subsequent patent. That Marconi did not

intend by the use of the word "insulated" to insist upon complete insulation at both ends of the wire, but only on such a degree of insulation as was necessary to effect the best results, appears from the failure of defendant's witnesses to so interpret the patent, and from the construction shown in the patent. In the original of the reissue, Marconi says that one of the balls of the spark-gap is connected to earth, and the other to a plate or conductor suspended on a pole, v, and insulated from earth, and that one terminal of the coherer is connected to earth, and the other to a plate or conductor, which may be suspended on a pole, and must be insulated from earth. The specification and drawings show that the insulation meant by the patentee is absolute insulation at the top, and such obstruction or insulation as is afforded by the spark-gap and filings tube. The elevated conductors, thus described as insulated, are absolutely insulated from earth at the top. The transmitting conductor is separated or obstructed from earth at the bottom by the spark-gap, across which, however, the current must pass to create the Hertz oscillations. The receiving conductor at the bottom is insulated when not in operation, because the local current cannot pass through the coherer. But the moment that the oscillations strike the tube and weld the powder into a conductor for the current, the elevated conductor is no longer insulated from earth at the bottom, because the current passes through the other end of the tube, which is connected to earth, and establishes connection with the earth. In neither case is the conductor operatively insulated from earth at the lower end, because the Hertzian oscillations leap across the spark-gap and pass through the tube whenever the circuit is closed and the apparatus is in operation. When, therefore, the patentee spoke of insulation, he meant the insulation described and illustrated by him—the effective insulation at the top, the physical insulation at the bottom, when the apparatus was not operating; and he showed that, when in operation, the conductor was not practically insulated, but was connected to earth, because the oscillations therein surging down passed to the earth across the spark-gap and through the coherer, respectively. In the improved construction the insulation at the top is unchanged, but in place of the connection to the spark-gap and coherer, the physical insulators, the conductor is connected to a transformer, which operates merely as an obstructor, and through which there is a continuous connection at bottom to earth. It is therefore argued that the patentee did not disclose an invention dependent upon such an absolute insulation at both ends as would prevent him from enjoining the use of a conductor insulated at the end where insulation was necessary, and not insulated at the other end, when it will operate whether insulated or not. The weight of the argument seems to favor the contention of complainant that the insulation intended by the patentee was the insulation at the top—the effective insulation to prevent the oscillations from passing off without operating the transmitting and receiving devices. This contention is further supported by the language of Marconi patent, No. 627,650, relied on by de-

fendant. There, while he says, "The conductor is no longer insulated, but is connected to a capacity, which may be the earth, through the primary of an induction coil," he still refers to these conductors thus connected as "insulated conductors"—that is, functionally insulated—although explaining that they are not insulated as in the former patent. Finally Marconi claims that in the earlier successful uses of his apparatus he used indifferently both conductors insulated from and connected to earth at the lower end.

This question, however, will not be disposed of upon these grounds. Both complainant and defendant now use a construction where the conductors are insulated at the top, but only interrupted or obstructed as to the earth connection at the bottom. The complainant contends that defendant admits that it is immaterial whether the aerial is insulated from the ground at the lower end. Dr. De Forest says that he prefers to employ earth connections, because they permit transmission to greater distances. Both sides are agreed that the function of the earth is not satisfactorily understood. Both agree that such an earth connection is an advantage possibly due to a guiding and strengthening force to conduct the waves to the surface of the earth, so that they may glide farther through the ether. In this state of uncertainty as to the whole subject, it is thought that the patentee should not be deprived of the benefit of his real invention upon any narrow limitation as to the earth connection or interruption at the lower end of the conductor, when it does not appear that even in the case of the spark-gap or tube-filing obstruction the earth did not discharge the same functions as it is now supposed to discharge, and when presumably the question is merely one of degree; the strength being theoretically greater in degree where the earth connection is merely obstructed by a transformer. As Marconi confessedly disclosed in his patent the first successfully operating commercial apparatus, and developed it as thus disclosed till he covered a distance of about 40 miles, and as defendant uses his conductors, in connection with improvements not invented by it, but disclosed by others in the course of the development of the Marconi inventions, consisting, inter alia, in a change in the earth connection or insulation at the lower end, but operating on the same principle as the insulation of the patent, it should not be permitted to escape infringement by claiming that Marconi, in describing his conductors as insulated, was necessarily confined to a form in which the insulation was absolute at both ends.

"Inasmuch as the defendants have not invented any new idea, but have adopted an old contrivance which performs the same result in substantially the same way by a formal and unsubstantial change in means, and by circuits which, while in some sense interdependent, are operatively independent, and which preserve and utilize the vital element, independence of phase, these circuits must be held to be the equivalents of the independent circuits of the patent; the word 'independent' being interpreted to mean operatively independent, so as to embrace the true spirit and essence of the Tesla invention." Westinghouse Electric Mfg. Co. v. New England Granite Co., 110 Fed. 753, 764, 49 C. C. A. 151, 162.

But whatever interpretation of the term "insulated" be adopted, the decision of the question of infringement rests upon the fact that

the Marconi invention in suit is a primary invention, and, as such, is entitled to a broader range of equivalents, so as to prevent the appropriation of the substance of the invention by a mere change in form, accomplishing a mere change in degree.

In McCormick v. Talcott, 20 How. 402, 405, 15 L. Ed. 930, the Supreme Court said:

"If the patentee be the original inventor of the device or machine called the 'divider,' he will have the right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such."

To the same effect are Railway Company v. Sayles, 97 U. S. 554, 556, 24 L. Ed. 1053, and Morley Machine Company v. Lancaster, 129 U. S. 263, 273, 9 Sup. Ct. 299, 302, 32 L. Ed. 715.

As was said by this court in Dederick v. Siegmund, 51 Fed. 233, 235, 2 C. C. A. 169, 171:

"It is true that when the invention is of a primary character a larger latitude is given to the equivalents which the patent includes than if the invention was a modification of a well-explored art. In the former case, devices which operate upon the same principle and perform the same functions by analogous means are held to be infringements (McCormick v. Talcott, 20 How. 402, 15 L. Ed. 930); and it is also true that when mechanical means are for the first time invented, which enable a law of science or force of nature to be used so as to accomplish a practical and beneficial result, such as the Bell telephone, or when an inventor invents mechanical means for carrying into effect a newly-discovered and useful principle of operation, like the double carbon of Brush, the inventor's properly drawn patent will include a very wide scope of analogous mechanical means which accomplish the same result."

"There are two tests of equivalency: (1) Identity of function; (2) substantial identity of way of performing that function. Primary as well as secondary patents are infringed by no substitutions that do not fully respond to the first of these tests. The second of these tests is somewhat elastic, because it contains the word 'substantial.' That word is allowed to condone more and more important differences in the case of a primary patent than in the case of a secondary one. In the case of a patent narrowed in construction by an extensive state of the preceding art, the word 'substantial' will give but little elasticity to the application of the doctrine. If fewer inventions preceded the one at bar, the word will have somewhat more of carrying power. When the invention at bar is strictly primary, and especially if it is extremely useful, then the word 'substantial' will be made to cover differences alike numerous and important, and even highly creditable to the infringer who invented them." Walker on Patents (4th Ed.) pp. 315, 316, § 362.

In the case at bar the functions of the two devices are identical. The original way of performing the function in Marconi was substantially that of the later way, which is that employed by defendant. The difference of insulation was not a different way of performance, but an enlargement of scope, an increase of the distance of transmission, by a greater use of the property of the earth as a capacity by means of a continuous physical connection. If this conclusion is correct, the equivalency of wires and plates necessarily follows as a corollary thereto. Both were well known and used in the prior art, and it was open to the patentee to adopt whichever was shown by experiment to be capable of producing the better results. That the contention of nonequivalency is also an afterthought of counsel appears from the fact that, although the experts

for complainant, both in chief and rebuttal, testified that wires and plates were equivalents, Dr. De Forest, in explaining the differences between his construction and that of the patent, did not assert that there was any substantial difference between using plates and using wires. That the Marconi conductors should not be limited to the metallic plates at the top of the vertical wires, shown in Figs 10 and 11 of the patent, but should be construed to cover the wires alone, also appears from the following facts:

The claims do not refer in terms to plates, but to conductors. Furthermore the patentee says: "At the receiver it is possible to pick up the oscillations from the earth or water without having the plate, w." In the earlier development of the system the plate on the wire furnished apparently the better, and therefore the preferred, form shown for long-distance transmission. The aerial wire was a part of the prior art, as already shown. Marconi testifies that in his experiments, commencing in 1895, he repeatedly used simple aerial wires as conductors. It is admitted that the aerial wire, without the addition of the plate, is the equivalent of the wire with the plate, and, while such plates are still used, Marconi explains that the chief reason for dispensing with them is the practical difficulty in keeping them in place where they would be exposed to high winds.

The patented coherer is an improved form of that found in the prior art. Most of the claims of the original of the Marconi reissued patent in suit covered the coherer device in a receiver. In his reissued patent he says as follows:

"I am aware that the sensitiveness of various apparatus, including tubes containing filings, to more or less distant electrical disturbances, has been observed in a general way, and that it has also been proposed to disturb the conductivity of such filings by various instrumentalities for shaking the tubes containing the same. I am also aware that the use of tubes containing metallic powders of several separate kinds has been described or suggested in connection with certain experiments relating to so-called coherers, but I am not aware that the utility of a mixture of metallic powders has ever previous to my invention been ascertained and utilized for the purpose of obtaining the required degree of sensitiveness in such an instrument."

This coherer is specifically described as comprising a dry powder, which, after it has operated to carry the impulses of the Hertzian waves to the receiver, must be shaken by a trembler back into its nonconductive condition. Defendant's liquid circuit closer or detector is covered by its patents. Its construction and operation have been already explained. It could not be used in the Marconi system. It is a newly discovered combination, in a newly evolved class of detectors. Complainant's tube transmits sounds by increase of resistance; defendant's, by decrease of resistance. But the effect of the oscillations upon various materials in respectively increasing and decreasing resistance had been pointed out by Branley in 1891, where he says:

"Substances in Which Diminution of Resistance has been Observed.

"The substances in which the phenomenon of the sudden increase of conductivity is most easily observed are filings of iron, aluminum, copper, brass, antimony, tellurium, cadmium, zinc, bismuth, etc.

"Increase of Resistance.

"An increase of resistance was observed in these investigations less often than a diminution. Nevertheless a number of frequently repeated experiments enable me to say that increase of resistance is not exceptional, and that the conditions under which it takes place are well defined. Short columns of antimony or aluminum powder, when subjected to a pressure of about 1 kilogramme per sq. om (142 lb. per square inch), and offering but a low resistance, exhibited an increase of resistance under the influence of a powerful electrification. Peroxide of lead, a fairly good conductor, always exhibited an increase. So, also, did some kinds of platinized glass, while others showed alternate effects."

And as already shown, Marconi states that the form of tube described by him may be replaced by other forms of imperfect electrical contacts.

The file wrapper of defendant's patent, No. 716,000, shows that the original broad claims were rejected by the Patent Office. There the examiner said, in view of prior publications, as follows: "It is held that it would not amount to invention to place the anti-coherer substances above described in a similar paste as in applicants' construction," and he rejected a large number of claims on said prior publication and on Marconi's and other patents. The applicants thereupon argued that it involved invention to provide a device which "is not subject to limitations in speed due to the mechanical lag necessarily present in those devices which depend upon mechanical agitation to restore them to sensitive condition after the passage of each electrical impulse or energy wave. It is evidence of invention of the highest order of merit to produce a device which is automatically restored, so to speak, to sensitive condition, and wherein the speed of operation is coextensive with the ability to read the signals. This is not the case with the cohorers of the references." Thereafter the old claims were generally canceled, and new claims introduced, which were materially modified, and which chiefly cover an improved form of coherer or detector device, which, by reason of its liquid or semi-liquid characteristics, operated automatically without the use of a trembler or tapper. This improved device therefore does not infringe those claims which are limited to a dry powder, but it does infringe the claims covering an imperfect electrical contact, because it produces the same result—the transmission of the oscillations by a variation of resistance—and by means which operate in substantially the same way, namely, by changing the amount of resistance in the coherer or detector device. Defendant's detector is not the equivalent of the "tube containing metallic powder" of claims 8 and 10. But it is the equivalent of the imperfect electrical contact of claims 1, 3, and 5, because it utilizes means identical in function and substantially identical in method with those first employed by Marconi in his primary invention to produce the same results. Claim 24 covers, inter alia, "a conductor tuned to respond to such oscillations," and "means controlled by the received oscillations for restoring the resistance medium to its normal conditions," etc. There is no evidence that defendant uses any tuned conductor, and it is not clear to what this clause refers, unless it be to the specifically described

plates tuned with each other in the air. The means for restoring the resistance medium refers to the automatic hammer or trembler described as used to shake the powder after the oscillation of the current has passed through it. The defendant uses neither of these devices, and therefore does not infringe the 24th claim.

These conclusions dispense with the necessity of considering the effect of the changes introduced into the reissued patent in suit, except in so far as they relate to claim 1.

The original patent contained 56 claims. It is not clear that any rights have intervened to prevent said reissue, or that it has been improperly broadened to cover inventions not embraced in the original patent. The claims in suit, except claim 1, are substantially the same as were found in the original patent. But claim 1 is a new, broad claim, which, in terms, covers every form of imperfect contact in every possible kind of system for producing signals by means of Hertz oscillations. In view of the limitations imposed upon the Marconi coherer by the disclosures of Branley, Popoff, and Lodge, such a generic claim, much broader than those of the original patent for which it seems to have been substituted, should not be permitted when the effect would be to enlarge the scope of the original invention. In the original patent, as already shown, Marconi limited most of his claims to a combination in a receiver for electrical oscillations of his coherer, consisting of a tube and powder, and means for shaking the powder. But inasmuch as this had been disclosed by prior publications, he applied for the reissue, and now, by claim 1, has attempted to cover, as shown above, not merely the coherer of his former claims, or any such coherer in a receiver, or a coherer with means for shaking the powder therein, but every form of imperfect contact device previously disclosed by others, or which might be thereafter discovered, whenever combined with any electrical signal apparatus using Hertz oscillations. This claim, if allowed, would apparently cover the prior devices of Lodge and Popoff, the latter of which is claimed to have necessitated the disclaimer and reissue.

A decree may be entered dismissing the bill as to claims 1, 8, 10, and 24, and for an injunction and an accounting as to claims 3 and 5; complainant to recover one-half of its costs.

NOTE.—On the settlement of the decree it was ordered "that no costs be recovered by either defendant or complainant."

## CAPEWELL v. GOLDSMITH et al.

(Circuit Court, S. D. New York. June 9, 1905.)

PATENTS—INVENTION—STICK PIN RETAINER.

The Capewell patent, No. 630,972, for a stick pin retainer, is void for lack of patentable invention, the same device in principle and mode of operation having long been used for analogous purposes, and its adaptation by the patentee to a similar use requiring only mechanical skill.

Suit in equity for alleged infringement of United States letters patent for "stick pin retainer," No. 630,972, to George J. Capewell, dated August 15, 1899. The defendants deny novelty, deny infringement, and allege anticipation by numerous patents; say that there is no invention in view of the prior art.

William G. McKnight (Edmund Wetmore, of counsel), for complainant.

G. H. & F. L. Crawford (Robert N. Kenyon, of counsel), for defendants.

RAY, District Judge. After a careful and patient examination of the patent in suit and the prior art, I am satisfied that in view of such prior art the complainant's patent fails to disclose patentable invention. The claim of the patent is as follows:

"A pin retainer, consisting of a shell with an opening for the passage of a pin, a rotary binder in the shell obstructing the opening and supporting means for said binder whereby the peripheral binding surface is automatically rotated and the size of the opening increased by an inwardly thrust pin, thereby affording free entrance to the pin, and whereby the peripheral binding surface is automatically rotated and the size of the opening decreased by an outwardly pulled pin, thereby clamping and preventing the withdrawal of the pin, and a spring for pressing the binder into the path of the pin and causing an initial clamping when the pin is thrust into the opening in the shell, substantially as specified."

This is a broad claim, and would seem to include the following elements in "a pin retainer," viz.: (1) A shell or case with an opening for the passage of a pin—the pin of the stick pin. (2) A rotary binder in the shell obstructing the said opening, but not intended to so close it as to prevent the entrance of such pin. (3) Supporting means for such binder, whereby the peripheral binding surface is automatically rotated and the size of the opening increased (that is, widened) by an inwardly thrust pin, thereby affording free entrance to the pin, and whereby the peripheral binding surface is automatically rotated and the size of the opening decreased by an outwardly pulled pin, thereby clamping and preventing the withdrawal of the pin. In point of fact this supporting means for such binder is or may be a part of the interior wall of the shell, or some additional thing presenting a slanting surface. (4) A spring for pressing the binder into the path of the pin (and against the pin when being pushed in, or withdrawn if not held), and causing an initial clamping when the pin is thrust into the opening in the shell. The claim ends with the words "substantially as specified." These words refer, as matter of course, to the speci-

fications and drawings. In figures 2 and 4 of the drawings of the patent are shown the interior walls of the shell with the attachment to form the sloping or slanting surface which widens the opening as we go further in and against which the rotary binder moves. As the rotary binder, in Fig. 2 a revolving cylinder (in the specifications called the "roll"), and in Fig. 4 two revolving cylinders, is pushed inwardly by inserting the pin, it follows the slant, and the result is the pin has a wider space for entrance, and is thrust, in Fig. 2, between the rotary binder and the side of the shell, and in Fig. 4 between the two cylinders or rolls which form the binder, and is held in place by the pressure of the binder thereon, which binder is kept in its place by the pressure of the spring below or behind it. The whole idea is simple and old.

In the Sackett patent, hereafter mentioned, claim 3 reads:

"The combination of a shell, A, having a bearing-surface against which the article to be gripped may be pressed, a gripping-roller, B', an inclined plane for causing said roller to grip the article when the same is moved in one direction and to release the article when the same is moved in the opposite direction, and means for retaining the roller out of grip upon the article during the adjustment of the latter; all substantially as and for the purpose herein set forth."

In the specifications we find:

"A spherical roller, B', is dropped into the shell, A, between said inclined plane and the rope or line, so that when the rope or line is drawn toward the smaller end of the shell, A, said roller will grip upon rope or line and prevent the movement in said direction of said rope or line, whereas when the rope or line is drawn in the opposite direction the roller will readily yield to permit the movement of the rope or line in said opposite direction, from which it follows that the rope or line may be adjusted longitudinally to be gripped at any portion of its length to resist movement in the direction of the smaller end of the shell. * * * It is of course to be understood that as an equivalent of the shell, A, a post or other support may have formed therein a conical socket corresponding in form to the interior of said shell, A, which said socket will serve the same purpose as said shell."

In the Allan and Holmes patent, hereinafter mentioned, we read:

"The object of our invention is to facilitate the adjustment of sockets upon rods of any shape for window fittings or any other suitable purposes. Upon the rods are sockets made large enough to slide easily upon their rods. At one or both sides of the rod is a runner or roller within a taper slot. The sides of the runner are shaped according to the shape of the rod upon which the socket slides. One edge of the runner bears against the outer edge of the slot and the other against the rod. When the runner is at the broad end of the slot, the socket can be slid along the rod, but on the runner moving or being moved towards the taper end of the slot it binds against it and the rod, wedging and securing the socket and rod together. To release them the socket is moved in the opposite direction, and the runner moves into the broad part of the slot, releasing the socket. This can be applied to any suitable purposes."

The moment an attempt is made to withdraw the pin, the friction of the pin on the binder draws it back towards the point where the pin entered the shell and into the narrower space, and the effort to withdraw therefore binds the pin more and more, and withdrawal is prevented, unless by manipulation the binder is held in position when the pin is pulled, so that the friction will not draw the binder into the narrower space or portion of the opening. In figures 5 and

6 of the drawings of the patent we find another construction working on precisely the same principle. However, in place of a cylinder (roll) revolving on its center (a rotary binder revolving on its center), we have a cam disk hung on studs arranged eccentrically and held by a spring. When the pin is pushed in this cam disk revolves freely, as the pushing of the pin overcomes the resistance of the spring and the pin is inserted between this cam disk or roll and the side of the shell and held in place by the action of the spring on such disk. The moment an effort is made to withdraw the pin (unless the cam disk is prevented from revolving, as is done with the cylinders or rolls in figures 2 and 4), the friction revolves the disk towards the mouth of the opening, and operates to narrow or close the space and bind the pin against the side of the shell, and so prevent its being withdrawn. The substitution of the cam disk hung on studs arranged eccentrically does away with the piece inside the shell so attached as to form the slant found in figures 2 and 4.

The claim covers all of these constructions, and it is evident that the patentee regarded them all as, in substance and effect, the same, and covered by and included within the same principle of action. This suit was commenced in May, 1903. In December, 1904, the complainant filed a disclaimer, viz.:

"To the Commissioner of Patents—Sir: Your petitioner, George J. Capewell, Jr., a citizen of the United States, residing at Hartford, in the State of Connecticut, represents that in the matter of certain new and useful improvements in Stick Pin Retainers, which Letters Patent of the United States, No. 330,972, were, on August 15, 1899, granted to said George J. Capewell, Jr., as inventor, he is the sole owner thereof; and that he has reason to believe that through inadvertence, accident or mistake, the said patentee has claimed more than that of which he was the first inventor or discoverer by or in consequence of Fig. 5 and Fig. 6 of the drawings attached to and forming part of said Letters Patent and by the use of the following language in the description of said drawings in the body of the specification attached to and forming part of the said Letters Patent, to wit:

" 'Fig. 5 is a similar view of another form, and Fig. 6 is a view of still another form.' (Lines 41 and 42, page 1.)

" 'In Fig. 5 the disk 8 is held by an arbor or outwardly-projecting studs 9, arranged eccentrically, so that the roll will move freely to permit the insertion of a pin, but will tend to bind and clamp the pin against the edge wall when an attempt is made to draw it outwardly. One edge of this cam disk 8 may be extended through one of the edge walls of the shell and may be provided with serrations in order that the disk may be moved and held from binding when it is desired to remove the pin. In this form an opening 10 is made through the inner end of the shell opposite the opening through the outer end of the shell. When the shell is formed in this manner, the retainer may be thrust upon a pin and located at any position along its length.

" 'Fig. 6 illustrates a form in which the binding-cam is arranged on the end of a lever 11, that has one end projecting through the edge wall of the shell. This lever oscillates freely to permit the insertion of a pin, but will prevent the removal of the pin unless its outer end is moved and held so that its inner end will not bind.' (Lines 14 to 38, pages 1, 2.)

"And also by or in consequence of the use of the following language in the body of the specification, to wit:—

" 'In place of the roll shown in the first form illustrated and described a sliding block may be used; but such is not as desirable in action as the rolling block shown on account of the additional amount of friction against the edge wall of the shell.' (Lines 39 to 44, page 2.)

"Your petitioner, therefore, hereby enters this disclaimer to the alleged form or modification of his invention shown by Fig. 5 and Fig. 6 of the drawings and to that part of the subject matter of the specification above quoted and to that part of the claim of said patent as might by its language be interpreted to extend to and include the forms or modifications shown in Fig. 5 and Fig. 6 of the drawings of said patent, and described in the above quoted language.

"Signed at Hartford, in the County of Hartford, State of Connecticut, this 20th day of December, 1904. George J. Capewell, Jr.

"Witnesses:

"Harry R. Williams.

"E. M. Lowe."

This would seem to be a confession that the structures shown in figures 5 and 6 are old, anticipated. If so, I cannot find patentable invention in the structures shown in figures 2 and 4. And in fact in view of letters patent to Hill and Webb, April 1, 1884, No. 296,169, for mail bag fastener; to John M. Sailer, November 11, 1884, No. 307,806, for cord or strap fastener; to George H. Sackett, November 24, 1885, No. 331,088, for gripping clamp for lines or reins; to G. W. Washburn, January 29, 1889, No. 396,788, for ear jewel; to Curtis N. Wilcox, August 19, 1890, No. 434,691, for line puller; to M. V. Bulla, August 21, 1891, No. 458,332, for broom holder; to Burbank, March 6, 1894, No. 515,817, for tool or implement holder; to Rankin and Spicer, June 8, 1897, No. 584,147, for guide and fastener for hat pins; and British patent to Allan and Holmes, December 30, 1887, No. 18,007, for sockets on rods, etc.—I am compelled to find want of patentability. The combination of the patent in suit is not new. The elements are all old, and the combination produces no new result. The combination was never made or used, so far as appears, to hold a stick pin; but patentable invention is not disclosed in applying to the holding or fastening of a stick pin a mechanism or apparatus which had been used to hold or fasten a hat pin, window fittings, sockets, straps, lines, brooms, tools, and implements in substantially the same manner stick pins are held.

On cross-examination, Mr. Williams, complainant's expert, said, after giving the elements of the patent in suit:

"X-Q. 17. Is any one of these four elements, considered by itself, a novelty, or a new and original device? A. A shell with an opening is old; a rotary binder in a shell is old; a supporting means for a binder, whereby the peripheral binding surface is automatically rotated, is old; and a spring for pressing the binder into the narrower part of a shell is old. In other words, the mechanical elements recited in this claim are old, but in no prior structure have such old elements been combined in substantially the same way as set forth for the purpose set forth."

The complainant showed considerable mechanical taste and skill in reducing in size these elements and changing the form of construction and the shape so as to produce a small, neat, and, in a sense, useful device to serve a useful purpose in connection with a stick pin; but he did not invent anything.

In Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566, approved Stephenson v. Brooklyn R. R. Co., 114 U. S. 149, 5 Sup. Ct. 777, 29 L. Ed. 58, it was said:

"A mere carrying forward a new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of

equivalents doing substantially the same thing in the same way by substantially the same means, with better results, is not such invention as will sustain a patent."

See, also, Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200, Consolidated Roller Mill Co. v. Walker, 138 U. S. 124, 11 Sup. Ct. 292, 34 L. Ed. 920.

The anticipatory devices must be found in an analogous art. Potts v. Creager, 155 U. S. 597, 608, 15 Sup. Ct. 194, 39 L. Ed. 275; Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177. In Potts v. Creager, 155 U. S., at page 608, 15 Sup. Ct., at page 199, 39 L. Ed. 275, the court said:

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result never attained before, it is evidence of invention. As a result of the authorities upon this subject, it may be said that, if the new use be so nearly analogous to the former one that the applicability of the device to the new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them be remote, and especially if the use of the old device produce a new result, it may at least involve an exercise of the inventive faculty. Much, however, must still depend upon the nature of the changes required to adapt the device to its new use."

The relations between the complainant's device and most of those cited from the prior art are not remote, and the uses are analogous.

In Pennsylvania R. Co. v. L. E. S. T. Co., 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222, Mr. Justice Gray said:

"It is settled by many decisions of this court, which it is unnecessary to quote from or refer to in detail, that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated."

I do not think it necessary to cite further authorities. The disclaimer came too late to be of avail. But it takes nothing from the broad language of the claim. It is impossible to give it any effect.

The bill of complaint must be dismissed, with costs.

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## In re PEONAGE CHARGE.

(Circuit Court, N. D. Florida. May 23, 1905.)

1. PEONAGE—DEFINITION.
   Peonage is a condition of compulsory service, based on the indebtedness of the peon to the master, which indebtedness is the criminal cord by which the peon is held to the master's service.

2. SAME—FEDERAL CONSTITUTION.
   Const. U. S. Amend. 13, providing that neither slavery nor involuntary servitude, except as a punishment for crime, shall exist in the United States, or any place subject to its jurisdiction, forbids involuntary servitude for the payment of debt within the jurisdiction of the national government, whether created by contract, by criminal individual force, by municipal ordinance, state law, or otherwise.

3. SAME.
   If a person desiring to have a servant returned to him to work out a debt causes such servant to be arrested on a warrant procured by the

master, and after incarceration the master procures the servant's release on his promise to return to his master's employment to continue to work out a debt, the master is guilty of peonage, prohibited by Rev. St. U. S. § 5526 [U. S. Comp. St. 1901, p. 3715], provided the servant had been charged with the crime for the purpose of procuring his arrest and incarceration, and to enable the master to extort from the servant a promise to return and work out the debt.

SWAYNE, District Judge (charging grand jury). On March 2, 1867, the United States Congress passed the following statute, which is known as section 1990 of the Revised Statutes [U. S. Comp. St. 1901, p. 1666]:

"The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the territory of New Mexico, or in any other territory or state of the United States, and all acts, laws, resolutions, orders, regulations or usages of the territory of New Mexico, or of any other territory or state which have heretofore established, maintained or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any person as peon, in liquidation of debt or obligation, or otherwise, are declared null and void."

And section 5526, Rev. St. [U. S. Comp. St. 1901, p. 3715], passed at the same time, is as follows:

"Every person who holds, arrests, returns, or causes to be held, arrested or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand, nor more than five thousand dollars, or by imprisonment not less than one year, nor more than five years, or by both."

The term "peonage," therefore, is not a new one, though some of you may not have been familiar with the statute, but the offense was more or less common in certain sections of the country, and, I believe, was first called to the attention of this court by Commissioner Cubberly about April, 1901. So far as I am informed, that case—United States v. Clyatt—was the first one presented in this part of the country. At that trial certain questions of law were raised for the first time, and these have been finally passed upon by the Supreme Court of the United States. 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726. During the period in which the appeal in the Clyatt Case was pending, the government hesitated to prosecute any others on similar charges, and thus a number of such causes have accumulated for your consideration, and it is incumbent upon the government's officers to present these matters to your attention; hence I will give you a few words of explanation of the law governing your action thereon.

Peonage is a form of slavery, and was abolished and prohibited by the acts above named. It may be defined as a condition of compulsory service based upon the indebtedness of the peon to the master. The principal fact is the indebtedness. This indebtedness of the peon to the master is the criminal cord by which they are held bound to the master's service. Upon this is based a condition of compulsory service. Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the origin, but none in the character, of the servitude. The one exists where the debtor voluntarily contracts to enter the

service of his creditor to work out a debt. The other is forced upon the debtor by some apparent, but void, provision of law, or by the exercise of criminal force, that is sometimes the perfection of cruelty. But peonage, however created, is compulsory involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the servitude is enforced. A clear distinction exists between peonage and the voluntary performance of labor in payment of debt. In the latter case the debtor, though contracting to pay his debt in labor, can elect at any time to break it, and no law compels a continuance of the service. That which is contemplated to be prohibited by the statute is compulsory service to secure the payment of a debt.

The thirteenth amendment to the federal Constitution is as follows:

"Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction."

This amendment denounces a status or condition irrespective of the manner or authority by which it is created. It forbids slavery and involuntary servitude wherever or however attempted within the jurisdiction of the national government, whether created by contract, by criminal individual force, by municipal ordinance or state law, and in whatever form, or however named. It operates directly on every citizen of the republic, regardless of his position, occupation, or influence, or the location of his residence.

Section 5526 of the Revised Statutes declares a punishment for every person who holds, arrests, returns, or causes to be held, arrested, returned, or in any manner aids in the arrest or return of, any person to a condition of peonage. Three distinct acts are here mentioned: First, holding; second, arresting; third, returning. Either may be the subject of indictment and punishment. A party may hold another in a state of peonage without ever having arrested him for that purpose. He may arrest an individual for the purpose of placing him in a condition of peonage, or he may, after one has fled from a condition of peonage, return him to it; and this whether he himself claims the service or is acting as an agent for another to enforce the return. And the fact that the warrant produced or used by such agent, who may claim to be an officer of the law, is invalid or bogus, is an all-important question for the grand jury to determine. If the jury should find that certain formal and customary proceedings had been gone through, though merely as a cover for the crime, they would have little difficulty in finding an indictment under one of the three phases of the crime denounced by the statute. If a person desiring to have a servant returned to him to work out a debt should cause that servant to be arrested on a warrant procured directly or indirectly by him, and after incarceration of the servant should go to the jail and procure his release after he had promised to return to the employment of the master to continue to work out a debt, the master would be guilty of the crime denounced by the statute, provided the jury

believed that the servant had been charged with the crime for the purpose of procuring his arrest and incarceration, and to enable the master to bring to bear all his influence in procuring the release from jail of the servant on a promise by the servant to return to work out the debt. In other words, if the circumstances attending the case leads the jury to believe that the master procured the arrest because of the abandonment by the servant of his employment, and for the purpose of placing the servant in such a situation that he was not free to refuse to return to the master's employment, but was simply given the option of remaining in jail and meeting the charges brought against him by the master, of whatever character these charges may be, or of returning to the employment, the master would not only be liable, but any officer of the law who was the instrument of the master in the proceeding, and who knew of the purpose of the prosecution, would be equally liable. It cannot be contended that this statute is a trap in which to catch the innocent. A guilty knowledge of the unlawful purpose of the arrest would be essential to the making out of the crime against the officer. The arrest must be knowingly, for the purpose of returning the person to a prior condition of peonage or servitude, or placing him therein to work out a debt.

Many artful methods for evading the effect of this statute have been devised, but none of them will avail if the juries of this country will discharge their duties fearlessly and impartially. Where it is found that a few hours after the servant is safely lodged in jail the master appears and proceeds to detail to him the severe results of the prosecution pending against him, and his willingness to help him out of his difficulty if he will return to work, producing on the mind of the servant a condition which leaves him no choice but to return to his employment, the master is guilty of the crime; or at least these circumstances, coupled with others, should warrant you in returning a true bill. You must regard all the conditions and circumstances surrounding the cases, and determine what the motive of the prosecution was, whether or not the master directly or indirectly causes or procured the arrest, and whether the legal proceedings were taken for the purpose of creating a condition of mind in the servant whereby little or no choice was left to him in returning to the employment. The return implies the prior existence of some state or condition of peonage; that is to say, the servant must have been working wholly or in part to pay an existing debt.

The result of the proceedings to arrest may be of two kinds: First, after the arrest, and before the trial, the servant, at the solicitation of the master, may return to the service, the officer permitting the dismissal of the charges; or, second, there may be some form of trial, a nominal or substantial fine imposed, which the master pays, and adds to the indebtedness of the servant, and returns the servant to the employment. But it makes little difference what outward form the proceedings may take, if the intention of the master is illegal, as already described.

I have described to you the most insidious form of peonage, the form hardest to deal with, because the act of the master is so covered up with legal forms as to give it the semblance of a just criminal proceeding against the servant; but in the exercise of your good sense you will be able to see through any subterfuge that may be adopted, and to get at the real intention of the parties.

Under these instructions you will have little trouble with the other forms of peonage—in the use or in the employment of "woods riders" and the forcible and illegal arrest without any color of law, or of the holding under threat or otherwise, of persons to work out a debt. These practices are not only illegal, but have been condemned by all our good people. They are extremely reprehensible because of the lawless condition to which they ultimately lead. In communities where such conditions exist, murders are frequent; in many instances traceable directly to these practices. It has come to the knowledge of this court that in two instances men have been so emboldened by these practices that they have extended their criminal force to respectable white persons. Parties are now standing indicted before this court, and have pleaded guilty to holding in bondage a respectable white man and his wife in one instance, and in another a white boy of good parentage, whom the party so charged on several occasions has returned to work by force and arrest to work out a debt, and to that end has scoured the woods for miles with "woods riders" to hunt up the fleeing servant.

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## VILLAMIL v. HIRSCH et al.

(Circuit Court, S. D. New York. April 5, 1905.)

CORPORATIONS—ELECTION OF OFFICERS—CONTROVERSY OVER RIGHT TO VOTE STOCK.

Where, on the death of the owner of the majority of the stock of a corporation, the right to vote his stock was vested by his will jointly in his widow and counsel as executors and trustees, and by reason of a controversy between them in a state court the counsel has been enjoined from voting the stock, a minority stockholder is entitled to an injunction to restrain the widow from voting such stock alone, or the holding of an election of officers until the right to vote the majority stock has been determined.

In Equity. On motion for preliminary injunction.

Edmund L. Mooney and David McClure, for the motion.
Blumenstiel & Blumenstiel, opposed.

LACOMBE, Circuit Judge. The replying affidavit of the plaintiff, taken in Cuba, was filed only yesterday, but the court was furnished with a draft of it some time ago, and so has had full opportunity of considering it in connection with the other papers submitted by both sides at the close of the argument. As was promised, its statements are strictly confined to denials only, and it presents no new matter calling for any reply.

As a minority stockholder owning one-fifth of the entire capital stock, complainant is interested in having the votes on the majority stock cast by those only who have the legal right to cast them, especially since the result of the voting may be the continuance of complainant in his salaried office of vice president or his failure of re-election thereto. Under the will the right to vote on the stock of the deceased passed to his widow and his counsel jointly, as executors and trustees. Differences have arisen between them. Charges have been made by the widow against the counsel, which he denies, and an application has been made to the Surrogate's Court to remove him. That court has full jurisdiction of such controversy, which is not before this court for determination. Upon the result of that proceeding depends the right to vote the stock, because, if the surrogate should decide that there was no sufficient cause to remove the counsel from executorship and trusteeship, he would have the legal right to participate with the widow in casting the vote; while, if he should be removed, she alone would have the right to vote. And until that question is determined it would seem improper that one only of the two persons to whom the testator confided the right to vote should exercise it to the exclusion of the other. The surrogate has enjoined the counsel from voting on the stock pending the trial in that court, and complainant now asks that the widow, whose attitude towards complainant is manifestly hostile, should also be enjoined from herself alone casting the vote. It would seem that, until the controversy in the surrogate's Court is decided, he should have such protection. But care should be taken that the result may not be that, the vote on the majority stock being neutralized by the two injunctions, the minority stockholders be allowed to record a majority of the votes cast, and thus themselves control the election of officers and directors for the coming year. The election should not be held until, by determination of the proper tribunal as to executorship and trusteeship, the question whether the stock formerly owned by deceased shall be voted by the persons he selected or by one only of them is decided.

Ordered accordingly.

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## DONALDSON et al. v. SEVERN RIVER GLASS SAND CO.

(District Court, E. D. Pennsylvania. June 12, 1905.)

No. 3.

1. SHIPPING—LIABILITY OF CHARTERER FOR DEMURRAGE.

The charterer of a barge cannot be held liable for demurrage because of delay in unloading a quantity of coal from the barge's hold, after she arrived at the place of loading, owing to the inadequacy of the charterer's facilities, where the coal was taken on by the master under a contract made with a third party after the charter, and without consulting the charterer.

2. SAME—FREIGHT—CONSTRUCTION OF CHARTER PARTY.

Under a charter of the whole of a barge, requiring the charterer to provide her with a cargo of "not less than seven hundred tons of sand,"

to be paid for at the rate of 90 cents per ton when delivered, she is entitled to recover the amount so stipulated for on delivery of the cargo as shipped by the charterer, although, without her fault, less than 700 tons was loaded.

3. SAME—INTEREST AND COSTS—TENDER.

A charterer is not relieved from the payment of interest or costs in a suit against him to recover charter hire by an offer to pay less than the sum due, renewed after suit brought, but without paying the money into court, or including in the offer interest or costs up to the time it was made.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 137–164; vol. 29, Cent. Dig. Interest, § 114.]

In Admiralty. Suit to recover freight and demurrage under a charter.

Howard M. Long, for libelants.
Daniel V. Summerill, Jr., for respondent.

HOLLAND, District Judge. The libelants in this case claim the sum of $630, being 90 cents per ton on 700 tons of sand, and demurrage for 4½ days at $20 per day, on the charter party executed by the parties to this suit on September 8, 1903.

The charter party provides that the barge B. T. Donaldson, of Philadelphia, then lying at the harbor of Baltimore, "agrees in the freighting and chartering of the whole of the said barge * * * unto the Severn River Glass Sand Company for a voyage from the Severn river sand banks to Philadelphia," and the said company agrees to furnish "a cargo of not less than 700 tons of sand loose," for which it agrees to pay the sum of "90c. per ton of 2,000 pounds payable on delivery of cargo," and when the barge is ready she is to receive "dispatch for loading and unloading," and for every day's detention by default of the sand company or its agent she is to receive the customary amount per day as demurrage. After the barge was chartered, the firm of Hite & Rafetto, not a party to this cause, agreed with the master of the barge to ship 90 tons of coal from Baltimore to the sand company's banks, and the coal was loaded in the hold of the barge, which was 12 feet deep. The barge arrived at the Severn River Glass Sand Company's banks, on the Chesapeake Bay, on September 10, 1903. The company, not being provided with machinery for unloading the coal from the hold of the barge, did not succeed in discharging the coal until September 17, 1903, after which it was necessary to thoroughly clean the hold of the barge, in order that the sand, which was used for making glass, should not be damaged or stained with particles of coal. The evidence shows that there was no necessity for putting this coal in the hold, and, if it had been loaded on deck, it could have been discharged more expeditiously, avoiding considerable delay. The libelants contend that the company was not ready to provide a cargo of sand, and that they were delayed from September 17th to September 22d in the loading; while the respondent avers that this time was the ordinary dispatch in loading sand at the banks.

The evidence is conflicting, but I am of the opinion that there was no unusual delay entitling the libelants to demurrage; and, as to the time devoted to unloading the coal, the libelants are not in a position to claim demurrage, as the delay, if unusual, was the result of their own act in taking on board this cargo of coal after the barge had been chartered to the respondent, and without consulting the management at the banks as to its facilities for unloading the coal from the hold of the barge. They took the risk as to the delay that might be caused by reason of shipping the coal, and I cannot see how it can be charged to the respondent in this case.

When the captain was informed that the loading of the sand was complete, he protested that there were not 700 tons on board, and he came to this conclusion from the fact that he had marks on the bow of the barge by which he judged the weight of a cargo. The respondent's superintendent, however, insisted that the amount called for by the charter party had been placed aboard the barge, and demanded that Capt. Schlear sign the bill of lading for that amount, which the captain did, under protest. Upon the arrival of the barge at Dickinson Street Wharf, Philadelphia, it was found that she had only carried 595.70 net tons, and the respondent refused to pay for more than that amount. The barge on its voyage up the Chesapeake, and through the Delaware and Chesapeake Canals, encountered no stormy weather, nor any accident which would cause her to lose any of the sand placed aboard; but the respondent endeavored to account for the loss of weight by reason of the fact that the barge was out of repair and had been leaking during the voyage, and that 104.31 tons were pumped out with the water. This is denied by the libelants, and I am convinced that the whole cargo shipped was delivered at Philadelphia. The method adopted at the banks for weighing the sand was not such as to enable the respondent to say with any degree of certainty how much sand was placed aboard, as they simply weighed a few wheelbarrow loads and then estimated the remainder, and in this way calculated the amount of the cargo shipped; and in unloading at Philadelphia the sand was hauled some distance in carts, and some of it lost before it was weighed, so that whatever difference there was in the weight does not appear to be attributable to any fault of libelants. Having delivered the cargo at Philadelphia, libelants insist they are entitled to freight on 700 tons of sand at 90 cents per ton, notwithstanding the fact that, under the circumstances, less tons were delivered here. The charter party provides for the chartering of the "whole of the barge," and that "a cargo of not less than seven hundred tons of sand loose" shall be provided by the respondent, which cargo shall be paid for at the rate of 90 cents per ton when delivered at Philadelphia. The barge delivered the cargo at Philadelphia, and under the contract we think that the libelants are entitled to recover the full amount of 90 cents per ton on not less than 700 tons of sand. It is true that the law presumes that freight is only paid upon the cargo which is delivered, but this is only the case where there is no express provision to the contrary. Where,

however, a written contract provides otherwise, and requires, as in this case, that a cargo of not less than a certain number of tons, at so much per ton, shall be shipped, and that amount paid upon delivery of the cargo, the libelants are entitled to recover the minimum amount stipulated for in the charter upon delivery of the cargo as shipped by the charterers. Planters, etc., Co. v. Elder et al., 101 Fed. 1001, 42 C. C. A. 130; Christie et al. v. Davis Coal & Coke Co. (D. C.) 95 Fed. 837; Gibson v. Brown (D. C.) 44 Fed. 98.

The respondent, prior to bringing suit, offered to pay to the libelants 90 cents per ton on 595.70 tons of sand, and payment of this amount was renewed after suit was brought, but it was not paid into court, nor was there any offer of payment of interest and costs up to the time the tender was made. As the respondent, neither before nor after suit was brought, tendered such an amount as the libelants are justly entitled to recover, we do not think that it should be relieved of interest and costs. Any real offer to pay by one then ready to pay the amount due before bringing suit, or, in case suit is brought, if the offer is renewed in such a way as to indicate readiness and willingness to pay the amount due, together with interest and costs to the time of tender made, will be treated as a lawful tender, regardless of the fact as to whether the money was produced or not, otherwise the party in default will be required to pay interest on the whole amount found to be due and the costs of suit. Benedict's Adm. (3d Ed.) § 552d; Boulton and Others v. Moore (C. C.) 14 Fed. 922; Lichtenfels et al. v. Phillips (D. C.) 53 Fed. 153.

Let a decree be entered in favor of the libelants for the sum of $630, with interest from January 14, 1904, and costs.

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## SEVERN RIVER GLASS SAND CO. v. DONALDSON et al.

(District Court, E. D. Pennsylvania. June 12, 1905.)

No. 6.

In Admiralty.

Daniel V. Summerill, Jr., for libelant.
Howard M. Long, for respondent.

HOLLAND, District Judge. The libel in this case to recover the value of 104.31 tons of sand at the rate of $1.35 per ton is dismissed, for the reasons stated in the opinion just filed in this court in the case of Donaldson et al. v. Severn River Glass Sand Co. (No. 3 of 1904) 138 Fed. 691.

## In re SCHERR.

(District Court, E. D. Pennsylvania. June 16, 1905.)

No. 1,895.

BANKRUPTCY—PETITION TO REVIEW ORDER OF DISTRIBUTION—TIME FOR FILING.

Under a rule of court requiring a petition to review an order of a referee for distribution of an estate in bankruptcy, and affirming the trustee's account, to be filed within 10 days, such a petition, seeking to review the order as to the commissions allowed the trustee will not be entertained after several months have elapsed, and distribution has been made in accordance therewith, and after the trustee's account was unanimously approved by the creditors at a meeting in which the petitioner was present by counsel.

[Ed. Note.—Appeal and review in bankruptcy, see note to In re Eggert, 43 C. C. A. 9.]

In Bankruptcy. On petition for review of account.

Putney, Twombly & Putney, for petitioner.
William S. Furst, for trustee.

HOLLAND, District Judge. This is a petition to review the referee's action in the allowance of commissions to the trustee in bankruptcy in this estate, and to authorize and direct the referee therein to receive and hear the same. The allegation in the petition is to the effect that the amount of the trustee's commissions was not known to the petitioner until long after October 7, 1904. There was no request presented to the referee for a review, in awarding the commissions in this case, before the expiration of 10 days after his final action, as required by an order of this court made December 10, 1904. The answer filed to the petition alleges that the trustee filed an account on September 26, 1904, and that a meeting of creditors to take action thereon was held at the office of the referee on October 7, 1904, and, after a full and open discussion of the same, the account was unanimously approved and duly confirmed, and an order for distribution of the assets in the trustee's hands was thereupon made, in accordance with the schedule of distribution, and that said order included the payment to the trustee of his commissions complained of in the petition, and, further, that counsel for the petitioners was present and approved the same, and that on the 20th day of February, 1905, after special notice had been given, a meeting was had by all creditors for the auditing of said account. The account was presented, examined, and unanimously approved, and at said meeting counsel for these petitioners was present, and the commissions received by the trustee were properly and lawfully allowed and paid out of the estate of said bankrupt, in full compliance with the act of Congress in such case made and provided.

The case was argued on petition and answer. The allegations set forth in the answer must be taken as true, as the pleadings now stand. So that in view of the fact that the petitioners had agreed to these commissions, and delayed far beyond the time allowed for

raising the question, we are of opinion that, under the rule of court above referred to, they are too late. This court has so decided in Re Heebner, 13 Am. Bankr. Rep. 256, 132 Fed. 1003.

The petition for review is therefore dismissed.

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COUCH v. McCOY et al.

(Circuit Court, S. D. West Virginia. June 21, 1905.)

1. VENDOR AND PURCHASER—OFFER OF OPTION—RIGHT OF WITHDRAWAL.
An offer of an option to purchase real estate, until it has become a completed option contract by acceptance in accordance with its terms and the payment of a consideration, is subject to the same rules as an offer to sell, and may be withdrawn at any time.

2. SAME—OPTION TO PURCHASE—CONSTRUCTION AND EFFECT.
An option contract for the purchase of real estate, if complete and certain as to its terms, and based on a valuable consideration paid, is converted into a contract of sale, which may be specifically enforced in equity by an acceptance by the vendee in accordance with the terms, and within the time limited therein. The purpose and effect of the option contract is the surrender by the vendor, for a consideration and for the time limited, of the right which he would otherwise have to withdraw the offer of sale contained therein.

3. SAME—ESSENTIALS OF OPTION CONTRACT—REDUCTION TO WRITING.
An offer to give an option to purchase real estate, where a written contract embodying the terms of the option is clearly contemplated by both parties, or by the party giving it, does not constitute a contract binding upon either party until such writing has been duly executed.

4. SAME.
After some correspondence between the parties with respect to the purchase of certain lands, complainant received from defendant, who resided in another state, a telegram as follows: "For fifty dollars will give sixty day option at twenty-five thousand dollars." To this he replied: "Forward sixty day option to-day First National Bank, Ronceverte." He also wrote on the same day as follows: "As I have but a few days in which to make my decision I decided to wire you to forward option at the price named and as soon as said paper arrives I will make investigation of your property and write you immediately on my return to Ronceverte." No paper was executed, and defendant subsequently withdrew the offer. *Held*, that no binding option contract, enforceable in equity, was made, first, because the offer, in the absence of an agreement to the contrary, required payment of the $50 to be made at the place of defendant's residence, and complainant's telegram and letter were not, therefore, an unconditional acceptance; and, second, because it was not contemplated that such contract should be created until formally executed in writing.

In Equity. On demurrer to bill.

This is a suit for the specific performance of a contract for the sale of lands, alleged by the plaintiff to exist by reason of certain written and telegraphic correspondence between him and the defendant W. J. McCoy, which correspondence, it is asserted in the bill, amounted to a valid 60-days option to the plaintiff to purchase the lands described in the bill, and which option the plaintiff duly accepted within said 60 days. The suit was originally brought by the plaintiff in the circuit court of Greenbrier county, W. Va., and was removed by the defendants to this court, after which removal an amended bill was filed in the cause. The material facts set up in the amended bill as showing grounds for the relief prayed in the bill are as follows:

That in the winter of 1903 plaintiff became interested in the possible development of certain lands in Greenbrier county, W. Va., and the construction

of railways to said lands, all of which, if successfully carried out, would require the expenditure of a large sum of money. That, to secure such a body of land as would render such expenditure desirable, it was necessary that plaintiff acquire many small tracts of land lying practically contiguous to each other. That, in his examination of a tract of 275 acres owned by J. C. McCoy and W. A. Brown, he ascertained that the defendant W. J. McCoy and others jointly interested with him owned three tracts of land adjacent to said 275-acre tract, and containing respectively 429, 336, and 943 acres, which tracts are known as the James McCoy lands. That about January 1, 1904, he entered into correspondence with defendant W. J. McCoy, as part owner of said lands and as agent for all of the other defendants, with a view to secure an option to purchase the said lands, and, as it required considerable time for said W. J. McCoy to communicate with his co-owners, "your orator, being desirous of obtaining such option and closing up the same without loss of time, your orator instructed the president and cashier of the First National Bank of Ronceverte, West Virginia, that should a sixty-days option to the plaintiff for said land be mailed to the bank by said W. J. McCoy, fixing a price thereon which was at all reasonable, that said bank should, out of the funds of your orator deposited therein, which largely exceeded said sum, pay to the said W. J. McCoy or his order $50 for said option, and your orator wrote to said McCoy informing him of this arrangement, and that the money was deposited in said bank for said purpose, and requested him to send said option to said bank." That, no such option having been received at said bank, the plaintiff, about March 2, 1904, caused J. C. McCoy, who is a cousin of said W. J. McCoy, to send for plaintiff a telegram to W. J. McCoy to the effect that the plaintiff was then in Ronceverte, and that unless an option was secured promptly the chance of a sale to him would be lost. That on March 3, 1904, said W. J. McCoy telegraphed said J. C. McCoy as follows:

"For fifty dollars will give sixty day option at twenty-five thousand dollars."

That on March 3, 1904 said W. J. McCoy also forwarded to said plaintiff two letters which read as follows:

"Dear Sir: I assume J. C. McCoy has shown you my telegram. I would explain delay by stating that not until after the receipt of his telegram did I succeed in getting consent of the last party interested, to name the figure mentioned,—$25000.00.

"If the option on that basis is desired please inform me to that effect.

"Respectfully yours, W. J. McCoy."

"Dear Sir: In my letter to you mailed this P. M., I should have added that the option referred to would mean one-third cash, balance, if desired, in one and two years, in equal installments, with 6% interest, payable annually, on the deferred payments.

"Resp'ly yours, W. J. McCoy."

That upon seeing the telegram to said J. C. McCoy, plaintiff at once, on the 3d day of March, 1904, sent the following telegram to said W. J. McCoy:

"Your telegram just handed me, forward sixty day option to-day First National Bank, Ronceverte. [Signed] C. B. Couch."

The bill further avers that on the same day the plaintiff wrote said W. J. McCoy accepting the option at said price, "and informing said McCoy that said sum was deposited at said bank and would be forwarded by it on receipt of option," etc. The letter referred to is exhibited with the bill, but does not contain any part of the language above quoted from the bill, but reads as follows:

"Your telegram to Mr. J. C. McCoy was handed me this morning and I was surprised at the price you placed upon your property inasmuch as your cousin J. C. McCoy whose land adjoins this had priced me his property at $10 per acre. However as I have but a few days in which to make my decision I decided to wire you to forward option at the price named and as soon as said paper arrives I will make investigation of your property and write you immediately on my return to Ronceverte.

"If you have not already forwarded option please do so at once as I have to give answer to other parties very shortly."

That on March 9, 1904, plaintiff received a telegram from said W. J. Mc-

Coy, stating that he could not send option at price named, to which he at once replied by wire as follows:

"Telegram to Charleston received. Have relied on your statements. Must hold you thereto. Am ready to take lands on terms mentioned."

On the same day W. J. McCoy replied by telegraph:

"As heretofore notified you deal is off."

On the 14th of March, 1904, Mr. Couch wrote the following letter to Mr. McCoy, which closes the correspondence exhibited with the bill:

"Dear Sir: Your telegram to me calling off trade between us was certainly a great surprise to me. I went into the matter in good faith and asked you for price on your and your co-owners' land in Greenbrier County, this State. Immediately upon receipt of your telegram to Mr. J. C. McCoy, which was sent at my request, I accepted the offer named in your telegram and went to considerable expense in sending engineers to survey and examine the property before I received your telegram declining to carry out your agreement. On March 8th I wired you that I was prepared to take the land upon the terms agreed upon, and I now write to confirm that telegram. I am prepared to take and pay you for the land upon the terms agreed upon, namely, one-third cash and the balance in one and two years, and in justice to myself I shall have to insist upon your complying with your agreement. As a matter of protection to myself, I have instituted suit for the specific performance of your contract, and have filed a Lis Pendens on the records in Greenbrier County.

"I believe if you will give this matter your consideration that you will recognize both your moral and legal obligation to convey to me this land in compliance with your agreement, and you will thus save the expense of a litigation which I shall have to prosecute to enforce my rights in the matter.

"Trusting that you will take this view of the matter, I remain," etc.

Before passing to a discussion of the case as the same is before me, I call attention to the fact that the above-quoted letter states that Mr. Couch wired acceptance of the land on March 8th. This is evidently an error, as his telegram was not sent until March 9th, and after the receipt of a telegram from McCoy withdrawing offer of option.

Mollohan, McClintic & Mathews and Geo. E. Price, for plaintiff.

Brown, Jackson & Knight and W. J. McCoy, in pro. per., for defendants.

KELLER, District Judge (after making foregoing statement). This case is now before me upon demurrer to the bill, and, as a matter of course, all the facts well pleaded in the bill are, for the purposes of the demurrer, to be taken as literally true; and I think these facts, relieved of certain minor contradictions appearing in the bill itself, are substantially set forth in the foregoing statement.

It is well at the outset to distinguish between an offer of an option and an offer of sale. It is indisputable that had a 60-day option, upon the terms set forth in the telegram exhibited with the bill, been offered by Mr. McCoy without consideration, it might have been withdrawn by him at any time, provided such withdrawal had been communicated to the plaintiff prior to his acceptance of the same; and by this I mean the acceptance of the proffer to sell, for until such acceptance there is no contract, as the proposed vendee is not in any way bound, and unless both are bound, so that an action could be maintained against either for a breach, neither is bound. Mr. Bishop, in his work on Contracts, § 325, says:

"Since an offer is not a contract, the party making it may withdraw it at any time before acceptance. Even though it is in writing, and by its terms is to stand open for a specified period, the result is the same. With no money

consideration, and no corresponding promise from the person to whom it is made, the promise not to withdraw it has no binding force. If a consideration for the undertaking to leave the offer open is given and accepted, this of itself constitutes a contract, and the offer cannot be withdrawn."

It is then manifest that an offer of an option, until accepted according to its terms, is no more binding than an offer of sale without consideration, and may be withdrawn unless prior to such withdrawal it be so accepted. There are then two elements in every option contract: First, the offer to sell, which does not become a contract unless and until accepted according to its terms; and, second, the completed contract to leave the offer open for a specified time, and this, as will be shown, in order to become a completed contract, must be for some consideration deemed valuable in law. The very existence of option contracts arose because of the liability of the withdrawal of offers to sell before they were formally accepted, and it thus becomes manifest that an offer of an option, until it is turned into a completed option contract by acceptance in accordance with its terms, and the payment or tender of the consideration therefor, is entirely subject to the same rules in regard to withdrawal as the plain offer to sell. It therefore becomes important in the case at bar to determine whether there was a valid and binding (that is, a completed) contract of option existing between the plaintiff and the defendant W. J. McCoy.

In the argument before me, considerable time was spent in discussing the question whether Mr. Couch, in his telegram of March 9th, and his letter of March 14th, had duly and properly accepted the offer to sell, in accordance with the terms of said offer. In the view I take of this case, I do not consider that point as material, and prefer now to examine the question as to whether there was in fact a valid option contract subsisting between the parties to hold the offer open for 60 days, because, if there was not, it is quite evident that the offer to sell was withdrawn before its acceptance by Mr. Couch, and the withdrawal was promptly communicated to him.

In England it has been held that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, but that the two minds must be at one at the same moment of time; that is, that there must be an offer continuing up to the moment of acceptance, and that if in fact the offer did not continue up to such moment the acceptance cannot make a binding contract. Dickenson v. Dodds, L. R. 2 Ch. Div. 463. In this country, on the contrary, it has been held that, to constitute a valid retraction, it must be communicated to the other party before he has accepted. Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94. A failure to distinguish and recognize the independent character of the contract to leave the offer open, and the attempt to treat the offer to sell and the time option contract as one transaction, has resulted in much confusion of thought. The relief usually sought is a specific enforcement of the offer to buy or sell, and, so far as the reported cases decreeing specific performance show, the offers have universally been accepted before their formal withdrawal, and therefore have become completed contracts which

could be enforced. The language of the courts must therefore be read in the light of that fact, and be regarded as surplusage in so far as it tends to hold that, if the offer was formally withdrawn before acceptance, the contract would still be specifically enforceable.

In an editorial note to the case of Litz v. Goosling (Ky.) 19 S. W. 527, 21 L. R. A. 127, it is suggested that even in the case where a completed time-option contract existed, and the offer therein contained was withdrawn before acceptance, there would ordinarily be no equitable ground for specific performance, although there would be a breach of the completed option contract. The author says:

"All attempts of the vendor to withdraw after being notified of acceptance are merely breaches of an existing contract which may be specifically enforced. But if before receiving such notice the vendor notifies the vendee of his withdrawal of the offer, it is difficult to see how there can be a specific performance of the contract, which has never been completed. Not withstanding the existence of a valid contract not to withdraw, if there is a withdrawal, the court, before enforcing the contract to sell, would have to either make a contract to enforce, or compel the vendor to make it. This might be done if there were distinct grounds for equitable jurisdiction, and no adequate remedy at law, by reason of the vendor's insolvency or some other cause. Otherwise it is hardly within equity jurisdiction. But the language of the opinions is broad enough to suggest the enforcement of a contract which has never been made."

I cannot go so far as the author of this note, because, in the case of a valid option contract, complete and sufficient in its terms to warrant specific enforcement if accepted before its withdrawal, and for which a valid consideration has been paid by the vendee, the very essence of the agreement is violated, and a time option becomes a farce, if we say that the vendee's only remedy for such a breach as a withdrawal by the vendor before the expiration of the time limited is a suit for damages for the breach. The contract in such a case is made, as to all its essential terms, in the unilateral option contract, which, it is true, is only binding upon the one party until accepted by the other, but which acceptance, if made within the time and according to the terms limited in the option contract, changes what was before a unilateral contract into a mutual one; and for this right of election, it is to be remembered, the party possessing it has paid what was deemed by the other a sufficient consideration for the right. It is evident that in large transactions, involving many tracts of land, failure to secure one upon which an option has been obtained may be, and often is, fatal to the whole enterprise, and damages for the breach of the option contract would be but a poor and feeble remedy, and one not at all adequate in the premises. Watts v. Kellar, 56 Fed. 1, 5 C. C. A. 394; Hall v. Center, 40 Cal. 65; and many others. But while I believe this to be the law as well established by well-considered decisions of many courts, it is nevertheless true that, before an option contract can be enforced by the person holding it, it must itself be complete and certain as to its terms, so that the court can see what contract the parties made. Brown v. Brown, 33 N. J. Eq. 650; Nichols v. Williams, 22 N. J. Eq. 63; Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500; Dalzell v. Dueber Mfg. Co., 149 U. S.

315, 13 Sup. Ct. 886, 37 L. Ed. 749; Colson v. Thompson, 2 Wheat. 336, 4 L. Ed. 253; Diamond State Iron Co. v. Todd (Del.) 14 Atl 27; and numerous other cases to the same effect. And such option contract must not only be certain and complete, but must be accepted in accordance with its terms. Any acceptance not in accordance with its terms is equivalent to a rejection. Weaver v. Burr 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Wilkin Mfg. Co. v. Lumber Co. (Mich.) 53 N. W. 1045; Potts v. Whitehead, 23 N. J. Eq. 512.

In the case last cited the following language was used by the court:

"An acceptance, to be good, must, of course, be such as to conclude an agreement or contract between the parties; and, to do this, it must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points, and closing with them just as they stand."

Tested in the light of these authorities, let us see whether in fact there was ever a valid option contract existing between these parties. Counsel, in the argument before me, have spent a good deal of time in discussing the question whether the telegram of March 9th, and the letter of March 14th, from Mr. Couch, contained a proper acceptance of the terms of the option offered by Mr. McCoy. In my view of the case, that question is entirely unnecessary to be considered. If I was forced to consider it, I should be inclined to hold that it was a sufficient notification to Mr. McCoy that Mr. Couch elected to take the land upon the terms proposed by Mr. McCoy; and, taking the view I do as to the enforceability of a valid option contract, accepted before the time limited for its expiration, I should be strongly inclined to hold that equity could take jurisdiction to enforce the contract. But the question here is not, as I view it, whether there was a sufficient acceptance by Mr. Couch of a valid option to purchase these lands, but whether there ever was in existence such a valid option contract.

Earlier in this opinion I called attention to the distinction between the option contract and the subsequent contract of sale. If there never was a valid, completed option contract between the parties, there never could be a valid agreement of sale founded upon it, for manifestly the only right Mr. Couch would have for time for election must grow out of such a valid contract for such time. Let us see what the offer of Mr. McCoy was, and whether it ever was accepted, so as to become a valid option contract for 60 days' time. Mr. McCoy's offer was couched in the following language: "For fifty dollars will give sixty day option at twenty-five thousand dollars." It will at once be observed that this was not an option, but an offer to give one in consideration of $50. Before any obligation rested upon Mr. McCoy to execute and tender the option contract thus referred to, the obligation rested upon Mr. Couch to accept the terms offered, and to pay or tender the consideration money. There can be no contention on the part of either party to this litigation that a formal contract was not contemplated. Mr. Couch, in his telegram of March 3d, says, "Forward sixty day option to-day First

National Bank, Ronceverte." And again, in his letter of the same date he says, "As I have but a few days in which to make my decision I decided to wire you to forward option at the price named and as soon as said paper arrives I will make investigation of your property and write you immediately on my return to Ronceverte." This language conclusively disposes of any possible contention that a formal option contract was not contemplated, for it will be observed that Mr. Couch, in his letter, proposes that "as soon as said paper arrives" he will make investigation of the property, etc. Under this state of affairs, and the information afforded by this letter, Mr. McCoy could be under no apprehension that Mr. Couch would place himself at any disadvantage by expending any money in the examination of this property or the purchase of contiguous property until he received the paper referred to in his letter. It will be observed that Mr. McCoy never offered to send this option agreement to Ronceverte or elsewhere, or to deliver it elsewhere than at the usual and ordinary place of delivery of such contracts, or until the consideration therefor had been paid. The vendor's domicile, residence, or place of business is, in law, the proper place for payment for and delivery of a contract or deed; and an acceptance by a proposed purchaser, payable or deliverable elsewhere, is not the unconditional acceptance required to make a binding contract. Such acceptance amounts to an alteration of the proposal, and is equivalent to a rejection; and, unless the alteration so made is thereafter expressly assented to by the proposer by word or act, it cannot convert the original offer into a completed contract.

In Sawyer v. Brossart, 67 Iowa, 678, 25 N. W. 876, 56 Am. Rep. 371, the offer was as follows: "Yours at hand. You can have that building for $3500 and the two for $5000. Let me hear from you at once." Plaintiff replied by telegraph: "Accept your offer for two buildings at $5000. Money at your order at First National Bank here. Telegraph me immediately when to expect deed." Sawyer lived in Iowa, and Brossart in California. Held, that the acceptance by Sawyer was not an acceptance of the offer as made, the court saying (page 680 of 67 Iowa, page 877 of 25 N. W. [56 Am. Rep. 371]), "When Brossart learned that he had offered the property at less than its value, or in any state of the case, it was his right to stand upon a strict acceptance of his offer;" emphasizing the point that it matters not what the motive may be influencing the defendant. To the same effect are Robinson v. Weller, 81 Ga. 704, 8 S. E. 447; Langellier v. Schaefer (Minn.) 31 N. W. 690; Greenawalt v. Este, 40 Kan. 418, 19 Pac. 803; Gilbert v. Baxter, 71 Iowa, 327, 32 N. W. 364; N. W. Iron Co. v. Meade, 21 Wis. 475, 94 Am. Dec. 557; Baker v. Holt, 56 Wis. 100, 14 N. W. 8; Batie v. Allison, 77 Iowa, 313, 42 N. W. 306.

This last case was one for specific performance, in which the offer was couched in the following language: "Will give warranty deed as title now stands as $8 per acre net to me." Plaintiff replied: "We accept your offer without qualification. * * * Notify us when and where to send money. * * *" The court below sustained a demurrer to the petition, and on appeal the court said:

"The offer expressed nothing as to time or place of payment, and, had the acceptance been without expression on that subject, the law would fix the time and place; but the acceptance is upon condition that the defendant would 'notify us when and where to send the money.'" See, also, Maynard v. Taylor, 53 Me. 511; Esmay v. Gorton, 18 Ill. 483; Dejonge v. Hunt (Mich.) 61 N. W. 341; Eliason v. Henshaw, 4 Wheat. 225, 4 L. Ed. 556.

These authorities, collated from such varying sources, abundantly show the uniform doctrine of the courts as to the necessity for an unqualified acceptance of an offer in order to convert said offer into an agreement.

It is manifest that under ordinary circumstances the telegram and letter of Mr. Couch would impose no obligation whatever upon Mr. McCoy to execute and send to the First National Bank of Ronceverte the paper in question. The pleader who prepared the bill in the case recognized this fact, and attempted to bridge the difficulty by an allegation that before this time he had arranged with the officers of said bank that, should an option for these lands be there received, at a price which was at all reasonable, they should pay to Mr. McCoy $50 for the same out of funds deposited there by the plaintiff, and that he had written to Mr. McCoy, informing him of this arrangement. This might all be true, but it imposed no obligation upon Mr. McCoy to assent to any such arrangement, and there is no allegation in the bill that he did assent to it, or ever agreed to deliver any contract until paid for it. The pleader further states in the bill that Mr. Couch's letter of March 3d, asking that the option be forwarded, contains a statement "informing said McCoy that said sum ($50) was deposited at said bank, and would be forwarded by it on receipt of option." An examination of the letter itself, a copy of which is exhibited with the bill, discloses that the pleader was in error as to this, for no such statement is contained in the letter, nor is any reference whatever made to any arrangements for payment for the option. But even if such statement had been made in the letter, could it change the rights of the parties? Undoubtedly not. Mr. McCoy was entitled to payment for his option at the time and place of its delivery, which latter, in the absence of clear agreement to the contrary, would be at his residence, at Clinton, in the state of Iowa. If an acceptance of an offer to sell, qualified by making the consideration payable or deliverable elsewhere than at the residence or place of business of the vendor, is not a good acceptance, and may be treated as a rejection of the offer, how much more true is this of an offer of an option, which requires a consideration paid to support it, and which, all the authorities concede, may be withdrawn at any time, even though complete in form and signed by the vendor, unless a consideration has been paid for it, or the agreement be under seal, which imports a consideration. Hawralty v. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613; Borst v. Simpson, 90 Ala. 373, 7 South. 814; Sutherland v. Parkins, 75 Ill. 338; Conner v. Renneker, 25 S. C. 514. And even in the latter case, upon a suit for specific performance, the want of consideration may be shown notwithstanding the seal. 1 Pom. Eq.

§ 383; 3 Pom. Eq. § 1293; Graybill et al. v. Brugh (Va.) 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894.

The United States Supreme Court has frequently held that, exercising the discretion vested in courts of equity in cases for specific performance, it will not be decreed "if it be doubtful whether an agreement has been concluded or is a mere negotiation," or "unless the proof is clear and satisfactory both as to the existence of the agreement and as to its terms." Dalzell v. Dueber Watch Co., 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749; Carr v. Duval, 14 Pet. 79, 10 L. Ed. 362; 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.

In Mississippi, etc., S. S. Co. v. Swift, 29 Atl. 1063, 41 Am. St. Rep. 545, 86 Me. 248, it was held that when parties enter into a general contract, and the understanding is that it is to be reduced to writing, or, if it be already in a written form, that it is to be signed before it is to be acted upon or to take effect, it is not binding until it is so written or signed, and that the burden of proof is on the party claiming the completion of the contract before the written draft is signed. In the case at bar it is perfectly clear that a formal option was contemplated by both parties, and in his letter of March 3d Mr. Couch says, "And as soon as said paper [the option] arrives I will make investigation of your property and write you immediately on my return to Ronceverte"; showing clearly that he was not relying on any existing option contract, but was looking to a formal option to be yet executed. It is also evident from Mr. McCoy's letter of March 3d that he had in mind the preparation of a formal option, and did not intend to be bound until such a paper was executed. In one of his letters of March 3d he says, "If the option on that basis is desired please inform me to that effect." To these letters explanatory of his telegram he never had any reply until after he had withdrawn his offer on March 8th.

In the case of Mississippi, etc., S. S. Co. v. Swift, supra, it was further held that:

"When correspondence indicates that a formal draft of a contract was in the minds of the parties, or at least in the mind of the party sought to be charged, as the only authoritative evidence of a contract, and that he did not have or signify any intention to be bound until the written draft had been made and signed, he is not bound until such draft is duly made and signed."

And in Wardell v. Williams, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814, it was held that:

"Either party has the right to withdraw from pending negotiations for the sale of real property, where no consideration has passed, no rights intervened, and the conditions of the parties have not changed."

From all of these considerations I conclude that, from the facts shown in the bill, it is not sufficiently shown that a valid option contract was entered into between the parties.

I conclude that the demurrer must be sustained, and the bill dismissed. A decree may be prepared in accordance with this opinion.

## DOLL v. EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES.

(Circuit Court of Appeals, Third Circuit. June 12, 1905.)

No. 20.

1. INSURANCE—APPLICATION—WARRANTIES.

Where a life insurance policy provided that it was granted in consideration of the written and printed application for the policy, which was made a part of the contract, and that the policy and application, taken together, constituted the entire contract, which could not be varied except in writing by one of specified executive officers of the society, and the application contained a provision over insured's signature that all statements and answers therein were warranted to be true, representations with reference to insured's family history as to consumption, and that insured had not had any serious illness within two years prior to the signing of the application, were warranties.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 558–570.]

2. SAME—BREACH.

Where, in an application for life insurance, insured warranted that there was no history of consumption in his family, and that he had had no serious illness within two years prior to the date of the application, evidence that insured's sister had died of consumption prior to the date of the application, of which fact insured had knowledge, and that within two years before the date of the application insured had repeated profuse hemorrhages from the stomach for nearly a week, and was treated by a physician for 30 days, who testified that his illness was serious, established a breach of such warranties.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 688–693.]

3. FOREIGN LAWS—REMEDY—APPLICATION.

A foreign statute of a state where a life insurance contract was made, prohibiting a physician from disclosing any information that he might have acquired in attending any patient in a professional capacity, which information was necessary to enable him to prescribe for such patient as a physician, etc., affected the remedy only, and hence was inapplicable in an action on the policy in a federal court sitting in another state.

4. SAME.

Rev. St. U. S. § 721 [U. S. Comp. St. 1901, p. 581], providing that the laws of the several states, except where otherwise provided, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply, does not apply to an objection to the competency of a physician to testify under a disqualifying statute of a foreign state where the insurance contract sued on was executed.

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

Spencer Weart, for plaintiff in error.

Gilbert Collins, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. The case before us comes up on writ of error to the United States Circuit Court for the District of New Jersey. Suit was brought by the plaintiff below, who is plaintiff in error, against the Equitable Life Assurance Society, defendant in error, in the Supreme Court of the state of New Jersey, upon a

policy of life insurance, issued by the defendant to William Doll, husband of the plaintiff, for the sum of $5,000. Thereafter, the said suit was removed, at the instance of the defendant, to the Circuit Court of the United States for the District of New Jersey. Application for the policy was made by the plaintiff's husband on October 3, 1902, and he died on the 11th of May, 1903.

The plaintiff's declaration avers generally the performance of all conditions precedent on the part of the insured to be performed. A statute of the state of New Jersey provides that "either party to an action may aver performance of conditions precedent generally; and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition precedent, the performance of which he intends to contest." The defendant pleaded the general issue, with notice of two special defenses, setting forth in detail certain conditions precedent, the performance of which the defendant intended to contest. Counsel for plaintiff in error, in his first assignment, contends that the specification of such conditions precedent, by way of notice of special matter to be given in evidence at the trial accompanying a plea of the general issue, is not such a pleading as is required by this statute. We think, however, this contention is without merit. The plea of the general issue, with notice, as above stated, is technically and in substance a pleading within the meaning of the New Jersey statute. Such a plea of the general issue, with notice of special matter, is authorized by the law of the state as a substitution for a special plea in bar. The special matter, as set out, is part of the pleading. There was no error in holding that the defendant had sufficiently complied with the requirements of the statute referred to.

At the conclusion of the testimony on both sides, upon motion of defendant's counsel, the jury were directed to find a verdict for the defendant, which action of the court below is here assigned for error. The two special matters of defense, of which notice was given with the plea of the general issue, were, (1) that the insured, William Doll, had warranted that there was no history of consumption in his family; i. e. among his parents, brothers or sisters, uncles or aunts, while the truth was that a sister had died of consumption; (2) that the insured, William Doll, had warranted that he had not had any serious illness, which was false, because he had had an attack of hemorrhage of the stomach within two years of the date of his application.

On the first page of the policy, as referred to by the court below in its opinion, is this language: "The privileges and conditions stated in the second and third paragraphs hereof form a part of this contract, as fully as if recited at length over the signatures hereto affixed," and on the third page, in addition to the statement of the money consideration, is the following: "This assurance is granted in consideration of the written and printed application for this policy, which is hereby made a part of this contract;" and at the close of the third page occurs this language: "This policy and the application therefor, taken together, constitute the entire contract, which cannot be varied, except in writing, by one of the fol-

lowing executive officers of the society," (naming them). In the application thus repeatedly and specifically referred to in the body of the policy, and signed by William Doll, the insured, appears this language:

"I hereby agree that this application and the policy taken together, shall constitute the entire contract between the parties hereto; that all statements and answers herein are warranted to be true; that this contract shall not take effect until the first premium has been paid during my good health. I have not been declined or postponed by any life company or received a policy different in form from the one originally applied for, nor have I been intemperate, or had any serious illness or disease, except diseases incident to childhood, and there is no history of consumption or insanity in my family, i. e., among parents, brothers or sisters, uncles or aunts.

"Note—If applicant has ever been declined by any life company or received a policy different from the form originally applied for or been intemperate, or had any serious illness or disease, other than childhood diseases, or if there is any history of consumption or insanity in applicant's family—among parents, brothers, sisters, uncles or aunts, state particulars here."

After the note, there was a small blank space in case of affirmative statements as to the matters mentioned in the note. This blank was not filled in. The father, and brother-in-law of the assured, and two physicians were called by the defendant, and by their undisputed testimony it appears that Rosa Buehler, a sister of the assured and wife of the brother-in-law who testified, had died of consumption in September, 1897; that she had had the disease from one to two years previous to her death; that about three months prior thereto, the disease culminated, and her death was probable; that during her illness, and at the time of her death, she was living in New York City, and that the assured, her brother, who was living with his father in Hoboken, New Jersey, had often visited his sister during her illness.

It is entirely clear that the statements made by the deceased in his application for insurance, were warranties and not mere representations or statements of belief. It is settled law that the party to a contract may make the existence or nonexistence of any fact a condition precedent to the obligation of performance undertaken by either party. And this is true as to the parties to a contract for life insurance. Moulor v. American Life Ins. Co., 111 U. S. 335, 341, 4 Sup. Ct. 466, 28 L. Ed. 447. The language we have quoted from the policy and the application is perfectly clear and unequivocal in this respect. There was an unqualified undertaking on the part of the insured, that the facts alleged by him were as he represented them to be. They were facts about which he could well have exact information. There is nothing in the language used in the whole instrument to indicate that the question between the insurer and insured was one merely of good faith and honest dealing or of belief on the part of the assured in the truth of his statements. In Moulor v. Insurance Company, supra, the court gathered from the language of the policy and application, "that what the company required of the applicant as a condition precedent to any binding contract, was that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, with-

out evasion or fraud, and without suppression, misrepresentation or concealment of facts with which the company ought to be made acquainted; and that by so doing, and only by so doing, would he be deemed to have made 'fair and true answers.'" In that case, the insured was asked to answer yes or no, as to whether he had ever been afflicted with any of seventeen different and specifically enumerated diseases. He answered "No," as to all of them. The main defense was, that the insured had been afflicted with asthma and consumption (two of the diseases so enumerated) prior to the making of his application. It may well have been that the assured, at the time of answering these questions, was unconscious of having been afflicted with either asthma or consumption. He must then have been in good health, and was subject to the examination of the physician of the insuring company, and it may well be said that it was "doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract." In such case, the court should properly lean against that construction which imposes upon the insured the obligations of a warranty. In the case at bar, the statement on the part of the insured, that there was no family history of consumption as to his father, mother, brothers or sisters, was a statement most material to the risk about to be assumed by the insurer, and a fact as to which he must have known the truth. By his answer, he averred there was a family history in the respect stated, and that there was no consumption in it. The undisputed fact, however, is that his sister died of consumption, which she had had for two years, and in acute form without hope of recovery for three months before her death; that the assured lived at home with his father, and with him was a visitor at his sister's home. With every disposition to lean against a harsh construction of these warranties and representations in the applications for life insurance, we find no ground upon which this expressed warranty by the assured can be interpreted as a mere representation of his belief, or that the condition precedent made thereby is not of the truth of the statement, but only of the good faith with which it was made.

What has been here said in regard to the first specific defense, is true also as to the second, namely, that the insured had warranted that he had not had any serious illness, and that such warranty was false, because he had an attack of hemorrhage of the stomach within two years of his application, the precise statement being that he had not "had any serious illness or disease, except diseases incident to childhood." The undisputed fact testified to by members of his family, and by the attending physician, was that in the year 1900, he was ill from hemorrhage of the stomach, the doctor testifying that he attended him for 30 days or more, the hemorrhages repeating themselves every day for about a week, and that they were large and profuse, and that the illness was of a very serious nature. There is no room here to find that the statement, that he had had no serious illness except those incident to childhood, was a representation which he might honestly have made, believing it to be true. The very form of the question, as to having had a "serious

illness," was such as to exclude any answer not founded upon positive knowledge. A serious illness, such as was described by his attending physician, could not have escaped the recollection of a man required to make a true statement in regard to his previous health. Courts have been reasonable in this matter, and sought to protect the beneficiaries of life insurance policies from careless or ill-considered statements as to prior health, by not holding non-serious ailments or those not material to the risk, within the warranty of a statement by the insured, but it will not do, by too great refinement of argumentation, to fritter away the protection which these stipulations as to previous illness are properly intended to give to the insurer. They must receive a sensible and reasonable construction. It does not seem to us possible, that a jury, upon any reasonable theory of the testimony disclosed in this record, could find that the insured had not warranted the truth of the statements made by him, but had merely warranted his good faith in making them. The court below were therefore right, in holding upon the undisputed testimony, that the policy on this account was void, and in instructing the jury to find for the defendant.

The decision of this court in McClain v. Prov. Sav. Life Assur. Society, 49 C. C. A. 31, 110 Fed. 80, has been cited and has been carefully reviewed. In that case, the application for insurance was made in two parts. The first contained the following stipulation:

"It is hereby agreed that * * * all the statements contained in part I and part II of this application, by whomsoever they be written, are warranted to be full, true and complete, * * * and that if any concealment or fraudulent or untrue statement be made, or if at any time any covenant or agreement herein made shall be violated, said assurance shall be null and void."

Part 2 closed with the following: "I hereby warrant said answers to be true." It was held that the stipulations must be construed together, the second with the first, which, by its terms, covered the entire application, and to prevent inconsistency in the application of the rule that doubts are to be resolved in favor of the assured, the word "warrant," as used in the latter, must be given the same meaning as in the former, as therein limited, and held to be a warranty, only that the statements in part 2 of the application were made in good faith, without concealment or fraudulent intent, and that under such construction such statements were representations and not warranties, and the policy was not to be avoided by a misstatement in regard to a matter not material to the risk, if made in good faith without intent to deceive. There is no language in the policy or application set out in the record before us, to indicate any intention that the declared warranty was only that the statements made were made in "good faith and without concealment or fraudulent intent," and not that the facts actually were as the insurer represented them to be.

The facts in the case just cited were, that the plaintiff was a strong, robust, active man, who died about a year after his insurance, of cancer of the stomach. In reply to questions in his application for life insurance, the applicant stated that he never had dys-

pepsia, and had had no medical attendance. He further stated, in answer to a general question, that he never had any sickness, injury or infirmity, "except temporary ailments." In an action on the policy, the jury found, in answer to special questions submitted, that he had previously had "dyspepsia or indigestion at times," and that he had been attended by a physician for "temporary indigestion, not material to the risk." They also found that his answers were made in good faith, and without any intention to deceive. It appeared from the evidence that the physician referred to was an intimate friend, with whom he walked nearly every day; that three or four times during these walks, he consulted his friend with reference to indigestion, without asking, or apparently needing, regular attendance. He was never otherwise attended by a physician. We held, and properly held, that the applicant had not stated an untruth, in classing "dyspepsia or indigestion at times" among temporary ailments.

Objection was made at the trial, to allowing a practicing physician and surgeon of New York, who had attended the sister of the deceased in her last illness, to testify as to the cause of her death. The ground of this objection was, that a statute of the state of New York prohibited a physician or surgeon from disclosing "any information which he might have acquired in attending any patient in a professional character and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." Counsel for complainant contends that, inasmuch as the contract of insurance was made in the state of New York, the law and usages of the place of the contract should govern in matters of construction affecting the validity of the contract and the rights of the parties, and that therefore this statute was controlling in the trial of the case at bar. Plaintiff's contention, however, confuses those laws which enter into and form a part of the contract, or with reference to which the contract was made, with those, merely, which govern remedy and procedure. The prohibition of the New York statute is a rule as to evidence or procedure, and does not enter into the contract of insurance. The interpretation of the contract does not at all depend upon it. The rule affects the remedy and not the contract. In such cases, the law of the forum, and not of the place of the contract, must govern. The New York statute, therefore, was not applicable to the trial in the Circuit Court for the District of New Jersey. Section 721 of the Revised Statutes [U. S. Comp. St. 1901, p. 581] has no relevancy to the point here under consideration. The Supreme Court, in Connecticut Mutual Life Ins. Co. v. Union Trust Company, 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708, a case cited by the plaintiff, merely decided that the provision of the New York statute here referred to was obligatory upon the courts of the United States sitting *within that state.* We think the learned judge of the court below committed no error in admitting the testimony objected to.

The judgment below is affirmed.

## ROBERTS v. GREAT NORTHERN RY. CO.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1905.)

No. 1,145.

APPEAL—ACTION AT LAW—DISMISSAL.

An appeal is not the appropriate remedy for reviewing alleged errors committed on the trial of an action at law, and will not be entertained.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 10–15.]

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

On Motion to Dismiss Appeal.

George W. Saulsberry, for appellant.

L. C. Gilman, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action at law brought for the recovery of damages for alleged personal injuries, and the alleged errors of the court below are sought to be brought here for review by means of an appeal. It has been many times decided that an appeal is not the appropriate method for the review of errors alleged to have been committed in an action at law. The motion of the appellee for the dismissal of the appeal must be granted.

Appeal dismissed.

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## THE CELTIC MONARCH.

### THE SEA LION.

(Circuit Court of Appeals, Ninth Circuit. June 5, 1905.)

No. 1,143.

ADMIRALTY—PLEADING—MOTION TO VACATE ATTACHMENT.

Under admiralty rule 51, which provides that new facts alleged in an answer shall be considered as denied by the libelant without replication, the truth of such allegations cannot be assumed for the purposes of a summary motion on the pleadings to vacate the attachment of a vessel for "manifest want of equity," filed pursuant to admiralty rule 35 of the District Court of the District of Washington, and such a motion cannot properly be sustained where the libel states a cause of action against the libeled vessel.

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

Piles, Donworth & Howe and C. H. Farrell, for appellant.

James M. Ashton, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. In the evening of October 27, 1904, the steamship Mainlander, owned by the appellant, and of the alleged value of $100,000, was run into and sunk in the waters of Puget

Sound by the steamtug Sea Lion, having in tow the sailing ship Celtic Monarch. The next day—October 28th—the appellant commenced the present suit in the court below against both the tug and tow. October 28th the Celtic Monarch, and October 29th the Sea Lion, were attached by the United States marshal pursuant to the terms of a monition issued to him out of, and under the seal of, the District Court; but both vessels were subsequently released from custody on receipt by the marshal of a notice of the bonding of each of them, signed by the clerk of the court. On November 2, 1904, a mandate was issued by the court below, directed to the libelant, requiring it to appear before the court the next day at 2 o'clock p. m., and show cause why the attachment of the Celtic Monarch and her cargo should not be vacated. This mandate was not served upon the proctors for the libelant until 9:30 a. m. of November 3, 1904. On the same day—November 3d—an amended libel was filed, as also an answer thereto by the claimant of the Celtic Monarch, supported by two affidavits; and on these pleadings the cause was heard at the appointed time, resulting in a decree dismissing the case as to the Celtic Monarch, with costs, from which decree the present appeal is brought.

These summary proceedings were had and taken by virtue of an admiralty rule of the court below, numbered 35, which is as follows:

"(35) In case of the attachment of property or arrest of the person in causes of civil and admiralty jurisdiction (except in suits for seamen's wages, when the attachment is issued upon certificate pursuant to Act of Congress of July 20, 1790 [1 Stat. 131]), the party arrested, or any person having a right to intervene in respect to the thing attached, may, upon evidence showing any improper practices or a manifest want of equity on the part of the libelant, have a mandate from the judge for the libelant to show cause instanter why the arrest or attachment should not be vacated."

The rule is a good one, and enables the court to make speedy disposition of causes where improper practice or a manifest want of equity is shown on the part of the libelant. But let us see whether either of these things may justly be affirmed of the libelant in the present case.

Turning to the amended libel, we find the libelant's cause of suit thus stated:

"That at the times hereinafter mentioned the steamtug Sea Lion was engaged in the business of towing vessels on the waters of Puget Sound to the Pacific Ocean, and her master was C. C. Manter. On the 27th day of October, 1904, the Sea Lion took in tow the British ship Celtic Monarch at or near Tacoma. On board the Celtic Monarch were her master, officers, and crew. The towline by which the Sea Lion towed the Celtic Monarch was an insufficient and improper towline to be used in the then condition of the weather, and the Sea Lion was not seaworthy at the time she took the Celtic Monarch in tow, for the weather which then existed and which was to be reasonably anticipated on the voyage from Tacoma to the ocean. At the time the Celtic Monarch was taken in tow, her master and officers consented to the use of the improper towline, and consented to being towed by the Sea Lion in her then unseaworthy condition. For several days prior to the day of the collision hereinafter mentioned, thick fogs had daily arisen, which increased in density as night came on. When the Celtic Monarch was taken in tow, a fog prevailed, which as evening approached became thicker, and the

master of the tug and master of the Celtic Monarch had reason to know that as night approached it was probable that the fog would become more dense. Notwithstanding said facts, the towline by which the Sea Lion towed the Celtic Monarch was of such a length that the master of the Sea Lion, immediately prior to the collision, did not deem it safe to stop or back the Sea Lion, because of the danger of the Celtic Monarch running into the Sea Lion. On the evening of October 27, 1904, between five and six o'clock, the Sea Lion then had the Celtic Monarch in tow; the master, officers, and crew of the Celtic Monarch then being on board of the Celtic Monarch. The Mainlander at said time was bound to Seattle from Bellingham. The last port at which the Mainlander touched prior to the collision hereinafter mentioned was Everett, and the Mainlander was keeping a vigilant lookout and sounding her fog signals, because a fog was then prevailing. As the Mainlander approached West Point light, and was to the north of said point, she heard the fog signal at said point, and as she approached she also heard the fog signals of the tug Sea Lion. The Mainlander continued to sound her fog signals. The fog signals of the Sea Lion were heard on the port bow of the Mainlander. The officer in charge of the Mainlander gave the signal for her to proceed under a slow bell, and said signal was immediately obeyed, and the Mainlander proceeded under a slow bell. The fog signals of the Sea Lion indicated that the vessels were approaching each other, and the officer in charge of the Mainlander signaled to her engineer to stop. Said signal was immediately obeyed, and the Mainlander continued to move through the water, with her engines stopped. Each vessel continued to sound fog signals. A thick fog prevailed. Before the vessels came in sight of each other, the Sea Lion blew two short blasts, and the officer in charge of the Mainlander immediately ordered the engineer of the Mainlander to go full speed astern, which signal was immediately obeyed. The engines of the Mainlander were reversed, and the Mainlander was either just going astern or was just stopped, when the Sea Lion, with the Celtic Monarch in tow, while going at a high rate of speed, with her engines in motion, driving her forward, and with a towline of such length as to make it dangerous, in the opinion of her master, for her to stop or back, struck the Mainlander on her port side, making a large hole in her, and causing her to sink in about twenty minutes from the time she was struck, and barely enabling the passengers and crew of the Mainlander to get aboard the Sea Lion. By reason of the said collision, the Mainlander, with her cargo, tackle, apparel, and furniture, became a total loss. That at the time of said collision the Sea Lion and the Celtic Monarch were out of the customary and usual course taken by vessels going from Tacoma outward bound. They were proceeding at a high and negligent rate of speed in the thick fog. They left Tacoma in a condition of weather making it negligent for a tug and tow of their character to attempt to get to sea. They were negligent in giving passing signals before the Mainlander and the tug and her tow, or either, were in sight of each other. They were negligent in using an improper and insufficient towline. They were negligent in not slowing down when the fog signals of the Mainlander were heard, and in not stopping or endeavoring to stop so that they could locate the Mainlander. They were also negligent in not attempting to make the tug go astern when it was found that they were approaching dangerously near to the Mainlander. They were negligent in not keeping a vigilant lookout for approaching vessels, and, when it was found that they were approaching the Mainlander, the tug and her tow were both so negligently and carelessly handled and steered that they caused said collision, although, if they had been properly handled, and if they had had a proper towline, they could have avoided said collision. The said collision was caused solely by the fault of the said tug and her tow, the Celtic Monarch, and without any fault or negligence on the part of the Mainlander, or any of her officers or crew."

The answer filed by the claimant of the Celtic Monarch admitted that at the time stated in the libel the Sea Lion took the ship Celtic Monarch in tow at or near Tacoma, when the master, officers, and crew of the Celtic Monarch were on board of her, but averred

that the claimant, as well as the master of its ship, was without knowledge as to whether or not the Sea Lion was seaworthy at the time when she took the Celtic Monarch in tow, and further averred that they had no means of acquiring knowledge in respect to the matter. It was further averred that the master and officers of the Celtic Monarch "never consented to the use of an improper towline by said tug at the time when the Celtic Monarch was taken in tow, nor at any other time or at all, but they at no time, nor did the Celtic Monarch at any time, through its master, officers, or owners, consent to being towed by the Sea Lion at a time when the Sea Lion was in an unseaworthy condition, and all allegations in that respect in said amended libel are here denied." The answer further expressly "denies that the towline by which the Sea Lion towed the Celtic Monarch was an insufficient and improper towline to be used in the condition of the weather prevailing at the time of said towing, and here avers that the towline in question was the property of and furnished by the said tug, the Sea Lion, and that, so far as the same could be observed by the master, officers, and crew of the Celtic Monarch, the same was in first-class order and condition, and duly shackled and attached to the Celtic Monarch." In its answer the claimant further expressly "denies that a fog prevailed at the time when the Celtic Monarch was taken in tow, and denies that the master of the Celtic Monarch had reason to know that the fog would probably become more dense as night approached, and denies that the master and officers of said Celtic Monarch had knowledge or had reason to know the condition of said fog at any time, or that it would become more dense at any time." The answer avers "that the scope of hawser between the tug Sea Lion and the tow Celtic Monarch was ample for all purposes, and not of such a length as to endanger their tow or it," and further avers that at the time in question the Celtic Monarch was fully laden with cargo, and that "it would have been impossible for said tug to be running at a high rate of speed when towing such a weight and burden as said ship and her cargo, and for that reason claimants are of the opinion, and here allege, that said tug could not have been running at a very high rate of speed at the time of said collision, and claimant denies that the towline was of such a length as to make it dangerous for the tug to stop, and that claimant is without information as to what was the opinion of the master of the tug in that regard." The answer further expressly "denies that said vessel was proceeding at a high and negligent rate of speed in a thick fog, although they admit that said fog became thick after their departure from Tacoma, as will hereinafter more particularly appear; but claimant denies that the Celtic Monarch left Tacoma in a condition of weather making it negligent for a tug and tow of the character of the Sea Lion and the Celtic Monarch to attempt to go to sea." The answer further expressly "denies that said Celtic Monarch, her officers and crew, were negligent in using an improper and insufficient towline, and denies that they used a towline of any kind, and here avers that the only towline used was that of the tug, and the same was furnished

by the tug, and, so far as the master and officers on board the Celtic Monarch could observe, the same was in proper and sufficient condition. This claimant and respondent here states that the Celtic Monarch kept a vigilant lookout for approaching vessels at all times when in tow of said tug, and that said vessel was handled and steered at all times with great care and caution when in tow of said tug, and properly handled in every way; but claimants here aver that the master, officers, and crew of said Celtic Monarch had no knowledge, nor had they any means of obtaining knowledge, as to any of the other circumstances and conditions set forth and alleged in said fourth article" of the amended libel. The answer further expressly "denies that the collision was caused by the fault of said tow or the Celtic Monarch in any manner or at all, and here avers that it was the speedy, accurate, and proper seamanship of the Celtic Monarch which enabled her to save herself and avoid the destruction of said tug and the lives of the passengers and crew of the steamer Mainlander and said tug at the time of and immediately after said collision." The answer of the claimant further alleges that the Celtic Monarch had never visited the port of Tacoma until the time in question, and her master had never before visited the waters of Puget Sound, and was entirely unfamiliar with them; that, when taken in tow at 1:30 p. m. on October 27th by the Sea Lion in Tacoma Harbor, her master relied solely upon the captain of the Sea Lion to act as his pilot, and relied solely upon the tug and her movements and navigation to safely tow her to sea; that the master, officers, and crew of the Celtic Monarch and her owners were without knowledge as to the seaworthiness and equipment of the Sea Lion, other than her general appearance as she approached the Celtic Monarch for the purpose of taking her in tow, and had no means of judging of her seaworthiness, nor the condition of her towing hawser or other equipment, except in so far as said hawser was passed on board and made fast to the Celtic Monarch, and that all parts of the hawser and of the towing gear furnished by the tug which could be seen by the master and officers of the Celtic Monarch appeared to be in first-class order and condition; that the same did not part nor cause mishap of any kind during the tow from Tacoma to the point of collision, nor did it part at the time of, nor was it instrumental in causing, said collision; that the entire length of the towing hawser, including wire-cable attachment, was, so far as those on board the Celtic Monarch could observe, about 164 fathoms in length from the stern of the tug to the stem of the Celtic Monarch (the hawser being about 180 fathoms in length, 10 fathoms being inboard on the Celtic Monarch, and about 5 or 6 fathoms inboard on the tug); that the jib boom of the Celtic Monarch was 30 feet long, leaving not less than 159 fathoms in the clear between the stern of the tug and the end of the tow's jib boom; that, under these conditions, and the weather being slightly foggy, and the Celtic Monarch relying solely upon the tug, it was taken in tow and continued on its course to sea until nearly opposite Robinson's Point, when the fog became so dense that those on board the vessel were unable to see the tug, but continued to

steer the tow by keeping her directly astern of and in the line of the towing hawser; that a lookout was at all times maintained on the forward part of the forecastle head of the Celtic Monarch, and, in addition to the lookout, her second officer was stationed upon the forecastle head as an additional lookout, and in order that he might be present to transmit orders to the master, and take any precautionary action that might be required in case of accident; that the first officer and crew were all on deck, preparing the vessel for sea; that her master was on the poop deck, astern and alongside of her quartermaster at the helm, directing the quartermaster as to steering the tow, so as to keep her directly astern of the tug, and the full length of the hawser distant from the tug; that the fog horn of the tow was constantly sounded down to and after the collision of the tug; that the tow proceeded as above stated until 5:50 p. m. on the same day, when the second mate reported from the forecastle head to the captain at the helm that the hawser had carried away, and to starboard the helm, which was instantly done, and, by the master of the vessel starboarding the helm quickly, he was enabled to direct the movement and momentum of the tow so that she cleared both the tug and the steamer Mainlander, thereby directing her course to port in such a manner and with great skill and seamanship, whereby the tow left the tug and the Mainlander about 20 feet on her starboard side, and continued outward towards the middle of the sound, drifting about in the fog until about 7:30 p. m., when she was again found by the tug, taken in tow, and brought to an anchorage at a point which her master was informed was in Salmon Bay; that the Celtic Monarch was in no manner implicated in or connected with the collision, which was solely between the tug and the steamer Mainlander, nor had the master, officers, or crew of the Celtic Monarch any knowledge of the facts and circumstances bringing about said collision at or prior to the happening thereof.

The affidavits filed by the claimant along with its answer were those of the masters of the tug and tow. That of the latter is to the effect that the Celtic Monarch was taken in tow by the tug at Tacoma at 1:30 p. m. on the 27th of October, 1904, when the weather was hazy, but not sufficiently foggy to prevent the tug and tow from plainly observing each other's movements; that the affiant and his said vessel were entirely under the control of the tug, the ship having no means of propulsion or control of any kind, except as she was moved by the towing hawser from the tug; that, according to the observation of the affiant, his ship was fully 160 fathoms astern of the tug, and was towed the entire distance from Tacoma to the point of collision at that distance astern; that when his ship arrived off Robinson's Point the fog had become so dense that the tug could not be seen, and remained in that condition until the collision, so that the affiant and those on board the tow had no knowledge as to the facts and circumstances under which the collision occurred; that the affiant could hear the signals which passed between the Mainlander and the tug shortly after the collision, but, aside from that, has no knowledge as to the collision; that the first knowledge that the affiant had of anything unusual was the calling to him by

the second mate, who was standing alongside the vessel's helm, which was being handled by a quartermaster under the direction of the affiant, of "hard astarboard," the vessel taking a course to port and clearing the tug and the Mainlander about 20 feet, they being left at that distance on the starboard side of the Celtic Monarch; that affiant afterwards learned that the call "hard astarboard" had come to the second mate of the vessel through the megaphone from the captain of the tug; that the affiant had no choice as to the time and manner in which his vessel should be taken in tow, all of those matters being entirely in the hands of the tug; that the towing gear was furnished by the tug, and fixed by the tug to the tow, at which time it appeared, with all its shackles and attachments, to be in good order and condition; and that there was no mishap in connection therewith during the towing, the same, and the appliances connected therewith, remaining in good order.

The affidavit of the master of the tug is the same in effect as that of the master of the tow in respect to the taking of the Celtic Monarch in tow, and as to the condition of the weather, and sets out that the Celtic Monarch had no pilot on board, and was navigated solely by the affiant, as master of the tug, with the exception that the ship simply held in position by her helm, so as to follow steadily as a tow following the tug; that the ship had no sail set, nor any means of propulsion other than the tug; that she was towed by a single hawser, the length of which from the stern of the tug to the stem of the tow was at least 160 fathoms, the towing hawser being 180 fathoms in length, and there being not over 10 fathoms inboard on the tow, and not over 5 or 6 fathoms inboard on the tug, and that the length of the hawser from the stern of the tug to the end of the jib boom on the tow was at least 155 fathoms; that the hawser consisted of a new 11-inch manila line, not over 60 days old, in perfect condition, and was safely shackled to the stern towing bitts of the tug, and attached to the tow by means of a 5-inch wire hawser, safely shackled to the manila line about 20 fathoms forward of the vessel's stem; that all the towing gear was strong and in first-class condition, and never parted at any time during the towing nor after the collision; that immediately after the collision, the tug herself being then actually making sternway, affiant ran to the stern of the tug and called through the megaphone to the lookout and master of the tow to put the helm of the tow hard astarboard, and at the same time the affiant immediately cast off the tow hawser from the stern of the tug, which could be done instantly, it being only necessary to pull out of the shackle the pin which held the manila line to the towing bitts; that the tow, with her helm so hard astarboard, and under the momentum caused by the towing, then directed a course to port in such a manner, and with great skill and seamanship, whereby the tow cleared both the tug and the Mainlander, passing over to port of both vessels, leaving them on her starboard side at a distance of about 20 feet at the time when the tow so succeeded in clearing them; that thereafter the affiant, with the tug, immediately saved the lives of all on board the Mainlander, which steamer sank in from 20 to 30 minutes; that, before

the Mainlander sunk, the affiant and his tug tried to save that ship by forcing her onto the beach, but was unable to do so, and thereafter affiant went to find his tow in the fog, and found her about 7:15 p. m. of the same evening, and brought her to anchor about one mile north by east of West Point.

The court below held the case to be such an one as its local rule 35 contemplates, and that it could be "finally disposed of in this summary proceeding, resembling a motion for judgment on the pleadings in an action at law." And in doing so the court further held that "the affirmative matter in the answer must be considered as true, so far as the same is not in conflict with the allegations of the amended libel." But admiralty rule 51, prescribed by the Supreme Court, requires such new facts to be considered as denied by the libelant. That rule is as follows:

"When the defendant in his answer alleges new facts, these shall be considered as denied by the libelant, and no replication, general or special, shall be allowed. But within such time after the answer is filed as shall be fixed by the District Court, either by general rule or by special order, the libelant may amend his libel so as to confess and avoid or explain or add to the new matter set forth in the answer; and within such time as may be fixed in like manner, the defendant shall answer such amendments."

In the event the libelant does not elect to confess and avoid or explain or add to such new matter, but to stand upon the issues raised by the provisions of rule 51, the burden of proof of such matter rests, as a matter of course, upon the party alleging it, and there can be no assumption of its truth without proof.

We can see no possible justification of the decree appealed from, unless it can be held that the amended libel contains no cause of action against the ship Celtic Monarch. But we are further of opinion that it cannot be properly so held, for the reason that the amended libel in effect alleges that the loss of the Mainlander was the result of concurrent negligent acts of the tug and tow, among which are the alleged failure of the Celtic Monarch to maintain a proper lookout, its alleged consent to be towed by an unseaworthy tug with an alleged improper and insufficient towline, and at an alleged excessive and negligent speed, under the conditions existing at the time, in respect to all of which allegations of the amended libel the claimant of the Celtic Monarch took issue by express denials set up in its answer. Upon those issues the libelant was clearly entitled to give evidence, and it is manifest that the merits of the cause could not properly be disposed of in advance of the determination of those issues.

The judgment appealed from is reversed, and the cause remanded to the court below for further proceedings not inconsistent with this opinion.

## MASTERS v. SEELEY.

(Circuit Court of Appeals, Fourth Circuit. May 9, 1905.)

No. 550.

MASTER AND SERVANT—ACTION FOR SERVICES—EVIDENCE—WITNESSES—IMPEACHMENT.

Where, in an action for salary, plaintiff's claim that, after he received an increase in salary, defendant was also to pay his actual and necessary living expenses, as theretofore, which defendant denied, rested mainly on his own testimony, defendant was entitled to show on cross-examination of plaintiff as a witness that he had previously recovered a default judgment against defendant on the same claim, which had been set aside for fraud and collusion, for the purpose of impeaching him as a witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1133, 1134.]

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

M. M. Caldwell and John C. Blair, for plaintiff in error.

J. F. Bullitt (A. A. Campbell, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

PRITCHARD, Circuit Judge. On the 24th of March, 1898, George M. Seeley, the defendant in error, instituted an action at law for $12,069.67 against the New River Mineral Company, the plaintiff in error, in the Circuit Court of the United States at Abingdon, Va., for salary alleged to be due him as the manager and agent of the plaintiff in error at Ivanhoe, Va., at which place the company was engaged in the business of manufacturing iron. The plaintiff in error was incorporated under the laws of New York, and had its principal office in that state. A judgment by default was entered for the defendant in error, and on appeal to the Circuit Court of Appeals was reversed and set aside on the ground that the same was obtained by fraud and collusion. See New River Mineral Co. v. Seeley, 120 Fed. 193, 56 C. C. A. 505. On the 26th of December, 1898, the defendant in error, George M. Seeley, instituted the present action against the plaintiff in error in the circuit court of Wythe county, Va., for salary alleged to be due him as manager and agent for the New River Mineral Company in the sum of $56,000, which sum embraced the claim for salary alleged to be due, as well as items included in the original action between the New River Mineral Company and George M. Seeley. 120 Fed. 193, 56 C. C. A. 505. On petition the case was removed from the circuit court of Wythe county to the Circuit Court of the United States at Abingdon, Va. On October 20, 1903, the case was tried, and resulted in a verdict and judgment in favor of the defendant in error for the sum of $16,466.83.

When the company first employed defendant in error, it agreed to pay him the sum of $100 per month, and also his housekeeping expense account. This agreement continued until July 1, 1895,

when the salary of defendant in error was increased to $5,000 per annum. It is contended by defendant in error that under the new contract it was understood that the housekeeping expense should be paid by the company, as it had done under the former agreement. On the contrary, it is contended by plaintiff in error that, in view of the large increase in the salary of defendant in error, he was only to receive $5,000 in full for all services and expenses.

During the progress of the trial below, plaintiff in error propounded to defendant in error the following question (defendant in error then being upon the stand as a witness in his own behalf):

"Is it not a fact that in March, 1898, you instituted a suit in this court based upon the account referred to, and that in that suit you obtained a judgment by default, which was afterwards set aside by the Circuit Court of Appeals of the United States for the Fourth Circuit on the ground of fraud and collusion?"

The court sustained the objection of the defendant in error to this question, and to this ruling of the court plaintiff in error excepted, and filed an assignment of error.

The foregoing statement of facts is deemed sufficient for a proper understanding and disposition of the case.

The defendant in error, among other things, had testified that when his salary was increased to $5,000 per annum the plaintiff in error agreed that in addition thereto it would pay his actual and necessary living expenses. On the other hand, the plaintiff in error admitted that the company, through its governing body, had agreed to pay the sum of $5,000 per annum as a salary, but insisted that there was no agreement to pay the necessary living expenses of the defendant in error. Thus it will be seen that there was a sharp and well-defined controversy between the parties as to the validity of defendant in error's claim for actual and necessary living expenses. The jury was called upon to determine as to whether defendant in error's contention in that respect was true. Inasmuch as defendant in error on that point relied almost exclusively on his own testimony, it was important that the jury should have been afforded an opportunity to consider any evidence which tended to weaken or strengthen his testimony. Their verdict in regard to the particular item in controversy necessarily depended in a large measure upon the weight which they attached to the testimony of the defendant in error. In the first place, the question was competent because it had a tendency to impeach the character of the witness. It was not only competent for this purpose, but it was also relevant to the issue being tried, in that it related to the particular transaction out of which the controversy between the parties arose. Any evidence which would explain the conduct of the defendant in error at the time the contract was entered into, or any evidence which tended to show that he at any time subsequent thereto had dealt unfairly with the plaintiff in error in regard to the subject-matter of the controversy, was relevant, and should have been submitted to the jury as evidence to be considered by it in determining the weight it should give to the testimony of defendant in error in regard to the transaction about which he was testifying,

and as bearing upon the justice and bona fides of his claim. It is contended by defendant in error that at most the failure of the court to admit the testimony in question was harmless error. There are many instances in the trial of causes wherein such contention would be well founded, but in this case it is without foundation. The failure of the court to allow the question proposed by the plaintiff in error may have determined the matter in controversy in favor of the defendant in error. In other words, inasmuch as the defendant in error to sustain his contention relied mainly on his own testimony, any evidence which would have explained his conduct in relation to the transaction between the parties was material to the issue then being considered; and the refusal of the court to permit the jury to have the benefit of such evidence in their deliberation was not harmless error, but was of such a character as to materially affect the verdict which the jury was called upon to render. If this had been a case wherein the defendant in error had proved his case on the particular point in question by clear and convincing evidence, by witnesses other than himself, and the court, in its discretion, had refused to permit the question, under such circumstances it would in all probability have been harmless error.

For the reasons stated, the judgment of the Circuit Court is reversed, with directions that a trial de novo be had.

Reversed.

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ROSENTHAL et al. v. McGRAW et al.

(Circuit Court of Appeals, Fourth Circuit. May 10, 1905.)

No. 514.

1. RECEIVERS—INCIDENTAL SERVICES RENDERED THIRD PARTY—RIGHT TO COMPENSATION.

Certain partnerships owning and operating oil properties sold an interest therein under an agreement that the purchaser should receive his proportion of the earnings of the properties, without any charge for their services in operating the same. Subsequently the firms became insolvent, and a receiver was appointed, who continued to operate the properties. *Held*, that he was not entitled to compensation for the incidental services rendered to the purchaser of the part interest, nor was the insolvent estate entitled to charge therefor, but was required to divide the earnings of the property in accordance with the contract.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 160–165.]

2. SAME—LIABILITY FOR INTEREST.

It was the duty of the receiver to pay over to the owner of the part interest his share of the earnings as made, and his failure to do so rendered him liable for interest on the sums withheld by him from the time of their receipt until he paid the same into court, and asked for directions as to their distribution.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1193, 1198.]

3. EVIDENCE—HEARSAY—TESTIMONY AS TO CHARGES IN BOOKS OF ACCOUNT.

The testimony of a witness as to an indebtedness, based upon his examination of charges made in books of account which were not made by him, and are in no manner authenticated, is hearsay and inadmissible.

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

Julius J. Frank, for appellants.
B. M. Ambler (Melville D. Post, on the brief), for appellees.

Before PRITCHARD, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

PRITCHARD, Circuit Judge. This is an appeal from the decree of the Circuit Court of the District of West Virginia making certain allowances to the receiver. On and prior to November 1, 1895, the firms or copartnerships of Bettman, Watson & Bernheimer and Bettman & Watson were the owners of certain oil properties in the states of Indiana and Ohio. Thereafter they sold an undivided one-fourth interest in certain designated leases of these properties to the appellants, and continued to operate the same for the joint benefit of themselves and the appellants under an agreement to do so without salaries or compensation; the appellants to be charged only for their proportionate share of expenses and outlay. In March, 1898, this copartnership made a general assignment for the benefit of creditors in the state of New York. In May, 1898, a suit in equity was instituted in the Circuit Court of the District of West Virginia against Bettman, Watson & Bernheimer and Bettman & Watson, charging that such copartnership was insolvent; and John T. McGraw was appointed a receiver in such proceeding, by an order made July 19, 1898, and entered into possession of the properties of the insolvents, as well as that of the appellants, including oil properties, machinery, tools, etc., and continued to operate the same, selling and collecting the proceeds of the product. The property was operated by the receiver until December, 1900, at which time the appellants filed a petition in which they requested the court to make an order directing the receiver to turn over to them all property and money of every description then in his possession. In response to such petition, the court made an order requiring the receiver to pay to petitioners the sum of $12,000, to be charged to their account. Subsequent thereto appellants filed another petition, in which they alleged that the receiver was indebted to them in the sum of $11,457.37, with interest thereon from the 1st day of January, 1900. They also asked the court to require the receiver to account to them for all money and property in his possession.

A decree was entered referring the petition of the appellants to a master; requiring him, among other things, to report what money he had received "from the Rosenthal estate, involved with the property of Bettman, Watson & Bernheimer and Bettman & Watson; what proportion, if any, of the costs, expenses, and charges of the receivership should be chargeable to the Rosenthal estate; to make settlement of all matters in dispute between Bettman & Watson and Bettman, Watson & Bernheimer and the said Rosenthals; what compensation, if any, should be allowed the receiver, and those acting for and under him, in the handling, operating, and administering the Rosenthal estate in connection with the receivership of the

estates of Bettman and Watson and Bettman, Watson & Bernheimer." The special master, in his report, stated the account between the parties on the basis of monthly statements, commencing January, 1900. He charged the appellants with 5 per cent. of the gross receipts as compensation for the receiver's services, and with the further sum of $2,999.29 as due from them to the insolvents before the date of their assignment. He also refused to allow interest to the appellants on the sums in the receiver's hands. No services were rendered by the receiver to the appellants, except his operation of the property of the insolvents.

Max Drey, who is a creditor to the extent of $223,000, out of a total indebtedness of $265,000 of the estate of the insolvents, through his counsel, moved to dismiss this appeal on the ground that the court did not have jurisdiction. This motion was refused.

The master found that the receiver was entitled to 5 per cent. of the gross earnings of the property belonging to the appellants. The court did not make the allowance as found by the master, but, in lieu thereof, signed a decree which required 5 per cent. of the gross earnings of the property of the appellants to be paid into the general fund, and increased the receiver's compensation to an amount equal to that sum.

It is admitted that, by the original contract by which the appellants acquired their interest in the property, the insolvents agreed to contribute their services in the operation and sale of the products of the properties without salaries or compensation of any kind. The receiver, with knowledge of this fact, took charge of the properties belonging to the insolvents, and operated the same without calling the attention of the court to the fact that such an agreement was in existence. If the property of the insolvents had remained in their hands under the original agreement by which the appellants became the owners of the shares which they held, they would not have been entitled to any compensation whatever for any services rendered in operating and marketing the products of such properties. This part of the agreement between the insolvents and the appellants was a valuable consideration, and was no doubt one of the inducements which caused the appellants to purchase the property in the first instance. Under these circumstances, the receiver was not entitled to compensation for incidental services rendered in operating the property of appellants, and such charge on account of compensation to the receiver should not be made in the shape of general costs of administration, any more than to the receiver direct; and in this respect the decree is clearly erroneous.

We think that it was the duty of the receiver to turn over to the appellants the sums of money which he received from time to time as the proceeds of the sale of their property, and his failure to do so rendered him liable for interest on the sums thus retained from the time he received them until the same was paid into the registry of the court.

In Manhattan Cloak & Suit Co. v. Dodge, 21 N. E. 344, 6 L. R. A. 370, Elliott, C. J., of the Supreme Court of Indiana, who de-

livered the opinion of the court, in charging an assignee with interest, in favor of creditors, says:

"He was bound to exercise diligence to secure a statement of the amount of the claims presented to the court, and ask an order declaring a dividend. A trustee has no right to keep money from the beneficiaries, when by reasonable diligence he can secure an order for their benefit. He had no right to withhold all the money until his final report was filed, for dividends may be declared when the amount can be ascertained, although without absolute accuracy, as the court may approximate the exact amount. Doubtless the assignee may show an excuse, where one exists, for failing to secure an order declaring a dividend, but no such excuse is here shown."

In Schwartz v. Keystone Oil Co., 153 Pa. 283, 25 Atl. 1018, it was held that it was the duty of the receiver to advise the court as to funds in his hands, and ask for directions as to their distribution. At page 288 of 153 Pa., page 1019 of 25 Atl., the court said:

"If delay in distribution was unavoidable, then the receiver should have paid the money raised into court, or invested it at interest, under the order of the court, for the benefit of those to whom it should be awarded. * * * If he found himself with such a sum on hand as, if it had been his own, he would have invested it, it was his duty to ask leave of the court to invest it, and try in good faith to keep it invested, for the benefit of the owners. When the assets were turned into money, it was his duty to make out his account, and submit the fund to the discretion of the court."

Beach on Receivers (2d Ed.) § 757, p. 817, states the rule as follows:

"The receiver is personally liable for interest in two classes of cases: (a) When he has funds in his hands on which he could by proper management have collected interest: (b) when he is charged with interest as a penalty for neglect or misconduct."

In view of these authorities, it is clear that the receiver is liable for interest on two grounds: First, he had funds in his hands which he refused to pay the appellants, and on which he could, by proper management, have collected interest; he is also liable for interest as a penalty for failing to pay over the sums which came into his hands.

The appellants also contend that the court erred in affirming that portion of the master's report in which he finds from the testimony of the witness Watson that the appellants were indebted to the insolvent firms prior to their assignment. Watson testified that the only examination which he made of the books pertained to the Ohio and Indiana leases. He stated that none of the entries in the books were in his handwriting, and that he did not superintend the making of the same. He also stated that he did not compare any of the entries in these books with any of the original entries of record. Before these books could have been introduced as competent evidence, it was incumbent on the party offering them to show by competent proof that they correctly represented the items involved in the transaction which was then being considered. It was not shown that the party who made the entries was beyond the jurisdiction of the court. Neither was it shown that, by reason of insanity or other inability, he was not able to be present and testify as to the entries contained therein. And it does not appear that

the witness made a thorough examination, or that he was in a position to testify from his own knowledge of the truthfulness of any of the statements which he made. His testimony was hearsay, and should not have been admitted in the first instance. Chaffee v. United States, 18 Wall. 516, 21 L. Ed. 908; Nicholls v. Webb, 8 Wheat. 326, 5 L. Ed. 628. The witness, among other things, stated, "I found the account virtually correct as set forth in the books, as near as I am able to judge." In other words, he knew nothing about the entries in the books of his own knowledge, and based his statements upon the ground that he found several entries in these books, but did not undertake to say that they were genuine, or that he had any knowledge as to when or why they were entered. If it were competent to introduce this kind of evidence, all that would be necessary for one to do, in order to prove the contents of a book containing accounts, would be to have some one who knew nothing about the books, or the manner in which they were kept, testify that he had examined the same, and that on such examination he found certain facts to exist. This testimony was incompetent, and should have been excluded by the master. The rule in regard to the introduction of record evidence is plain and explicit. It has been universally held that, in order to render record evidence competent, it must be shown that the party who made the entry is beyond the jurisdiction of the court, or is, on account of death, insanity, or other disability, unable to appear in person and testify. In this case there was no foundation laid upon which to base the introduction of evidence.

We are of opinion that the Circuit Court erred in affirming that portion of the master's report which found that the appellants were indebted to the firm of Bettman, Watson & Bernheimer in the sums involved in this finding.

For the reasons stated, we are of opinion that the Circuit Court was in error. The cause is therefore remanded, with the direction that the decree be reformed in accordance with the views herein expressed.

Decree modified.

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## SOUTHERN RY. CO. v. LOGAN.

(Circuit Court of Appeals, Fourth Circuit. May 9, 1905.)

No. 583.

MASTER AND SERVANT—INJURY OF SERVANT—ASSUMED RISK.

Plaintiff, who was employed as a conductor in the switchyards of defendant railroad company, in taking a dining car to a Y at a junction about a mile from the yards, in the nighttime, for the purpose of turning the same, placed the engine behind; leaving no light in front of the car, except a lantern, which he held in his hand while standing on the front platform. Other engines and trains were frequently on the tracks at the junction, and it happened on this occasion that an engine which had left its train on the Y was backing up to a coal chute, and a collision occurred between the tender and the dining car, in which plaintiff was injured. *Held*, that it was error to instruct the jury that plaintiff could recover, although the placing of the engine behind the car, instead of in

front, was more dangerous, if they found that he did so by direction of the yard master, who was his superior, since, even in such case, being familiar with the additional risk involved, he assumed the same, and could not charge defendant with liability for its result.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 561, 562, 648–650.

Assumption of risks incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

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

C. P. Sanders, for plaintiff in error.
Jos. A. McCullough, for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

PRITCHARD, Circuit Judge. The defendant in error, who was a yard conductor in the service of the plaintiff in error at Spartanburg, S. C., brings this action to recover the sum of $20,000 for damages received by him while in charge of a "diner" which had been left at Spartanburg for the purpose of being turned, in order that it might be ready for the train which was due to pass Spartanburg at 7 o'clock each morning. In order to turn this car, it was necessary to take it to the yard of the plaintiff in error, which was situated at the junction of the Asheville & Spartanburg Railroad with the main line running from Charlotte to Atlanta. The Y was a little over one mile from Spartanburg. The defendant in error was charged with the duty of turning the diner, and, in doing so, used a switch engine which was furnished him for that purpose. This engine was provided with a headlight at each end, which was put there to enable the engineer to see obstacles on the track in time to prevent a collision. The defendant in error had complete control over the movements of the engine and dining car between Spartanburg and the Y. In going from Spartanburg to the junction Y, it was necessary that the operator at Spartanburg should notify the operator in the office of the plaintiff in error at the junction yard to hold the engines and trains at that point until the engine and cars leaving Spartanburg should arrive. This office is situated at the northern end of the junction (the end nearest Spartanburg), while the Y was at the southern end of the junction yard (the end nearer Greenville). On the night in question the operator at Spartanburg notified the operator at the junction yard to hold the engines and cars until the defendant in error in charge of the diner should arrive at that point. On arriving at the office, the defendant in error, as conductor in charge, failed to report before proceeding beyond that point. After leaving this point, the defendant in error, while in charge of the diner and engine, signaled the engineer to go at a greater rate of speed. This signal was repeated twice. The engine had been placed in the rear of the car, and the defendant in error was standing on the platform in front of the diner, with no light except his hand lantern. On the night in ques-

tion an engine of the plaintiff in error, which had left its cars at the Y, was on the main line, and was running back towards the coal chute, and while running in this manner the engineer suddenly became aware of the approach of the dining car. He at once reversed his engine, but before he could start in the opposite direction the dining car struck the tender, which resulted in the injury to the defendant in error.

It is contended by the plaintiff in error that the court erred in using the following language in its instruction to the jury:

"* * * But under that testimony, if you believe that the yard master instructed him to move the engine in that way, the car being in front, although you might conclude that that was not the safest way to do it—it was clear that it was not the safest way—yet, if the yard master instructed him to use it that way, then no negligence can be imputed to him for using the engine in that manner; the yard master being superior in authority to the conductor. * * *"

There was evidence which tended to show that the defendant in error, in pushing the car in front of the engine, did so under the orders of the yard master. It was also in evidence that the movements of the car and engine were directly under his control and he had the right, if he chose to do so, to put the engine in front of the car, instead of pushing it. It does not appear that coercion was used by the yard master. Even if the yard master had directed the conductor to put the engine behind the car, and if such direction amounted to coercion, if at that time the defendant in error was aware of the risk which he assumed, he would be guilty of contributory negligence, and would assume any risk incident to carrying the car to and from the different points on the yard.

In the case of Reed v. Stockmeyer, 74 Fed. 194, 20 C. C. A. 388, among other things, it is said:

"It is urged that Stockmeyer, in obeying the orders of Drehoble, acted under compulsion, and should not be, therefore, held to have assumed the risks of the work he was directed to perform. It is conceded that he made no objection to the order; that he did not protest any incapacity to comprehend the risk; but that he was coerced into compliance with the order through fear of discharge in case of disobedience. That, however, does not charge liability upon the master. In the absence of restrictive contract provisions, the master is at liberty to discharge the servant at any time. So, likewise, is the servant at liberty to abandon his service at will. The master has the right to demand other service than that for which the servant has engaged. The latter may accept or decline at will. Declining, he may lose employment. Accepting, he assumes the risks attending the service, if he knows or has been properly warned of them. The servant is not under guardianship. He is a free man, at liberty to make such contracts as he will. That through stress of circumstances he consents to the orders of the master, rather than be discharged from employment, does not impose liability upon the master because of such demand, if he has otherwise performed the duty which the law imposes upon him with respect to the servant. Leary v. R. Co., 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733; Dougherty v. Steel Co., 88 Wis. 343, 350, 60 N. W. 274."

While it appears from the evidence that it was the custom to push the car, it is conceded that it would have been much safer to have placed the engine in front, where the engineer could have had the benefit of the headlight; and the testimony shows that, if the engine had been in front, the headlight would have enabled him

to have discovered the approaching engine in time to have avoided the accident.

In this case there were two ways by which the defendant in error could have performed the services which were required of him. One of these was less hazardous than the other, but he chose to adopt the one which involved the greater risk, and in doing so he assumed all risks incident thereto. He was a man of mature years, and had been in the employment of the company for some time, and was thoroughly familiar with all the dangers with which he was surrounded while engaged in carrying the diner from the various points on the yard in the nighttime. He knew that after he passed the junction office the car was on a track which was frequently used by other engines and cars, and the manner in which he carried the diner over this particular portion of the track, with nothing but a lantern to indicate his approach, was attended with great hazard. Notwithstanding such knowledge on his part, he failed to report his arrival at the junction yard; and, after passing that point, instead of keeping his car under control, he signaled the engineer for a greater rate of speed, and although the engineer responded, and increased the rate at which they were going, he again signaled for more speed, and, as a result of such negligent conduct on his part, the car was moving so rapidly that it was a physical impossibility for the engineers to stop their engines in time to prevent the collision which occurred.

It has been repeatedly held that when one assumes employment at railroad yards, where there are many side tracks, and where trains and engines are constantly passing, he assumes the risk incident to the employment in which he is engaged. In the case of Randall v. B. & O. R. Co., 109 U. S. 482, 3 Sup. Ct. 325, 27 L. Ed. 1003, it is said:

"A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another; and any one who enters the service of a railroad corporation, connected with the moving of trains, assumes the risk of that condition of things."

In the case of Tuttle v. Milwaukee Railway, 122 U. S. 194, 195, 7 Sup. Ct. 1168, 30 L. Ed. 1114, it is also said:

"It is for those who enter into such employments to exercise all that care and caution which the perils of the business in each case demand. The perils in the present case, arising from the sharpness of the curve, were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employés have reason to suppose is in proper working condition. Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed."

Judge Cooley states the rule as follows:

"The rule is now well settled that, in general, when a servant, in the execution of his master's business, receives an injury which befalls him from one of the risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself. The reason most generally assigned for this rule is that the servant, when he engages in the employment, does so in view of all the incidental hazards, and that he and his employer, when making their negotiations, fixing the terms and agreeing upon the compensa-

tion that shall be paid to him, must have contemplated these as having an important bearing upon their stipulations. As the servant then knows that he will be exposed to the incidental risk, 'he must be supposed to have contracted that, as between himself and the master, he would run this risk.'"

In view of the law and evidence in this case, the instruction of the Circuit Court to the jury to the effect that, inasmuch as the yardmaster had directed the conductor to push the diner with the engine, no negligence could be imputed to him, was erroneous. The court should have told the jury that, even though the defendant in error was moving the diner under the directions of the yard master, if they found that at the time he had knowledge of the risks that were incident to his employment, and that he assumed the same, they should find in favor of the plaintiff in error, or, if they should find that there were two means by which he could have moved the car, and that he adopted the one which involved the greater risk, that the defendant in error would not be entitled to recover.

For the reason stated, the judgment of the Circuit Court is reversed, and the case is remanded for a trial de novo in accordance with the opinion of the court.

Reversed.

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## LAFFERTY MFG. CO. et al. v. ACME RY. SIGNAL & MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

No. 1,127.

PATENTS—INVENTION—RAILWAY TORPEDOES.

The Bevington patent, No. 474,718, for a railway torpedo, is for a combination of elements all of which were old, and differs from prior structures only in the substitution of paper for tin or other metal as material for the dome-shaped cap, which does not constitute patentable invention, the only advantage shown being in the lessening of the cost.

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

The bill is to restrain infringement of letters patent No. 474,718, issued May 10, 1892, to J. H. Bevington, for improvement in torpedoes. The torpedoes meant are the detonating class used on metal rails as signals that there is danger ahead. The decree of the Circuit Court held the patent to be good and valid; appellee to be the sole and exclusive owner thereof; and that defendant had infringed claims one to five, inclusive; enjoining the defendants from further infringement, and ordering an accounting. The claims held to be infringed are as follows:

"1. A torpedo embodying in its construction, and in combination, substantially as hereinbefore described, a base or bottom part and a cover or top part of paper or other analogous material secured to each other to form a hollow shell, and a composition, explosible by concussion, contained in said case of shell."

"2. A torpedo embodying in its construction, and in combination, substantially as hereinbefore described, a base or bottom part of metal and a cover or top part of paper secured to each other to form a hollow case or shell, and a composition contained in said shell, which is explosible by concussion."

"3. A torpedo embodying in its construction and in combination, substantially as hereinbefore described, a metallic base or bottom and a waterproofed

paper cover or top part secured to each other to form a containing-case for the explosive composition."

"4. A torpedo embodying in its construction, and in combination, substantially as hereinbefore described, a metallic base or bottom part, a water-proof cover or top part, and a lining or upper surface of water-proof paper, such as E, for the base part, all secured to each other to form a containing-case for the explosive composition.

"5. A torpedo embodying in its construction, and in combination, substantially as hereinbefore described, a metallic base or bottom part and a paper cover or top part secured to each other by an annular flange on the outer rim of said base part, which flange is turned over and onto the rim of the paper part to form a case or shell, and a composition explosible by concussion contained in said case or shell."

From this decree the appeal is prosecuted. Other patents cited are as follows:

No. 167,532, Sept. 7, 1875, F. Hickman.
No. 170,067, Nov. 16, 1875, H. J. Detwiller.
No. 257,761, May 9, 1882, J. H. Ridgway.
No. 279,992, June 26, 1883, A. R. Tiffany.
No. 375,254, Dec. 20, 1887, J. H. Bevington.
No. 441,830, Dec. 2, 1890, W. A. Dunlap.
No. 676,327, June 11, 1901, E. S. Lafferty.
British patent, No. 1,064, Mch. 21, 1873, to William E. Newlan.
The further facts are stated in the opinion.

Thomas F. Sheridan, for appellants.
De Witt C. Tanner, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts). Bevington's device is a shell or case having a base part of metal, circular in form, over which is laid, almost, but not quite, to its circumferential edge or rim, paper or some analogous fabric, light, soft and flexible. Over this is placed a dome of paper, preferably water proofed, whose edges join the edge of the paper lying over the metal base, the whole being secured together, after the explosive is inserted, by means of an annular flange formed of the outer rim of the metal base turned over upon the outer edge or rim of the paper constituting the cover and the base layer. The torpedo thus formed is held to the rail by a metal strap, the ends of which reach around the edges of the rail.

Railroad torpedoes of this general description admittedly are old. Of the elements of Bevington's torpedo, the holding strap, the explosive compound, the metal base, and the paper lying over the metal base, are old. [Heckman and Detwiler patents]. The dome shaped cap is old. Clamping flanges are old. [Detwiler]. The new thing done by Bevington in the matter of the cap, was to substitute paper for tin or other metal. So that, whatever merit Bevington's patent has, is to be found in his substitution of paper for tin or other metal, as material for the dome shaped cap.

A mere substitution of one material for another, does not constitute invention. Florsheim v. Schilling, 137 U. S. 64, 11 Sup. Ct. 20, 34 L. Ed. 574; Gardner v. Herz, 118 U. S. 180, 6 Sup. Ct. 1027, 30 L. Ed. 158; Celluloid Mfg. Co. v. Tower (C. C.) 26 Fed. 451. The mere fact that the cost of the article to the public is thereby

cheapened does not give to the substitution of one material for another the quality of patentable invention.

Two claims are made, however, to take the substitution of one material for another here shown out of the general rule. The first is, that danger in the manufacture and use of the torpedo is thereby lessened; and the second, that the use of the paper cap, by putting paper against paper in the crimping process that makes the joint, results in the making of a better joint.

The first of these claims is the one insisted upon most strongly by counsel for appellee. But to our minds, it is a claim not proven. We are unable to see, in the absence of proof of actual injury, that the one form of torpedo is more dangerous than the other. In the use of each, danger seems to be at a minimum. And the proof of actual injury offered is wholly inconclusive and unsatisfactory.

The second claim is the one that seems to have determined the judgment of the Circuit Court. It does not appear to have been, consciously, in the mind of the inventor, for no advantage in that respect is pointed out in the letters patent. The truth is, that as an element of better joinery, the feature of paper against paper does not, to any considerable extent, seem to have been carried out in the Bevington patent. In that patent, in the crimping for a joint, the paper is not turned up. The contact of paper against paper is only over a little horizontal portion not affected by the crimping. It was not until appellants' torpedo came into the market that the paper itself was turned up in the crimping process, so as to bring paper against paper throughout the joint made. We do not feel at liberty, under the case here disclosed, to hold, that a joint that thus finally and adequately utilizes the advantage of crimping paper on paper, is anticipated by a previous joint in which the contact was but partial and inadequate, and, so far as we can see, without any conscious design.

The decree of the Circuit Court will be Reversed, and the cause remanded with instructions to the Circuit Court to dismiss the bill for want of equity.

## ELECTRIC BOOT & SHOE FINISHING CO. v. LITTLE et al.

(Circuit Court of Appeals, First Circuit. June 13, 1905.)

No. 568.

PATENTS—NOVELTY—PROCESS OF FINISHING BOOT AND SHOE SOLES.

The Crooker process, reissued patent No. 11,144, claim 1, for a process of polishing and finishing sole and heel edges and other parts of boots and shoes, is void for lack of patentable novelty in view of the prior art.

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

For opinion below, see 75 Fed. 276.

Benjamin Phillips and Elmer P. Howe, for appellant.

Oliver R. Mitchell, for appellees.

Before PUTNAM and LOWELL, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. Claim 1 of letters patent No. 11,144, to William W. Crooker, dated February 10, 1891, is:

"(1) The improvement in the art of polishing and finishing sole and heel edges and other parts of boots or shoes, which consists in dyeing said parts or surfaces black and treating the said surfaces with wax or other resinous or waterproof compound, and polishing the same by contact with a rapidly moving yielding surface, substantially as described."

The complainant contends that this claim is for a novel and patentable process.

To color the surface of a material, and then to wax it and polish it by hand with a cloth or soft pad, is a proceeding so common that it requires satisfactory evidence to show that it was novel or involved invention to apply it to the finishing of boots and shoes. The complainant's argument is skillfully framed, and is based upon evidence produced for the purpose of showing the practical value of complainant's mode of finishing, and the previous attempts and failures of persons skilled in the art to attain a result as satisfactory as that of the complainant.

It is said that, in the prior art, the leather was colored by sediment stains which were not a true black; that to prepare the leather to receive such stains its fiber was raised by buffing; that when the stain had been applied it acted upon the leather partly as a true dye and partly by depositing insoluble particles on the raised fiber of the leather; that, in order to incorporate the sediment or insoluble parts of the stain with the leather and to bring out the final color, it was necessary to burnish the leather with a hard tool before the surface was ready for the wax polish; that in factories the burnishing step required expensive machinery, and had to be performed while the leather was in "temper," or in a suitably moist condition; that the use of a true dye prepared the leather for immediate polishing, and rendered unnecessary the usual step of burnishing, with its attendant inconvenience and expense for machinery.

The complainant contends, also, that the use of a dye obviated the necessity for preparing the leather by buffing, or raising its surface, and that this was a substantial advance in the art. This feature is not referred to in the specification, and we can attach little importance to it, in view of the patentee's testimony. He was asked, "As ordinarily practiced in the use of your process, is the preliminary buffing or sandpapering omitted?" and replied, "It is not."

Was it novel, and did it constitute invention, to dispense with the operation of burnishing?

A final polish secured by applying wax and rubbing it with cloths, pads, or brushes seems to have been as common a feature in the finishing of boots and shoes as in the polishing of floors or furniture. Novelty must be sought, therefore, in the mode of preparing the surface for polishing. The argument comes, in substance, to this: Crooker prepared his surface with an insoluble black dye, while in the prior art the surface was prepared by staining and burnishing. Crooker, however, was not the first to omit burnishing in preparing the surface of leather to receive a wax polish. The evidence shows clearly that leather had been treated with colored stains or dyes and immediately given a wax polish without resort to burnishing to incorporate the color with the leather, or to bring out the final color.

Assuming that dyed leather is as well prepared to receive a wax polish as leather stained and also burnished, it is still true that leather was commonly prepared for polishing by the use of stains or colored dyes, without burnishing. Mr. Folsom testifies that he used black coloring matter made of alcohol, water, logwood, and tincture of iron, and immediately finished the leather with a wax polish for the purpose of avoiding the expense of burnishing. We think the evidence such as to preclude a finding that Crooker was the first to suitably prepare the surface for polishing without resort to burnishing.

The complainant concedes that, in the use of sediment stains, the final color was produced partly by a dyeing action and partly by fixing insoluble particles to the fiber and rubbing them in with an iron. When the burnishing was omitted, however, as was the case, not only with the black stain described by Mr. Folsom, but with various colored stains and dyes, the process was substantially that of the patent in suit, so far as the avoidance of the expense of burnishing is concerned. It is, of course, impossible to avoid anticipation by limiting the claim to an aniline dye, or by saying that a blue-black dye is not a black dye. The black stain of Folsom was used by him simply as a black dye. The various other stains which were not burnished were used simply as dyes, and, although the color might have been different from or inferior to the complainant's, we find no patentable novelty in the mere substitution of a superior dye in a well-known process of finishing shoes without burnishing.

We are of the opinion that, in view of the prior art, there was no patentable novelty in what is claimed. The evidence as to commercial use and as to the importance of the Crooker process does not aid the patent. It clearly appears that what is done in practice is

something very much more specific than that claimed, and that the superior result of the so-called Crooker process is due to the use of a particular dye, specially selected wax, and a particular kind of polishing appliance which the patentee says "is necessary in order to be practical." Upon evidence as to the process actually used, as distinguished from that described in the patent, the Circuit Court was of the opinion that the specification was, for the purpose of deceiving the public, made to contain less than the whole truth relative to the invention, and hence that the patent must be held to be invalid under Rev. St. § 4920 [U. S. Comp. St. 1901, p. 3394]. We find it unnecessary to determine this question, since it is sufficient, for the purposes of the case, to say that the process described in claim 1 did not involve a patentable novelty.

On the whole, as dyes of all kinds, including aniline black, had previously been in public and general use for dyeing all kinds of materials, there was no invention in applying them, as distinguished from stains and pigments, to leather. It is admitted that picric acid is a dye, and had previously been applied to leather for obtaining a yellow color, the process of finishing being substantially the same as that disclosed in the patent in issue; and there could be no invention in substituting for picric acid aniline black after it came on the market. Indeed, from every point of view, what is claimed was within the common arts as generally practiced before the alleged invention of claim 1 of the Crooker patent.

The decree of the Circuit Court is affirmed, and the appellees recover costs of appeal.

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## CURTAIN SUPPLY CO. v. NORTH JERSEY ST. RY. CO.

(Circuit Court, D. New Jersey. May 9, 1905.)

1. PATENTS—INFRINGEMENT—SHADE-HOLDING DEVICE.
   The Forsyth patent, No. 559,446, for a shade-holding device for use chiefly on the shades in car windows, discloses invention, and is valid, but, in view of the prior art, is limited to the self-righting feature which is its essential element, by means of which the bottom of the shade, when pulled or pushed out of the horizontal, will automatically reassume such position. As so construed, *held* not infringed by the device of the Hoyt patent, No. 676,557.

2. SAME.
   The Paterson patent, No. 659,315, for a shade fixture, claims 1, 2, and 3, construed, and, as limited by the prior art, *held* not infringed.

In Equity. Suit for infringement of patents. On final hearing.

C. C. Linthicum and L. S. Bacon, for complainant.

J. Edgar Bull and Worth Osgood, for defendant.

GRAY, Circuit Judge. The bill filed in this case charges the infringement of claims 1 and 2 of letters patent No. 559,446, dated May 5, 1896, and issued to Henry H. Forsyth, and Henry H. Forsyth, Jr., for shade-holding device, and claims 1, 2 and 3 of letters patent No. 659,315, issued October 9, 1900, to James W. Paterson, for shade fixture. The defendant is sued as the user of the patented

device, the same having been manufactured by the National Lock Washer Company, of Newark, New Jersey, which company, by stipulation, is defending the suit. Complainant's title to both patents is also admitted by stipulation, as well as the use of the alleged infringing device and the corporate character of the parties complainant and defendant. The complainant thus describes the device of the Forsyth patent:

"This patent (which will be referred to as the 'Forsyth patent') relates to a device for holding a window shade or curtain in any desired position of adjustment, within the limits of the window frame, and the device is most frequently employed on the shades or curtains of railroad and street railway cars. These shades are usually of heavier cloth than the ordinary shade cloth which is used in houses, and as the cars are subjected to vibrations and occillations of a more or less violent character, and as the curtains or shades are sometimes drawn down when the windows are open, the shade-holding device must be of such character as to hold the curtain against the tendency of these forces to disturb its position. These curtains or shades are attached at one end to a shade roller containing a spring which exerts a constant tendency to turn the roller in a direction to wind up the shade thereon, and which roller differs from the one commonly used in house curtains or shades in the fact that the holding dogs, which lock the shade roller in position when it comes to rest, are omitted.

The shade-holding device is intended to hold the lower edge of the shade at the desired elevation, against the oscillations, vibrations, and other external forces incident to the movements of the car, the force of the wind when the window is open and the curtain is lowered, and also against the constant tendency of the shade-roller spring to wind the shade upon the roller. Further, the shade-holding device must be of such character that the shade may be quickly adjusted by the passengers upon these cars.

In the following cuts (which are figures 2 and 3 of the drawings of the Forsyth patent) the construction of the Forsyth fixture and its relation to the shade and window frame, are clearly shown:

Fig. 2.

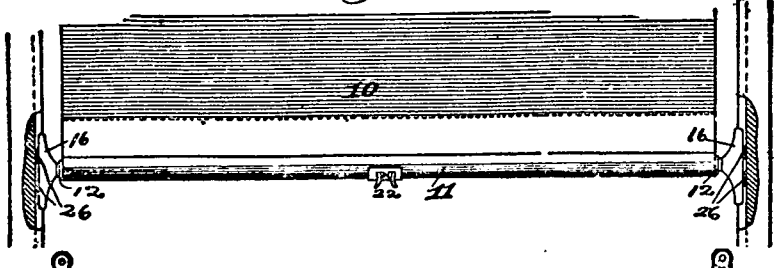
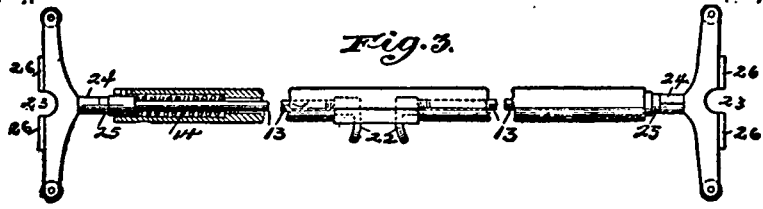



Fig. 3.




The shade stick consists of a hollow rod (11), which is enclosed within a pocket in the lower end of the shade (10), and contains two sliding rods (13), whose inner ends are provided with pinch-handles or pendants (22), and whose outer ends carry elongated heads (16), provided in their faces or vertical edges with friction tips (26). The extremities of these heads are rounded

on their outer corners, as shown in figure 2 of the patent, but may be provided with rollers (27), as shown in figure 3 of the patent. The details of construction of the heads are more clearly shown in figures 4 to 6, inclusive, of the drawings of the patent. Coiled springs (14), located within the hollow shade stick, and having a bearing thereon and upon the shanks of the heads, tend to thrust the latter out into contact with the window frame, which latter is provided with vertical grooves in which the heads move so as to hold the shade parallel to the window.

The friction tips are of such character and the springs of the fixture are so proportioned as to hold the shade in the adjusted position, and this holding function is automatically effected. To adjust the shade to a higher or a lower position, the pinch handles or pendants are provided, and by proper manipulation the shade can be raised or lowered and held in any adjusted position with the shade stick or bar parallel to the bottom of the window frame. Experience has proven, however, that this is not the universal or even the usual mode of adjusting the shade. The ordinary passenger seizes the lower edge of the shade, usually near one end, and attempts to pull it down or push it up, with the result that the shade stick is likely to be placed in a canted or oblique position, and in the attempt to restore the shade to a horizontal position, unless special provisions are made, the holding heads will escape from the grooves, and the lower edge of the curtain freed, so that it is violently rolled up by the roller spring."

Claims 1 and 2 of this patent, of which infringement is charged, are as follows:

"(1) A self-righting holding mechanism for spring-actuated shades comprising, in combination with the shade, heads carried thereby, said heads having separated bearing or contact points of diverse frictional holding power and arranged in such relation to each other that when the margin of the shade is moved from a horizontal position the bearing-point of least resistance will be engaged and the bearing-point of greater frictional power wholly or partially withdrawn from contact whereby the shade may resume its normal horizontal position, substantially as described.

(2) A self-righting holding mechanism for spring-actuated shades comprising in combination with a shade, heads carried thereby, said heads having projecting friction tips in the vertical faces thereof, and antifriction-rollers journaled in the extremities of said heads on opposite sides of the friction tips, said heads and rollers adapted to bear upon the same opposing surface whereby when the shade is moved from a horizontal position, the roller will be brought into contact with such surface and the tip wholly or partially withdrawn from contact and the shade resume its normal horizontal position when released from the moving force, substantially as described."

That the self-righting capacity of this device is the essential feature of the invention, is apparent from a brief survey of the prior art. The patentee, in his specifications, refers to only a certain portion of the prior art, which was embodied in the Hall patent of 1891. This patent shows rods slidably mounted in a pocket or tube in the lower margin of the shade, and carrying friction tips at their outer ends, adapted to traverse grooves in the jambs of the windows, and held against the back of said grooves by the outward pressure of the coiled springs actuating said rods. These friction tips, not much wider than the end of the rod, are of rubber, and are seated in a metal pocket at the end of said rods. The friction of these rubber tips on the back of the grooves, serves to hold the shade with the lower edge horizontal against the upward pull of the spring roller at the top, the shade being easily lowered or raised by pressing together the pinch handles attached to the inner ends of the spring actuated rods, thus withdrawing the friction tips from con-

tact with the back of the grooves. The degree of outward pressure on these friction tips is generally such that the shade could be raised or lowered without touching the pinch handles, by using force enough, with the hand on the bottom of the shade, to overcome the holding power of the friction tips. It was this tendency to so raise or lower the shades, without withdrawing the friction tips by pressure on the pinch handles, that caused the trouble sought to be overcome by the Forsyth patent in suit. Persons who were careless or ignorant were apt to seize one side of the bottom of the shade, through which the tube and rods passed, to force it up or down. The result generally was that only the side to which the force was applied was raised or lowered, leaving the shade in a canted position, and the tendency was for the heads and friction ends of the rods to come out of the grooves and leave the shade flapping. The Forsyth patent in suit met this difficulty by using the same spring actuated rods, securely fastened to metal heads with elongated arms slidable in the grooves, with a friction tip in the center, of rubber or other substance, calculated, when pressed against the back of the groove, to resist the upward pull of the spring roller. The extremities of the elongated metal heads were either rounded, so as to diminish friction, or provided with antifriction rollers, so adjusted with reference to the central friction tip as that the latter shall extend outwardly a little beyond the line of the bearing of said extremities, so that when the bottom of the shade is in its normally horizontal position, the metal extremities of the head or the roller tips are not quite in contact with the back of the grooves. When, however, one side of the shade is pulled down further than the other, the central friction tip on that side is measurably withdrawn from contact with the back of the groove, by the tilting of the elongated head, the antifriction roller of the upper arm coming in contact with the back of the groove, and acting as a fulcrum upon which the lower arm swings out, or nearly out, of the grooves. The position of things in the opposite groove is just the reverse. The central friction tip is withdrawn to the same extent as in the other end, but the roller tip of the lower arm of the head is in contact with the back of the groove, the upper one being displaced as described. As the metal head is fastened securely upon the spring actuated rod, there is a tendency, resulting from the pressure in the lower and upper arms of the heads on the opposite sides of the shade, to press the rods inwardly against the yielding pressure of the springs. In this position, the self-righting feature of the invention is intended to come into play, and, when everything is in proper adjustment, does come actually into play. The frictional holding tip in the center of the head being withdrawn from its contact with the back of the groove, the head slides easily on the antifriction roller tip in the lower arm of the head on one side, and on the roller tip in the upper arm of the head on the other. The head on the side pulled down rolls up on the roller tip of its topmost extremity, and the head on the opposite side tends to move downward on the roller tip of its lower extremity into normal position, with

the bottom of the shade horizontal. This is the self-righting function claimed for the device in the Forsyth patent in suit.

In other devices of the prior art, with the exception of that of the Hall patent, the aim has been to guide and keep the heads of the rods in the grooves, so as to resist any canting tendency, where force is applied to one side of the shade either to raise or lower it, thus assimilating the operation of raising and lowering the curtain to that attained by the various devices applied to hold a window sash in any position to which it may be raised or lowered, the rigid sides of the sash preventing any such tilting or buckling as is possible in the raising or lowering of curtains and shades. In the devices referred to, the elongated metal heads attached to the ends of the curtain rods were intended by their form and by the enclosing fixtures of the jambs of the windows, to give as far as possible something of this rigidity to the sides of the curtain that is attained in a window sash by the sides of the sash, so that pressure on one side of the bottom of the curtain would result, as would pressure on one side of the bottom of a sash, in raising or lowering both sides alike, the bottom remaining horizontal, or the result might be to jamb and resist all movement whatever.

The device of the Sweeney patent is on the principle just described. We have a rigid curtain rod, the ends of which are fitted immovably to a metallic head, with a central friction block of some suitable material, held out yieldingly against the back of the groove by a flat spring between the friction block and the end of the rod. The head also is furnished with elongated arms, on the ends of which are antifriction rollers. This head, with its antifriction rollers, is so inclosed as that it may not pull out, and the rollers, in the language of the patent, "serve to properly guide the curtain while it is being operated." There is thus attained something of the rigidity of the window sash in its upward and downward movement. Although we have in the Sweeney device the same elongated head with the antifriction roller tips at the end of each arm, and the friction tip at the center between the same, as the Forsyth patent has, the principle of operation is different. Mr. Wilhelm, expert for complainant, says:

"As compared with the Sweeney device, the Forsyth device is based upon an apparently paradoxical notion, which is, that instead of connecting the head with the guide in such a way that it cannot substantially change its position of parallelism with reference to the guide, the device should leave the head perfectly free to tilt out of the guide (the groove) and yet make provision to keep it in the guide (the groove) under the ordinary conditions of displacement which can occur in the handling of the curtain in practical use."

The Fondu (British and German) patents, exhibited in the record, supply a device with the same idea of rigid parts to guide the fixture as it moves up and down, performing the function of a window sash. In it, however, we have the elongated head and the roller tips bearing on suitable vertical tracks guiding the fixture to prevent it tilting, whereas in the Forsyth patent in suit, every facility is furnished for tilting, and the self-righting feature, already explained, is re-

lied on to restore the normal horizontal position of the bottom of the shade.

To produce a device, which, besides the elongated head, antifrictional roller tips and central frictional tip, should possess a self-righting capacity, was the object of the invention in the Forsyth patent. The invention of the means by which this object was attained, entitled him to the patent he received. But, in view of the prior art, his invention must be confined to the particular device invented for this purpose. This purpose limits his claims, as he has distinctly confined the same to curtains having self-righting capacity. In view of this specifically imposed limitation, these claims cannot be construed as broad enough to cover devices devoid of the self-righting capacity.

The defendant's alleged infringing device is one for which letters patent were issued to Daniel Hoyt, in 1901. It has therefore run the gauntlet of the Patent Office, and the letters patent were issued therefor presumably in view of the previously issued patents in suit. The defendant is therefore entitled to the presumption that the invention, as claimed, is not an infringement of the earlier patent in suit. The defendant's device belongs to the type of shade holder in the prior art which we have described, where the object in view has been to insure a rigid vertical movement of the shade, without tilting, preserving at all points the horizontal position of the bottom of the shade. The patentee of the defendant's device thus describes the object of his invention:

"My invention has for its object to provide a window shade holder which will permit the shade to be drawn down practically without resistance and without manipulation of any parts whatever, and which will automatically lock the shade against upward movement in any position in which it may be placed, it being an important feature of my novel shade-holder, that the locking of the shade is effected by cam action rather than by spring action, and that when force is applied to raise the shade that entire force is caused to act on both sides of the casing to resist the upward movement of the shade, thus rendering it practically impossible to raise the shade by a direct upward movement, while, on the other hand, the shade may be instantly and conveniently released by manipulation of the holder, it being understood, of course, that the holder is especially adapted for use upon spring or, as they are commonly called, 'self-acting' shades or curtains."

In the defendant's structure, to the ends of the tube running through the pocket in the bottom of the shade, are adjustably, but immovably, fixed metal heads with elongated arms at right angles to the tube, and fitting in the grooves of the window jambs. A metal cam is pivoted to the head just below the lower side of the tube, while its upper end is attached to a rod in the tube actuated by a spring which holds the cam by yielding pressure against the back of the groove. The other ends of these rods are in proximity at the middle of the tube, and have attached to them pinch handles, by which the cams may be withdrawn from contact with the back of the grooves. The eccentric pivoting of the cam is such that an upward pressure on the rod at the bottom of the curtain tends to throw it into closer engagement with the back of the groove, thus locking the curtain against all upward pressure, and making it

necessary to actuate the pinch handles, thus withdrawing the cam, in order to raise the curtain. There can, of course, then be no tilting of the bottom of the curtain by pressure upon one side, as in the Forsyth patent in suit. It is true, there is no locking by the cam against downward movement, and the curtain can be pulled down without touching the pinch handles, though not so easily as in the Forsyth device. But it is apparent that the object of the defendant's device is entirely different from that of the Forsyth patent. So far from intending to facilitate the tilting of the head when one side of the curtain rod is raised, the intention is to prevent the raising of one side by any pressure whatever, by the locking function of the cam. The curtain can only be raised, as was the intention of the patentee, by pressing the pinch handles, thus releasing the locking pressure of the cams. While thus holding the pinch handles, the curtain is easily raised without any tilting of the heads, the roller tips then coming into play and serving to guide the upward movement, produced in large part by the upward pull of the spring roller. It is to be noted that the antifriction rollers of the Forsyth patent are only brought into play when the shade is tilted, having no function to perform as long as the shade moves vertically or preserves its normal position. The antifriction rollers, however, of the defendant's device serve to guide the shade while it is being operated, and must be in full play whenever the shade is being raised, which operation of raising can only be accomplished by the withdrawal of the locking cams, by the manipulation of the pinch handles.

It is true that in pulling the curtain down, by laying hold with considerable force of one side near the end of the rod, the other side will sometimes, to a certain extent, remain stationary; that is, until the lower margin of the curtain becomes more than a little oblique, but no self-righting capacity can develop itself, for the simple reason that the lower side is prevented from rising into normal position by the locking cam of defendant's device. In fact, it is not only not self-righting, but it cannot be raised into normal position except by relieving the pressure on the cams by manipulation of the pinch handles. When the cams are thus withdrawn, the upward pull of the curtain asserts itself, and the lower head rides up on the roller tips and the opposite one correspondingly descends. But this is not in any sense of the phrase an automatic self-righting operation. It requires the formed design, and act in pursuance thereof, of an intelligent being, to bring into play the forces that make this adjustment. The device of defendant's patent may be distinctly inferior to that of the patent in suit, owing to this absence of automatic self-righting capacity, but it accomplishes its own stated object, which is different from that of the patent in suit, and it does so by means that are peculiar to itself. Complainant urges that if the defendant's device does not in practice automatically right itself when the bottom of the curtain is pulled out of the horizontal position, there is a tendency so to do. Whatever this may mean, I have no difficulty in finding that defendant's fixture has no self-righting

capacity, in the sense meant by those words in the first and second claim of the Forsyth patent.

The Paterson patent in suit, No. 659,315, issued October 9, 1900, is for a fixture having rigid heads and friction pads on the ends of spring actuated rods passing into the tube in the bottom of the curtain. This friction pad acts independently of the guiding head, and is meant to be in contact with the back of the groove so as to hold the shade in the position in which it is set. The antifrictional rollers at the extremity of each arm of the head are intended at all times to bear against the back of the groove. The peculiar feature of this device, and which alone distinguishes it from the Sweeney and Fondu (British) patents, is the means for adjusting the heads longitudinally of the rod and rigidly securing the same to said rod in their adjusted positions. The claims involved are as follows:

"(1) In a shade fixture a rod adapted to be secured to the lower margin of a shade and provided at each end with a head having arms oppositely extended at right angles with said rod, means for adjusting said heads longitudinally of said rod and rigidly securing the same relatively to said rod in their adjusted positions, and antifriction devices at the extremity of each arm adapted at all times to engage the window-jamb whereby said rod is at all times held in a horizontal position.

(2) A holding mechanism for spring-actuated shades or the like, comprising a rod secured to the lower margin of a shade and provided at each end with a head, means for adjusting said heads longitudinally of the rod and rigidly securing the same relatively to said rod, an arm on each head forming right angles with said rod, a roller at the extremity of each arm adapted at all times to bear against a window jamb or the like and a friction device movable with respect to said heads and rod and adapted to yieldingly engage said window jamb.

(3) A holding device for spring-actuated shades comprising a rod having tubular ends and adapted to be secured to the lower margin of a shade or the like, a head secured on each end of said rod and adjustable longitudinally thereon, means for rigidly securing said head in its adjusted position, arms on each head extending at right angles with said rod and oppositely from each other, an antifriction device at the extremity of each arm adapted to engage at all times a window jamb or the like and a spring-pressed friction pad longitudinally movable with respect to said rod and adapted to engage the jamb intermediate of the extremities of said arm."

If we omit from the claims the "means for adjusting said head longitudinally of said rod," they would be anticipated by the Sweeney patent, and by the Fondu (British) patent. In the Paterson patent, the head is adjusted longitudinally with the rod, by means of a milled nut. This is not the means used for rigidly adjusting the head upon the tube of the defendant's structure. It is there accomplished by a threaded sleeve in the head fitting over the threaded end of the tube. It can hardly be seriously contended that the Paterson patent can cover every means of lengthening or shortening a rod or tube. The claims are not only thus limited, but they also restrict themselves to devices in which the "antifriction devices at the extremities at each arm of the head are adapted at all times to engage the window jamb." I have tried to read this language of the claims in the light of complainant's contention, viz., that "adapted" means merely "capable of being engaged with the window jamb." I cannot, however, so interpret it. The word "adapted," in the connection used, evidently means that the de-

vices are of such a character as at all times to engage the window jamb. And this meaning is the more plain when we read the immediately following words: "Whereby said rod is at all times held in a horizontal position." The antifriction rollers in defendant's fixtures do not at all times bear against the window jambs.

For the reasons stated, I am of opinion that the defendant does not infringe either the first or second claim of the Forsyth patent, or the first, second or third claim of the Paterson patent.

The bill must therefore be dismissed.

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## In re BAUGHMAN.

(District Court, M. D. Pennsylvania. May 26, 1905.)

No. 636.

BANKRUPTCY—JURISDICTION OF COURT—PROPERTY SUBJECT TO VALID LEVY.

An adjudication of bankruptcy draws to the bankruptcy court jurisdiction to administer all property of the bankrupt, real and personal, although it may be subject to a valid lien acquired by judgment or the levy of an execution more than four months prior to the bankruptcy; and a sale under such lien will be enjoined, and the property sold by the trustee, unless the court, in the exercise of its discretion, may otherwise direct.

In Bankruptcy. Rule on Citizens' Trust Company of Gettysburg to show cause why execution should not be stayed.

Ross & Brenneman, for trustee.

Joseph R. Strawbridge, William Herbst, and W. C. Sheely, for execution creditor.

ARCHBALD, District Judge. This case is governed by In re Vastbinder, 13 Am. Bankr. Rep. 148, 132 Fed. 718, decided by this court, where it was held that notwithstanding a lien had been acquired by levy upon personal property more than four months prior to bankruptcy, to enforce which a vend. ex. had been issued, and the sheriff had advertised the goods for sale, a stay of the execution should be granted and the goods be sold by the trustee, jurisdiction of the property by the bankruptcy proceedings having been drawn to this court, under direction of which the estate was to be administered, and to which parties having claim by way of lien or otherwise were remitted for the ascertainment and establishment of their rights. Very little need be added to what is there said. In the present instance, while the execution creditor by virtue of its judgment has a lien upon the real estate proposed to be sold, which, antedating the bankruptcy proceedings by over four months, as it does, may not be affected thereby, yet, bankruptcy having intervened, the sale and distribution of the property, as well as the establishment of the correct amount due to the judgment creditor which seems to be in dispute, belongs to this court, unless it is considered best to let it go on elsewhere, as might be the case if the liens were more than enough to exhaust the property, leaving nothing for gen-

eral creditors; although this is not always controlling, and is entirely optional. In re Keet, 11 Am. Bankr. Rep. 117, 128 Fed. 651. A stay of execution does not interfere with the lien, as argued. It merely controls its enforcement, in the interest of general creditors, where that is deemed advisable. Neither is there any difference in this respect between real and personal property. Nor, as pointed out in the Vastbinder Case, supra, does such a case come within the ruling made in Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122. See Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555.

The rule is made absolute, and further proceedings upon the execution of the Citizens' Trust Company of Gettysburg, in the hands of the sheriff, are hereby stayed.

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## THE BRILLIANT.

(District Court, E. D. of New York. June 5, 1905.)

1. SHIPPING—INJURY TO CARGO—SEAWORTHINESS.

A ship had a distribution box in the pumproom, containing three valves; one closing a pipe leading into a water-tight tank usable for cargo or for water ballast. Such valve was controlled by a spindle, and could be used to fill or empty the tank, but, when the spindle was disconnected, became a nonreturn valve, through which the tank could be pumped out, but which would not permit water to enter. There was a pipe connecting the distribution box with the sea, containing a sea valve. On the termination of a long voyage at New York, it was found that sea water had entered the tank, and damaged sugar cargo stowed therein. A survey showed that the sea valve had become incrusted and leaked slightly; also that the tank valve was obstructed by a stick five inches in length, which prevented it from closing tightly. There was also evidence that the spindle was unshipped. *Held*, that whether or not it was so disconnected was immaterial, since, if it was, the valve was equally effective to prevent the entrance of water, and the ship would not be for that reason unseaworthy. *Held*, also, on the evidence, that the obstruction lodged in the valve while the pumps were being tried during the voyage, and that the ship was not unseaworthy at the beginning of the voyage because of the defective condition of either valve; it being shown that they were properly constructed, and were in good condition at that time.

2. SAME—FAILURE TO USE DUE DILIGENCE IN EQUIPMENT.

A ship was equipped with a tank usable for cargo or water ballast, into which extended a pipe 5½ inches in diameter, reaching nearly to the bottom, and having its lower end open. This pipe could be connected by valves with the sea, and was used both for filling the tank and pumping it out. During a voyage on which sugar was stowed in the tank, the valve closing such pipe became obstructed by a stick 5 inches long, which the evidence tended to show was drawn into the pipe from the tank when the pumps were being tried; and sea water entered through the opening, which damaged the cargo. *Held*, that the failure to place a rose or screen on the lower end of the pipe to prevent the entrance of foreign substances which might foul the valve was a failure to exercise due diligence in equipment to make the ship seaworthy at the beginning of the voyage, and which rendered her liable for the damage, under section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. p. 2946]).

[Ed. Note.—Statutory exemptions of shipowners from liability, see note to Nord-Deutscher Lloyd v. Insurance Co., 49 C. C. A. 11.]

8. SAME—EXEMPTION BY BILL OF LADING—PERILS OF THE SEA.

A ship cannot by bill of lading exempt herself from liability for damage to cargo from sea water, as a peril of the seas, where such water entered because of the obstruction of a valve, due to the failure to exercise due diligence in the equipment of the ship at the beginning of the voyage.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 493–499.]

In Admiralty. Suit to recover for damage to cargo.

Butler, Notman & Mynderse (Wilhelmus Mynderse, of counsel), for libelants.

Convers & Kirlin (J. Parker Kirlin and Charles L. Hickox, of counsel), for claimant.

THOMAS, District Judge. The bark Brilliant, launched in April, 1901, at Scotland, going thence to New York, Yokohama, Sourabaya, Pasorean, and back to New York, has a fore peak separated by a collision bulkhead from the fore hold, aft of which is a water-tight tank, usable for cargo or water ballast, and aft of this were other spaces, not here involved. In the forward part of the tank is a pumproom or well tank 8 feet and 4 inches by 10 feet, extending from the bottom of the ship to the top of the tank, and accessible from the deck. In the pumproom is a distribution chest, raised about 7 or 8 feet above the bottom of the ship. It is 4 feet 3¼ inches athwartships, 10¼ inches fore and aft, and 7¾ inches deep. In this chest are three valves—the tank valve on the starboard side of the chest, the well valve on the port side, and the fore-hold valve between the two. Another valve (the sea valve) is located on a pipe or casing about 3 feet 6 inches above the bottom of the ship, opening downward towards the sea, and upward through a pipe to the distribution chest. Each of these four valves is related to a rod or spindle extending to the between-decks, which is operated by a wheel. The lower end of the spindle is not attached to the well valve or fore-hold valve. When screwed down, the spindle of either the well valve or fore-hold valve presses upon the top of such valve so as to keep it closed, but when the spindle is released such valve may be raised by the suction of the pump, so as to draw out any water that may be in the well or fore hold, but does not allow water to be pumped into either of these spaces. The lower end of the spindle going to the tank valve has a circular head that slips into a horseshoe-shaped collar on the top of the valve. When the spindle rises or descends, the valve, if in normal relation, rises or descends with it. This valve has a beveled edge, has 5½ inches interior and 6¾ inches exterior diameter, and extending downward from it are four legs, about 2½ inches long, that enter the circular metal chamber, on the top of which the valve rests when closed. When the lid over the valve is bolted in place on the top of the chest, the valve cannot be raised so high as to permit these legs to escape from the mouth of the chamber, and thereby the valve is prevented from having any lateral motion that would cause disconnection of the valve from the spindle. The

chamber extends downward from practically the bottom of the chest for a distance of 5 or 6 feet, where at a point about 18 inches above the bottom of the tank it penetrates the bulkhead of the tank, whereupon it connects with a pipe, understood to be 5½ inches in diameter, that, bending downward, extends in such tank to within an inch and a half of the skin of the ship. The end of this pipe is in a box 2 feet long and 4 feet wide. Two of its walls are two of the iron floors or beams that extend across the tank, while its other sides are two plates connecting such two floors. There are limber holes in the sides composed of the floors, and small perforations of one-half to three-fourths of an inch in diameter in the other sides. There is no rose or screen at the end of the pipe. When it is necessary to fill the tank the sea valve and tank valve are opened, and the water runs through the sea valve and its upper pipe to the chest, thence through the tank valve, its chamber, and continuing pipe to the ballast tank, until the water within the tank has reached the sea level. Then both valves are closed, and the tank filled from above by the pumps. When it is necessary to empty the tank, the sea valve and tank valves are opened, and, after the water has run down in the tank to the sea level, the sea valve is closed, and the remaining water is pumped out through the tank valve into the distribution chest. The well and fore-hold valves are called "non-return valves," which may be used to pump out, but not to pump in. While the ballast-tank valve may be used to fill or empty the tank, yet, if the spindle were disconnected from the valve, the latter would then become a nonreturn valve, capable of performing the duty of such a valve—that is, to pump out—as it weighed 8¼ pounds, or 1 pound more than the fore-hold valve. In the top of the distribution chest are three circular openings, and over each opening is a metal plate or lid, held in place by cement and four tap bolts—one at each of its corners. Each lid acts as a stuffing box, and the spindle passing through it works on a thread, so that it screws up to release the valve, and down to close it; but while the lid is closed and bolted the spindle cannot be raised sufficiently to allow the tank valve to unship from its end, nor can it be displaced by a person inserting his hand in the chest, because the legs of the valve cannot be raised clear of the seat, as already stated, nor can the spindle be carried out of its normal line. But if the lid be unscrewed and raised about half an inch, the spindle can be carried to one side, and such disconnection effected.

Upon the arrival of the vessel at New York, it was found that there were about 19 inches of water, of about 30 tons' weight, in the ballast tank, and that the upper surface of such water was about awash with the upper sides of the transverse iron floors. On these floors removable sectional ceiling was placed, and on this sugar in baskets was stowed in tiers. The water did not reach the bottom of the baskets of the lower tier, but the motion of the vessel had brought it in contact with the bottom of the baskets, injuring the sugar, and to recover damages for such injury this action was brought.

When the hold was opened for the discharge of the sugar there was no visible evidence of injury, and it was not until the lower tier had been reached that damage was discovered. Such investigation as then could be made did not reveal the cause of the injury. Thereafter the vessel was placed on dry dock, where it was discovered that there was a very slight leak from the sea valve. A trial of the wheel showed that this valve was closed as tight as possible, but its removal disclosed that its face was foul—a condition probably caused by shell or other adhering substance. Thus the salt water had passed through the sea valve up into the chest. But even then it could not escape into the ballast tank, had the tank valve been closed; and it was evident that there must be some defect in the ballast-tank valve, and that such defect must have existed for some time. Therefore the surveyors, to wit, McDougal and Davies, representing the cargo, and Herbert, representing Lloyds Register, went into the pumproom where the chest is located; and thereupon McDougal, acting as machinist, removed the tap bolts, pried up the cemented lid, and raised it and the spindle. When the spindle and lid were raised, it was found that the valve was unshipped, according to the evidence of McDougal and Davies, although Herbert and the captain of the vessel gave evidence tending to contradict that of McDougal and Davies. In any case, after the spindle was raised McDougal took hold of the valve and attempted to raise the same, but was unable to do so until he used some instrument to loosen it. Also a stick about five inches long was found, which had been jammed between the face of the valve and its seat. Marks upon it show that it at some time had rested on the seat, where it was pressed by the face of the valve. Inasmuch as the surveyors, by trying the wheel on deck, found that the valve was tightly closed, the presence of this stick slightly raising it furnished the opening through which the water coming from the leaking sea valve into the chest passed into the ballast tank. McDougal and Davies reported that the valve was unshipped, was jammed, and that a stick was beneath it. Herbert did not report that the valve was unshipped, but that it was jammed.

The claimant, among other defenses, invokes the third section of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]).

Could the accident have happened without the concurrence of three conditions: (1) The sea valve slightly opened; (2) the tank valve disconnected; (3) the stick under the valve? It is obvious that the accident would not have happened, had not the sea valve been open, as that furnished the more immediate access to the sea. Whether the tank valve was disconnected or connected, the stick had equal opportunity to get between it and its seat, for, whether the valve was disconnected or connected, it would press down upon the intervening stick by the operation of the spindle. It, if disconnected, would be a nonreturn valve, like the well and fore-hold valves; and, saving for a slight increase in its weight, the tank valve would open and close as do such nonreturn valves. There

would be this difference in advantage between the tank valve connected and disconnected. If connected, it would press upon a stick, and when thereafter raised at St. Helena, and the pump worked to test the tank, the valve would be raised higher, and give more space for the suction to carry the stick away, and the opportunity, in point of time, would be increased, because, if the valve were disconnected, the suction of the pumps would raise the disconnected valve spasmodically, so that it would be raising and closing at such short intervals and to such lesser degree that the stick would not have the same time or space to escape as where the connected valve is drawn up. Moreover, if the valve were connected, and if it could be jammed by the stick so as to hold it down with considerable force, yet the raising of the spindle would relieve the jam, while, if it were disconnected, the suction would be less efficient to raise the valve if so jammed. So, also, if connected the valve could be raised, and the condition of the tank tested by the pump, while, if disconnected and in fact seriously jammed, the use of the pump would perhaps cause some water to rise from the tank; but it would be comparatively slight, and would tend to mislead the operator, and cause him to think that the tank was substantially free from water. But assume that the tank valve had been originally made a nonreturn valve; should it be the subject of criticism, any more than the fore-hold valve? Such a valve would not allow water to be pumped into the tank; that is, a nonreturn valve prevents water from entering the tank. The accusation here is not that water did not enter the tank, but that it did. Now, if a nonreturn valve will not allow water to enter, how can it be said that the valve, simply because it became a nonreturn valve, was a proximate cause of the injury? For pumping out it was just as good as the other nonreturn valves, except that it weighed one pound more than the fore-hold valve, and there is no evidence to show that such additional weight would preclude its useful operation either for pumping out the tank or testing its condition. If the owners had made the tank valve a nonreturn valve, as it became if disconnected, it is difficult to hold that this would have rendered the ship unseaworthy. But the presence of the stick was an essential condition of the injury. If the sea valve were wide open, the water could enter the chest, but it could go no farther, if the tank valve, connected or disconnected, were closed and pressed down by the spindle. But the stick, if interposed between the valve and the seat, left a space through which the water could pass.

It will be considered how far the owners, either through themselves or their agents or servants, failed in their duty to make the ship seaworthy.

The ship was put on dry dock at Yokohama, and the sea valve examined and found to be in good condition, and so it was in good condition at New York, save that its face was slightly fouled by "grit," "corrosion," "bit of shell," or "sea growth" (using the descriptive terms of the witnesses), so that one could "hardly get the point of a knife in," through which there came a "slight weep,"

"small weep," "a drip," "a small drip," "in drops" (again using the descriptive words of the evidence). This valve specifically could be examined only when the ship was on dry dock, and duty, in the absence of actual or constructive notice, did not require that the ship should be docked again at the subsequent ports. But the mere impossibility of docking emphasizes the demand for other tests, or the observance of other conditions that might indicate whether the sea valve was in good order, and the necessity for protecting the valves in the chest against impeding substances. The claimant seems to suggest that the heavy weather off the Cape of Good Hope may have caused the sea valve to work "open a trifle." If a sea valve was subject to disturbance from such cause, or to fouling when opened, as at Yokohama and Sourabaya, the diligence required of the owners in fitting the ship and inspecting her at the loading ports would be somewhat measured thereby. But as regards the sea valve itself, it is concluded that the owners did all that their duty required.

The next inquiry relates to the question whether the tank valve was disconnected, and if so, when. There is some contention, based upon conflicting evidence, as to whether the carpenter, for purposes of cleaning, removed the tank valve at Yokohama. It is quite unimportant whether he did or not, as it is evident that the tank valve was not disconnected at that port, even if the carpenter removed and replaced it there. For if he took the valve out and replaced it before the tank was filled with water at Yokohama, he must have replaced it correctly; otherwise the tank could not have been filled, for it is beyond question that, while the tank could be pumped out with a disconnected valve, it could not be filled with a disconnected or nonreturn valve. Hence the valve was connected when the tank was filled at Yokohama. The carpenter could not have removed the valve at all after the tank was filled at Yokohama, as the pressure of the water in the tank, at least, if it was above the top of the chest, would force the water into the chest and deluge the pumproom. There can be no conception of such rash action on the part of the carpenter. Therefore when the ship sailed from Yokohama the tank valve was connected. From Yokohama the vessel went to Sourabaya, where the tank was emptied. There are satisfactory reasons for concluding that the tank valve was not disconnected at that port. It could not be disconnected unless the separate lid of the chest over the tank valve was taken off. This required the removal of four tap bolts, the prying up of the lid as McDougal did it at New York, the raising up of the spindle, threaded through the lid, for the distance of half an inch, and then the carrying of the spindle laterally so as to disengage its end from the horseshoe-shaped collar of the valve; and this must be followed by error in attempting to readjust the valve. There is no evidence that this was done. The evidence of the carpenter is that he did not uncover the valve at Sourabaya, but did remove the lid of the fore-hold valve and feel all the valves, and that the tank valve was in place, and that there was no stick under it. Upon an earlier ex-

amination the carpenter testified that at Sourabaya he took off the lid of the well valve to feel the tank valve. This was an impossibility. He subsequently testified that it was the lid of the fore-hold valve that he lifted, whereby his hand could be inserted. This he could do. This change of testimony is urged against his credibility. But it is thought that the error does not have that effect. His mistake may have arisen from the fact that the plan of the ship shows that the tank valve was in the middle, where it could be reached from the well valve. In fact such tank valve is on the starboard end of the chest, and the fore-hold valve is in the center. But he probably misnamed the valve through sheer inadvertence. There is much temptation to such error. Indeed, the learned counsel for the libelant in his brief states that the tank valve is on the starboard end, the fore-hold valve at the center, and the well valve near the port end; and again, on the same page, he speaks of the "fore-hold valve at the port end of the chest," and of "the well valve in the center of the chest." The carpenter, in the excitement of an unaccustomed examination, might well make a statement similarly inadvertent. The carpenter's experience, the trust reposed in him by his employers, and his appearance as a witness, do not indicate, and the known impossibility of reaching the tank valve from the well valve makes it improbable, that his first designation of the valve uncovered by him was other than accidental. Even if his evidence that he felt of the tank valve were open to suspicion, it would not authorize a conclusion that he dismantled the tank valve at Sourabaya, for there is not the slightest evidence to that effect, and it would be a physical impossibility to disconnect the tank valve from the spindle unless he did take off the lid as above described. The ship was new, with a first-class registry, and having gone first from Scotland to New York with water ballast in the fore tank, where the tank was emptied, took therein case oil, which she carried to Yokohama. The carpenter states that he did not uncover the tank valve, and there is nothing to discredit such evidence, unless it be that the valve was, as alleged, found disconnected at New York. It was connected at Yokohama, and its continuing connection at Sourabaya and Pasorean is a presumed fact. Moreover, when the water was pumped out at Sourabaya after having reached the sea level, the valve, if disconnected, would not act as freely, and, especially if disconnected and jammed, a very limited quantity of water would pass through it, and in the opening and closing the valve the carpenter would be likely to notice the lessened revolutions of the spindle. Such conditions would tend to attract attention. Again, if the valve had been disconnected and jammed at Sourabaya, the water would, if the sea valve leaked, have entered the tank after the tank had been emptied, cleaned, dried, and had received two coats of cement; and the officers and Lloyds surveyor who inspected it would at least have had some opportunity to notice it, and the carpenter examining the chest would have discovered the water in it. It is true that the water coming in at that port would have been comparatively

inconsiderable, and after the floors were laid it might have escaped notice, especially if cargo were loaded in the fore tank. These considerations lead to the conclusion that the valve was not disconnected at Sourabaya, and that it was not then impeded by the stick. It is possible that, when the valve was closed after the tank was emptied at Sourabaya, it closed down on the stick, the sea valve being then closed tight. But the carpenter states that he felt of the valve after the tank was emptied at Sourabaya, and that it was in place, and no stick was under it; and, in the absence of contradiction, that evidence has much force. There is no evidence that the valve was opened after the ship left Sourabaya. It is believed that the tank valve was not then obstructed, and in such case it would not admit water, whether it was connected or disconnected. That condition would continue at Pasorean. The tank valve was opened by the spindle near St. Helena to test whether there was water in the tank. There was then an opportunity for the stick to enter, and it is believed that the stick did enter at that place, because the evidence shows that it is improbable that it was in the valve before. Had it been jammed in the valve at an earlier time, it would have cleared at St. Helena, certainly if the valve were connected, probably if the valve were disconnected, unless the valve were closed so hard upon it that the valve could not raise; and it is difficult to understand how the stick could get between the valve and the casing, so that the valve would not raise when the pump was in operation. If an attempt be made to insert the stick, so as to prevent the valve raising, the improbability of the stick holding down even a disconnected valve against the suction of the pump will be appreciated. But the stick may have got into the tank from putting down the ceiling, or in loading the baskets, and the suction would draw it up into the valve. But it probably reached its final position when the valve was closed, after pumping at St. Helena, and thereafter held the valve open so that the disturbed sea valve allowed the water to enter. The libelant urges that the tank valve was found disconnected at New York, and alleges that as a fault. But it is thought that such disconnection, if it existed, shows no fault. As already stated, a disconnected tank valve becomes a nonreturn valve. It is just as useful to keep water out as a connected valve. Its defect would be its inability to let water in. It is as serviceable to keep water out as the well or forehold valve, and it would be no more fault to make it a nonreturn valve than to make the other valves nonreturn valves. A stick was practically no more apt to get under this valve than the other valves. The mischief was caused by the stick and the sea valve. Even the sea valve would have been sufficient, if closed. But a sea valve properly made, as this was, and inspected so far as practicable, as this was, and a nonreturn valve, as this was if disconnected, screwed down, as this was, would have kept the ship tight, had not the stick entered. But was the valve disconnected at New York? Looking only at the evidence relating to the dismantling of the tank valve at New York, there could be no hesitation

in finding that the valve was unshipped there. The evidence of McDougal and Davies, surveyors, far outweighs the evidence of Herbert, surveyor, and the captain. Any one reading the evidence would have no difficulty in reaching this conclusion. It is true that the pumproom was contracted, and was not very light. But McDougal states that it was sufficiently light, and he and Davies testify that they did see, that the spindle came up alone, that the valve remained in its seat, and that McDougal was obliged to use some instrument to pry it loose. But what is the result? The evidence, direct and circumstantial, is persuasive that the valve was not disconnected when the voyage began, either at Yokohama, Sourabaya, or Pasorean. Hence the situation is this: (1) The valve was not disconnected, and in that regard the ship was seaworthy at the inception of the voyage; (2) the evidence of libelants' witnesses who were present when the valve was removed at New York, preponderatingly shows that it was disconnected at that place. Hence it must have been disconnected, if disconnected at all, en route; and this exculpates the ship, so far as the alleged disconnection is concerned.

But if it becomes necessary to make choice between the evidence as to condition when the voyage began and the evidence of condition at New York, it is considered that the evidence of the earlier condition should be preferred. For there is a chance that McDougal and Davies were mistaken, while the circumstantial evidence, supported by the evidence of the carpenter, precludes the conclusion that the valve was disconnected either at Yokohama or Sourabaya, and this conclusion is reached, wherever the law places the burden of proof. However, it is thought that the fact is immaterial, as the ship, for purposes of keeping out water, was just as seaworthy, whether the valve was connected or disconnected, and that for pumping purposes it was sufficient.

But it is considered that the absence of a rose at the end of the pipe in the ballast tank shows that the owners did not use due diligence to make the ship seaworthy. There seems to be a consensus of opinion that the stick came from the tank. The holes in the floors were quite large enough to admit the stick to the pipe. The suction of the pumps was sufficient to draw it up into the valve, where it lodged. Now, is a ship properly constructed that allows such impediments to be drawn into a chest containing three valves, to become lodged in a valve, and to hold open such valve, with the result now present? The sea valve was subject to leak. It could not be examined except when the vessel was dry-docked. Heavy weather might open it. It was vital, then, that the tank valve should be kept free so that it could be closed; and yet the end of the tank pipe was open, so that a stick five or six inches long was drawn through it. When it got in, how long it had been in the pipe, is not important. The event shows that it did enter. The tank was used for water ballast, and this use allowed obstructive material to enter, such as "muck," as the captain suggests. It was important that this material should not get into the pipe so as to

clog the valves, and yet there was nothing to prevent. Limitation of size of the foreign material was the only protection. This stick was not too large. The valve was to be used not only for pumping out the tank before loading, but also for removing any water that might get in after loading and during the voyage. The powerful pumps that would lift a nonreturn valve weighing seven or eight pounds could well draw up substances of considerable size that would lodge in the pipe, and against them there was no precaution whatsoever. It was the duty of the crew to pump on the voyage, but the performance of this duty might effect the obstruction, and then there would be nothing between the cargo and the sea save a sea valve incapable of examination. So, when the pump was dutifully worked near St. Helena, it probably drew the stick into the valve, and thereupon the valve was closed upon it.

But it is urged by the claimant that the bill of lading exempts the ship from liability for injury arising from "peril of the seas"; that the damage to the cargo was from a peril of the sea, and hence within the exception. The proposition, applied to the present question, is that a shipowner may so construct his ship as to allow the sea to enter, and, yet be free from liability, because the entry of sea water is a peril of the sea. If the claimant intended to go as far as that, his position should not be maintained, as it would enable the owner to lay aside his duty to make the vessel seaworthy, or to use due diligence therefor.

Upon the sole but sufficient ground that the pipe in the tank was not properly screened, the libelant should have a decree.

## TIFT et al. v. SOUTHERN RY. CO. et al.

(Circuit Court, W. D. Georgia, S. D. June 28, 1905.)

1. CARRIERS—FREIGHT CHARGES.
The general rule is that, the greater the tonnage of the commodity transported, the lower should be the rate of freight charges for such transportation.

2. INTERSTATE COMMERCE COMMISSION—CONCLUSIVENESS OF FINDINGS.
Explicit law, the settled policy of the government, the practical principles of reason and justice require that, save for controlling reasons of law or fact, the national courts should not discredit or disparage the conclusions of the interstate commerce commission.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, §§ 138–145.]

3. SAME—FINDINGS OF FACT.
The findings of fact set forth in the report of the commission are in all judicial proceedings deemed prima facie evidence as to each and every fact found.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, §§ 138–145.]

4. PRIMA FACIE EVIDENCE.
Prima facie evidence of a fact is such as, in judgment of law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for the purpose. Mr. Justice Story, in Kelly v. Jackson, 6 Pet. 631, 8 L. Ed. 523.

5. INTERSTATE COMMERCE COMMISSION—REPORT—PRESUMPTIONS—BURDEN OF PROOF.
The act to regulate commerce creates a rule of presumption in favor of the commission's report, which on its introduction in evidence changes the burden of proof, and casts it upon that party against whom the report is made.

6. RULES OF EVIDENCE—LEGISLATIVE CONTROL.
The Legislature, subject only to the limitations of evidence expressly enshrined in the Constitution, has entire control over the rules of evidence, and by statutory enactments may alter, change, or create them anew.

7. CARRIERS—FREIGHT CHARGES.
The reasonableness of a rate of charge for transportation is eminently a question for judicial investigation. Justice Blatchford, in Chicago, M. & St. Paul R. R. v. Minnesota, 10 Sup. Ct. 702, 134 U. S. 418, 33 L. Ed. 970.

8. SAME—REASONABLENESS.
It is no longer open to question that the interstate commerce commission is an expert tribunal empowered by law to determine in the first instance the reasonable or unreasonable character of the rate charged for transportation in interstate commerce.

9. SAME—RATE ASSOCIATION.
The character of the Southeastern Freight Association, the effect of its concert of action and agreements as to freight rates in the territory to which it extends, considered and discussed.

10. SAME—ADVANCE OF RATES.
When a number of railroads, acting under articles of organization, by concert of agreement and action advance the rates upon shipments of a particular class throughout all the territory to which their organization and influence with similar organizations extend, and when they actually advance such rates and exact the same of shippers, it is of no consequence that they have a stipulation in such articles that each and all members can at will and at any time withdraw from the agreement.

11. SAME—REASONABLE COMPENSATION.
Resonable compensation for the service actually rendered is all that a common carrier is permitted to exact. Justice Brewer, for the Circuit Court of Appeals of the Eighth Circuit, in Chicago & N. W. R. R. Co. v. Osborne, 3 C. C. A. 347, 52 Fed. 914; Smyth v. Ames, 18 Sup. Ct. 418, 169 U. S. 466, 42 L. Ed. 819.

12. SAME—UNREASONABLE INCREASE.
Where a vast increase of lumber traffic had resulted in large increase of net revenue to the carrier, the service was inexpensive, required neither rapidity of movement nor specially equipped cars, shippers were obliged to furnish and pay for equipment, railroads were neither to load nor unload, the commodity was neither fragile nor perishable, the risk of damage was inappreciable, the industry affords a tonnage second in magnitude to only one other transported by the carrier, an arbitrary increase to points of principal destination of two cents a hundred pounds is unreasonable and unlawful. This is especially clear where the particular traffic is practically destroyed immediately after the advance is made.

13. SAME—REGULATION OF CHARGES.
Railroads have no legal right to graduate their charges in proportion to the prosperity which attends industries whose products they transport.

14. SAME—INJUNCTION—REPAYMENT OF UNLAWFUL EXACTIONS.
In this case the conclusions of the court agree with the conclusions of the interstate commerce commission. The enforcement of the advance will be enjoined, and, general counsel for respondents having stipulated in judicio they would repay to the shippers the sum total of the increased exactions in case such increase should be held illegal, a reference will be had to ascertain the amount thus due the complainants respectively, and decree will be rendered therefor.

(Syllabus by the Court.)

In Equity.

Ellis, Wimbish & Ellis, for complainants.
Ed. Baxter, for respondents.
John I. Hall, for Georgia Southern & F. Ry. Co.
Dorsey, Brewster & Howell, Dessau, Harris & Harris, C. B. Northrop, and Merrel P. Callaway, for Southern Ry. Co.
Lawton & Cunningham, for Central of Georgia Ry. Co.
Kay, Bennett & Conyers, for Atlantic Coast Line Ry. Co.
Louis F. Garrard, for Macon & Birmingham Ry. Co.
King, Spalding & Little, for Louisville & Nashville R. Co.
Brown & Randolph, for Seaboard Air Line Ry.
Claude Walker, for Nashville, C. & St. L. Ry. Co.
Mason, Hill & McGill, for Southeastern Freight Ass'n.

SPEER, District Judge. An adequate statement of the issues in this case is given in the report of the interstate commerce commission which appears in the record. The Southeastern Freight Association is a combination of common carriers. In the preamble of its organic agreement it is stated that its purposes are set forth in the "following articles." A critical scrutiny of the articles will disclose its machinery, but we fail to discover any express statement of its purpose. It is, however, plainly enough to fix and control the rates to be charged by each and all of its members for the railway transportation of freight. Most of the railways constituting its membership are actively engaged in interstate commerce, and all of them may be. The territory to which this association extends

its dominating control comprehends the states of Virginia, North Carolina, South Carolina, Georgia, Florida, and those portions of Tennessee and Alabama east of a line extending from Chattanooga via Birmingham, Selma and Montgomery to Pensacola. In that territory, with all of its varied products, with an area and population vaster than many empires of which we have an account, as regards every interest dependent upon the transportation of commodities, the action of the association is more authoritative than the firman of the Sultan or the ukase of the Czar. A most important industry of this association's dominion is the manufacture of lumber. The tonnage of this product is enormous. The cotton plant is indigenous to much of this territory, but while in the year 1903 the railroads whose rates are arranged through the Southeastern Freight Association transported 1,274,727 tons of cotton, in the same year, of lumber, they moved 9,808,463 tons, or nearly eight times as much. Indeed, in tonnage thus transported lumber was not approached by any other product, and was only exceeded by bituminous coal. This tonnage has been steadily increasing. In 1901 it had been little more than six and a half millions, and two years later, as we have seen, it was nearly ten millions of tons. The vast income from moving this tonnage, an immense proportion of which was the product of the forests and mills of Georgia, poured into the treasuries of the defendant companies. That it was remunerative is not in dispute. It is charged in the bill that it was very profitable. In the answer it is admitted that it was profitable. The remunerative rates for which this product was transported could scarcely have been denied in view of the fact that the rates themselves had been advanced pari passu with the increase of tonnage. For their convenience, the rate makers have divided their territory into what are termed "groups." From group 2 of the Southern Railway there has been an increase of 3 cents a hundred pounds on lumber since May, 1894, 2 cents since September, 1899. From May, 1894, to September, 1899, the rate to Cairo from that group was 13 cents. This was increased to 14 cents from September, 1899, to June, 1903. From other groups, generally speaking, since 1894, the increase has amounted to four cents a hundred pounds. From all the groups the present rates to Cincinnati, Louisville, and Evansville are greater than they have been since 1891. The rate to Cincinnati from most of the groups is now four cents higher than it was in 1892, and from the Georgia group on the Southern Railway, to Cincinnati, Louisville, and Evansville and all Ohio river points, the rates are three cents higher than they have been since 1891. This steady and marked increase of rates for the transportation of this freight, coincident with the phenomenal increase of the tonnage carried, seems abnormal. "The general rule," said the interstate commerce commission in its valuable report in this case, "is this: The greater the tonnage of an article transported, the lower should be the rate. No rule is more firmly grounded in reason or more universally recognized by carriers." While these conditions were existing, while the respondent railroads were engaged in the transportation of the largest annual ton-

nage of lumber theretofore known, in April, 1903, the Southeastern Freight Association and other similar associations having conferred upon the subject, the defendant companies, acting in concert, announced that they would forthwith put into effect an increase of two cents a hundred pounds in the rate on lumber to points on the Ohio river and beyond. This announcement brought the intelligence of this additional levy upon their products to the owners of every mill in Georgia, in Florida, in Alabama, in Mississippi, in Louisiana, and in Arkansas. On the lumbermen at work in the immediate domain of the Southeastern Freight Association estimated on the tonnage of that year the assessment amounted to $132,000. It is perhaps not surprising that these men immediately sought protection through the courts.

On the 17th of April, 1903, the original bill was filed. The complainants are H. H. Tift, W. S. West, J. Lee Ensign, J. S. Betts & Co., Garbutt Lumber Company, Alapaha Lumber Company, Southern Pine Company, and all other members of the Georgia Sawmill Association (a voluntary association, not a party). The averments, in brief, are that the defendant companies had published, and were to immediately put into effect, an increase of two cents a hundred pounds in the rate on lumber from Georgia points to points of delivery on the Ohio river and beyond; that the threatened advance was unjust and excessive, and would result in irreparable injury. An injunction was sought upon the ground that the contemplated action of defendants was in violation of the act of Congress to regulate commerce. A temporary restraining order was issued, with the usual rule calling upon the respondents to show cause why the injunction sought by the bill should not be granted. A general demurrer denying the jurisdiction of the Circuit Court of the United States as such, and as a court of equity, was interposed. Respondents also filed a response to the rule. A hearing was had upon the demurrer, and also upon the evidence submitted by both parties. By interlocutory decree entered on the 16th day of May, 1903, it was held that the court had jurisdiction to grant the relief sought, if finally satisfied of the righteousness of complainants' demand; that the demurrer be overruled; that the bill, with amendments, be retained in the files of the court; and that the temporary injunction be dissolved. The reasons which moved the court to take this action were stated in the opinion that day filed. Among them was the statement that the increase of rates had not been actually imposed. The decree concluded with the following clause:

"In case the respondents shall enforce the rates complained of and the complainants shall make proper application to the interstate commerce commission to redress their alleged grievances, the court will entertain a renewed application on the record as made, and such appropriate additions thereto as may be proposed by either party for enjoining the enforcement of such rates pending the investigation by the commission, unless otherwise dissolved, and on presentation to the court of the report of the commission such other action be taken as will be conformable to law and the principles of equity."

Upon the dissolution of the restraining order, to wit, on the 22d of June, 1903, the respondents at once made the advanced rates effective. On the day following the complainants presented to the

interstate commerce commission their complaint and their prayer that the advance be declared to be excessive, unjust, and unreasonable. Subsequently complainants again sought from this court an injunction to restrain the enforcement of the rates pending the action of the commission. Upon this application a full rehearing of the controversy was had. This involved an exhaustive discussion of the jurisdictional questions and the facts as well. The conclusions of the court may be found in 123 Fed. 789–796. Action upon the application of complainants was withheld. The reasons for this course, as stated on page 796 of the opinion, are as follows:

"The complainants, it appears, have appealed to the commission. * * * The respondents are all solvent—probably all of them highly prosperous—railway corporations. It will be easily competent for the complainants to keep careful account of all the charges claimed to be unreasonable and excessive exacted by the defendants on shipments of lumber to the territory described in the bill. If their contention shall be maintained, it will be competent for the court in its final decree to direct the respondents, or either of them, to make restitution of the sums thus exacted. Indeed, the learned special counsel for the respondents, by his statement made in judicio, binds his clients to promptly repay to the complainants all such sums in case they shall finally prevail. Nor is it likely that in the interval which shall remain before the commission will act there will ensue any serious impairment of the business of complainants, or either of them. It is easily conceivable that a case or cases of this general character might be presented on which it would seem obligatory on the court to grant an immediate injunction. Such injunctions, however, should not be granted save in cases of grave and compelling exigency. Judicial action should be conservative, and rarely is such conservatism more plainly required than when vast commercial operations involved in interstate transportation will be arrested or disturbed by incautious orders. In this case the duty to grant the extraordinary order sought does not now seem imperative. The court, therefore, in view of the record and of the considerations mentioned, will withhold further judicial action upon the application until properly apprised of the action of the interstate commerce commission. When we shall have received the valuable assistance in the performance of the grave duty before us which must be expected from the conclusions of that authoritative and eminent body, such other and further action will be taken on this application as the law and the principles of equity will seem to direct."

It will thus be seen that the court did not deny the injunction prayed for. It merely withheld action to await the report of the commission. This has now been submitted. After hearing and considering the voluminous evidence, that body, on February 7, 1905, made its report. The report sustains in toto the contentions of the complainants, and declares that the advance in rates complained of was unreasonable, unjust, and violative of the act to regulate commerce. The report was, however, not unanimous. The honorable chairman, Mr. Knapp, and Commissioner Fifer expressed their dissent as follows:

"In the view we take of this case, the conclusions of our associates are not justified by the facts and circumstances appearing in the record, or otherwise entitled to consideration. Holding that the rates complained of have not been shown to be in violation of law, we respectfully dissent from the foregoing report and opinion."

It is regrettable that the dissenting commissioners did not more fully record the grounds of their dissent. It might then be possible for the court to inquire to what extent the dissent was supported by

"facts and circumstances appearing in the record," or by facts and circumstances not so appearing, and which, therefore, do not appear to the court. The order of the commission seeking to make effective their conclusions declares the rates and charges complained of to be excessive, unreasonable, unjust, and in violation of the provisions of the act to regulate commerce. "It is further ordered that the defendants, the Southern Railway Company, Atlantic Coast Line Railway Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railroad Company, Seaboard Air Line Railway, Central of Georgia Railway Company, Georgia Southern & Florida Railway Company, and the Macon & Birmingham Railway Company, be, and each of them is hereby, notified and required to cease and desist on or before the 1st day of April, 1905, from further maintaining or enforcing said unlawful advance of two cents per one hundred pounds, and the said unlawful rates and charges resulting therefrom, for the transportation of lumber as aforesaid."

A certified copy of the opinion and order of the commission has been duly filed. This is accompanied by an application for an injunction pendente lite and for final decree granting the relief prayed in the original bill. Counsel for the respective parties, with meritorious purpose to avoid delay and to obtain a speedy hearing on the merits, entered into a stipulation that the evidence taken before the interstate commerce commission shall stand as the evidence in this court, subject, however, to the right of either party to apply to the court for leave to introduce such additional evidence as the court may think proper for a just decision of the case. On the hearing additional evidence, mainly in the form of affidavits, was submitted by the respective parties. It is agreed that the testimony thus submitted shall have the same force and effect as if it had been regularly taken in accordance with the rules in equity. With equally meritorious purpose counsel for the respective parties agreed that this should stand for and be the hearing for final decree in equity. Counsel for the respective parties have been fully heard. The hearing was concluded on the 22d inst. On account of the gravity of the questions involved and the tremendous record, we have taken time for consideration.

The effect of the commission's report was strongly controverted in the argument. Counsel for the complainants insisted that it must be accepted by the court as true, unless it was wholly without evidence to support it. On the other hand, it was insisted that it was only prima facie correct, and "tipped the judicial scale only by a hair's breadth." Our view is that it would be violative of explicit law, the settled policy of government, and the most practical principles of reason and justice for the courts of the nation, save for controlling reasons of law or fact, to discredit or disparage the conclusions of the interstate commerce commission. The act to regulate commerce (paragraph 14), declares that the "findings of fact set forth in the report of the commission shall in all judicial proceedings be deemed prima facie evidence as to each and every fact found." In paragraph 16 this provision is distinctly reiterated.

Nor are we in any doubt as to the import of the expression "prima facie evidence." In Kelly v. Jackson, 6 Pet. 631, 8 L. Ed. 523, Mr. Justice Story declares that "prima facie evidence of a fact is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose." The authority of this case has been uniformly recognized. Rose's Notes on U. S. Reports, vol. 3, p. 301. It follows that the report of the commission declaring these advanced rates to be excessive and violative of the act to regulate commerce has such evidential effect that, had complainants been content to introduce the report and to rest their case without further evidence, it would have entitled them to the decree unless the respondents by preponderant and controlling evidence should rebut and disprove its findings. Lilienthal's Tobacco v. United States, 97 U. S. 268, 24 L. Ed. 901. In other words, the act of Congress creates a rule of presumption in favor of the commission's report, which, on its introduction, changes the burden of proof, as in this case, from the complainants to the respondents. "There is not the least doubt, on principle," says the author of the recent work Wigmore on Evidence, "that the Legislature has entire control over such rules, as it has over all other rules of procedure in general, and evidence in particular, subject only to the limitations of evidence expressly enshrined in the Constitution." 2 Wigmore on Evidence, par. 1354, cl. 3. Elsewhere in the same comprehensive and valuable work, vol. 1, par. 7, it is stated: "Apart from the constitutional rules to protect against statutory changes the Legislature has the power to alter or create any rule of evidence."

The wisdom of according to the report of the commission this important effect is as little open to question. The administration of justice, said Webster, "is the chiefest concern of man upon earth." Within the scope of that function of government there is, perhaps, no single topic of greater magnitude or moment than controversies which arise in trade and commerce. Said Sir Walter Raleigh, "Whosoever commands the trade of the world commands the riches of the world, and consequently the world itself." In a material sense, and in our astonishing civilization, nothing is more important than the transportation of commodities sold or interchanged, and in transportation the stability and reasonable character of the rates charged therefor is scarcely less important than transportation itself. The three grand departments of government, legislative, executive, and judicial, are with steady and swerveless purpose enacting or enforcing laws to safeguard the rights of the general public, and as well that portion engaged in the business of transportation. The shippers are appealing to government to protect them against unwarrantable exactions by the carriers. Appeal may be made by the carriers to protect their interests from unremunerative rates to which they may be restricted by state or other local authorities. In either case complaint is heard and redress is given. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Chicago, etc., Ry. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; Rose's Notes on U. S. Re-

ports, vol. 11, p. 946 et seq. It is no longer doubtful that "the question of the reasonableness of a rate of charge for transportation is eminently a question for judicial investigation." Justice Blatchford, in Chicago & St. Paul Ry. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970. To this end, in part, the government has created the interstate commerce commission. It is a tribunal to hear, investigate, and report on the reasonableness of rates, and to attempt the correction of inequalities and injustice therein. Said the Supreme Court in Louisville & Nashville R. R. Co. v. Behlmer, 175 U. S. 675, 20 Sup. Ct. 219, 44 L. Ed. 309, "That body, in the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon the questions of fact of the character here arising." In view of these considerations and precedents, it can, we think, be no longer open to question that the interstate commerce commission is the expert tribunal empowered by law to determine, in the first instance, the reasonable or unreasonable character of the rates charged for transportation in interstate commerce. Said Judge Taft, for the Circuit Court of Appeals, in East Tennessee, V. & G. R. R. Co. v. Interstate Commerce Commission, 99 Fed. 64, 39 C. C. A. 425:

"It has been suggested that the traffic managers are much better able by reason of their knowledge and experience to fix rates and to decide what discriminations are justified by the circumstances than the courts. This cannot be conceded so far as it relates to the interstate commerce commission, which, by reason of the experience of its members in this kind of controversy, and their great opportunity for full information, is in a sense an expert tribunal."

We may repeat what was stated by this court in Commission v. Louisville & Nashville R. R. Co., 118 Fed. 626:

"The righteous orders of the great commission which has been primarily intrusted by Congress with the tremendous duty should in all proper cases be respected and enforced by the courts of the country. While, on occasion, the railway or other corporation may suffer a temporary diminution of revenues from an order of this character, the interest of the public, and in the end the interest of the corporation itself, is conserved. In all such cases the general welfare must control. 'Salus populi est suprema lex.'"

It is proper to observe, however, that the court has considered the entire record, and has formed its conclusions not only from the report of the commission, but from all the evidence submitted to that body and stipulated into the case here, and from the additional evidence submitted de novo on this hearing.

A highly significant feature of this case is the fact that the rates complained of are the result of concert of action on the part of the members of the Southeastern Freight Association. This organization, as we have seen, embraces as members all of the defendants except the Nashville, Chattanooga & St. Louis Railroad and the Louisville & Nashville Railroad Company. But the latter, as colessee of the Georgia Railroad, while not nominally, is also essentially, a member. The association was a proper, though perhaps not a necessary, party. It might well desire to be heard with regard to the relating charges against its character and conduct. While in the original bill there was a prayer that this association should be declared an illegal combination in restraint of interstate trade,

and that the defendant railway companies be enjoined from prosecuting the purposes of such illegal combination through the medium of the freight association, counsel for the complainants in argument properly abandon that prayer. While this is true, it is also true that the methods of the association, and the conduct of its members in this particular case, were placed before the commission, and are fully before the court. In reply to the contention on the part of the respondents that they acted independently each for itself, and not through the agency of the Southeastern Freight Association, the commission finds:

"The proof shows conclusively that the advance was the outcome of concert of action and previous understanding between the companies. Through their authorized official representatives, they conferred with each other repeatedly as to the making of the advance; recognized the fact that, because of competition in common markets between the lumber producing districts served by them, the advance should be from all those districts or none; and, finally, they all promulgated the advance to take effect at exactly the same date and for exactly the same amount. This concurrence of action was not only between the railway companies, parties defendant in this case, and in relation to rates from Georgia shipping points, but was participated in by the lumber-hauling roads serving the territories both west and east of the Mississippi in Arkansas, Louisiana, Mississippi, Alabama, and Florida."

The commission concludes that it is its duty to consider this joint, or concert of, action of the defendants as bearing upon the reasonableness and validity of the advanced rate which results. It holds that the element of competition is eliminated. In the absence of legitimate competition, destroyed, as we shall presently see, by methods obviously illegal, the commission presumes that the advance rates are higher than legitimate competition would produce. In other words, the marked increase of charges for transportation of that commodity which, save one other, affords the largest tonnage of freight to the respondent roads, did not originate from a normal or reasonable exigency of the respondents' business. On the contrary, it was an arbitrary exaction, imposed by a combination of railroad agents made in restraint of the natural movement of the product in the lumber trade. This combination or concert of action on the part of the respondent railroads is plainly violative of that provision of the interstate commerce law which forbids pooling. This was enacted, among other things, for the purpose of securing competition. Pooling may be as well effected by a concert in fixing in advance the rates which in the aggregate would accumulate the earnings of naturally competing lines, as by depositing all of such earnings to a common account and distributing them afterwards. That such an association and concert of action between agents of naturally competing lines is destructive of competition is equally unanswerable. To entertain any other view is to ignore reiterated decisions of the Supreme Court of the United States and many rulings of the Circuit Courts and of the state courts. Perhaps the leading cases on this subject are United States v. Freight Association, 166 U. S. 341, 17 Sup. Ct. 540, 41 L. Ed. 1007; Joint Traffic Association Case, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. In the first case the court had under considera-

tion the legality of the Trans-Missouri Freight Association. The agreement of that body may differ in form, but its substantial purpose was the same as that of the Southeastern Freight Association. It avowedly was the "mutual protection to the railroads by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local." After argument by many of the most eminent counsel in the country, and after exhaustive consideration, the court held that the anti-trust law prohibiting contracts, combinations, and conspiracies in restraint of trade or commerce among the several states or with foreign countries apply to and cover common carriers by railroad, and a contract between them in restraint of such trade or commerce is prohibited even though the contract is entered into between competing railroads only for the purpose of thereby effecting traffic rates for the transportation of persons and property. It was further held that, in order to maintain such a contention the complainant is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce if such restraint is the necessary effect, and concluded that the anti-trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce. The court then proceeds to declare that the agreement of the association does in fact constitute such a restraint in violation of the law. It is proper to state that four judges, three of whom are not now on the bench of the court, dissented from this conclusion; but the opinion of the majority is, of course, controlling. In the subsequent case of United States v. Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, the court, after full consideration, reaffirmed its holding in the Trans-Missouri Case. It further declares that Congress, with regard to interstate commerce, and in the course of regulating it in the case of railway corporations, has power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition. The tremendous significance of these findings is shown by the multitude of cases in which the doctrines announced have been utilized and reaffirmed. See Rose's Notes on U. S. Reports, vol. 12, p. 958 et seq.; also supplement to same publication, vol. 3, p. 795. Perhaps the most noted case on this subject is that of the Northern Securities Company v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. There it was held that a contract by which a majority of stock of two companies who owned parallel interstate railroads is transferred to a corporation organized for the purpose of holding and voting the same and receiving dividends and dividing the same pro rata among the stockholders of the two companies, violates the anti-trust law. Such is the superabundance of authority upon this subject that further citation will be superfluous. It may be pardonable to recall that one of the pioneer cases on this important topic was that of Rowena Clarke v. Central R. R. & Banking Company of Georgia (C. C.) 50 Fed. 338, 15 L. R. A. 683 et seq., heard in this district. This case was decided in 1892. Commenting upon similar conditions, it was there observed:

"It is not difficult to perceive that a combination of corporations which produces a condition so inequitable cannot be sanctioned by the law. We believe that transactions of this character are within the spirit, if not within the letter, of the act of Congress known as the 'Sherman Anti-Trust Law' (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). It is certainly, as we have seen, obnoxious to the law of Georgia, and it was certainly as obnoxious to the common law."

This decision was made 13 years ago. The principles then announced, which were challenged in many influential quarters, are now imbedded in the country's jurisprudence and in the legislation of the national Congress. It was insisted with great earnestness by the learned special counsel for the respondents that because the various members of the association expressly stipulated in the articles of organization that each and all members could at will and at any time withdraw from the agreement to fix rates, it was not a combination in restraint of trade. This view seems wholly untenable. That is merely a recitation of a privilege which any party to an unlawful enterprise inherently enjoys. Confederates or conspirators who unite to do an unlawful act or to do a lawful act in an unlawful way may jointly or severally abandon the project. The law affords them the locus pœnitentiæ. If, however, the object of the conspiracy is accomplished, its character is not to be determined in view of the consideration that the conspirators might have repented, but with an eye single to the fact that they did not repent. Besides, it is indisputable that the agreements of the association were made to be kept, and not to be broken. Good faith between the members, not to mention a powerful compulsory force behind them, obliged that the agreements be kept, and the fact is, as the commission finds, they were kept.

The cardinal error to which the railroads have been committed in this important controversy is the apparent belief that they have the right, by arbitrarily increasing freight rates, to divert at any time to their own treasuries a share of the profits of successful industries or occupations. It was not contended that the antecedent rates were unremunerative. As before stated, they were conceded to be profitable. That additional revenue was needed to meet increased expenses was the motive of the advance was testified by Vice President Culp of the Southern Railway Company. To quote his language: They "looked about to see where" they could best, but without injury, get that additional revenue, and one of the commodities which they thought would "bear an advance" was lumber. But the courts have more than once decisively corrected this assumption on the part of railway officials. It is true that the business of railway transportation is usually carried on by private capital invested in corporations. It is, however, business of a quasi public nature. As we have seen, there is no doubt that within the limitations of the Constitution it is subject to governmental control. These facts prohibit the agents of the railway from charging, like the owners of other property, any price they may choose to exact for the use of the railroad. The law does not fail to regard the enormous franchises which have been granted to the railroads by the public, their corporate powers, the right to avail themselves of

the right of eminent domain, the right to protection against exorbitant restrictions or exactions from local authority, and other similar considerations. These views are very plainly set forth in the opinion of Justice Brewer sitting with the Circuit Court of Appeals of the Eighth Circuit in the case of Chicago & N. W. R. R. Co. v. Osborne, 52 Fed. 914, 3 C. C. A. 347. The conclusion of the learned justice is that reasonable compensation for the service actually rendered is all that the railroad is permitted to exact. Five years after the decision just cited was made the Supreme Court of the United States had before it the same question. This was in the case of Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. This was a case of great importance. The opinion was happily unanimous. It was argued for the appellant by Mr. John L. Webster and by Mr. Churchill, Attorney General of the state of Nebraska, and with them appears the famous name of William J. Bryan. For the appellees there appeared J. M. Woolworth and that renowned leader of the American bar, the late Mr. James C. Carter. The case would be additional authority for the jurisdiction of this court in equity to prevent a multiplicity of suits, if such additional authority was needed; but the great duty which fell upon the court was to determine the rule for fixing the reasonableness or unreasonableness of transportation rates. The state of Nebraska had attempted to determine this by fixing an arbitrary maximum for the transportation of interstate commerce. This the court held it could not do. But in holding this it announced certain principles which the controlling officers of railroads, charged as they are with such vital duties to the commerce and welfare of the country, might well take to heart. "The railroad," said the court, "is a public highway, none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such corporation was created for public purposes. It performs a function of the state. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the guaranties for the protection of its property." It may not "fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the service rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders."

After careful consideration of the extensive record, there seems to have been an utter absence of excuse or justification for the concerted action of the railroads which advanced the rates on lumber throughout the South. The vast increase of the lumber traffic had resulted in large increase of net revenue for those roads. The service was inexpensive. It required neither rapidity of movement nor specially equipped cars, and such simple equipment as was needed the shippers were obliged to furnish and pay for. The railroads

were required neither to load nor unload the cars. This was done by the consignor and consignee. The lumber carried was neither fragile nor perishable, and the risk therefore from loss or damage was inappreciable. Mr. Tift, the principal witness for the complainants, and one of the largest lumber men of the state, testified that for 30 years he had not been compelled to present a claim for damage on lumber shipped from his mill. Nor were there any exigencies in the financial condition of the principal defendants which called for so vast a contribution to their treasuries from an industry whose product forms such a large part of their tonnage, and which is so indispensable to the public welfare. On this subject we may, perhaps, with propriety quote literally the figures and findings of the commission. On page 573 of the report it is said:

"The financial condition of the principal defendants appears to have steadily improved for a number of years up to and including the year 1903, in which the advance in rates complained of was made. They were comparatively prosperous at the date of and for years prior to the advance.

"The Southern Railway Company has declared dividends for each year from 1897 to 1903, both inclusive, ranging from $543,000 * * * in 1897, up to $4,500,000 (7½ per cent. on $60,000,000 of preferred stock) in 1903. That road also reports surpluses of from $464,013 in 1898 to $2,100,897 in 1902.

"The Louisville & Nashville Railroad Company has declared dividends for each year from 1899 to 1903, both inclusive, ranging from $1,848,000 (about 3½ per cent. on $54,912,520 of common stock) in 1899, up to $3,000,000 (5 per cent. on $60,000,000 of common stock) in 1903. That road also reports surpluses of from $40,204 in 1899 to $2,987,195 in 1903.

"The Atlantic Coast Line Railroad Company has declared dividends for each year (except year 1900) from 1894 to 1903, both inclusive, ranging from $318,399 in 1894 (5½ per cent. on $7,021,950 of common stock), up to $1,714,075 (5 per cent. on $1,744,100 of preferred stock and 5 per cent. on $36,650,000 of common stock) in 1903. The surpluses reported by that road are from $86,875 in 1894 to $1,293,983 in 1903. In 1900 no dividend was declared, but there was a surplus reported of $2,152,406.

"The Nashville, Chattanooga & St. Louis Railway Company declared dividends ranging from $100,000 in 1899 (being 1 per cent. on $10,000,000 of common stock) to $400,000 in 1895, 1896, 1897, and 1898, being 4 per cent. on $10,000,000 of common stock. For each year from 1900 to 1903 that road reported surpluses ranging from $566,907 in 1900 to $823,480 in 1903.

"The Georgia Southern & Florida Railway Company declared dividends for each year from 1897 to 1903 ranging from $27,360 (being 4 per cent. on $684,000 of preferred stock) in 1897 up to $99,240 in 1901 (being 5 per cent. on $684,000 of preferred stock and 6 per cent. on $1,084,000 of preferred stock) in 1903. For each of the years 1902 and 1903 it declared a dividend of $77,560. The surpluses reported from 1896 to 1903 range from $9,657 to $107,060 in 1896. The surplus for 1901 was $24,105, for 1902 $41,448, and for 1903 $77,968.

"The Seaboard Air Line Railway Company has declared no dividends, but reports surplus of $252,676 for 1901, $769,331 for 1902, and $754,431 for 1903. The Central of Georgia Railway Company declared no dividends, but reports surpluses for each of the years 1899 to 1903, both inclusive, ranging from $58,888 in 1899 to $203,506 in 1903. The Macon & Birmingham Railway Company has declared no dividends, and reports a deficit for each of the years from 1894 to 1903, both inclusive, ranging from $29,099 in 1902 to $96,715 in 1894. The deficit reported for 1901 was $34,313, for 1902 $29,099, and for 1903 $45,949."

It is true, as insisted, that the operating expenses of the railroads have grown larger, and the percentage of operating expenses to gross earnings has increased. But it is also true that both gross

and net earnings have steadily increased. The statement made in argument that the gross earnings of the Southern Railway have increased from $25,353,686 in 1899 to $42,313,248 in 1903 does not seem to have been challenged. In the same year the net earnings, it seems, had increased from more than eight millions to more than twelve and a half millions, and the net earnings per mile have increased more than one thousand dollars. While these figures are most encouraging, and will afford gratification to all of those who are broad-minded enough to rejoice in the prosperity of the railroads, which do so much for the welfare of the country and the advancement of its civilization, it is also true that this is probably an understatement of the real earnings of this great corporation. It was insisted by Mr. Baxter in his very able argument for the respondents that every expenditure of a railway, no matter how permanent the improvement, must be charged to the expense account of operation. This accomplished lawyer is accustomed to speak authoritatively with regard to matters intrusted to his care. His statement in judicio may be regarded as binding upon all of the respondent companies, and, if accepted, when we consider the vast material improvements which have been made in the southern railways it will be difficult to estimate the marvelous prosperity which they now enjoy. It is true counsel for the railroads insist that their net revenue did not increase in proportion to their gross earnings, but, in the nature of things, this is not to be expected in any business. A manufacturing enterprise of extensive character may make 10 per cent. by the product of its mill. It may double its capacity and double its output, but it may look in vain for a double increase in net earnings. How needless, then, was the exaction upon the great lumber industry of the South, which has occasioned this costly litigation with all of its lamentable consequences. The hardship upon the complainants was incontestable. The findings of the commission show that under the old rates they had built up a prosperous trade in the Northwest. Under the new rates this practically ceased. When the court, with what was thought to be caution conservative of the rights of all parties, retained the bill, but declined to continue the injunction, and gave complainants the opportunity to avail themselves of their right to appeal to the commission, this business was practically prostrate. Unhappily, but no doubt necessarily, there was a delay of 19 months before the commission made its finding. In the meantime, for well-known causes of a political nature, there had been a great and enthusiastic revival in the business, enterprise, and confidence of the country. A great demand for yellow pine lumber had grown up in all sections. Builders felt themselves obliged to have it, whatever the price, and whatever the rate, and large shipments were made on the advance rates. This is plainly enough shown by the numerous supplemental affidavits offered by the complainants and received as evidence. This, however, was in no sense ascribable to the action of the Southeastern Freight Association in imposing this rate, but was despite that action. It in no sense relates to the reasonableness or unreasonableness of the rate. And it should not be

forgotten that while the business of the lumbermen was recuperating the treasuries of the railroads were all the while receiving a proportionate increment from the unreasonable increase of rates which they had imposed. They have no right to graduate their charges in proportion to the prosperity which comes to industries whose products they transport. With equal reason they might demand an increase of rates for the transportation of cotton with every increase in the value of our great staple. Indeed, to concede the principle for the fixation of rates upon which the railroads through the medium of the Southeastern Freight Association have acted in this case would concede their power to levy for no better service augmentation of tolls for every increase of profit in every line of endeavor won by the enterprise, sagacity, and industry of the American people. It is superfluous to add that a government of laws, and not of men, will never tolerate such domination and control of the trade, manufactures, and commerce of the people. These views relate exclusively to the facts before the court in this case as proven incontestably by the evidence and as found by the interstate commerce commission. Here is no attempt to discredit the incalculable services which are hourly rendered the country by the railways. In nothing do we share the animus or purposes of that sinister, selfish, and insincere agitation which would excite, if it could, the masses of the people to hatred and injustice toward corporations. Such a propaganda provokes in the justly balanced mind, and particularly in the mind trained for the administration of law, and for the protection of property and personal rights, disapprobation, and, indeed, abhorrence. With sincere enthusiasm the judge of this court has elsewhere testified to the wonderful material blessings bestowed upon our once prostrate Southland by our great railway systems in "economies of operation, in constant, if gradual, reduction of rates, in increased facilities and more expensive accommodations, in more uniform service for longer distances without change of cars, in abolition of short disjointed lines under different management, in augmentation of shipping facilities, in physical perfection of the properties and consequent safety to the public, in the steady increase in value of all the securities of these great highways of Southern commerce. * * * And with what result? Where formerly asthmatic engines attached to unsafe and noisome trains through the solitudes of an impoverished country like a wounded snake dragged their slow length along, now we behold on massive rails of gleaming steel, on roadbeds of granitic ballast, successive sections of long freight trains sturdily steaming through a prosperous land, smiling with luxuriant crops, beautiful with neat and happy homes, the chimneys of great factories giving employment to thousands, almost marking the miles; or the admiration kindles and the pulse leaps as the limited express laden with its human freight glances by on its mission of progress and civilization." In nothing do we abate that enthusiastic approval of the services of the railways to the people; but not more than any other human agency is railroad management infallible. The patriotic and proper solution of every controversy involving the vast ques-

tions of transportation is simply the trial of each case on its particular facts, and with an eye single to the merits of the one party or the other. In interstate commerce this is exclusively a duty of the national tribunals, and the laws regulating such commerce are within the exclusive power of Congress.

Innumerable are the cases in which the railroads themselves successfully invoke the identical principles here announced for their own protection against intemperate and injurious local legislation restrictive of their just powers and destructive of the just rights of their stockholders. Such was the case of Smyth v. Ames, supra. Such was the case of Chicago, etc., Ry. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970. See, also, Central R. R. v. Macon (C. C.) 110 Fed. 871; Iron Mountain R. R. v. Memphis, 96 Fed. 122, 37 C. C. A. 410; Milwaukee, etc., Co. v. Milwaukee (C. C.) 87 Fed. 577; Ball v. Rutland (C. C.) 93 Fed. 516; Cleveland City Ry. v. Cleveland (C. C.) 94 Fed. 409; Chicago, M. & St. P. Ry. v. Tompkins, 176 U. S. 173, 20 Sup. Ct. 336, 44 L. Ed. 417; Louisville, etc., v. McChord (C. C.) 103 Fed. 220. In all of these cases and many others of pertinent character which might be cited, corporations found themselves obliged to resort to the courts to obtain protection against rates which were unreasonably low. The courts of the country will be found prompt to protect them in the righteous exercise of righteous powers. They will be equally prompt in proper cases to protect the public or any individual from unrighteous exactions, particularly when invoked through the agency of unlawful combinations or associations in restraint of trade and commerce, affecting not only the welfare and happiness of the individual, but the thrift and prosperity of entire communities and great commonwealths.

In this case the conclusions of the court as to the issues involved agree with the conclusions of the interstate commerce commission as expressed by their report. A decree enjoining all the respondents against further enforcement of the rates complained of will be at once entered. Order will be taken referring to the standing master the pleadings and evidence, with instruction to ascertain the sum total of the increased rate paid by each of the complainants to either or all of the defendant companies since the rate went into effect and to the end of this litigation, and report such amount to the court, in order that, pursuant to the stipulation made by the respondents in open court, in case the complainants prevail, decree of restitution shall be made. Because of the vast extent of the lumbermen's business, and the great expense and inconvenience which might result to them, to the lumber trade, and the railways from the instantaneous enforcement of this injunction, when respondents may have purpose to appeal from this action, it will be ordered further that the decree now granted shall not take effect until 10 days from this date have elapsed, in order that the respondents or either of them, if they so desire, may seek supersedeas.

## PENNY et al. v. CENTRAL COAL & COKE CO.

(Circuit Court of Appeals, Eighth Circuit. April 29, 1905.)

No. 2,116.

1. TRESPASS—INJURY TO FREEHOLD—REMOVAL OF COAL—EVIDENCE OF TITLE.
In an action by the trustees of a church for trespass on their church property in the removal of coal from beneath the surface of the land, evidence *held* to justify a finding that the title to the land in controversy was in the church.

2. SAME—UNINTERRUPTED POSSESSION—PRESUMPTIONS.
Where a religious society had had uninterrupted possession of land in controversy for 30 years or more, using it as its own, it would be presumed, in the absence of an existing deed to the land, that plaintiff's entry was under a purchase, and that its grantor had lawful right to convey.
[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 596.]

3. SAME—RELIGIOUS SOCIETIES—TRUSTEES—RIGHT TO SUE.
Where a religious society, consisting of many worshipers, was the owner of certain lands in controversy, its trustees were entitled to sue for an injury to the freehold consisting of a wrongful removal of coal from beneath the land without joining the members of the congregation, under Sand. & H. Dig. Ark. § 5632, providing that when the question is one of common or general interest of many persons, or where the parties are numerous, and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all.
[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 12; vol. 42, Cent. Dig. Religious Societies, §§ 159, 202.]

4. SAME—BILL OF EXCEPTIONS—CONSTRUCTION—ADMISSIONS.
Where, in a suit for the wrongful removal of coal from beneath land belonging to a church and used for the church building and for a graveyard, the bill of exceptions, at defendant's instance, recited that defendant had removed from under the land described in the complaint, without any injury to the surface and without in any way interfering with or molesting or damaging the church and burial ground, 1,200 tons of coal, etc., such recital constituted an admission that the coal taken lay definitely under the whole of the tract of land in controversy or directly beneath the graveyard or buildings of the society.

On Rehearing.

5. TRESPASS—INJURY TO FREEHOLD—RELIGIOUS SOCIETIES—OWNERSHIP—PRESUMPTIONS.
Where an unincorporated religious society had had uninterrupted possession of land in controversy for 30 years or more, and had used it as its own under a lost deed, it would be presumed, in view of the fact that the society was incapable of taking title in itself, that the title was legally conveyed to trustees for its benefit.

6. SAME—MINES—SURVEY.
In trespass on a religious society's property, for the removal of coal from beneath the surface of the land by defendant, the excavation being in defendant's possession, the court should have granted plaintiffs' application for a survey of the mining operations, in order to disclose the direction of such excavation and to ascertain the quantity of mineral extracted.

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

T. B. Pryor and F. A. Youmans, for plaintiffs in error.
Ira D. Oglesby, for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

PHILIPS, District Judge. The plaintiffs in error brought action in trespass against the defendant in error to recover the value of coal mined on, and removed from, a two-acre tract of land claimed to be in the possession of the Cherokee Chapel, African Methodist Episcopal Church, represented by the plaintiffs in error as trustees. Inasmuch as at the close of the plaintiffs' evidence the court directed a verdict for, and entered judgment in favor of, the defendant, it is necessary to give a summary of the facts disclosed by the evidence.

The religious body above named, first known as the "Wollage Colored Church," had, since about 1870, claimed and used the buildings on the two-acre tract of land in controversy as a house of worship and schoolhouse, up to the time of the alleged trespass. From one-half to two-thirds of the area of the two-acre tract claimed by the plaintiffs was inclosed by a rail fence, which inclosure during said period was used as a graveyard by the congregation. The church and schoolhouse were on that portion of the land not inclosed. About the time of the erection of the church building the pastor of the church came into possession of an instrument of writing purporting to have been executed by one W. F. McCullom and wife, and purporting to have been duly acknowledged before a justice of the peace named Watts. He took this instrument of writing to the office of the recorder of deeds at Ft. Smith, Sebastian county, Ark., and delivered it to the recorder of deeds to be recorded. Afterwards this pastor called for the written instrument, and it was delivered to him by the recorder, who showed him the record of the paper in the record book at Ft. Smith. This paper he took home with him, and read the same to the congregation in said church. He was unable to state the description of the land given therein, and specifically what it conveyed. This instrument the pastor delivered to one of the church trustees, and he has not seen the same since. The trustee to whom the paper was delivered moved away from that locality some years thereafter, and died about the year 1880.

At the time said paper was delivered to the recorder at Ft. Smith, Sebastian county, in which the land is situated, had been divided into two recording districts, one being at Ft. Smith and the other at Greenwood. The land described in the petition was situated in the Greenwood district. The records in the latter district were burned in 1880 or 1882. The plaintiffs never had the deed in their possession nor knew its contents. Part of the records covering lands in the Greenwood district were removed to Greenwood before the fire.

In 1870 or 1871 the county surveyor of said county made a survey of a tract of land in the vicinity of the church house and grave-

yard, and while the survey was being made said McCullom and others were present, when McCullom stated that he had sold to the negroes two acres of land, but did not state what two acres. This statement, upon objection by defendant, was excluded by the court. Two lines of the survey referred to ran near by the church and graveyard. The rail fence around the graveyard was subsequently replaced by a wire fence, and a frame house erected within a few feet of the log house used as a church.

The evidence showed that the defendant company had removed from under the land described in the complaint about 1,200 tons of coal, worth, after being delivered on top of the ground on board the cars, $1.10 per ton. The removal of said coal did not disturb the church building or graveyard.

The first objection interposed to the right of recovery by the plaintiffs in error is that they did not show such title as would authorize them to maintain the action of trespass for an injury to the freehold, such as removing coal from beneath the surface of the land. There was some evidence in this case from which the jury might have inferred that a deed had been made conveying the property in question for the benefit of said religious association. While the pastor of the church was unable to state from his recollection that the written instrument described the two-acre tract in question, yet that it was a deed pertaining to this property should not be regarded as a strained inference. This from the facts that the pastor took the written instrument to the recorder's office of the county where the land is situated, and left it there for record, where deeds of conveyance of lands are, under the law, recorded; that he afterwards took from the recorder's office the instrument and read it to the congregation in assembly, presumably that they might be advised and assured that they had acquired the title to the property on which they had erected buildings for worship and were educating their children, and where they were burying their dead. The fact that he then delivered it into the keeping of one of the trustees of the church would indicate that either the instrument itself or the church polity pointed out the trustees as the persons "to have and to hold," for the use of the society. As the evidence shows there are only three trustees, the presumption is that such number constituted the body of trustees of the organization from its inception. As the deed could only be manually placed in the hands of one of them, the further presumption would reasonably arise that he took it for the representative body. The failure to find the deed of record at Ft. Smith, where the pastor testified he delivered it for record, is sufficiently explained by the fact that the county had been divided into two recording districts, and that a part of the records for the land situated in the Greenwood district, including the land in question, was removed there from Ft. Smith, and that the records of the Greenwood district, in 1880 or 1882, were destroyed by fire. If the said instrument purported to convey the parcel of land in question, as applied to the facts of this case, it was not essential that the plaintiffs in error should have gone further in their evi-

dence, and shown that McCullom, from whom they claimed title, owned the land at the time of the alleged conveyance.

In the absence of an existing deed of conveyance to land, the law is that where a person, or association of persons, as in this case, has had the uninterrupted possession of a piece of land for 30 years or more, using it as his or its own, the common law of the land creates the presumption that the entry was under a purchase; and, nemine dissidente, the same law creates the presumption that the grantor had lawful right to convey. Such presumption does not always proceed on a positive belief that the thing assumed has actually taken place. Mr. Justice Field, in Fletcher v. Fuller, 120 U. S. 534–545, 7 Sup. Ct. 673, 30 L. Ed. 759, in a review of the decisions touching this question, said:

"When possession and use are long continued they create a presumption of lawful origin; that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It may be, in point of fact, that permission to occupy and use was given orally, or upon a contract of sale, with promise of a future conveyance, which parties have subsequently neglected to obtain, or the conveyance executed may not have been acknowledged, so as to be recorded, or may have been mislaid or lost. Many circumstances may prevent the execution of a deed of conveyance, to which the occupant of the land is entitled, or may lead to its loss after being executed."

Further on he sums up the rule thus:

"Where any proprietary right is exercised for a long period, which, if not founded upon a lawful origin, would in the usual course of things be resisted by parties interested, and no such resistance is made, a presumption may be indulged that the proprietary right had a lawful origin. The principle is thus stated by Mr. Justice Stephen of the High Court of Justice of England, in his Digest of the Law of Evidence, using the term 'grant' in a general sense, as indicating a conveyance of real property, whether corporeal or incorporeal: 'When it has been shown that any person has, for a long period of time, exercised any proprietary right which might have had a lawful origin by grant or license from the crown or from a private person, and the exercise of which might and naturally would have been prevented by the persons interested, if it had not had a lawful origin, there is a presumption that such right had a lawful origin, and that it was created by a proper instrument, which has been lost.'"

In United States v. Chaves, 159 U. S. 452–463, 464, 16 Sup. Ct. 57, 62, 40 L. Ed. 215, Mr. Justice Shiras, after discussing the question of fact as to whether or not the evidence was sufficient to show affirmatively that the claimant obtained title from the Mexican government, said:

"We do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as disclosed in this case. Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for 20 years, and that such rule will be applied as a presumptio juris et de jure wherever, by possibility, a right may be acquired in any manner known to the law."

All the facts and circumstances disclosed by the record were, without more, sufficient to show title in fee to the land occupied by this religious society.

It is next objected by the defendant in error that the plaintiffs, who sue to the use of said church, disclose no legal authority to maintain this action. Counsel for plaintiffs in error predicate the right of action in the name of the three parties as trustees, upon section 6381 of the Arkansas Statutes, which is as follows:

"All lands and tenements, not exceeding forty acres, that have been or hereafter may be conveyed by purchase to any person or persons as trustee or trustees in trust for the use of any religious society within this state, either for a meeting house, burying ground, camp ground or residence for their preacher, shall descend, with the improvements and appurtenances, in perpetual succession, in trust to such trustees as shall, from time to time, be elected or appointed by any such religious society according to the rules and regulations of such society."

This statute devolves the title to the church or graveyard property upon the successive trustees of the religious society in perpetuity, where there has been a conveyance under purchase to any person or persons as trustee or trustees for the society. As it is conceded that the plaintiffs who brought this action were then acting trustees of the church, they were entitled to maintain the action if the title to the property had been conveyed by purchase to any person or persons as trustee or trustees for the use of the society. It perhaps would not be too much to say that there was some evidence in this case from which the jury might have inferred that a deed had been made to the trustees, as hereinbefore indicated. But the right of the plaintiffs to maintain this action need not be rested upon said section of the statute. Section 5632, Sand. & H. Dig. Laws Ark., provides that:

"When the question is one of common or general interest of many persons, or where the parties are numerous and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all."

Surely, it must be conceded that it is a question of common or general interest of many persons composing the congregation of a religious society that a coal mining corporation should, unbidden, come and burrow beneath their house of worship and the graves of their dead, for coal, and cart it away. As the worshipers of such a society are generally numerous and changing, constantly coming and going, rendering it difficult, if not impracticable, to obtain the names and the consent of such a conglomerate mass, composed of men, women, adults, and minors, to join in such an action as this, the situation certainly brings the case within the scope of the statute, enabling the acting trustees of the society, to its use, to maintain the action of trespass for such a wrongful entry upon and spoliation of its property. This statute, in its pertinency to the instance of a church congregation, does but give legal recognition to the generally known fact that the temporalities of a religious organization are customarily committed to the care and direction of one or more trustees.

The only remaining contention on behalf of the defendant in error, deemed of sufficient importance to notice, is that the proof did not show that the coal taken lay definitely under the whole

of the two-acre tract of land, or that it lay directly beneath the inclosure of the graveyard, or under the buildings used as a schoolhouse and church. This contention is not fair to the bill of exceptions, which recites that the coal company "has removed from under the land described in the complaint, without any injury to the surface, and without in any way interfering with or molesting or damaging the church and burial ground, 1,200 tons of coal," etc. This, it seems to us, not only concedes that mining was done under the two acres in question; but in view of the statement, which doubtless the defendant in error had the bill of exceptions recite, that the undermining was done without interfering with the graves and buildings, it should be held as tending to show that the mining was done beneath the graveyard and the buildings. It not appearing that the negroes were claiming any other two acres of ground than this, it was a circumstance confirmatory of their claim. A grant of two acres for a graveyard, church, etc., would presumptively be in one body, with regular boundary lines, not zigzagging or in disjected parcels.

It follows that the Circuit Court erred in directing a verdict for the defendant; and its judgment is reversed, and the cause remanded, with directions for further proceedings in conformity with this opinion.

## On Rehearing.

Complaint is made in the motion for rehearing that in the opinion filed herein the court did not consider the point, made by the defendant in error in its brief, that the African Episcopal Church, being an unincorporated voluntary association, was incapable, at law, of taking and holding as grantee under a conveyance, and therefore no presumption arose in this case that any grant, cognizable at law, was ever made to the church. It may be conceded that at common law a deed of conveyance to an unincorporated religious association would be bad, for lack of a capable grantee. Philadelphia Baptist Ass'n v. Hart, 4 Wheat. 27, 4 L. Ed. 499; Beatty v. Kurtz, 2 Pet. 566, 7 L. Ed. 521; Stewart et al. v. White et al. (Ala.) 30 South. 526, 55 L. R. A. 213. But the authorities are also agreed that a valid grant may be made to trustees for such association, and that such title will descend in perpetuity. As shown by the citations in the opinion herein, after such long occupancy and exercise of proprietary right, "there is a presumption that such right had a lawful origin, that it was created by a proper instrument, which had been lost, * * * and that such rule will be applied as a presumptio juris et de jure whenever by possibility a right may be acquired in any manner known to the law." If, as contended, the church association could take only through trustees for its use, and the presumption is, as asserted by the Supreme Court in the cases cited in the original opinion, that, if the title had not lawfully passed to such occupant, its long exercise would have attracted the attention of and "been prevented by the persons interested," we can perceive no sensible reason why the rule should not obtain in this instance that a proper deed was made to trustees for the church. If there was any misconception in the opinon filed herein, it

was in the half concession that such deed to trustees for the church may not have been made.

In respect of the criticism made that the court misconceived the facts touching the filing of the deed in the recorder's office, for the reason that, when the pastor of the church testified he filed the deed in the recorder's office at Ft. Smith, the county had been divided into two recording districts, one at Ft. Smith and the other at Greenwood, and as the land in controversy was situated in the Greenwood division the presumption should be indulged that no deed was so recorded at Ft. Smith, it is sufficient to quote from the bill of exceptions:

"The records of the Greenwood district were burned in 1880 or 1882. * * * Part of the records conveying lands in the Greenwood district were removed to Greenwood before the fire."

It is to be conceded that the description of the land in question, given in the petition, is vague, leaving it in irregular shape—evidently, it is not unreasonable to infer, a clerical mistake of the framer of the petition. But the answer, after describing, by regular lines according to Congressional survey, the lands the defendant claims title to, in effect concedes that the land in controversy is a part thereof, and so the case was tried below. The matter of description can be rectified by amendment, in the event of further litigation.

We deem it proper to observe that the record shows that the plaintiff below moved the court for an order to have the mine in question surveyed, which was refused. Under the situation of this case, the excavation being in the possession of the defendant, it was a very proper case for the court to have ordered a survey, under its prescription. Without this course it was within the power of the defendant to conceal from the plaintiffs two important facts: First, as to the direction of the excavation, to determine whether or not it be beneath the surface survey; and, second, to ascertain the quantity of mineral abstracted. It is now the recognized practice in such contests, on the application of the party out of possession of the mine, to direct such survey.

The motion for rehearing is denied.

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## UNITED STATES v. AH SOU.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1905.)

No. 1,110.

1. CHINESE EXCLUSION—ILLEGAL ENTRY OF WOMAN—EFFECT OF MARRIAGE TO CHINESE LABORER.

Where a Chinese slave girl was brought to the United States, and her entry secured by fraud in violation of the exclusion laws, her subsequent marriage in this country to a Chinese inhabitant registered as a Chinese laborer, and not entitled to have a wife in this country, is not a defense to proceedings for her deportation; and especially where the marriage was at her solicitation, for her protection, and was not followed by cohabitation, nor apparently regarded by the parties as more than a formality.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Aliens, § 80.]

2. SAME—DEPORTATION OF SLAVE GIRL.

The fact that the deportation of a Chinese slave girl illegally brought into this country for purposes of prostitution by her master, from whom she subsequently escaped, would result in remanding her to slavery and degradation, affords no ground upon which the courts can refuse to enforce the statute.

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

For opinion below, see 132 Fed. 878.

Jesse A. Frye, Edward E. Cushman, and Alfred E. Gardner, for appellant.

John P. Hartman, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. On January 1, 1904, the appellee, a Chinese girl, was apprehended for being unlawfully in the United States, and, upon examination before a United States Commissioner, was adjudged to be unlawfully in the United States, and ordered to be deported to China, whence she came. An appeal was taken from that order and judgment to the judge of the District Court for the District of Washington, and the order and writ of deportation were accordingly stayed. Upon testimony taken on the appeal, the order of the commissioner was reversed, and it was ordered that the appellee be permitted to remain in the United States. From that judgment this appeal is taken. The testimony shows that the appellee was brought to the United States for purposes of prostitution, but that she entered the United States ostensibly as the minor daughter of Moy Sam, a Chinese merchant residing at Tacoma, Wash. She was not the daughter of Moy Sam, but was the slave of a Chinaman by the name of Ah Bun, who had purchased her in China, and who had schooled her to say that she was the daughter of Moy Sam, and the sister of Yee Gun, who was the son of Moy Sam. Moy Sam connived with Ah Bun in imposing upon the immigration officers at Port Townsend, and through false representations the appellee secured an unlawful entrance into the United States. At the time of securing this unlawful entrance she did not belong to the privileged class, nor was she a person allowed to enter and remain in the United States under the Chinese exclusion laws. Thereafter Ah Bun, her master, compelled her to enter upon a life of prostitution. She escaped from him, and took refuge in the Chinese Women's Home at the city of Portland, where she lived for a time. She was there married to a Chinese inhabitant of this country, who was registered as a Chinese laborer. The marriage ceremony was performed in compliance with the laws of Oregon. The district judge, in his opinion, said of the marriage:

"The marriage has not been consummated by cohabitation, and it appears to be questionable whether the parties themselves regarded it as bona fide, or only a mere pretense, creating no binding obligation. The woman was not contented at the home, and she solicited the man to marry her and become her protector. He was reluctant, and by his testimony he appears to be uncertain whether he is in fact the woman's husband."

In thus regarding the marriage, and in holding that its effect was not to legalize the presence of the appellee in the United States, we think the court was undoubtedly correct. The man to whom she was married was a Chinese laborer, but just prior to the marriage he had made an application for a certificate of departure from the United States. He, being one of the prohibited class, was not privileged to have his wife in the United States, even if she could, under the circumstances, have lawfully contracted a marriage here. The trial court found that the appellee should be deported to China, whence she came, except for one thing; and that was that, in his opinion, her deportation would in fact be remanding her to a life of perpetual slavery and degradation.

The appellee has moved to dismiss the appeal on the ground that the sole question involved is the application of the thirteenth amendment to the Constitution of the United States, and that therefore the appellate jurisdiction of the Supreme Court is exclusive. We do not see that the decision of the appeal involves the construction or application of the thirteenth amendment. There is no reference to a constitutional question in any of the pleadings in the case. It is true that the thirteenth amendment was adverted to in the opinion of the trial court, but we do not understand that it was made the ground of the decision. The true ground of the decision, from the language of the opinion, would appear to have been that compliance with the statute would be a barbarous proceeding, equivalent to remanding the appellee to perpetual slavery and degradation. The court said:

"If sent back to her own country, where she was by her own kindred sold to a cruel master, she must abandon hope, and it is shocking to contemplate that the laws of our country require the court to use its process to accomplish such an unholy purpose."

The court, arguendo, proceeded to observe that it was proper to consider that by the thirteenth amendment it is ordained that neither slavery nor involuntary servitude, except as a punishment for crime, whereby the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction, and said:

"This article is a part of the supreme law of this land, whereby all branches of the government must be controlled," and that it was "a mandate from the highest authority, requiring the exercise of all the force necessary for the protection of the liberty of any and every individual whose right to liberty has not been forfeited by conviction of crime."

The court said in conclusion:

"The effort which the appellant has made to escape from thraldom and to rise from her condition of degradation entitles her to humane consideration, and, because I can see no other way in which to emancipate her from actual slavery, I direct that an order be entered vacating the order for her deportation."

In so ruling the court did not, as we understand it, hold that the thirteenth amendment, prohibiting slavery within the United States

or in any place subject to their jurisdiction, by its terms prohibited the deportation of the appellee; nor is it contended on this appeal that by virtue of an order of deportation her condition as a slave would be recognized, or that she would be sent into slavery at any place within the United States or within its jurisdiction. The case is one which, from its nature, enlists the sympathy of the court, and we regret that the law is so written that it does not permit us, as we view it, to yield to the humane considerations which actuated the court below.

We see no escape from the conclusion that the judgment of the trial court must be reversed, and the appellee remanded to the country whence she came. It is so ordered.

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## AYRES v. CONE et al.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1905.)

No. 2,126.

1. BANKRUPTCY—OBJECTIONS TO ALLOWANCE OF CLAIM—RES JUDICATA.
Where the validity of the claim of a petitioning creditor in involuntary bankruptcy proceedings is put in issue by the bankrupt's answer, and the issue is heard upon evidence and determined in favor of the creditor, such adjudication is conclusive upon the bankrupt and all other creditors who, under the bankruptcy act, might have become parties to the proceeding, and, failing to do so, are to be considered as represented by the bankrupt; and the petitioning creditor's claim cannot again be contested when filed for allowance before the referee.

2. SAME—OBJECTIONS TO CLAIM BY OTHER CREDITORS—PROCEDURE.
Creditors of a bankrupt who desire to contest the allowance of the claim of another creditor, as they may do as parties in interest under Bankr. Act July 1, 1898, c. 541, § 57d, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], must file objections in their own behalf, and cannot become parties to the issue merely by formally adopting objections filed by the bankrupt; nor have they any standing to contest such claim on an appeal taken from the decision of the District Court by the trustee in which they did not join.

Sanborn, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of South Dakota.

C. O. Bailey (J. H. Voorhees, J. W. Boyce, and R. H. Warren, on the brief), for appellant.

Hosmer H. Keith (Albert Keith, on the brief), for appellees.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

RINER, District Judge. This was an appeal from an order made by the District Court for the District of South Dakota directing the referee in bankruptcy to allow a claim, the validity of which had been passed upon and allowed by the District Court in the proceedings wherein the appellant was adjudicated a bankrupt.

On the 3d of March, 1904, a petition in involuntary bankruptcy was filed by F. S. Cone and W. H. Dryden, copartners under the firm name of Cone & Dryden, A. S. Chambers, and A. R. Priest, against W. J. Gentle, in which it was alleged that Gentle owed debts to the amount of $1,000 and more, and that the petitioners were creditors of Gentle, having provable claims amounting in the aggregate, in excess of securities held by them, to $500 and more. The petition then averred that $500 of the sum claimed by Cone & Dryden to be due to them was for money loaned or advanced by them to Gentle, and that the sum of $5,361 was an indebtedness growing out of a real estate transaction between Cone & Dryden and Gentle, the petition setting out the facts in relation thereto. It was further averred that Gentle was insolvent, and had within four months next preceding the date of the filing of the petition committed an act of bankruptcy, in that, on the 13th day of January, 1904, he conveyed, transferred, concealed, and removed a stock of goods belonging to him, consisting of groceries, fixtures, book accounts, and other property, to one B. C. Mathews, who represented a portion of the creditors, and that Mathews took possession of the stock of goods, and was selling and disposing of the same for the purpose of paying a portion of the creditors of Gentle, with intent to prefer such creditors over other creditors. On the 11th of March, 1904, Gentle filed an answer to the petition in bankruptcy, in which he denied that he had committed the acts of bankruptcy alleged in the petition; denied that he was insolvent, and alleged that he should not be declared a bankrupt for any cause in the petition alleged; denied that he was indebted to Cone & Dryden, or either of them, in the sum of $500; denied all liability to Cone & Dryden by reason of the real estate transaction set out in the petition, because of certain other alleged transactions between Cone & Dryden and himself, which he sets out at length in his answer. To this answer the petitioning creditors filed a replication, and the matter came on for hearing before the District Judge upon the petition, answer, replication, and evidence, as shown by the stipulation of the parties found in the record, resulting in an order, entered on the 28th of March, declaring Gentle a bankrupt, and referring the matter to the referee to take such further proceedings therein as are required by the provisions of the bankruptcy act. Cone & Dryden presented their claims for the sum of $5,361 and for the sum of $500 to the referee for allowance. The allowance of each was objected to by the bankrupt, he filing written objections thereto, setting out substantially the matters theretofore averred in his answer to the petition. Four other creditors, not parties to the petition, attempted to join in the objections filed by the bankrupt to the allowance of these claims, by filing with the referee the following paper, indorsed "Objections":

"In the Matter of W. J. Gentle, Bankrupt. In Bankruptcy.

"The undersigned, creditors of the said W. J. Gentle, bankrupt, whose claims have been duly proved and allowed in said matter, do hereby unite

in the objections to the claim of F. S. Cone and W. H. Dryden, copartners under the firm name of Cone & Dryden, filed herein on the 2d day of May, 1904, and hereby adopt the objections of the said bankrupt, hereto attached.

"Anthony Kelly & Co.,
"Andrew Kuehn Co.,
"Jewett Bros. & Jewett,
"Manchester Biscuit Co.,
"By Bailey & Voorhees,
"Their Attorneys."

The referee, after hearing argument upon the objections, held that the proceedings had in the District Court when Gentle was declared a bankrupt were not res judicata or conclusive upon him as to the validity of the claim of Cone & Dryden, and decided that he would hear further proof. As we understand the record, the referee did not reject the claim, neither did he allow it, but decided only that the proceedings in the District Court when Gentle was adjudicated a bankrupt were not conclusive upon him. This, we think, was the full extent of his ruling. From this finding, upon the petition of Cone & Dryden, the matter was certified to the District Judge by the referee, who, after argument, made the order here complained of.

This case presents the single question whether a petitioning creditor in an involuntary bankruptcy proceeding, whose claim has been adjudged valid by the court, on the application for an adjudication, in which proceedings its validity was in issue, can be required to establish it again before the referee at the suggestion of the bankrupt and other creditors, not parties to the petition. The District Court held that he could not, and in this conclusion we concur.

In the proceedings had before the District Court at the time the adjudication was made, the bankrupt appeared and answered, and in his answer not only put in issue the question of bankruptcy, but set out in detail the transactions out of which the alleged indebtedness of petitioners arose, and attempted to show that by reason of these and other transactions he owed no part of the claim for $5,361. Under the issues as framed by the parties, if his defense to this claim was good to the extent of one dollar, it was good as to the entire amount. The defense to the $500 claim of Cone & Dryden was based upon and in connection with the grocery business, which he alleged entered into the real estate transactions set out in the pleadings, and was by the answer made to depend upon the real estate transactions and the transfer of the stock of goods; hence, if the District Court had found that his defense to the $5,361 was good, it must necessarily have found that the defense to the $500 item was good, for, under the issues as made by the pleadings, the validity of both of these claims, necessarily united by reason of the incidents out of which they grew, was involved. In an adjudication in involuntary bankruptcy there is involved not only the question whether or not the petitioning creditors represent claims to the extent of $500 or upwards, but also the question whether or not the bankrupt owes debts to the extent of $1,000 or more. The answer in this case put in issue all of these questions. It is therein alleged:

"That practically the whole of the remaining indebtedness referred to in the petition herein as being the indebtedness of the said W. J. Gentle owing to other creditors not uniting in said petition is in truth and in fact the indebtedness of the said Cone & Dryden, incurred by the said W. J. Gentle as their agent in the operation and management of the said grocery store."

Under these issues, the court, in determining the question whether or not Gentle should be declared a bankrupt, necessarily had to determine whether or not the allegations of the answer were true. If they were true, then the indebtedness claimed by the petitioning creditors did not aggregate $500, and the bankrupt did not owe $1,000 provable in bankruptcy, for the debts thus alleged to have been created were in fact the debts of the petitioning creditors. The court, therefore, in making the adjudication, had to find that the bankrupt owed the petitioning creditors the sum of $5,361, for, as we have already seen under the issues, he owed the whole of it or he owed none of it.

It must be conceded, we think, that if there had been a judgment in the case reciting that, the issues herein coming on to be heard upon the pleadings and evidence, the court found that the defendant owed the petitioning creditors the sums of $5,361 and $500, the judgment thereon would have concluded the bankrupt as to the amount he owed the petitioning creditors. Gould v. Railway Co., 91 U. S. 526, 23 L. Ed. 416; Miller v. Covert, 1 Wend. 487; Roberts v. Heim, 27 Ala. 678; Robinson v. Howard, 5 Cal. 428; Aurora City v. West, 7 Wall. 99, 19 L. Ed. 42; Goodrich v. City of Chicago, 5 Wall. 573, 18 L. Ed. 511.

We do not think that the bankruptcy act contemplates that in a case where, upon issues involving the validity of the petitioning creditors' claim in the proceedings for an adjudication, the question has been fully heard and determined in favor of the validity of the claim, the bankrupt shall thereafter be allowed, when these same creditors present their claims for mere formal proof before the referee, to file the same answer and demand that the same issue shall again be tried before the referee and finally before the same judge who heard the application of the petitioning creditors for an adjudication, and this is precisely what is sought to be done in this case.

In In re Fallon, Fed. Cas. No. 4,628, Judge Blatchford said:

"So long as the adjudication of bankruptcy stands unrevoked, all inquiry as to the existence or validity of the debt claimed to be due to the petitioning creditor in the involuntary proceedings is precluded. The debt due to such creditor was established for the purpose of the adjudication, and neither the debt nor the adjudication can be attacked on a motion of this kind by a creditor who claims an adverse interest to the assignee in bankruptcy."

In In re Ulfelder Clothing Co. (D. C.) 98 Fed. 409, the identical question now before the court was passed upon by Judge De Haven. In that case the petitioning creditor alleged that the corporation was indebted to her in the sum of $2,000, evidenced by a promissory note. The answer, in addition to putting in issue the allegations of the petition in relation to insolvency, also contained a denial that the petitioner was a creditor of the corporation in any sum or amount whatever. The case there, as here, was heard upon the

issues made by the pleadings and upon evidence, and the court found the allegations of the petition to be true, entered an order of adjudication, and sent the case to a referee. The petitioning creditor presented her claim to the referee for allowance. Objection was made to the allowance of the claim, for the same reasons set up in the answer at the time the adjudication was made. The referee held that the validity of the claim could not be questioned either by the bankrupt or by any other creditor. In disposing of the case, Judge De Haven said:

"She was the petitioner in the proceeding to have the Henry Ulfelder Clothing Company adjudged bankrupt, and, the alleged fact having been put in issue by the answer to her petition, it was incumbent upon her to prove that she had a legal demand against that corporation for at least $500 in excess of securities held by her. Bankr. Act, July 1, 1898, c. 541, § 59, subd. 'b,' 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445]. Without proof of this fact, the corporation and creditor who appeared in opposition to the petition for involuntary adjudication would have been entitled to a dismissal of the proceeding. In re Cornwall, 9 Blatchf. 114, Fed. Cas. No. 3,250; Bank v. Moore, 2 Bond, 170, Fed. Cas. No. 10,041; In re Skelley, 2 Biss. 260, Fed. Cas. No. 12,921. The question whether she was a creditor in that amount was therefore a material issue in that proceeding, and the decree therein undoubtedly establishes the fact that she was such creditor."

In that case the proof offered by the petitioning creditor before the referee and in the involuntary proceeding for an adjudication was a promissory note upon which she claimed the bankrupt was liable. It having been determined upon the proceedings for adjudication that the note was executed by the corporation and delivered upon a sufficient consideration, the court held that the same question could not be again drawn into controversy in the same bankruptcy proceeding in which the decree of adjudication was given. The learned judge said:

"The law certainly does not contemplate that the petitioning creditor shall be required to establish the validity of a particular claim against the bankrupt more than once in the same proceeding, unless the court shall, upon some legal ground, grant a new trial of such issue."

Under the bankruptcy act, any creditor may voluntarily appear and join in the petition or be heard in opposition thereto, and those not appearing are, we think, in contemplation of law, represented by the bankrupt to the extent of being concluded as to all matters directly in issue and determined by the order of adjudication.

In Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294, it was argued that creditors, not parties to a suit affecting the title to the debtor's property, were not in privity with the debtor, and therefore not estopped by the judgment. The court, however, said:

"We think otherwise. The law which gave the judgment debtor the unlimited right (when honestly exercised) to contract debts, to settle and adjust their amount, to secure and to pay them, made him to that extent the representative of all his creditors who should seek the satisfaction of their demands out of his property. So far, at least, they are in privity with, and claim under, their debtor."

In our judgment, there is neither reason nor authority for the contention that an adjudication in bankruptcy made upon issues

such as are presented by the pleadings in this case, and, as the record shows, upon the evidence in support thereof, offered by the respective parties, does not conclude the bankrupt as to the facts therein involved and passed upon by the court. Neither do we think that there is any merit in the contention, made in this case, that other creditors sought to interpose at the hearing before the referee: First, because the creditors presented no objection; they simply said, "We adopt the answer of the bankrupt." The bankruptcy act makes no provision for such procedure. It authorizes any creditor to object to and contest the allowance of any claim, but he must file his own objections and make an issue. The act authorizes other creditors to join in a petition in involuntary bankruptcy, but they must enter a formal appearance, and then, by leave of court, may join by adopting the petition; but no such practice is authorized in respect to one creditor resisting the claim of another. Second, it is an all-sufficient answer that these creditors took no appeal from the action of the District Court. The appeal was taken by the trustee in bankruptcy, who resisted the allowance of the claim as the representative of the estate, and we think such intervening creditors ought not to be allowed to interpose and provoke a trial in their interest, and, after defeat, without incurring the risk of the costs of an appeal, to claim that they were represented by the trustee, and have the costs, if the appeal fails, taxed against the estate.

This record, we think, shows that the defense which the creditors proposed to make to the allowance of the petitioners' claim was a defense in favor of the bankrupt, which he had fully presented to the court, and which had been fully contested. In other words, the effort here is to have a new trial of the same issues between the petitioning creditors and the bankrupt. This, we think, cannot be done. The parties have had their day in court, and are not entitled to another.

We see no reason for disturbing the order made by the District Court, and it is therefore affirmed.

SANBORN, Circuit Judge (dissenting). A thoughtful consideration of the important question presented in this case has failed to bring my mind to yield assent to the conclusion of the majority that creditors who are not parties to the litigation upon a petition in bankruptcy are estopped by an adjudication thereon from subsequently contesting the allowance of the claim of the petitioning creditor and his right to share in the estate of the bankrupt when he proves and presents it for allowance to the referee and the court. The question arises in this way: On May 2, 1904, the appellees, Cone and Dryden, presented formal proof of their claim for $5,861 against the estate of Gentle, a bankrupt, of which the appellant, Ayres, was trustee. On May 7, 1904, Gentle filed objections to the allowance of this claim, which, if the allegations there made were true, disclosed the fact that this claim was false and fictitious. Four creditors of the bankrupt, whose claims had been proved and allowed, attached to the statement of these objections a writing

over their signatures, whereby they declared that they "do hereby unite in the objections, * * * and hereby adopt the objections of the said bankrupt hereto attached." The appellees objected by an answer to the introduction of any testimony to establish or to defeat their claim, upon the ground that in the trial of the issue whether or not Gentle was a bankrupt, to which the four objecting creditors were not parties, the validity of the claim of the appellees was adjudged. The referee overruled this objection, held that evidence upon the merits of the issue raised by the objections was admissible, and disallowed the claim. The District Court reversed this judgment of the referee and ordered him to allow the claim, upon the ground that both Gentle, who was a party to the proceeding for the adjudication, and the objecting creditors, who were not parties to it, were estopped by the adjudication in bankruptcy from insisting, as they did before the referee, that the claim of the appellees was unfounded. From this order of the District Court which allowed this claim, the trustee appealed.

In the opinion of the majority of the court this order should be affirmed: (1) Because the objecting creditors did not make another and separate statement of their objections, but adopted the written objections made by Gentle by a writing over their signatures; (2) because the trustee appealed from the order, and the objecting creditors did not; and (3) because the creditors and the trustee were estopped by the adjudication in bankruptcy from contesting the allowance of the claim of the appellees.

1. The objections of the four creditors to the allowance of the claim were the same as those presented by Gentle. There were no other objections. These creditors had the right to present and to secure an adjudication of these objections, because they were parties in interest in the allowance of the claim of the appellees. Sections 57d, 57f, Act July 1, 1898, c. 541, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443). If the statement of the objections had been written in duplicate, and one of the duplicates had been signed by Gentle and the other by the four creditors, or if the latter had copied Gentle's statement of the objections and had signed and filed that copy, their presentation of their objections must have been free from all criticism. For they certainly had the right to make the same objections which Gentle did. When the objections had been formulated, however, and signed by the attorney of Gentle, the four creditors added to them a writing over their signatures, whereby they declared that they united in and adopted the objections "hereto attached"; and this single instrument, which contains the statement of the objections, the signature of Gentle, and the written adoption of the objections "hereto attached" by the four creditors, was entitled "Objections," and filed with the referee and the court. Why were not these the objections of the four creditors as much as they were the objections of Gentle? A mere written statement over their signatures that they objected to the allowance of the claim upon the same grounds that Gentle presented would undoubtedly have amply made these objections on their behalf. The signature to objections is in any event but an

adoption of them, and the fact that one declares in writing that he does adopt them ought not to have less effect. Nor does one fail to adopt or to make any objection because others make or adopt the same. The adoption, filing, and presentation of the objections to the referee and the court were, in my opinion, as effective a making of objections by the four creditors as the filing and presentation of a separate paper which contained the same statement and the same objections over their signatures could have been.

2. The referee rejected the claim. The District Court reversed the order of rejection, and ordered the allowance of the claim. The trustee had the right, and it was his duty, if he believed this claim to be false and fictitious, to appeal from the order which allowed it, and the objecting creditors had no such right unless the trustee refused to take the appeal. Section 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432; Chatfield v. O'Dwyer, 42 C. C. A. 30, 32, 101 Fed. 797, 799; Foreman v. Burleigh, 48 C. C. A. 376, 109 Fed. 313.

3. Did the adjudication of bankruptcy estop the objecting creditors and the trustee who represents them from contesting the allowance of the claim of the appellees and their right to share in the estate of the bankrupt? It is not material whether or not the adjudication estopped the bankrupt, and for that reason it is conceded that on March 28, 1904, when Gentle was adjudged a bankrupt, 25 days after the filing of the petition in bankruptcy, the issue whether or not he was indebted to the appellees in the sum of $5,861 became res adjudicata between the petitioning creditors and the bankrupt. The estoppel of that adjudication, however, did not arise until that day, which was 25 days after the rights of all creditors in the estate had become fixed, and it did not bind any one who was not a party to the litigation of the issues which that judgment determined.

Although the bankrupt was thus debarred from subsequently contesting the claim, the adjudication against him gave the owners of that claim no right to any share in his estate or to any dividend from its proceeds. Their right to that share and to that dividend was conditioned by the express terms of the bankruptcy act by a subsequent proof of their claim by a written statement under oath (section 57a) and by its allowance by the referee or by the court, and the trustee and other creditors were expressly granted the right to object to and to contest that allowance after the proof had been filed. (Sections 57c, 57k, 30 Stat. 560, 561 [U. S. Comp. St. 1901, pp. 3443, 3444]. Not only this, but the duty still rested upon the bankrupt to "examine the correctness of all proofs of claims filed against his estate" (section 7 [3], 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]), and, "in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee" (section 7[7]), and the duty was imposed upon the trustee to defeat such a claim if possible. Chatfield v. O'Dwyer, 101 Fed. 797, 799, 42 C. C. A. 30, 32.

Identity of parties is as essential to an estoppel by res adjudicata as identity of causes of action. Fowler v. Stebbins, 136 Fed. 365 (decided at the last term). The objecting creditors were not named

as defendants. They did not appear, answer, or take any part in the litigation which resulted in the adjudication of bankruptcy. Upon familiar principles, that litigation was therefore res inter alios acta as to them, and they were not bound by the determination of the issues which the parties might present in it, and which the bankruptcy act required to be litigated at another time and place. This rule is invoked and applied by the express provisions of that act that the creditors may exercise the option to appear in and be barred by the adjudication (section 18b–d, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), or to refrain from taking part in it and be free from it, and that they may object to and contest the allowance of claims of all other creditors, without exception (section 57d). Since no exception of the claims of petitioning creditors from this right of other creditors to contest them was made by the Congress, the conclusive legal presumption arises that it intended to make none, and it is not the province of the courts to do so. Webber v. St. Paul City Ry. Co., 38 C. C. A. 79, 82, 97 Fed. 140, 143; Madden v. Lancaster Co., 12 C. C. A. 566, 573, 65 Fed. 188, 195; McIver v. Ragan, 2 Wheat. 25, 29, 4 L. Ed. 175; Bank of State of Alabama v. Dalton, 9 How. 522, 528, 13 L. Ed. 242; Vance v. Vance, 108 U. S. 514, 521, 2 Sup. Ct. 854, 27 L. Ed. 808.

Moreover, the bankruptcy act has provided a time, a place, and a tribunal where all claims to share in the estate must be heard and allowed upon proofs of claims, and has given the right to all creditors to contest them there. From this provision the presumption necessarily arises that this time, place, and tribunal were to be exclusive, and that all creditors are relieved from the necessity of contesting claims to share in the estate at any other time or place. Petitioning creditors, like all others, are required to prove and secure an allowance of their claims in the face of the objections of other creditors, notwithstanding the adjudication of bankruptcy in their favor. The litigation upon their petition is not the time nor the place prescribed by the law for the trial of the question whether or not, or to what extent, their claims may share in the distribution of the estate of the bankrupt. The logical and inevitable conclusion from these considerations appears to me to be that, when the validity and extent of a petitioning creditor's claim is determined in the litigation upon the petition which results in the adjudication of bankruptcy, the bankrupt and those creditors, and those only who either voluntarily or involuntarily become parties to that litigation, are estopped by the determination there of the petitioner's claim, while all other creditors and the trustee who represents them, when the petitioning creditor's claim to share in the estate is subsequently presented to the referee or the court for allowance, are free to contest it upon its merits as it stood at the time of the filing of the petition in bankruptcy, regardless of the subsequent adjudication.

Nor is this conclusion without authority to support it. The only direct decision upon the question sustains it. That is the decision of Judge De Haven in In re Henry Ulfelder Clothing Co. (D. C.) 98 Fed. 409, cited by the majority. There is an obiter dictum in the

opinion in that case, which will be subsequently considered, to the effect that the bankrupt is the representative of all the creditors in a litigation upon a petition for an adjudication in bankruptcy, and that the determination of any material issue between the petitioning creditor and the bankrupt in that litigation estops all the creditors, whether they are parties to the proceeding or not. The decision in the case, however, repudiates this novel theory, and sustains the position that the determination of the validity and extent of claims in such a proceeding binds only those creditors who are in their own persons parties to the litigation. The case was this: Donie Ulfelder filed a petition in bankruptcy against the Henry Ulfelder Clothing Company, a corporation, in which she alleged that the corporation owed her $2,000, that it was insolvent, and that it had committed an act of bankruptcy. The corporation and one of its creditors, Bernard Lowenstein, appeared and filed answers to this petition, in which they denied that the petitioner was a creditor of the corporation and that the corporation was insolvent. Upon the trial of these issues the petitioner introduced in evidence a promissory note of the corporation to her for $2,200, to prove that she was its creditor, and two other promissory notes of the corporation, one to Henry Ulfelder for $1,800 and one to A. Levy for $1,440, for the purpose of proving its insolvency. The corporation and Lowenstein introduced evidence which tended to show that the three notes were never executed by the corporation and were without consideration. The court found the issues for the petitioner, and adjudged the corporation a bankrupt. Thereafter the three claims were presented to the referee for allowance by Donie Ulfelder, Henry Ulfelder, and A. Levy respectively, and the bankrupt and Bernard Lowenstein objected to their allowance upon the same grounds which they had urged at the trial upon the petition in bankruptcy. Neither the trustee nor any other creditor made any objection. The court decided that the issue over the validity of the claim of the petitioner, Donie Ulfelder, was res adjudicata between these parties, because the bankrupt and Lowenstein were both parties to the suit on the petition and to the trial of that issue in that litigation and denied them permission to contest that claim upon its merits. But the court also decided that the issues over the validity of the claims of Henry Ulfelder and A. Levy were not res adjudicata even against the corporation and Lowenstein, notwithstanding the fact that they were material issues and had been carefully tried and determined in the litigation upon the petition, because neither Henry Ulfelder nor A. Levy were parties to that litigation. The court accordingly reversed the order of the referee and directed him to try these issues upon their merits, regardless of the adjudication in bankruptcy. In re Henry Ulfelder Clothing Co. (D. C.) 98 Fed. 409–411, 413, 414.

It is obvious that this decision was a direct repudiation of the proposition that the estoppel of the bankrupt was the estoppel of the creditors, because under that theory the estoppel of the bankrupt to contest the claims of Levy and Henry Ulfelder must have estopped them although they were not parties to the litigation.

The theory that after the filing of the petition the bankrupt is the representative of the creditors, and that his subsequent estoppel affects the rights of creditors in the property which he owned at the time the petition was filed, is fallacious, because the status of claims of creditors and the status of the property at the time of filing the petition, and at that time alone, fixes the rights of the parties, and because the power of disposition and application of the property at will, and hence the power to bind it and the creditors, its beneficial owners, is divested from the bankrupt by the law, and vested in the creditors and the court, when the petition in bankruptcy is filed. It is for this reason that the decision in Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294, is neither controlling nor persuasive here. In that case Russell Lord, a debtor, confessed a judgment in August, 1843, for $1,400 in favor of Henry Lord, and a second judgment, during the same month, for $1,250 in favor of Champlin. On March 29, 1844, Candee recovered a judgment against Russell Lord for $1,142.90. He brought a suit upon this judgment to avoid the prior judgments for fraud, and Henry Lord and Champlin answered that his judgment was founded upon a forged note. The court rightly held that in the absence of fraud they were bound by the judgment against their debtor, because at the time it was rendered he had the right and the power to sell, to dispose of, to charge with liens, and to apply his property to the payment of his debts as he chose, so that any deed, assurance, or judgment of their debtor estopped his creditors as well as himself. In the case at bar the bankrupt, Gentle, was deprived of this right and power of disposition 25 days before the estoppel by the adjudication in bankruptcy arose, and for that reason his deeds, assurances, and estoppels after the filing of the petition in bankruptcy bound neither his creditors nor the property, which had vested in the court in trust for the creditors when the petition was first deposited. The condition of this property and of the parties after the filing of the petition will more clearly appear by a brief consideration of the effect of that filing upon the rights of the bankrupt and of the creditors.

The status of claims at the time of the filing of the petition in bankruptcy, and not at any subsequent time, fixes the rights of their owners to share in the distribution of the estate of the bankrupt. Bankr. Act July 1, 1898, c. 541, § 63a (1) 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]; Swarts v. Siegel, 117 Fed. 13, 15, 54 C. C. A. 399, 401; In re Bingham (D. C.) 94 Fed. 796. The filing of a petition upon which a subsequent adjudication of bankrupcty is rendered places all the property of the bankrupt "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" in custodia legis. Section 70a (5) 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]. From that hour the bankrupt is divested of the power to appropriate it to the payment of his debts or to use and dispose of it at will, and that authority is vested in the District Court. Every suit against him upon a provable claim is stayed from the date of the filing of the petition. Section 11a, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]. Every person is forbidden to

receive from the bankrupt any material amount of property after that date with intent to defeat the act. Section 29b, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433]. Every intentional preference after that date is voidable. Section 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. Upon the filing of the petition the court may take immediate possession of the property if the bankrupt is neglecting it so that it is deteriorating in value. Section 69a, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]. And upon the appointment of the trustee all the property of the bankrupt which, prior to the filing of the petition, he could have transferred, or which could have been seized or sold under judicial process against him, passes to this officer of the court. Section 70a (5). Indeed, the condition at the time of the filing of the petition measures the extent of the estate and the rights of all creditors of the bankrupt and all parties interested in the property throughout all the provisions of the law. Sections 1 (10), 3b, 9b, 29b (4), 63a (1), 30 Stat. 544, 546, 549, 554, 562 [U. S. Comp. St. 1901, pp. 3419, 3422, 3426, 3447].

The difference between the judgment under consideration in Candee v. Lord and the judgment in the case at bar is the difference between a judgment against a debtor while he holds the title and the unlimited power of disposition of his property and a judgment against him after he has parted with the title and the power. The former binds his creditors, who must work out their rights to the property through their debtor; the latter has no effect upon any rights of creditors or any interests in the property, because the power of disposition had passed from the debtor before it was rendered. When the petition in bankruptcy was filed, Gentle was divested of all power to dispose of or to apply the property which he then owned in any other way than to the payment of the claims of the creditors as they stood at that time in the proportions prescribed by the act. What the bankrupt has when the petition in bankruptcy is filed is thenceforth the property of the creditors, in the custody of the court for their benefit. What he thereafter acquires, and that alone, is the property of the bankrupt, subject to his action and disposition. Hence estoppels of the bankrupt which arise after the filing of the petition may bind rights and interests in the latter, but they may not deprive the creditors of their rights in the former which are fixed at the time of the filing of the petition.

Any other conclusion is almost certain to lead to the destruction of the rights of creditors without notice or hearing, to palpable wrong and injustice. If, after the filing of a petition in bankruptcy, the bankrupt is still the representative of his creditors, and an estoppel which subsequently arises against him binds them, how completely are they at his mercy! The estoppel of a bankrupt upon every material issue relative to the validity and extent of claims which is involved in the adjudication in bankruptcy is as conclusive as it is upon any of these issues. In such a proceeding the issue of insolvency is frequently material, and its determination sometimes involves the validity and extent of the claim of every creditor. In such a case, if the estoppel of the bankrupt estops the creditors, the adjudication might determine the claims of all the creditors

without notice to, or the hearing of, any of them but the petitioning creditors.

The estoppel of a judgment by default is as conclusive upon every issue whose determination is requisite to the adjudication as the estoppel of a judgment after answer and trial. Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 692, 15 Sup. Ct. 733, 39 L. Ed. 859; Board v. Platt, 25 C. C. A. 87, 92, 79 Fed. 567, 572; Geer v. Board, 38 C. C. A. 250, 256, 97 Fed. 435, 440. Under this theory 1 creditor, if the whole number is less than 12, and 3 if it is more, may by ex parte averments and proof and the mere silence of the bankrupt estop every other creditor, not only from contesting the claims of the petitioners, but from questioning the averments of the petition relative to his own.

An adjudication is only an estoppel, and if an estoppel of the bankrupt by an adjudication estops all of his creditors, by the same mark an estoppel of the bankrupt by deed, by confession, or by act must have a like effect. And his admission or confession by deed or act of the existence and validity of a claim after the filing of the petition must estop all other creditors to deny it as completely as it would bind the bankrupt himself. This proposition has been presented to this court before. In Watson v. Merrill, Trustee, 136 Fed. 359 (decided at the last term), the petition was filed February 6, 1903. Brown, the bankrupt, had leased a building of one Watson on a long term, and was obligated to pay him $6,900 in monthly installments. The adjudication in bankruptcy was made on April 2, 1903. On March 2, 1903, Brown made a written agreement with Watson whereby he surrendered the building and acknowledged himself indebted to Watson in the sum of $2,300 on the lease. After the adjudication, Watson proved his claim for this $2,300 and the written agreement. But the written confession of the bankrupt was unavailing to estop the other creditors or to sustain the claim, and it was disallowed.

The logical and necessary results of the theory that creditors of the bankrupt are bound by estoppels against him which arise after the filing of the petition are so far-reaching, so fraught with danger to rights of creditors and of property, so inconsistent with the express provisions of the bankruptcy act, and so violative of the familiar and indispensable rule that suits and judgments estop only those who either voluntarily become or are involuntarily made parties to them, that it fails to commend itself to my reason or judgment. In my opinion, it disregards the law and the facts which condition and govern all the rights of the parties, the facts that upon the filing of the petition in bankruptcy the property of the bankrupt becomes the property of his creditors and passes into the custody of the court for their benefit, that from that hour the bankrupt is divested of the power either by deed or act, by admission or by estoppel, to apply it to the payment of the claim of any creditor in preference to those of others, to dispose of it in any other way than as provided by the bankruptcy act, to deprive any creditor of the right granted to him by that law to contest upon its merits the claim of any other creditor to share in the estate at the place,

at the time, and before the tribunal specifically designated to determine that issue, and to do any other act to prevent the distribution of the estate among the creditors in the way prescribed by the law.

The case of In re Fallon, Fed. Cas. No. 4,628, cited in the opinion of the court, contains nothing inconsistent with this view. It neither involved nor touched upon the question in this case. It arose out of a motion by a judgment creditor for a vacation of the stay of execution upon his judgment pending proceedings in bankruptcy. The court denied the motion, and rightly decided that an inquiry into the debt of the petitioner in bankruptcy was not permissible upon a motion of that nature.

No question of the validity of the judgment of bankruptcy is presented in this case, nor of the sufficiency of the evidence of the claim of the petitioners to sustain that adjudication. The only issue is whether or not that adjudication estopped the objecting creditors and the trustee from contesting the existence of that claim and the right of the petitioning creditors to share in the distribution of the estate when they subsequently presented their claim for allowance. The objecting creditors were not parties to the litigation which resulted in that adjudication. The law gave them the option to appear therein and be bound or to refuse to appear and be exempt from the determination of the issues relative to the claims of creditors therein, and they chose to decline to appear and to be free from it. The bankruptcy act prescribed a time, a place, and a tribunal, and thereby excluded other times, places, and tribunals, and relieved all creditors from the necessity of appearing therein, where all claims to share in the estate must be presented and allowed, and it gave to every creditor the right then and there to contest the claim of every other creditor, without any exception of the petitioning creditors. The property of the bankrupt at the time of filing the petition became the property of his creditors, and passed into the custody of the court at that time, so that his subsequent acts and estoppels were not the acts and estoppels of his creditors and did not bind them. The status of their claims at the time of the filing of the petition measured their rights to share in the distribution of the estate, and subsequent estoppels of the bankrupt by acts, confessions, or judgments could not change that status or estop the trustee or other creditors from proving it.

For these reasons, the objecting creditors and the trustee were not, in my opinion, estopped by the adjudication in bankruptcy from contesting the allowance of the claim of the petitioning creditors and proving its true status upon the day on which the petition in bankruptcy was filed, and the judgment of the District Court to that effect ought to be reversed.

DREY v. WATSON et al.

(Circuit Court of Appeals, Fourth Circuit. May 24, 1905.)

No. 513.

1. RECEIVERS—SERVICES—ALLOWANCE.
Where a receiver of property sold for $271,000 served for 29 months, during which he did not physically manage the property, which service was performed by other employés, and the principal service rendered by him was 125 days spent in various cities, for which he received $15 a day as expenses, and in the sale of the property, an allowance of $24,022.84, exclusive of such expense allowance, was excessive, and should be reduced to $15,000.

2. SAME—ASSIGNEE—COMMISSIONS.
An allowance of 5 per cent. to an assignee of an insolvent on the money handled by him was reasonable.
[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments for Benefit of Creditors, § 1157.]

3. SAME—ALLOWANCES TO ATTORNEYS.
On exceptions to a receiver's report, allowances made to attorneys for the receiver and the insolvent's assignee reviewed, and *held* excessive.

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

B. M. Ambler and A. Leo Weil, for appellant.

F. B. Enslow and Daniel P. Hays (McCluer & McCluer and Melville D. Post, on the briefs), for appellees.

Before PRITCHARD, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

PRITCHARD, Circuit Judge. This is an appeal from the decree of the Circuit Court for the Northern District of West Virginia, in which certain allowances were made to the receiver, his attorneys, and to the assignee and his attorneys, as costs and expenses in the administration of the estate in the custody of the court. Bettman, Watson & Bernheimer and Bettman & Watson were partnerships owning oil properties in the states of West Virginia, Ohio, Indiana, and Pennsylvania. Assignments were made in the state of New York by the insolvents. A bill was filed by one of the partners in the state of West Virginia, where the operating offices were located, asking the court to set aside the deeds of assignment, appoint a receiver, wind up the partnerships, and distribute the assets; and, as a result, John T. McGraw was appointed receiver. Before his appointment he represented, as counsel, a large number of creditors, who, through him, opposed the appointment of a receiver. Max Drey, appellant, owned claims against the firms of Bettman, Watson & Bernheimer and Bettman and Watson aggregating $223,236.50, or 84.76 per cent. of the total indebtedness of the insolvents. The master, to whom was referred the question as to the allowances which should be made to the receiver, his attorneys, and others in the administration of the estates, made a report, to which numerous exceptions were taken; and on the 5th day of February, 1903, the Circuit Court entered a decree confirming the same, and to which

decree counsel for appellant in their supplemental brief waived all exception to allowances so made, except as to the following, viz.:

Allowance to John T. McGraw, Receiver.

| | | |
|---|---|---|
| 5% on $308,703.43 | $15,435 17 | |
| 2% on 271,300.00 | 5,426 00 | |
| Expense account 125 days at $15 per day | 1,875 00 | |
| Due from Bettman, Watson & Bernheimer and Bettman & Watson estates | | $22,736 17 |
| 5% on $10,297.30 of Drey Bros. & Kahn interest | $ 514 86 | |
| 5% on 725.64 of David Leventritt interest | 36 28 | |
| 5% on 1,021.33 of I. & S. Bernheimer interest | 51 06 | |
| Amount due from joint owners | | 603 20 |
| On receipts for account of Jesse & Samuel Rosenthal | $ 279 17 | |
| On receipts for account of Jerome Rosenthal | 2,279 40 | 2,558 57 |
| Total | | $25,897 84 |

Allowance to J. G. McCluer, Attorney for E. W. Bloomingdale, Assignee.

| | | |
|---|---|---|
| To allowance March 5, 1898, to May 21, 1898 | $ 1,000 00 | |
| To allowance May 21, 1898, to July 19, 1898 | 1,000 00 | |
| To expense account | 245 00 | $ 2,245 00 |

Allowance to J. G. McCluer, Attorney for John T. McGraw, Receiver.

| | | |
|---|---|---|
| To allowance | $ 6,000 00 | |
| To expense account | 377 50 | |
| To allowance | 175 00 | 6,552 50 |
| | | $ 8,797 50 |

Allowance to E. W. Bloomingdale.

| | | |
|---|---|---|
| 5% on $22,262.27 | $ 1,113 17 | |
| To allowance (conditioned as shown in report) from May 21, 1898, to July 19, 1898 | 860 81 | $ 1,973 98 |

Allowance to F. C. Reed, Attorney for E. W. Bloomingdale, Assignee.

| | | |
|---|---|---|
| To allowance | $ 1,000 00 | |
| To expenses | 518 93 | $ 1,518 93 |

Allowance to Hays, Greenbaum & Hershfield, Attorney for E. W. Bloomingdale, Assignee.

| | | |
|---|---|---|
| To allowance from March 8, 1898, to May 21, 1898 | $ 1,500 00 | |
| To allowance from May 21, 1898, to July 19, 1898 | 2,500 00 | |
| To allowance for services after July 19, 1898 | 500 00 | $ 4,500 00 |

Allowance to F. B. Enslow, Attorney for E. W. Bloomingdale, Assignee.

| | | |
|---|---|---|
| To allowance from June, 1898, to July 19, 1898 | | $ 1,000 00 |

Allowance to F. B. Enslow, Attorney for John T. McGraw, Receiver.

| | | |
|---|---|---|
| To allowance | $ 4,500 00 | |
| Expense account | 765 75 | $ 5,265 75 |
| Allowance | | 495 00 |
| | | $ 6,760 75 |

The report of master shows that the receiver made frequent trips to New York looking to the adjustment of the affairs of the property in his custody, with a view of bringing about a compromise among creditors, and endeavoring to form a syndicate of them for the purpose of disposing of the property at an advantageous price to the creditors. It appears that he did not succeed in any of these attempts. He also attended before the master in New York, and visited that state several times for the purpose of investigating the books and accounts of the firms of Bettman, Watson & Bernheimer and Bettman & Watson, relative to Stettheimer & Bettman. He employed M. A. Bettman at a salary of $75 per week from the date of his appointment as receiver until a sale of the property on January 28, 1901, for the purpose of looking after the Indiana property. He kept the general office of the two estates at Parkersburg, W. Va., and retained Gilbert L. Watson, as superintendent, for which services he paid him the sum of $125 per week from the date of his appointment until the sale of the property. M. A. Bettman received from the receiver for services above indicated the sum of $9,900, and the receiver paid Gilbert L. Watson for services rendered as superintendent the sum of $16,500. Watson had control and management of all the property of these estates, including the property over which M. A. Bettman had control, before the appointment of the receiver, and before the firm made an assignment. The report of the master also shows that Watson could have managed the whole property, and that Bettman was an unnecessary employé. It appears that the receiver was away from home 125 days, looking after the affairs of the two estates; that he was allowed the sum of $15 per day, while thus engaged, as expenses, amounting in the aggregate to $1,875; that he visited New York, Baltimore, Parkersburg, and Clarksburg; there were almost daily transactions in his office at Grafton concerning the properties, but he did not give anything like all his time to the business of the receivership; that Watson had control and management of all the physical operations of the property; that on one occasion the receiver met some parties in Clarksburg, and compromised a lease for $3,000, which would have been lost to the estate, and which was a valuable asset. It also appears that he conferred with Watson from time to time as to the operations of these two estates, and that he sold the property at public auction at the door of the federal court house in Parkersburg, on the 28th day of January, 1901, to Max Drey, for the sum of $271,000; that out of that sum only $48,063.50 came into his hands as receiver. The balance of the funds arising from the sale of the properties was permitted to remain in the hands of the purchaser, because he represented and owned nearly all of the debts against the estates. The receiver claimed to have sent telegrams, for which there are no vouchers or itemized account for $293, which was allowed; that he claimed postage at Grafton $250, for which there are no vouchers or itemized account; that he claims $2,500 as expenses incurred by him in the discharge of his duties as receiver, on account of which he was allowed. It appears that the receiver was allowed the sum of $1,375 as a premium for

giving an indemnity bond which he executed for the faithful performance of his duties. The receiver borrowed $30,000 from a bank, in which he was a director, for a period of 90 days, and paid therefor as interest the sum of $1,730, which was allowed. The evidence shows that he had the use of about $15,000 from that bank for less than 60 days, and that by the end of September, 1898, he not only had all the money refunded, but there was a balance to his credit for the remainder of the time for which the trust received no interest. This amount was under the absolute control of the receiver.

In view of the facts, it is difficult to understand the basis upon which the different allowances were made to the receiver. He served as receiver for 29 months, but the evidence shows that during that period he was not burdened with the physical management of the property, the principal service which he rendered being 125 days spent in New York and other cities, for which he received $15 per day as expenses. It does not appear that he was in attendance at any of the courts wherein matters pertaining to the estates were involved, but, on the other hand, the master's report shows that he relied mainly on his superintendent for the information which he obtained as to the management and control of the property intrusted to his care. It appears that he only visited one of the properties in West Virginia on one occasion. It further appears that the superintendent actually drew most of the checks, and practically did all of the work that is ordinarily required of a receiver. That he received, as such receiver, the sum of $24,022.84, exclusive of $15 per day for 125 days, which was allowed him as expenses.

We are of opinion that the amounts allowed the receiver are disproportionate to the amounts involved in the administration of the estates intrusted to his care and custody. Where property is placed in the hands of a receiver, its administration should be conducted in the same way, and the same rules of prudence and economy should be observed by the receiver that obtain in the management and control of the private interests of individuals. To adopt any other rule would bring the courts in disrepute, and would be a manifest abuse of the power thus conferred. In Foster's Federal Practice, § 258, it is said:

"In cases of moderate amount, a commission of five per cent. on receipts and disbursements is not unusual. Where the amounts received and disbursed are large, it is customary to pay the receiver a salary or a lump sum graduated according to the amount of his time employed, the value of the property, the difficulty of his task, and the success of his administration."

While we are reluctant to interfere with the decree of the Circuit Court where the facts have been found by the master and approved by the court, at the same time we are of opinion that the amounts allowed to the receiver in this case are excessive, and should be reduced to a sum commensurate with the services actually rendered by him in the administration of the estates that were placed in his custody. In view of the evidence, we think that the sum of $15,000 as compensation to the receiver, in addition to the allowance

made for expenses, would be amply sufficient to remunerate him for services rendered.

We next come to the consideration of the item of allowance of $1,973.98 to E. W. Bloomingdale, assignee. This amount, we believe under the circumstances, should not be disturbed; the larger portion of it being made up of the commission of 5 per cent. upon the money handled by him, which seems reasonable.

The next exception presents for our consideration the allowance made to J. G. McCluer, attorney for E. W. Bloomingdale, assignee, and also as attorney for John T. McGraw, receiver. On the first account he was allowed $2,245, and on the latter $6,552.50, certain items of expense being included in each account; the actual allowance to him as counsel fees being $8,000. The first service by this attorney was in representing the assignee from the 5th of March, 1898, to May 1, 1898, $1,000. We are inclined to allow this item. But the next fee, of $1,000 for services rendered the assignee pending the contest over the receivership, we think was excessive, and that $500 would be full compensation therefor. Considering the item of $6,000 made to this same counsel for services rendered the receiver, we think that in the light of the facts, as reported by the master, as to the services rendered, this charge is likewise excessive, and that on that account, and in view of the fact of the employment of other counsel by the receiver for the performance of substantially the same service, the sum of $4,000 is ample compensation.

We next consider the exception to the allowance made F. B. Enslow, attorney for the assignee and receiver, $1,000 of which was for services to the assignee in resisting the receivership, and $4,995 for services to the receiver, in addition to the expense account of $767.65. We think that the $1,000 item in favor of Enslow should be reduced to $500 for the reasons stated in passing upon a similar claim of J. G. McCluer, and that $4,995 for services rendered the receiver, for the reasons also stated in passing upon a similar claim of J. G. McCluer, is excessive, and should be reduced to $3,500.

We now consider the exceptions to the allowance made Hays, Greenbaum & Hershfield, attorneys for E. W. Bloomingdale, assignee, amounting to $4,500. This charge is made up of three items —one of $1,500, between the dates of March 8, 1898, and May 21, 1898, for services rendered Bloomingdale, assignee, in connection with this trust, and $2,500 for services from May 21, 1898, to July, 1898, and $500 additional for services after the receiver was appointed. The item of $2,500 paid to these attorneys for resisting the appointment of the receiver is excessive. The first item of $1,500 was abundantly ample for the services rendered, and, taking into consideration this fact, and also the additional allowance of $500 for services rendered the assignee, we think the item of $2,500 should be reduced to $1,000.

We now finally consider the exception to the claim of F. C. Reed, attorney for E. W. Bloomingdale, assignee, of $1,000, and $518.93 expenses. We think, in the light of the services claimed to have been rendered by this attorney, and the findings of the master there-

on, and the large item of expenses allowed against the trust estate in his behalf, that $1,000 is excessive, and that the sum of $500 is a reasonable and proper fee for the services rendered, and the allowance made will be reduced to this amount.

What we have heretofore said in passing upon the receiver's compensation in regard to the prudence and economy which should be observed in the administration of estates in the custody of the court applies with equal force in considering the allowances to counsel. Not only were the amounts awarded counsel under the facts and circumstances of this case, in our judgment, much too high, but the number of counsel employed in connection with the litigation, and who claimed compensation for services rendered the trust estate, were out of proportion to the work performed.

The decree of the Circuit Court is reversed. Let the cause be remanded, with instructions that the decree be modified in accordance with the views herein expressed.

Reversed

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McEWEN et al. v. HARRIMAN LAND CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1905.)

No. 1,367.

1. CORPORATIONS—INDEBTEDNESS—ASSIGNMENT—VALIDITY.

Where, pending proceedings in insolvency to settle the affairs of a corporation, a reorganization committee was organized to purchase certain of its property, and, in order to accomplish such result, a corporation was organized under an agreement that creditors of the insolvent corporation should be permitted to transfer to it claims against the old corporation in exchange for stock in the new, which, though authorized, did not use any of such indebtedness so transferred for the purchase of the property of the old corporation, a transfer of such indebtedness by the old creditors in exchange for stock did not constitute a payment of their indebtedness, but vested in the new corporation all the rights of such creditors as against the old corporation and its assets.

2. SAME—ASSIGNMENTS—VALIDITY—CHAMPERTY.

Where, after the assets of an insolvent corporation had been largely administered, leaving a large part of the indebtedness unpaid, the court authorized the receiver to continue certain suits against promoters to recover secret profits for the sole benefit of such creditors as were willing to execute bonds for costs and to indemnify the receiver, etc., against costs, expenses, etc., whereupon certain owners of indebtedness against the corporation assigned their claims under an agreement that the assignees should execute the indemnifying bonds for them in consideration of 30 per cent. of the sums received by the assignees on account of the proceedings—such assignments were not void for champerty.

3. SAME—CREDITORS' SUIT—PARTICIPATION.

Where, after partial administration of the assets of an insolvent corporation, the court ordered its receiver to bring suits against nonresident promoters to recover secret profits for the sole benefit of such creditors as should provide security for costs, including expenses of the receiver as counsel, etc., creditors who failed to join in the furnishing of such security, and made no effort to participate in the proceedings until it became evident that a large sum would be recovered therein, were not entitled to share in such fund.

4. SAME—SALE OF ASSETS—COLLATERAL ATTACK.

Where, on the insolvency of a realty corporation, a reorganization agreement was entered into in which all creditors were entitled to participate, and a large part of the corporation's property was purchased at an upset price, fixed in the decree of sale, which sale was confirmed by the court, creditors who did not join in the reorganization were not entitled to collaterally attack the sale on the ground that the price paid was inadequate.

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

Leon Jourolmon and Jerome Templeton, for appellants.

Wm. Hepburn Russell, Wm. Beverly Winslow, and George W. Easley, for appellees Harriman Land Co. and others.

R. B. Cassell, for appellees Rodes and Hendricks.

Before LURTON and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. This is an appeal from a decree rendered in a case within another case. That case is this: Prior to November 18, 1893, the East Tennessee Land Company, a Tennessee corporation, organized in the year 1889, with its principal place of business at Harriman, in the Eastern District of that state, became insolvent. On that day six of its creditors, noncitizens of Tennessee, filed against it in the lower court a general creditors' bill. Two days later receivers were appointed to take charge of its assets. March 23, 1894, a bill to foreclose a mortgage upon a large quantity of real estate in five certain counties in said Eastern District, given by it August 28, 1891, to secure bonds to the amount of $1,000,000, was filed in said court by the Central Trust Company of New York, the trustee in the mortgage. On the same day the former suit was consolidated with the latter, and the receivership therein was extended thereto. Thereafter certain proceedings were had in said consolidated causes, and on February 27, 1897, a final decree was entered therein. By said decree the entire indebtedness proven against the corporation was adjudged. It consisted of said mortgage bonds, balances of purchase money due for certain portions of said real estate, secured by vendors' liens, most of which were superior to said mortgage, but some of which were inferior thereto, obligations secured by pledges of personal property, and obligations unsecured in any way. The indebtedness so adjudged exceeded the sum of $1,750,000. Some of it, however, was a duplication, owing to the fact that one kind of indebtedness, principally, if not entirely, said bonds, had been pledged as collateral security for other kinds thereof. In view of this it is difficult to state the exact amount of the real indebtedness of the corporation as thus adjudged, but this fact is not material to any question raised by this appeal. The decree further adjudged the liens upon the assets of the corporation and their priority, a sale of said assets, and a distribution of the proceeds thereof, after payment of the costs and expenses of the proceedings, in discharge of said liens to the extent thereof and in accordance with their priority. Under this decree a

sale was had on July 20, 1897, which was shortly thereafter duly confirmed. At said sale those portions of real estate covered by the vendors' liens which were superior to the mortgage were purchased by the holders of said liens at amounts considerably less than the balances due them, which were thus left unpaid to this extent. The rest of the real estate was purchased by Linus S. Freeman, James E. Rodes, and William Beverly Winslow as trustees for the parties to certain agreements by which funds were subscribed to pay the purchase price bid therefor. They purchased it for the sum of $70,000, the upset price named in the decree, which exceeded by the sum of $380 only the amount necessary to defray the costs and expenses of the litigation other than those incidental to the prosecution of the foreign suits hereinafter referred to. It does not appear what sums the personal assets pledged to secure certain obligations brought, but evidently they did not bring much. This exhaustion of the assets of the corporation left its indebtedness largely unpaid. With the sale of said assets and the distribution of their proceeds this much of the litigation spent its force. In the course, however, of the proceedings prior to the making of said decree, to wit, on May 22, 1895, an order was made directing the receivers to institute suits in the state of Massachusetts against Joseph R. Leeson and John Hopewell, Jr., residents of that state, and two out of sixteen individual promoters of said corporation, the East Tennessee Land Company, to recover secret profits made from said corporation at the time of its organization, which, if recovered, would constitute assets of the corporation for distribution in said consolidated causes upon its indebtedness. Pursuant to said order, in May, 1895, two separate suits against said individuals were brought in the state court of Massachusetts having original jurisdiction of them. December 19, 1895, an order was made in said consolidated causes directing a temporary suspension of the suits in Massachusetts until it should be ascertained that it was necessary to collect said assets to pay the indebtedness of the corporation. In June, 1897, this fact having been ascertained, and the receivership being represented by a single individual, the order of suspension was revoked, and the receiver was directed to proceed with said suits. On April 11, 1898, an order was made upon application of the Central Trust Company of New York, trustee under said mortgage, absolving it thereafter from any liability for costs of the receivership, and providing for the continued prosecution of said suits in the following words, to wit:

"It is ordered that the receiver continue the prosecution of said suits only in the event that creditors of the East Tennessee Land Company, who are parties to these causes, shall provide security for the costs of such suits, including the expenses of the receiver and his counsel, for such sums and in such form and amount as the clerk of this court may deem adequate and satisfactory, and to be sufficient to protect the Central Trust Company from being charged or liable for any such expenses from the date of the entry of this order. It is further ordered that the creditors so indemnifying the receiver as aforesaid, and who shall elect to further continue the prosecution of said suits or actions, shall be entitled to the proceeds or benefits thereof to the extent of their respective claims, and to the proceeds of all property and assets hereafter coming into the hands of said receiver, to the exclusion of

other creditors and persons who do not within 30 days after notice to the solicitors for the respective parties of the entry of this order join in providing security for the payment of further costs and expenses as hereinafter required."

June 24, 1898, the time within which indemnifying bonds might be given under said order, was extended 20 days thereafter. Under these orders the Harriman Land Company, a New Jersey corporation, organized in 1897, and, claiming to be the assignee of the bulk of the creditors of said East Tennessee Land Company, whose claims against it had been proven in said consolidated causes, and adjudged by the decree of February 27, 1897, J. E. Rodes, assignee of one of such creditors, and Claude E. Hendricks, assignee of four or five of such creditors, executed bonds as required by said order. No other such creditor or assignee thereof executed any bond in compliance therewith. Thereafter the receiver, at considerable cost and expense to said indemnifiers, prosecuted said suits against said Leeson and Hopewell to a successful determination, and recovered from them for distribution in said consolidated causes as a part of the assets of said insolvent corporation the sum of $89,173.26, which is now held by him for such purpose. The proceedings had in said suits and the basis of the recovery therein are fully set forth in the following reported decisions of the Supreme Court of Massachusetts, to which said suits were carried by said Leeson and Hopewell on four separate occasions, to wit: Hayward v. Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; East Tennessee Land Co. v. Leeson, 178 Mass. 206, 59 N. E. 639; Same v. Same, 183 Mass. 37, 66 N. E. 427; Same v. Same, 185 Mass. 4, 69 N. E. 351. This, then, is the case within which is the case in which the decree appealed from was rendered.

The case that is within said other case in which the decree appealed from was rendered is this: On the 3d of February, 1903, the suits in Massachusetts had progressed so far that a recovery was absolutely certain, and the amount of recovery was reasonably certain; but before the defendants therein had made any payment on account of said liability and the receiver had any moneys in hand arising therefrom, an intervening petition was filed in said consolidated causes by John T. McEwen, executor of William S. McEwen et al., six creditors of said insolvent corporation, whose claims against it were on account of balances of purchase money due them for real estate sold said corporation, to secure which they held vendors' liens superior to said mortgage, whose claims had been proven and adjudged by said decree of February 27, 1897, and who had purchased at the sale thereunder said real estate at sums less than the balances due them, respectively, against said Harriman Land Company, J. E. Rodes, and Claude E. Hendricks, the only parties who had executed indemnifying bonds under said order of April 11, 1898, in which, for the reasons therein stated, they sought to have it adjudged that said defendants thereto were not creditors of said East Tennessee Land Company, and had no right to share in said fund about to be recovered by the receiver; and that same, after paying costs and expenses, should be distrib-

uted amongst the petitioners and all other creditors of said corporation whose claims were unpaid. On March 28, 1904, four other parties claiming to be unpaid creditors of said corporation, to wit, Nathaniel W. Myrick, Byron A. Beal, Charles Gerding, Jr., and D. A. Mowry's personal representative, were permitted to file an intervening petition against the defendants to the former petition, in which they prayed the benefits thereof and the same relief as therein prayed. It is conceded that Myrick and Beal are creditors, each holding bonds for which judgment was taken on their behalf by said trustee in said decree, neither having proved their bonds therein, Myrick, however, having proved certain coupons for interest on said bonds. It is denied that Mowry and Gerding are creditors. It is conceded that Mowry held bonds at one time which were proven in said causes on his behalf by one Schumacker, but it is claimed that this indebtedness was assigned to the Harriman Land Company, one of the defendants to said intervening petition. It is conceded that Meisner, of whom Gerding claimed to be assignee, held the obligations of the said insolvent corporation for a balance of purchase money due for real estate conveyed to it, but it is claimed that the title to sufficient of the real estate conveyed to cover said balance had proven defective, and provision had been made in the decree for an abatement therefrom to the extent the title was defective.

The decree rendered in the case made by these two intervening petitions from which this appeal has been taken by said petitioners was a dismissal of said petitions with full prejudice, thus denying to them any right to participate in said fund of about $90,000. No other judgment has been rendered in relation to said fund.

Counsel for the parties to the appeal have discussed two questions and presented them for determination by this court. One is whether the appellees, the Harriman Land Company, J. E. Rodes, and Claude E. Hendricks, are creditors of the East Tennessee Land Company, and entitled to share in the distribution of said fund. The other is whether the appellants, the petitioners in said intervening petitions, and creditors of said insolvent corporation, are entitled to share in said distribution. Our conclusion is that the latter are not entitled to share therein, and that the former are entitled to the whole of the fund. In order to understand appellants' position as to the first of these two questions, and the grounds of our disposition of it, a further statement of fact is essential. The way in which the appellee the Harriman Land Company claimed to have become the owner by assignment of the indebtedness which it asserted is this: Pending said consolidated causes, and some time prior to said decree of February 27, 1897, the bulk of the creditors and stockholders of the East Tennessee Land Company entered into a written agreement with each other, which they characterize therein as an agreement for the reorganization of said company, whereby it was provided, in substance, that a new corporation should be organized to purchase at the sale to be had under the decree in said causes so much of the properties of said company as it was deemed advisable to purchase; that the parties thereto

should receive from said corporation stock therein, which was to be divided into three distinct classes, with an order of preference, in exchange for their indebtedness against and stock in said company, the indebtedness to be exchanged for stock of the highest rank and the stock for that of the lower rank, with an assessment and each dollar for dollar; that other stock of the corporation of the highest rank should be sold for cash; that other indebtedness, whose owners did not enter into the agreement, might be purchased for cash, power to borrow which for that purpose was given; and that 17 named individuals, creditors and stockholders of said company, should be a committee, characterized as a "reorganization committee," to carry the provisions of said agreement into effect. All creditors and stockholders of said company were given an opportunity to become parties to this agreement. Through the instrumentality of said reorganization committee, and under the provisions of said agreement, the appellee Harriman Land Company was organized in July, 1896. At the time of the sale in July, 1897, neither the reorganization committee nor the Harriman Land Company possessed sufficient funds with which to purchase the properties of the East Tennessee Land Company. In this contingency, in the early part of that month the agreement hereinbefore referred to was entered into by which sufficient funds were subscribed to purchase the real estate of said company not covered by prior vendor liens at the upset price named in the decree of sale, to wit, $70,000, and said Freeman, Rodes, and Winslow were designated as trustees to make the purchase on behalf of the parties thereto, collect the moneys subscribed, and pay the purchase price. Many, if not most, of the parties to these agreements were parties to the reorganization agreement; and Freeman and Winslow, two of the trustees thereunder, were not only parties thereto, but members of the reorganization committee. It would seem that these agreements were entered into at the instance and by the procurement of said reorganization committee. But whether so or not, at any rate there was an understanding with said reorganization committee that it, on behalf of the parties to the reorganization agreement, should have the benefit of the purchase of said real estate by said trustees upon reimbursing their beneficiaries for the moneys expended in purchasing same and interest thereon. So that, though the reorganization committee did not actually purchase said real estate at said sale, yet on the behalf aforesaid it had an equitable interest in the purchase, and upon making said reimbursement had a right to enforce a transfer of the bid to it. It was the real purchaser, and said trustees only had a lien on the property for reimbursement. This much is said in view of the emphasis placed by appellees' solicitors upon the circumstance that the trustees, and not the reorganization committee, were the purchasers at the sale. It cuts no figure in the disposition of the question under consideration. After the sale, to wit, September 1, 1897, the reorganization committee was in condition to take over the real estate so purchased by said trustees, and thereupon they and said committee transferred and conveyed same to the appellee Harriman Land

Company, to whom a deed was subsequently made by the court, and the creditors and stockholders, parties to said reorganization agreement, through said reorganization committee, and an attorney in fact and a trustee as to certain of them, transferred and assigned the entire indebtedness and stock represented by said parties to the appellee Harriman Land Company, and received from said company its stock in exchange therefor in accordance with the terms of said reorganization agreement. It is through this reorganization agreement and its execution that the appellee Harriman Land Company asserted title to most of the indebtedness of said East Tennessee Land Company claimed by it. In addition thereto, it asserted title to an indebtedness in favor of the Coal Creek Mining & Manufacturing Company for a balance of $51,353.90 on account of purchase money for land sold the East Tennessee Land Company after crediting thereon the proceeds of the sale of said land in enforcement of its vendor's lien under said decree, and also to an indebtedness in favor of Mason, Gillingham, and Crab Orchard Coal Company for a balance of $18,375 on like account, which it claimed to have acquired by virtue of an agreement of date February 16, 1897, between said reorganization committee and said first-named company, and an agreement of date February 19, 1897, between said committee and said last-named creditors, providing for an assignment thereof to the appellee Harriman Land Company in exchange for certain of its securities, and execution thereof.

The way in which the appellees J. E. Rodes and Claude E. Hendricks claimed to be the owners by assignment of the indebtedness asserted by them, respectively, is this: R. B. Cassell was the attorney of the assignors in the assignments under which said Rodes and Hendricks claimed. At his instance the assignments were made under an agreement that the assignees were to execute indemnifying bonds under the order of April 11, 1898, on behalf of the claims assigned, and pay the assignees 30 per cent. of the sums received on account of same.

Now, the main attack of the appellants is upon the appellee the Harriman Land Company's claim that it is a creditor of the East Tennessee Land Company as to the indebtedness covered by the reorganization agreement. They maintain that the effect of that agreement and its being carried into effect by the issuance of said stock in exchange for said indebtedness was a satisfaction and payment thereof, so that after its execution said indebtedness no longer had any existence, and at the time of the giving of the indemnifying bond on April 11, 1898, the appellee was not a creditor of the East Tennessee Land Company as to same. It is difficult to see what possible room there is for this contention. The agreement in relation to this indebtedness was simply to exchange it for the stock of the new corporation that was to be formed under its provisions; i. e., to assign and transfer it to such corporation in consideration for said stock. By section 7 of the agreement it was provided that:

"The stock of the new corporation of the several classes indicated shall be issued to holders of the bonds, stocks, and securities of the present East

Tennessee Land Company in exchange for such bonds, stocks, and securities only upon the conditions and limitations hereinbefore stated."

By section 8 provision was made for holders of vendors' liens receiving first lien preferred stock of the new corporation "in exchange for their lien claims." By section 9 provision was made that a holder of an unsecured claim, whose status was such as, in the opinion of the committee, to justify it, should be "allowed to exchange his claim for second preferred stock of the new corporation without cash payment," and that the holders of unsecured claims whose status was not such should, "upon subscription and payment for such amount of first lien preferred stock of the new corporations as seems fair," be "permitted to exchange their claims or such amount thereof as may be agreed upon in the particular case for the second preferred stock of the new corporation." Likewise, the carrying into effect this agreement was simply an exchange of the indebtedness covered by it for stock of the appellee Harriman Land Company; i. e., a transfer and assignment thereof to said company in consideration for its stock. The transaction was as much a transfer and assignment of said indebtedness to said company as the transactions with the Coal Creek Mining & Manufacturing Company and Mason et al., who were no parties to said agreement, were transfers and assignments to said company of the claims held by those parties, or as if said committee under the authority of section 11 of the reorganization agreement had purchased indebtedness of the East Tennessee Land Company from persons not parties to said agreement, and paid for same with money borrowed for that purpose, the transfer and assignment of such indebtedness to appellee would have been in reality what it purported to be, and have kept the indebtedness alive in the hands of appellee. A transfer and assignment of indebtedness from one person to another for a given consideration is never a payment of such indebtedness. The indebtedness is kept alive, and passed from the assignor to the assignee. This is elementary. The only possible question that could be made as to the reorganization agreement and its being carried into effect in accordance with its provisions would be as to whether the parties to said agreement paid value for the stock of the appellee; but that is a question which cannot be raised by the East Tennessee Land Company or any creditor of such company.

But counsel for appellants argue that their position finds support in the cases of Central Trust Co. v. Cincinnati, J. & M. Ry. Co. (C. C.) 58 Fed. 500; First Nat. Bank v. Radford Trust Co., 80 Fed. 569, 26 C. C. A. 1. The facts of the Central Trust Company Case were these: The Cincinnati, Jackson & Michigan Railway Company owned a railroad in two divisions. One division was known as the "Jackson Division"; the other as the "Van Wert Division." The latter by itself was subject to two mortgages—one to secure $1,150,000 of ordinary bonds, the other to secure $363,000 of income bonds. Both divisions were subject to a mortgage to secure more than $2,000,000 of ordinary bonds. As to the Van Wert Division, the mortgages covering it alone were prior to the

mortgage covering both divisions. As to the Jackson Division, there was nothing ahead of the latter mortgage. There was a small amount of floating indebtedness. There was a personal liability on the part of the company for the indebtedness covered by all the mortgages. That covered by the mortgages on the Van Wert Division was not an original liability, but one by assumption only. In this condition of things, all the stockholders and all the bondholders, save those holding $211,000 of the income bonds, entered into an agreement to this effect: Proceedings should be instituted to foreclose the mortgages and sell both divisions. A corporation should be formed to purchase them at the foreclosure sale. Each stockholder of the old corporation should receive on account of his stock therein an equal amount of stock of the new corporation, paying a certain assessment. Each income bondholder should receive on account of bonds an equal amount of stock of the new corporation without paying any assessment; and each ordinary bondholder, whether his bonds were secured by the mortgages on the Van Wert Division alone or by the mortgage on both divisions, should receive on account of his bonds an equal amount of the bonds of the new corporation. A committee was appointed to carry the agreement into effect, and it was given all powers to enable it to do so. In accordance with the agreement, foreclosure proceedings were instituted, and the property sold under a decree of foreclosure. It was purchased by the committee. A new corporation was formed, to whom it was conveyed; and the parties to the agreement received stock or bonds of the new corporation as provided in the agreement. Each bondholder whose bonds were secured by a mortgage on the Van Wert Division received a like amount of bonds of the new corporation, and so did each bondholder whose bonds were secured by a mortgage on both divisions. Though there was a distinction between these two classes of bondholders under the old régime, there was no distinction between them under the new. At the foreclosure sale, the Van Wert Division was purchased by the reorganization committee for $150,000 and the Jackson Division for $2,525,000, which was $125,000 in excess of the bonds secured by the mortgage on both divisions. The reorganization committee used $150,000 of the Van Wert bonds in paying for the Van Wert Division, and the entire bonds covering both divisions in paying all but $125,000 of the purchase price for the Jackson Division. This left $1,000,000 of the Van Wert bonds unused, and there was on hand for distribution by the court the $125,000 realized from the Jackson Division in excess of the bonds on it alone. A controversy arose between the reorganization committee and the holders of the floating indebtedness of the old corporation as to whether the holders of the $1,000,000 of unused Van Wert bonds had a right to share in the distribution of said surplus of $125,000. It was held by Judge Taft that they had not. This case, however, does not support the contention of appellant's counsel in this case. There is a wide distinction between that case and this. The key to the distinction between them lies in the fact stated above that the right to share in the distribution of said sur-

plus on account of said bonds was asserted by the reorganization committee on behalf of the original holders of the Van Wert bonds. It was not asserted by the new corporation organized by the reorganization committee in pursuance to said agreement. Here the right to share in the Leeson-Hopewell fund, so far as the indebtedness covered by the reorganization agreement is concerned, is not asserted by or on behalf of the original holders of that indebtedness, but by the appellee Harriman Land Company. It asserts such right on the ground that it was provided by the reorganization agreement that the indebtedness of the old corporation held by the parties thereto should be exchanged for securities of the new corporation to be formed under the agreement—i. e., transferred and assigned to said corporation in consideration of receiving its securities as provided in the agreement—and that thereafter and before the execution of the indemnifying bond under the order of April 11, 1898, the exchange, transfer, and assignment was carried into execution. Such was the true intent and meaning of the agreement, and it is not capable of any other construction. In the Central Trust Company Case it was not even asserted by anybody that any exchange of the bonds of the old corporation for those of the new—i. e., a transfer and assignment of said bonds to the new corporation in consideration of receiving the bonds of the new—was contemplated by the agreement entered into, or had ever been made. The sole controversy was as to whether the unused Van Wert bonds, after the carrying of the reorganization agreement into effect, had any further life in them in the hands of the reorganization committee on behalf of the original holders thereof. It was held that they had not. It was so held because the reorganization agreement was construed to mean that upon the execution thereof all the bonded indebtedness held by the parties thereto should be treated as paid, extinguished, or fully satisfied. This construction was enforced by two considerations. One was this: Each Van Wert bondholder had received a like amount of the bonds of the new corporation on account of his Van Wert bonds, and each Jackson and Van Wert bondholder had received as much, and no more. If the position put forward on behalf of the Van Wert bondholders were correct, then simply because the reorganization committee had failed to make the Van Wert Division bring more than $150,000, the Van Wert bondholders would be permitted to share in the surplus of the Jackson Division, and the Jackson and Van Wert bondholders would not; and so it would be that the former would "obtain greater benefit from the foreclosure and sale and the reorganization agreement than the Jackson Division first mortgage bondholders, whose security sold for more than their mortgaged bonds." Both sets of bondholders were parties to the reorganization agreement. Judge Taft said: "Plainly the parties to the agreement intended no such paradoxical result." The other consideration was this: All the stockholders and all the ordinary bondholders were parties to the reorganization agreement. As matters stood when the agreement was entered into, the stockholders were individually liable to said bondholders in case there should

be a deficiency after the sale of the mortgage property. If, then, it was not the true meaning of that agreement that the indebtedness held by the bondholders should be considered as fully satisfied upon the execution thereof, the holders of the unused Van Wert bonds had a right to assert this individual liability against their associates in the agreement, to wit, the stockholders, to the extent of said bonds. Judge Taft said:

"Can the Van Wert bondholders, or the committee of reorganization for them, enforce this liability? It is conceded by counsel for the committee that they cannot. If not, why not? The only reason is that the bondholders under the agreement have impliedly agreed with the stockholders that the new securities which they have received extinguished their debt."

Such being the proper construction of the agreement, the only other question in that case was as to whether the old corporation or its floating creditors, who were not parties to the reorganization agreement, could claim the benefit of its provisions. It was held that they could; that it was a case where two parties to a contract had stipulated for the benefit of a third person, a stranger to the contract; and that such third person had a right to assert the benefit arising thereby to him. Under the reorganization agreement in this case the only possible contingency in which the indebtedness represented by the parties thereto, or any part thereof, could have been treated as paid and satisfied would have been had the reorganization committee found it necessary to use it in payment of the purchase price for the property which it had power to do, and so used it. But that contingency never arose. The property sold for cash. The cash was paid. No part of said indebtedness was ever used in paying for the property. There was no occasion to use it. Not having occasion to so use it, it was transferred and assigned to the appellee the Harriman Land Company in accordance with the provisions of the agreement, and thus kept alive as an indebtedness of the East Tennessee Land Company.

Then as to the Radford Trust Company Case. There the property of an old corporation was transferred to a new corporation in consideration of its assumption of the liabilities of the old. The property in the hands of the old corporation was subject to a mortgage to secure a certain quantity of bonds. The new corporation made a mortgage to secure a new set of bonds. Some of the holders of the old bonds accepted the new bonds in substitution for the old. Other of the holders of the old bonds did not. It was held that the former, by their acceptance of the new bonds for the old bonds, had released the old security; and the latter, by their nonacceptance thereof, retained their old security, and had a lien on the mortgaged property to secure their old bonds, which was prior to that held by the former to secure their new bonds. It was precisely the same as if there had been no new corporation in the transaction, and the old corporation had executed the new bonds and mortgage to secure same. Judge Lurton said:

"The election to hold and rely upon the bonds of the Hughes Bros. Manufacturing Company as a substitute for the bonds of the Hughes Lumber Company operated as a payment of the latter bonds and a release of the security

provided by the Barton mortgage. Central Trust Co. v. Cincinnati, J. & M. Ry. Co. (C. C.) 58 Fed. 500. The case of Robb v. Voss, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52, is a case where, under circumstances of much greater hardship, a party was held to the consequences of an election. The principles upon which that case rests are those which govern this. Union Trust Co. v. Illinois M. Ry. Co., 117 U. S. 435–470, 6 Sup. Ct. 809, 29 L. Ed. 963, also presents a case of the acceptance of bonds secured under a junior mortgage in substitution for bonds issued under an earlier mortgage, where the court held that acceptance worked a cancellation of the earlier mortgage and held the parties to their agreement."

That, therefore, was another case where the securities of the new corporation were accepted in payment and satisfaction of the securities of the old. It was not a case, as here, of exchanging the one for the other—transferring and assigning the one in consideration of receiving the other.

An instance where a reorganization agreement contemplated the indebtedness of the old corporation being kept alive and being sold or given in exchange for securities of the new corporation may be found in the case of Columbus S. & H. R. R. Co. Appeals, 109 Fed. 177, 48 C. C. A. 275, decided by this court.

Such, then, is appellants' position as to the appellee Harriman Land Company being a creditor of the East Tennessee Land Company to the extent of the indebtedness covered by the reorganization agreement and the reasons for our conclusion that it was. As to the claims asserted by it as assignee of the Coal Creek Mining & Manufacturing Company and Mason et al., there would seem to be no possible reason for holding that it did not acquire such claims by assignment from said parties, and by virtue thereof is a creditor of said company to the extent of said claims. The suggestion is made that the purchase was made so as to prevent said creditors from competing with the reorganization committee at the sale that was to be had under the decree to be entered in said causes. We know of no law preventing one creditor from purchasing the indebtedness of another creditor to get him out of the way. It is a matter solely between the two creditors, and, if one is willing to sell to the other, no one else can complain.

Then as to the status of the appellees Rodes and Hendricks. The suggestion is made that the transactions by which the claims asserted by them were assigned to them were champertous and void. We do not so regard them. We concur in the opinion of Judge Wanty, who rendered the decree appealed from, that they were "legitimate transactions."

It remains to state the ground of our position in regard to the second question presented for our determination on this appeal. We hold that the appellants, though creditors of the East Tennessee Land Company, are not entitled to share in the Leeson and Hopewell fund, because of their failure to comply with the order of April 11, 1898, and execute a bond to indemnify the receiver for all costs and expenses to be incurred in the prosecution of the suits against said individuals. It was expressly provided by that order that the creditors who should indemnify the receiver and elect to further continue the prosecution of said suits should be entitled to

the proceeds or benefits thereof to the extent of their respective claims to the exclusion of other creditors who did not so act. All of the appellants were at that time parties to said consolidated causes, had notice of the making of said order, and failed to comply with its terms. Their failure so to do cut them off from all right to share in said fund. Said order is a barrier in the way of such right, and it would be inequitable to permit them to stand by and see others execute the bonds and incur the expense involved, and then come in and share in the result. Our view of this matter cannot be better expressed than in the language of Judge Wanty in the opinion before referred to. In alluding to the appellants he said:

"They did not see fit to contribute to the expense of the litigation until it had been carried by the receiver for the benefit of the contributors to a successful termination, and then they awoke from their sleep with outstretched hands to receive the fruits of a contest that they declined to make. These suits against Leeson and Hopewell were prosecuted by the parties giving the bonds for their own benefit, and not for the benefit of these petitioners. Had no bonds been given under the order of April 11, 1898, the suits would have been abandoned, and there would have been no money for distribution. Now that the fund has been secured, after due notice to these petitioners that they must bear their share of the burden if they desire to share the fruits of the contest, they have no standing in a court of equity to claim this fund and exclude the parties who, under the order of the court, are entitled to it."

After it became a certainty that there would be a recovery in these suits, each of the four appellants, to wit, Myrick, Beal, Gerding, and Mowry, parties to the second intervening petitions filed in the lower court, brought a suit in the proper court in Massachusetts, in which he sought to equitably attach the funds due to the East Tennessee Land Company from Leeson and Hopewell and have them applied in payment of his debt. These suits were defended by the receiver on behalf of the company, and it was held that the plaintiffs therein were not entitled to any such relief. Gerding v. East Tennessee Land Co., 185 Mass. 380, 70 N. E. 206. The ground upon which it was held that all of said appellants except Beal were not entitled to the relief sought was that each of them had voluntarily become a party to the insolvent proceedings in the lower court, and had thereby elected to take advantage of and become bound by those proceedings, and could not thereafter resort to remedies against the property of the insolvent company in other states to which otherwise he would have a right of recourse. Beal, though he had become a party to said proceedings, and was such at the time of the making of the order of April 11, 1898, had thereafter been permitted to withdraw therefrom; so that at the time of filing his bill of equitable attachment he was not a party to said proceedings. The ground, therefore, upon which he was denied the relief which he sought, was said order of April 11, 1898, and his failure to comply therewith. Judge Loring, in the course of his opinion in the case last cited, said:

"The plaintiff Beal elected not to contribute to the prosecution of these suits. He allowed other creditors to contribute to the expense of conducting them under an order that they should be conducted for the benefit of the contributors. He lay by for nearly four years and a half after he elected not to contribute to the prosecution of these suits, until they had been brought to

a successful issue by the efforts of those who did contribute. He then undertook to step in and appropriate to himself the fruits of the expenditures of those who did contribute. He has no standing in equity to maintain such a bill. He does not stand in the situation he would have stood in had these suits against Leeson and Hopewell been conducted at the expense of the company. They were in fact conducted by the creditors, and at the expense of the creditors. Under these circumstances, Beal, who elected not to contribute to these suits, must in equity yield to the prior rights of the creditors who contributed to them and prosecuted them to a successful termination."

What is said here of Beal is true of all the other appellants, and is sufficient not only to bar them all from a right to exclude appellees from sharing in said funds until their claims were satisfied, but also from any right to share with appellees in the distribution thereof.

Here this opinion might well terminate, but in view of the emphasis placed by appellants' solicitors upon two considerations, which really have no higher dignity than makeweights, some reference should be made to them. One of them amounts to this, to wit, the prominent position taken in the institution and prosecution of the proceedings in the lower court to wind up the affairs of the East Tennessee Land Company, and to bring about the making of the reorganization agreement and its carrying into effect by certain of said individual promoters of said company, who, like Leeson and Hopewell, had made secret profits to a like extent at its organization, and the prominent positions they now hold in the appellee the Harriman Land Company, which will reap the principal benefits from the Leeson and Hopewell fund. The claim is put forward that everything that has been done along this line was for the purpose of shielding said promoters, and making it so that they would not have to account to said company like Leeson and Hopewell. It is thought to be inequitable that said promoters should thus be allowed to shield themselves and then participate in the distribution of said fund. This consideration is not thus put forward by appellants' solicitors, but such we conceive it to be in effect. The record, as we read it, does not bear out this contention as to the purpose of said proceedings, reorganization agreement, and its execution. No doubt, there was no great desire on the part of said promoters to account for said secret profits, but the purpose of said cause of action was not to prevent their accounting therefor. Said proceedings, on the contrary, afforded an opportunity of making them account. Possibly the receivers first appointed were friendly to them, but they were subsequently removed, and receivers were appointed in no way connected with them. These receivers, at about the same time the suits against Leeson and Hopewell were instituted, filed a dependent bill in the lower court against said promoters, by which they sought to make them account for said secret profits. Some of them were insolvent and others nonresidents of Tennessee, and not properly suable in the lower court. Thereafter that litigation was settled by certain of the promoters so sued canceling certain indebtedness on the part of the East Tennessee Land Company, which settlement was approved by the court and by all the parties to the consolidated causes and their counsel, and a de-

cree was entered accordingly. In so far as any creditor was persuaded by said promoters not to take any steps to make them account for secret profits, or to consent to or acquiesce in said settlement, he alone can complain of such persuasion, and he can complain only in the event he was overreached. None of the appellants claim to have been persuaded by said promoters to acquiesce in said settlement, much less to have been overreached by them. And if for any reason they are not bound thereby, this fact is no ground for the appellees being denied the Leeson and Hopewell fund. The sole effect of it is to put them in position to take steps yet to make said promoters account according to law, if their right so to do is not now barred by the statute of limitation.

The other consideration is that the reorganization committee and the appellee Harriman Land Company was enabled to acquire all the real estate of the East Tennessee Land Company not covered by prior vendor liens at the sum of $70,000, which was greatly less than its real value. So far as McEwen et al., the creditors in first intervening petition, are concerned, they were not hurt by this fact. They had no right to participate in the proceeds of this real estate until the mortgage indebtedness, which amounted to over $1,000,000, was paid. Besides, all creditors were given an opportunity to enter into the reorganization agreement according to their respective rights, and those who lost anything by not doing so have themselves only to blame. And, finally, said sale was duly reported to the court, and has been duly confirmed. It cannot now be questioned collaterally.

Counsel have also discussed whether the appellant Mowry's personal representative and Gerding are creditors of the East Tennessee Land Company, but, in view of our holding that no creditor of said company outside of appellees is entitled to any interest in the fund in question, it is not essential that these questions should be disposed of.

The decree appealed from is affirmed.

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## AMERICAN SEWAGE DISPOSAL CO. v. CITY OF PAWTUCKET.

(Circuit Court of Appeals, First Circuit. June 13, 1905.)

No. 564.

PATENTS—INFRINGEMENT—SEWAGE APPARATUS.

The Glover patent, No. 559,522, for a sewage apparatus comprising a series of stationary primary filter-beds having a structure inclosing the same, and a series of secondary filter-beds open to the air, does not include as an element of the combination a septic tank, nor do the primary filter-beds operate on the principle of septic or putrefactive action, to liquefy the sewage, but of sedimentation and filtration. As so construed, *held* not infringed by an apparatus using a septic tank.

Appeal from the Circuit Court of the United States for the District of Rhode Island.

For opinion below, see 132 Fed. 35.

Edward P. Payson, for appellant.

William R. Tillinghast (Edward W. Blodgett, on the brief), for appellee.

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

COLT, Circuit Judge. This appeal relates to the Glover patent, No. 559,522, issued May 5, 1896, for improvements in sewage apparatus. The Circuit Court dismissed the bill on the ground of noninfringement. The Glover apparatus comprises a series of primary filter-beds, a structure inclosing these beds, and a series of secondary filter-beds located outside the structure. The patent also describes a settling tank, from which the liquid and sludge may be drawn off onto the primary filter-beds. This tank, however, is not claimed as a part of the invention covered by the patent.

The single claim of the patent reads as follows:

"A sewage apparatus comprising a series of stationary primary filter-beds, a structure over said beds with provision for the removal of offensive gases therefrom, and a series of stationary secondary filter-beds located outside the said structure and arranged to receive by gravitation the effluent from the primary filter-beds, the said primary beds being constructed to discharge the effluent wholly through filtering material, whereby the offensive matter is retained in the structure and the effluent is clarified and partially purified, and whereby the said effluent may receive subsequent treatment in the open air by extensive secondary beds for any required length of time without offense."

The validity of the Glover patent has not been attacked, the counsel confining their argument to the question of infringement. Upon this question the case resolves itself into a single sharply-defined issue. Was Glover the inventor of the septic tank, and has he embodied this tank in the patented apparatus? More specifically stated, the issue is narrowed down to the proposition: Are what are termed "primary filter-beds" in the patent in fact septic tanks? The defendant's plant as now operated uses septic tanks, or a septic tank, and if, in the sense of the Glover patent, primary filter-beds signify septic tanks, the defendant infringes; otherwise there is no infringement, and the bill must be dismissed.

The complainant's position may be summarized as follows: The modern and most perfect system for the disposal of municipal sewage comprises the combination of putrefactive or septic tanks and filtering-beds. The first step decomposes the crude sewage into liquid and gases by septic action. The second step purifies the effluent by oxidation. Glover discovered the septic tank in 1880, and took out a patent for it in 1882. This was his great invention, but the system was incomplete. The complete invention is covered by the patent in suit, in which there is found the combination of septic tanks and filter-beds. It is not claimed that Glover had any scientific knowledge of putrefactive or anaërobic bacteria, or of the putrefactive process or method; but it is maintained that he discovered the septic tank as a structure, that his 1882 patent is for this structure, and that the patent in suit includes this structure as the first and primary element of his perfected invention. It is further

contended that, although the primary filter-beds of the patent in suit contain filtering material, they are, and were intended to be, in their structure and mode of operation, septic tanks. It is also urged that, if the meaning of "primary filter-beds" is not entirely clear on the face of the patent, the court should give them such an interpretation as to save the actual invention, since Glover was the first to discover the utility of the septic tank in the disposal of sewage.

The defendant's answer to this position is that the patent in suit actually covers, and was only intended to cover, a system of rapid intermittent filtration, comprising two series of filter-beds—the primary filter-beds, which are under cover, and the secondary filter-beds, which are outside the structure.

To determine whether Glover invented the septic tank, which is the fundamental question in this case, it is necessary to have some clear comprehension of the meaning of the terms "septic tank" and "septic action" in the sewage art.

The best and most satisfactory source of information on this subject is the documentary evidence in the record, from which it will prove helpful if we quote quite fully.

The term "septic" appears for the first time in the Cameron British patent of 1896, 16 years after Glover made his alleged discovery of the septic tank, and 14 years after he took out his first patent. The Cameron patent clearly describes the septic tank and the septic process. The specification says:

"This invention relates to the treatment of sewage and to apparatus therefor, and has for its principal object to deal with crude sewage bacteriologically and bring it into such a condition of solution and liquefaction that it can be treated by filtration or irrigation, or in any other suitable way.

"By this invention further it is possible to get rid of the sludge difficulty, because the solid portion of crude sewage is entirely thrown into solution.

"In the systems now employed the crudge sewage is first treated chemically, so that the solid matter is to a great extent precipitated and it is only the liquid part which is treated by filtration or otherwise.

"By this invention the chemical treatment is entirely dispensed with, and, further, the expense of dealing with the precipitated matter is also obviated. In previous systems it has been considered of advantage that there should be contact of sewage matter with the air. In the treatment of sewage according to our invention it is of the utmost importance that the chamber in which the bacteriological action takes place should be dark, and also that means should be provided for preventing contact with the air. This want of contact with the air can be arranged by providing a closed cover to the tank or vessel or in certain cases by having no cover, but by utilizing the formation of scum which occurs when sewage is treated according to this invention. In carrying out this invention we provide or construct a tank of concrete, brick, or other suitable material, preferably shallow compared to its other dimensions. In order to insure exclusion of air, we make the cover air-tight and the manhole solid and air-tight. It may be found desirable to have a valve in the manhole to allow at times of the escape of gas should the fermentation or bacteriological action take place too rapidly. The inlet pipe and outlet pipe into the tank should be preferably trapped. The inlet pipe should be so arranged that it discharges into the tank some two or three inches below the normal surface of the water so as to avoid breaking the scum which forms. For the same reason the outlet pipe should be from the top of the tank, but trapped, and carried down below the surface, so that the floating matter is retained in the tank. The bottom of the tank may be pro-

vided with a small channel, or it may be dished so that the mineral or other insoluble matter may be collected there and taken out as required.

"We have found by experiment that the tank should be of a capacity to hold about 20 gallons per head of population, but we do not bind ourselves to this. After such a tank has been for 2 or 3 days in operation, a brown scum forms at the top, and eventually becomes 2 or 3 inches in thickness. This scum is formed by bacteriological action, and rises in particles from the bottom of the tank; gas forming at the bottom and carrying these small particles with it to the top of the tank. After such a tank has been in operation for 2 or 3 days, the effluent is satisfactory, and is in a condition to be further treated by any other means; such, for example, as a coke-breeze filter."

"It is not absolutely necessary for the tank to have an air-tight cover, as above described, because the dark scum which forms serves to keep both light and air from the sewage, but we consider it important to provide the cover."

The reports of the Massachusetts State Board of Health for the years 1898 and 1899 throw further light on this subject:

"Septic Tank System.

"The processes by which the percentage of suspended organic matter can be reduced are now being taken advantage of by the so-called septic tank system (first in operation in Exeter, Eng.), the main feature of which is an air-tight tank into which the sewage passes, to be retained for a time in order to allow the bacteria of decomposition, and subsequently those of putrefaction, to break up the organic matters into simpler forms.

"During the year we have studied this method with very interesting results. An air-tight wooden tank, divided into two compartments by a partition midway in the tank, has been used as a septic tank. The sewage flows into one compartment, and over this partition into the other, from which it is withdrawn by means of a faucet midway between the top and bottom of the side of the tank. Thus we avoid drawing out either the sediment from the bottom of the tank or the fat and fatty matters which accumulate upon the surface of the sewage. The sewage remains in the tank from twenty-four to thirty-six hours, and the tank is always kept full, sewage being run into the tank when any is withdrawn, and at the same rate.

"The sewage, when drawn from the tank, is generally of an exceedingly offensive odor, and darker colored than when it enters, but always clearer than ordinary sewage."

"Septic Tanks Need not be Air-Tight; Neither Need Light be Excluded.

"It was stated in the last report that it appeared to be doubtful if it was necessary to have a septic tank air-tight, and also doubtful if it was necessary to exclude light. During the year two small septic tanks were operated for several months, one being open to the air and light, and the other air-tight and covered.

"In the case of the open tank, it can be said that a phenomenon took place that prevented the access of air to the sewage in the tank, and excluded the light almost as thoroughly as if care had been taken in the first place to make the tank air-tight and to exclude the light; that is, a thick scum of fats and bacterial growths formed over the surface of the sewage. This same result has been obtained on a large scale more recently at Manchester, Eng., where it is proposed to utilize hereafter as septic tanks the already constructed open chemical precipitation tanks in the new scheme of treatment of the sewage of that city."

A still earlier description of the septic tank and septic process is found in the Mouras French patent of September 22, 1881, and the Mouras American patent, No. 268,120, bearing date November 28, 1882

After reciting the methods then in use for cleaning cesspools, the specification of the French patent says:

"THE AUTOMATIC AND ODORLESS SCAVENGER.

"Description of the Apparatus.

"This apparatus of extreme simplicity is composed firstly of three agents, viz.:

"1. An air-tight tank, hermetically closed, of a capacity in proportion to the needs it is to satisfy.

"2. A feed pipe, B, sealed to the top of the tank, and destined to receive evacuations, slops, and rain water.

"3. An elbow pipe, C, likewise fastened to the upper part of the tank, and serving to discharge the sewerage contained in the tank.

"The feed pipe, B, as well as the discharge pipe, C, both well sealed, are to plunge from 10 to 15 centimetres into the liquid in the tank. This is what closes it hermetically.

"Construction of the Tank, the Scavenger.

"The tank, the scavenger, may be constructed in all kinds of forms and of all kinds of materials. For small households, which wish to practice economy, it may be reduced to a simple sheet-iron cask placed anywhere, provided that this cask is furnished with a receiving pipe and a discharge pipe communicating with a sewer pipe.

"Our tank being easy and inexpensive to construct, the owner or architect may place it anywhere in the house, even in the narrowest closet. Besides, as it is odorless, cesspools may be established even in the interior of the rooms without the least inconvenience.

"The first condition to fulfill in the construction of this tank is to leave it perfectly air-tight.

"Its covering may, at will, consist of slabs or of a masonwork arch, of bricks, of concrete, cement, or any other material; but it should be made so that in no case the outer air can get into this tank, which, to be protected from changes in temperature, should always be hermetically closed. This is the second condition to fulfill.

"Mode of Operation of the Tank.

"The tank, A, does not begin to operate until it is completely full of water. If then there is let in through the receiving pipe, B, any volume whatever of water or fæces, immediately an equal volume of water is expelled by the discharge pipe, C, sealed at the upper part of the tank.

"But we must carefully note that the discharge pipe never passes anything but a turbid water holding in dissolution a certain quantity of matter coming from the decomposition and disaggregation of matter going on at the bottom of the tank.

"For the proper working of the apparatus it is expedient to discharge into the receiving pipe, as much as possible, rain water and dish water, in short all water that can be disposed of, in order to facilitate in the tank the decomposition and disaggregation of fæces and all other decomposable matters which may chance to be there.

"The tank constructed as we have just said, there can be no escaping of gas, no emanation whatever, either by the tank, A, which is air-tight, and hermetically closed, or by the feed pipe, B, which plunges into the water to the depth of 10 to 15 centimetres."

"Under ordinary normal conditions the tank always acts as we have just said. However, there is a case, but a very exceptional one, in which the tank will be unable to perform its functions, and that is when, in the long run, in consequence of the carelessness of negligent servants, the tank will be completely filled by the accumulation of foreign substances, such as bones, broken dishes, and kitchen refuse of all kinds which shall have been thrown into it through the reservoirs. It is incontestable that in such a case the owner, to clean out his tank, will be obliged to use the ordinary means of cleaning. But, we repeat, this will be an exception, and nothing but an ex-

ception. Furthermore, even in the very unfavorable supposition which we have just foreseen, it is only after a very long lapse of time—a century perhaps—that there will be occasion to clean out the tank.

"In any other case, one will never be obliged to open the tank and summons the nightman, and we say so with this certitude and assurance furnished by the twenty years' experience, during which time the system has never failed to perform its functions with the greatest success in the home of the inventor."

"To conclude, we will say that our system is far from being one of those experiments more theoretical than practical, which await the sanction of experience; but that, on the contrary, it has shown what it can do. The twenty years during which it has worked with the greatest success in the house of the inventor testify clearly that the tank, the scavenger, is one of those serious inventions of general utility which have only to be produced to be immediately accepted and sought after by the public."

In commenting on the Mouras invention, M. Moigno, in the Cosmos des Mondes for December 21, 1881, and January 21, 1882, says:

"I had been prepared for a long time, by personal observation, to accept and explain to myself in a sufficiently satisfactory manner the incredible facts M. Mouras has been in possession of for twenty years."

"The automatic scavenger is, in fact, first, hermetically sealed and closed by the most inviolable of fastenings, hydraulic fastenings; that is to say, its contents is cut off from all contact with the surrounding atmosphere. For that very reason, second, it is absolutely odorless, and renders all infection impossible. Third. By a mysterious operation, and one which reveals a quite new principle, it transforms all it receives, solid and liquid excrements, in a rather short space of time, and without addition of chemical ingredients, into a homogeneous liquid, only slightly turbid, and holding everything in suspension in the form of scarcely visible filaments, without leaving any deposits on the sides of the evacuation pipe or at the bottom of the drain pipe. Fourth. It empties itself automatically and continuously; that is to say, each volume of new evacuations introduced by the feed pipe immediately drives out an equal volume of old evacuations worked over and fluidized. Fifth. The liquid which escapes, while it contains all the organic and inorganic elements of the evacuation, is almost odorless, and may be received on the spot into a watering cart for agricultural purposes, or may flow away of itself into the branch pipe at first, then into the street sewer, then into the main sewer, and at last into canals for irrigation of prairies, fields, forests, etc."

Respecting septic action, it was said before the English Society of Arts in 1886:

"During spontaneous subsidence, which is a much slower process than precipitation, fermentation sets in. Solids are converted into liquids, and both solids and liquids into gases."

On the same subject, M. Moigno wrote in January, 1882:

"The mysterious agents of fermentation causing the decomposition and liquefaction of the fæces are the vibrions or anaërobic bacteria which, according to Pasteur, are destroyed by oxygen, and which manifest their destructive activity only in vessels from which the air is excluded."

From the foregoing descriptions it appears that the fundamental condition which characterizes the septic tank, and which differentiates it from the ordinary settling tank, is that the sewage shall remain in the tank for a considerable period of time in order that the bacteria of putrefaction may manifest their destructive activity, and so accomplish their work of decomposition and liquefaction.

The second essential condition which marks the septic tank is

that the contents of the tank must either be practically cut off from all contact with the atmosphere, or the surface of the sewage must remain quiescent for a sufficient length of time to permit the accumulation of a thick scum on the top, which operates to exclude the air and light. In other words, the tank must be built either air-tight, or so constructed with respect to its inlet and outlet pipes that the brown scum may be allowed to form on the exposed top surface. The necessary absence of air from the tank is due to the fact that the bacteria of putrefaction are destroyed by oxygen.

We are now prepared to consider Glover's earlier patent, which, it is contended, discloses his great discovery of the septic tank. This patent is numbered 258,744, and was issued May 30, 1882. The specification says:

"This invention has for its object to enable sewage matter to be disposed of without danger of contaminating the soil by matter in suspension, or the air by gases and odors.

"The invention consists, first, in the combination of a series of tanks, a sewer main or pipe arranged to discharge sewage matter into the first tank of the series, from which said matter flows successively through the other tanks; a building or inclosure over said tanks, having an inclined roof forming a flue, having an opening at its lower end for the admission of external air, and a chimney connected to the upper end of said roof or flue; said chimney, flue, and opening causing a current of air to pass over the series of tanks to the chimney and carry with it from the building all the gases and odors arising from the matter in the tanks.

"The invention also consists in an apparatus or building for the disposal of sewage, composed of, first, a central structure, receiving a sewer main, and provided with a ventilating flue or chimney; and, secondly, a series of radiating wings or inclosures, each having a series of tanks adapted to receive sewage matter from the central structure, and an inclined roof or flue communicating with the central chimney, and adapted to conduct to the chimney the gases and odors from the sewage matter in the tanks. Each wing is separated from the other wings, and means are provided for shutting off the sewage from either of the wings, so that when the tanks in either wing require cleaning out the work can be done without stopping the operation of the tanks in the other wings; all of which I will now proceed to describe."

"In carrying out my invention I construct a chimney, A, of sufficient height to create a strong upward draught and carry gases and odors from sewage to a sufficient height to prevent them from being offensive. Around the base of said chimney I construct a building, B, into which, at its base, enters a main sewer pipe, C. Around the building, B, are a series of radiating buildings or wings, D, of any desired number. The main sewer-pipe, C, has several branches, E—one for each wing. D. Each wing has a series of tanks, F, of any desired number, and the branch pipe, E, of each wing, is arranged to discharge sewage matter from the main pipe into the first tank, F, from which the sewage overflows into the succeeding tanks, the same water flowing through all the tanks in the series until it reaches the outer end of the wing, and depositing in each tank a portion of the matter held in suspension until it is comparatively free from such matter, and passes out from the last tank to the ground, or to a suitable conduit, in a practically pure condition. The roof of each wing, D, is inclined upwardly from the outer end to the main building and communicates with the chimney, A, as shown in Fig. 2, so that it constitutes an inclined flue, which conducts all gases and odors from the sewage matter in the tanks to the chimney. Each wing, D, is provided with an opening, H, at its outer end under the roof to permit the entrance of air to facilitate the passage of the gases and odors to the chimney, otherwise the wings are made as nearly air-tight as possible. The branches, E, which conduct the sewage matter to the wings, D, are provided with suitable valves or gates, I, so that the flow of sewage to either wing can be shut off when

it is desired to remove the deposits of solid matter from the tanks of such wing. In practice, when the described works are constructed on a large scale, capable of disposing of the sewage of a city or town, the wings will be shut off one at a time to be cleaned, the disposal of sewage going on at the same time in the other wings. Each wing is provided with doors, K, for the removal of the matter from the tanks."

"I am aware that sewage has been caused to flow through a series of tanks, depositing in each a portion of the matter held in suspension; but I am not aware that such tanks have ever been covered by a structure having an inclined roof or flue leading to a chimney, whereby all offensive odors and noxious gases are sufficiently removed as to be harmless.

"I claim as my invention—

"1. In an apparatus for the disposal of sewage, the combination of a series of tanks, a sewer main or pipe arranged to discharge sewage matter into the first tank of the series, from which said matter flows successively through the other tanks, a building or inclosure over said tanks, having an inclined roof forming a flue having an opening, H, at its lower end for the admission of external air, and a chimney, A, connected to the upper end of said roof or flue, said chimney, flue, and opening causing a current of air to pass over the series of tanks to the chimney and carry with it from the building all the gases and odors arising from the matter in the tanks, as set forth.

"2. The improved apparatus or building for the disposal of sewage, consisting of, first, a central structure receiving a sewer main, and provided with a ventilating flue or chimney; and, secondly, radiating wings or inclosures, each having a series of tanks adapted to receive sewage matter from the central structure, and an inclined roof or flue communicating with the central chimney and adapted to conduct to the chimney the gases and odors from the sewage matter in the tanks, the central structure being provided with means for shutting off the sewage from either of the wings whenever the tanks require cleaning, as set forth."

Upon its face this patent covers a series of settling tanks in combination with a ventilating structure over the tanks, which causes "a current of air to pass over the series of tanks," and carry with it the gases and odors arising therefrom. The patent expressly declares that the invention is found in the building and chimney for carrying away the gases and odors, and not in the tanks. The patentee says that he is "aware that sewage has been caused to flow through a series of tanks, depositing in each a portion of the matter held in suspension," but he is "not aware that such tanks have ever been covered by a structure having an inclined roof or flue leading to a chimney, whereby all offensive odors and obnoxious gases are sufficiently removed as to be harmless." This statement is totally inconsistent with the idea that there was anything novel in the construction or mode of operation of the tanks, and with any intention on Glover's part to patent a septic tank as distinguished from a settling tank.

The ventilating structure of this patent does not show that Glover had any comprehension of septic action, or of the essential conditions which enter into a septic tank. At this time the scientific distinction between sedimentation and septic action was not generally understood, and it was the popular impression that settling tanks emitted odors and gases, which should be disposed of in some way without danger of contamination therefrom.

Further, these tanks, both in description and mode of operation, are wanting in the primal characteristics of septic tanks. There is nothing in the patent which indicates that the sewage is to remain

in the tanks long enough to cause liquefaction by the septic process. On the contrary, the specification says that in practice the "wings" may be shut off one at a time in order to be cleaned. Again, the portion or quantity of the matter held in suspension which would be deposited in each tank would depend upon the rate and quantity of the flow, and whether it was continuous, and the patent is silent on these important subjects.

The second vital condition inherent in a septic tank is likewise absent from these tanks, namely, the exclusion of the air. The patent expressly provides that a current of air shall pass over the tanks. It further expressly provides that the sewage shall overflow from the first tank into the succeeding tanks. We have, then, in these tanks neither the total exclusion of the air from the sewage, nor, in the alternative, such an undisturbed condition of the surface of the sewage as will permit the formation of the thick scum which operates to shut out the air. Since, according to Pasteur and other scientists, the presence of oxygen destroys the activity of putrefactive bacteria, it is manifest that the Glover tanks would not operate, in any proper sense, as true septic tanks.

It may be observed in this connection that in the ordinary settling tank the line between sedimentation and septic action cannot be strictly drawn, for, if any portion of the sewage is permitted to remain for a considerable time in such a tank, there will be more or less fermentation, and this would be true of the Glover tanks. The question, however, is not whether there may not be some septic action in these tanks, as there may be in all settling tanks; but whether this patent discloses, or was intended to disclose, the practical septic tank of the sewage art for the disposal of sewage by the septic process.

For these reasons we fail to find in this earlier Glover patent any intention to patent a septic tank, or any description of such a tank within the meaning of the patent law.

Thirteen years after the issue of his first patent, Glover filed his application for the patent in suit. The literature of the art shows that during this time those interested in the subject, both from a scientific and a practical standpoint, were directing their efforts largely to intermittent filtration as affording the best solution of the sewage problem. We think it appears from this later patent that Glover's mind ran in the same direction, and that he believed that the best system of sewage was to be found in two series of filter-beds combined with substantially the ventilating structure of his first patent. The only part of this later apparatus which, on the face of the patent, is like the tanks of his first patent, is what is described as a "settling tank," which is not shown in the drawings nor included in the claim of the patent.

The patent reads as follows:

"This invention has for its object to permit the filtration of sewage on a large scale without making the same offensive; and it consists in an apparatus comprising a series of primary filter-beds and means for charging the same with sewage, a structure inclosing said primary beds and having provision for the removal of the gases emanating therefrom, the said primary

beds being constructed to separate the solid from the liquid matter and to discharge the effluent wholly through filtering material, and a series of secondary filter-beds located outside the said structure and arranged to receive said effluent by gravitation and adapted to complete the purification of the same, the effluent being clarified and sufficiently purified and deprived of offensive matter by the primary filter-beds to permit its treatment by the secondary beds in the open air without offense.

"Of the accompanying drawings, forming a part of this specification, Fig. 1 represents a vertical section of one form of sewage apparatus embodying my invention. Fig. 2 represents a section on line 2, 2, of Fig. 1, and a plan of the parts below said line. Fig. 3 represents a vertical section of another form of apparatus.

"The same letters of reference indicate the same parts in all the figures.

"In the drawings, a, a, a, represent a series of primary filter-beds, which are inclosed in a structure having provision, such as a chimney, $b^1$, for the removal of gases emanating from the filter-beds, a.

"The sewage may be first deposited in a settling-tank, which may be within the structure, b, or elsewhere, and after sedimentation or chemical precipitation in said tank the liquid and the sludge may be drawn off onto the primary filter-beds.

"I have not shown the settling-tank in the drawings, but it may be supposed to be below the floor of the structure, b, and connected with pipe, c, through which the sewage may be transferred to the primary filter-beds.

"d, d, d, represent a series of secondary filter-beds located at the outer ends of the primary beds and at a lower level, so that the effluent from the primary beds will flow by gravitation upon the secondary beds.

"The primary beds are constructed to arrest the solid matter and permit the escape of the liquid matter wholly through filtering material onto the secondary beds, so that the effluent will contain comparatively little offensive matter. The primary beds may be of any suitable construction to accomplish this end. For example, they may have water-tight bottoms of concrete and a series of porous pipes, e, disposed upon the said bottoms and converging to an outlet-pipe, f, as shown in Figs. 1 and 2, the walls of said pipes, e, constituting the filtering material. The pipes, e, have no direct communication with the spaces inclosed by the walls of the primary beds and the effluent enters said pipes only through the porous wall of the pipes, which may be of unglazed earthenware.

"In Fig. 3 I show primary filter-beds, $a^1$, composed of filtering material, such as sand and gravel or any of the materials used for such purposes, resting on a liquid-tight concrete bottom, $a^2$. An outlet-pipe, $f^2$, communicates with the filter-bed and receives the effluent therefrom and delivers it to the corresponding secondary bed.

"The secondary beds are located outside of the structure, b, and may be of any desired size and construction. They are here shown as provided with sluices, or passages, g, which receive the effluent from the outlet-pipes, f, and have lateral outlets, $g^1$, through which the effluent passes in numerous small streams to filtering-surfaces.

"It will be seen that the sewage matter is separated in the primary beds into two parts, the offensive matter being retained in the gas-removing structure, where it may be composted with ashes, loam, or sand, and removed without offense, while the effluent is clarified and partially purified by being deprived of the greater part of the offensive matter, so that it may be rapidly disposed of in the open air by the secondary beds without being a source of offense. The secondary beds should be of much larger area than the primary beds, so that they can dispose of all the effluent that can possibly flow from the primary beds.

"The fact that the secondary beds are much larger than the primary beds is indicated in the drawings, in which the outer ends of the secondary beds are shown as broken away, this being due to the limitations imposed by the size of the drawing-sheet.

"I prefer to provide seven or more of the primary beds and an equal number of secondary beds, each primary bed and the accompanying secondary bed being of sufficient capacity to dispose of one day's sewage. The solid matter

deposited in the primary beds may be removed from time to time in any suitable way.

"It is to be understood that in practice the outer ends of the sluices, g, are closed or of such height that the effluent can escape therefrom only through the outlets, $g^1$, to the beds, d, d.

"The general construction of the entire apparatus is such that while the primary filtration takes place in a structure adapted to remove offensive gases, the secondary treatment, being in the open air, may extend for such length of time or over such an area of secondary beds as to completely dispose of the sewage.

"I claim—

"A sewage apparatus comprising a series of stationary primary filter-beds, a structure over said beds with provision for the removal of offensive gases therefrom, and a series of stationary secondary filter-beds located outside the said structure and arranged to receive by gravitation the effluent from the primary filter-beds, the said primary beds being constructed to discharge the effluent wholly through filtering material, whereby the offensive matter is retained in the structure and the effluent is clarified and partially purified, and whereby the said effluent may receive subsequent treatment in the open air by extensive secondary beds for any required length of time without offense."

This patent must be read in connection with the prior proceedings in the Patent Office.

The claim of the original application was rejected on the prior Black patent, No. 450,094, the Patent Office saying, among other things:

"No reason has been alleged why the material should be subjected to a double filtration, nor why the material should choose to pass through the lateral passages, $g^1$, in place of traveling in a straight line."

In reply to this communication, Glover's solicitors wrote:

"The reason for double filtration now seems to be clear. The material passes through the lateral passages, $g^1$, just as it would through holes made in the bank of a canal below the water line."

The claim was again rejected on the Black patent and the prior Glover patent. In reply to this second communication, the solicitors wrote:

"The general construction of the entire apparatus is such that while the primary filtration takes place in a structure adapted to remove offensive gases, the secondary treatment, being in the open air, may extend for such length of time or over such an area of secondary beds, as to completely dispose of the sewage."

Also:

"In an apparatus capable of disposing of any considerable quantity of sewage, it would be impracticable to provide a structure extending over filter-beds of sufficient area to quickly and thoroughly dispose of it.

"The applicant has provided apparatus which permits inoffensive filtration over any desired area or for any necessary length of time."

The claim was a third time rejected, the Patent Office saying:

"In view of the fact that it is old to provide stationary filtering beds with a structure extending over all the beds, as shown in applicant's patent No. 258,744, there is certainly no invention in now providing a part of the filters with a part without such structures. This would appear to be a retrogression in the art."

In reply to this communication, the solicitors wrote the following letter, setting out the system covered by the patent and how it dif-

fers from the first Glover patent. It was upon the strength of the representations made in this letter that the patent was finally passed to issue:

"The Glover system provides a series of primary filter-beds through which the sewage is allowed to pass by filtration there being a separate bed for each day's sewage so that the filtration may be intermittent. Provision is made for the working of this system throughout the year by covering the primary filter-beds with a roof and the ventilation of the sewage by a forced draught.

"The primary filter-beds being protected by a building, can be cared for and renewed at all seasons and will not become a nuisance in any neighborhood.

"The effluent is partially purified and wholly clarified by the primary filter-beds, and flows therefrom to a series of out of door or secondary filter-beds where it is distributed by a series of overdrains. These secondary filter-beds provide for the further purification of the sewage.

"After the sewage has been clarified and partially purified by the rapid intermittent filtration through the primary filter-beds, so much of the impurities will be found to have been removed that an acre of secondary filter-beds will probably purify from 300,000 to 500,000 gallons daily, whereas without the preliminary purification afforded by the primary filter-beds, a much greater area would be required in the secondary filter-beds.

"The above facts are obtained from an article in the Boston Herald of October 4, 1895, by John N. McClintock, of Boston, a civil engineer.

"The same article contains the following description of experiments made with the Glover system at Lawrence, Mass.:

" 'The partially purified and wholly clarified effluent from the covered filter-beds is carried to a series of out-of-door filter-beds where it is distributed by a series of overdrains, thoroughly ventilated, under a cover of loam. These out-of-door filter-beds are thoroughly underdrained and provide for the further purification of the sewage, allowing an acre for the purification of a 100,000 gallons of sewage daily.

" 'After the sewage has been clarified by sedimentation in the tanks, and purified by rapid, intermittent filtration through the first filter-beds, so much of the impurities will be found to have been removed that an acre will probably purify from 300,000 to 500,000 gallons daily.'

"We give the foregoing to show the importance of applicant's invention and that it is not retrogression in the art as implied by the last Office letter.

"Applicant's former patent, 258,744, does not show filter-beds. It contains simply a series of tanks in which the sewage is acted on only by sedimentation. The effluent leaves the structure without being clarified by filtration.

"The apparatus shown in said patent does not therefore show the construction now claimed nor an equivalent thereof, lacking as it does, the two series of filter-beds."

When we read in this patent of "primary filter-beds" in connection with the statement in this last letter to the Patent Office:

"Applicant's former patent, 258,744, does not show filter-beds. It contains simply a series of tanks in which the sewage is acted on only by sedimentation. The effluent leaves the structure without being clarified by filtration. The apparatus shown in said patent does not therefore show the construction now claimed nor an equivalent thereof, lacking as it does the two series of filter-beds."

—No other rational conclusion can be reached than that primary filter-beds mean primary filtering receptacles; and these receptacles cannot, upon any possible rule of construction, be interpreted to signify septic tanks. It is inconceivable that Glover should have disclosed septic tanks in his earlier patent, and then have intended to incorporate these tanks into the patent in suit under the name "primary filter-beds"; and this in the face of the fact that he ex-

pressly says that his earlier tanks are not made a part of this patent.

It is possible there may be some septic action in this filtering-bed receptacle, just as there may be some action of this character in the ordinary settling-tank. This, however, is immaterial, the question being whether these beds were intended to operate as septic tanks.

Upon full consideration of the whole case, we find that the first Glover patent does not disclose the septic tank, and that the second Glover patent is for a system of rapid filtration, comprising two series of filter-beds, one inside the ventilated structure and the other outside. It follows that the defendant's apparatus does not infringe the Glover patent in suit by using a septic tank or septic tanks in combination with filtering beds.

The decree of the Circuit Court is affirmed, and the appellee recovers costs of appeal.

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## WESTINGHOUSE ELECTRIC & MFG. CO. v. STANLEY INSTRUMENT CO.

(Circuit Court of Appeals, First Circuit. June 14, 1905.)

No. 504.

1. PATENTS—SUIT FOR INFRINGEMENT—LEAVE TO FILE BILL OF REVIEW.
   Where it is claimed that a patent in suit, and against infringement of which an injunction is sought, expired pending an appeal, because of the expiration of a foreign patent for the same invention, the facts in relation thereto should be presented to the appellate court on or before the hearing on the merits; and the defendant is chargeable with laches, if he fails to so present them, which will warrant the court in denying him leave to file a supplemental bill, in the nature of a bill of review, to enable him to present the question after the case has been finally determined on the merits, unless on terms named in the opinion.

2. SAME.
   In re Gamewell Fire Alarm Telegraph Co., 73 Fed. 908, 20 C. C. A. 111, applied.

3. SAME—LIMITATION OF TERM BY FOREIGN PATENT—CONSTRUCTION OF STATUTE.
   The provision of Rev. St. § 4887, as it stood before its amendment in 1897, that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent," is plain and unambiguous, and not to be extended by construction, and applies only to cases where the inventions actually claimed in the foreign and domestic patents are identical; it is not sufficient that the foreign patent may disclose the invention of the later United States patent, where it is not therein claimed.

4. SAME—ELECTRIC MOTORS.
   The terms of the Tesla patents, Nos. 511,559 and 511,560, for an improved method and means of operating electric motors, *held* not limited by prior British patents to the same inventor, because the latter do not claim the same inventions.

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

On petition of appellee, the respondent below, for leave to apply to the Circuit Court for leave to file a supplemental bill in the nature of a bill of review, or to amend the judgment on appeal (133 Fed. 167).

W. K. Richardson and Thomas B. Kerr, for appellant.

Charles E. Mitchell, Wm. Houston Kenyon, and Henry B. Brownell, for appellee.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. On this appeal we entered a decree against the petitioner, the respondent below and now the appellee, who brings this petition, which it bases on the claim that the case is within section 4887 of the Revised Statutes as it stood before it was amended, and that, pending this appeal, the patents sued on expired by limitation as therein provided. It prays that this court shall so amend its judgment as to deny any injunction, and as to direct that the accounting shall cease as of the date when the patents expired, or that the petitioner may have leave to proceed in the proper way in the Circuit Court to accomplish the same result. The petition has been answered, and proofs taken, and the whole submitted to us on briefs.

The decree of the Circuit Court was in favor of the petitioner, and the complainant below appealed. The patents in suit issued on December 6, 1893, on applications filed in December, 1888. The present bill was filed in 1899, and the decree was entered in the Circuit Court on the 16th day of March, 1903. An appeal was promptly taken, and the same came on for hearing before us in April, 1904. Judgment was rendered by us, as already said, on September 9, 1904 (133 Fed. 167), reversing the decree of the Circuit Court, and remanding the case with instructions to enter a decree in favor of the complainant for an injunction and an accounting, and to take such further proceedings as might be required not inconsistent with our opinion. Afterwards, on the application of the present petitioner, the mandate was stayed, and the petitioner applied to the Supreme Court for a writ of certiorari, which was denied on November 28, 1904. This petition was filed on December 7, 1904.

The practice on a petition of this nature has been sufficiently explained by us in In re Gamewell Fire Alarm Telegraph Co., 73 Fed. 908, 20 C. C. A. 111, and in Boston Electric St. Ry. Co. v. Bemis Car-Box Co., 98 Fed. 121, 38 C. C. A. 661. In those cases we stated to what extent appellate tribunals will ordinarily go with regard to the merits on an application of this character, and also as to laches; but our own records satisfy us that on this petition we can dispose of all essential questions. Therefore, in view of the multiplied and protracted litigations over the patents in suit, and in view also of the fact that they now have only a few years to run, we deem it our duty to consider everything which we can consider, and end this suit so far as it is in our power to do so.

The respondent in this petition, the complainant below, maintains that the foreign patents were for identically the same subject-matters as two certain patents issued to the complainant in April, 1889, and, therefore, before the patents in suit issued. It therefore further maintains that, if the present position of the petitioner were

correct, to the effect that the foreign patents covered the same subject-matters as the patents in suit, it follows that the patents issued in 1889 were also for the same subject-matters, and that therefore they were a complete defense on the merits of the present bill. Consequently it urges that, as the petitioner, from its standpoint, could have set up the patents of 1889 as a defense to the merits, it is guilty of such laches that the petition must be dismissed. If this were all that there is of the petition, it would meet all of the petitioner's propositions; but, as we go on, it will be perceived that it is not all.

The foreign patents to which the petition relates expired, one on the 16th day of April, 1903, which was a few days after the decree entered in the Circuit Court, and the other on the 3d day of December, 1903, which was after the present appeal was taken, and before it was heard by us. We therefore have a question of laches which cannot be wholly overlooked. Under the circumstances, it was the duty of the petitioner to have brought these facts to our attention at or before the time the appeal was argued on its merits; and it failed in its duty in allowing us to proceed to hearing an issue with regard to an injunction which, from the standpoint of the petitioner, had ceased to involve anything except moot questions. It was its duty to have then presented the facts which it now brings to our attention, instead of holding them in reserve for further consideration after we had been allowed, by its entire silence, to investigate and dispose of the voluminous and difficult questions which the record involved. It had ample opportunity to have seasonably brought before us, in an informal manner, all the questions which the present petition raises, as was fully explained by us in Mossberg v. Nutter, 124 Fed. 966, 60 C. C. A. 98.

As the foreign patents referred to are British patents taken out by the same inventor, Tesla, as those in issue, relating to the same branch of the same art, the fact alleged in the petition, to the effect that they were not discovered except as the result of search made after our judgment was entered on September 9, 1904, does not avail to excuse the petitioner. In Re Gamewell Fire Alarm Telegraph Co., 73 Fed. 908, 913, 914, 20 C. C. A. 111, already referred to, we pointed out that, as there is no limit to the amount of published material, there will be no end to the number of applications based on new discoveries thereof, one after another, unless very strict rules are insisted on in reference thereto. Our expressions were approved by the Circuit Court of Appeals for the Sixth Circuit in Kissinger-Ison Co. v. Bradford Belting Co., 123 Fed. 91, 92, 59 C. C. A. 221. Certainly, in a case which has involved so much litigation and so much investigation as this now before us, it is impossible to excuse the petitioner for not having discovered the British patents, and brought them to our attention seasonably, at the time and in the manner we have explained. The present case goes further, because the petition admits that no search for foreign patents with regard to the present question was made until after our decree of September 9, 1904, and that the previous searches were in regard to the prior art. It will appear, however, that we have no occasion

to determine absolutely on a question like this now before us, which involves not merely the petitioner but also the general public, whether this laches would justify us in wholly denying relief; but on account thereof, even if we should grant any relief, the petitioner should be held to stand practically in the ordinary position of one asking leave to proceed in review on newly discovered matter, to the extent that, before the proceeding in review can make substantial progress, the judgment entered must be performed so far as it is not absolutely unjust that it should be. Ricker v. Powell, 100 U. S. 104, 107, 108, 25 L. Ed. 527; Story's Equity Pleadings (10th Ed.) § 406. Of course, in this case, this rule cannot be strictly applied, because there is no final decree; but, if we should grant leave to file a bill in the nature of a supplemental bill, equity would require us, for the reasons we have stated, to proceed in this respect by analogy to the practice with reference to bills of review. On this petition, however, the merits are so clearly against the petitioner that it is our duty to hold the case firmly, with the view of preventing further unnecessary litigation.

The statute on which the petitioner relies is, as we have said, section 4887 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382], as it stood before it was amended, as follows:

"No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

In Bate Refrigerator Company v. Sulzberger, 157 U. S. 1, 36, 15 Sup. Ct. 508, 516, 39 L. Ed. 601, the language of this provision was spoken of generally as "so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress." So it seems to us as applied to the present case. It is a "patent" granted for an invention which has been previously "patented" in a foreign country, etc., which is limited. It is a domestic patent against a foreign patent. All through, it is one patent against another. In the United States, nothing is patented except what is covered specifically by the claims required by statute. The same was the law of England at the time the patents relied on by the petitioner were there issued. Edmunds on Patents (2d Ed.) 181 et seq. Yet, with a single exception, which we will refer to later, the petitioner all through maintains that section 4887 of the Revised Statutes applies, not only where the foreign patent covers what is patented in the United States, but where it describes what is so patented. At one point of its brief it states that the issues raised are entirely different from the question of double patenting. At another point the brief so far emphasizes this position as to maintain, in clear error, that Commercial Company v. Fairbank Company, 135 U. S. 176, 10 Sup. Ct. 718, 34 L. Ed. 88, sus-

tains the petitioner. Again, it states formally four major propositions, three of which are clearly in this line, while the fourth is equivocal, and, if it has any other aspect, will be covered by what will be said further on. It reiterates the proposition that the invention in issue was disclosed in the foreign patents, so that, as it says, "the English public obtained a complete disclosure of the invention, and in 1903 obtained the right to freely use the same." The two facts stated in this citation may be true. The legal effect of them will be found to be inconsequential, so far as this case is concerned. Elsewhere, the proposition is put definitely, as follows:

"A prior foreign patent will limit the term of a later United States patent to the same inventor, when the foreign patent is of such character that its disclosure would, if contained in an earlier United States patent issued to the same inventor, without reservation, prior to the filing of a later United States patent, operate as an abandonment of the invention of the later United States patent, or when the foreign patent is of such character that its disclosure, if made by another person earlier in the art, would anticipate the later United States patent."

These positions find no support in the natural reading of section 4887 of the Revised Statutes; and the provisions of this section are too severe, as apparent to the ordinary comprehension, and as has been since declared by Congress by its amendments thereto, to justify any relaxation which would extend it beyond its letter. No authorities can be found to sustain the petitioner on this point, unless it is an expression in Walker on Patents (4th Ed. 1904) 150. The learned author there cites as authority for the proposition Commercial Company v. Fairbank Company, 135 U. S. 194, 10 Sup. Ct. 718, 34 L. Ed. 88, already referred to, as also does the petitioner; but a careful examination of that decision fails to disclose any justification for assigning to it such an effect. In view of the fact that the learned author is discussing an obsolete statute, it is not at all strange that he nodded. On the other hand, Robinson on Patents, in section 623, reiterates the natural reading of the statute, as follows: "In order that the term of a foreign patent may thus limit that of the domestic patent, it is essential that the inventions covered by the two patents should be identical." It will be noticed that the author uses the word "covered," and not "shown" or "disclosed." He makes his position clear by his note to this section, wherein he cites a decision that the foreign patent is not effective unless the claim, as well as the patent itself, describes the same invention.

The petitioner relies on Siemens v. Sellers, 123 U. S. 276, 8 Sup. Ct. 117, 31 L. Ed. 153; but that case, so far as it touches the present question, discusses merely the identity of what was in fact patented. This is emphasized at page 283 of 123 U. S., page 119 of 8 Sup. Ct. (31 L. Ed. 153), where the court carefully explains the claim in the English patent, and not merely what the patent disclosed. The same observation applies generally to Commercial Company v. Fairbank Company, supra, which is also strenuously relied on by the petitioner. The discussion in the opinion in the last case cannot be said to particularly bind the court, because it

was carried out for the most part by simply making long extracts from the opinion passed down in the Circuit Court; but, at the foot of page 188 of 135 U. S., page 722 of 10 Sup. Ct. (34 L. Ed. 88), it speaks of the question of the identity of one foreign patent with the patent then in suit. What has this to do with what merely is disclosed by either one patent or the other? The petitioner especially relies on what is said near the foot of page 194 of 135 U. S., page 724 of 10 Sup. Ct. [34 L. Ed. 88], that the test is whether, if a person in the United States, after the issue of the United States patent, should commence the manufacture of a patented article by the precise process described in the foreign patent, the court would properly restrain him. To begin with, this, as already said, is a mere quotation from the opinion of the Circuit Court, and not an expression devised by the Supreme Court; and it is not to be assumed that where an appellate tribunal, as in this case, quotes long extracts, it is held to be bound by all the expressions contained in them. However, for that particular case, this test was a sufficient one, and it was not necessary, therefore, for the court to state any qualifications with reference thereto. For other cases, including the one at bar, the test is not sufficient. This is evident wherever the foreign patent covers a substantial and important improvement on what was patented in the United States. A test of this character is too dangerous unless applied to the circumstances of the particular case in which it is used. Therefore we are unable to find any authority which requires us to disregard the natural reading of section 4887 of the Revised Statutes, and no authority which leads in that direction.

As we have already said, at one point the petitioner disregards this main proposition, and asserts identity of patenting. As to this, it should be first observed that, as the case is finally worked out, the petitioner places no reliance on one of the English patents, and as to the other, so far as concerns any alleged identity of patenting, it relies only on claim 4, as follows:

"(4) The method of operating a synchronizing motor, which consists in passing an alternating current through independent energizing circuits of the motor and introducing into such circuits a resistance and self-induction coil, whereby a difference of phase between the currents in the circuits will be obtained, and then, when the speed of the motor synchronizes with that of the generator, withdrawing the resistance and self-induction coil, as set forth."

The petitioner maintains that, on the issue of identity of the patent, this claim falls within the decisions of the Supreme Court to which we have referred; but we do not so understand it. These were based on the proposition that a difference in mere detail does not avoid identity. This is undoubtedly true, as stated in Sawyer Spindle Co. v. Carpenter (C. C.) 133 Fed. 238, 240, where apparently the leading authorities bearing on this question are grouped. In Siemens v. Sellers, supra, relied on by the petitioner as to this particular topic, we refer again to page 283 of 123 U. S., page 119, of 8 Sup. Ct. (31 L. Ed. 153), where the opinion explains the fact that the furnace described in each patent there in question was the same in all essential particulars, while the English specification was only

more detailed, and the drawings more minute and full. So in Commercial Company v. Fairbank Company, supra, which the petitioner specially relies on in this particular connection, it is plain that the court regarded what was patented in the United States and in all the foreign countries as identically the same in substance. This was elaborated and made clear at pages 190 and 191 of 135 U. S., page 723 of 10 Sup. Ct. (34 L. Ed. 88), where it was pointed out that what were the apparent differences in the various patents arose from the fact that the inventor deemed himself as addressing, within the foreign jurisdictions, a class of persons more skilled in the general topic to which the invention related than would be found in the United States.

It is true that claim 4 of the British patent, already quoted, necessarily includes all the elements of the patents in issue here; but it also includes other elements, establishing a new combination which is an essential, novel, and patentable improvement on what was claimed in the patents before us on appeal. This follows from what is said in the petitioner's brief, that what was accomplished by claim 4 of the British patent referred to was "a motor which obtained synchronous speed, and thereafter, at will or when desired," had facility for "withdrawing the resistance and self-induction coil." This is made clear by the extract from the British patent, cited by the respondent in this petition in its brief, as follows:

"In other words, by a certain change in the circuit connections of the motor, it is converted at will from a double circuit motor, or such as is now known as a Tesla motor, and which will start under the action of an alternating current," etc.

It is also made clear by the same brief, where it explains this claim as covering a convertible motor, in which the split-phase invention claimed in the patents here in suit is in no way a more prominent element than the polyphase patents which belong to a prior stage of the art. This claim 4, therefore, covers not a mere improvement on either the split-phase invention or the polyphase invention separately. That it covers an invention by which a convertible motor is produced necessarily takes the case out of the field of identity with either the earlier polyphase or the later split-phase patents.

Therefore, in view of the fact that the propositions involved arise clearly on the face of this petition and our own records in this litigation, we find the case within the classes to which we have said that an appellate tribunal, on a proceeding of this character, may consider and pass on every question which might be raised before it or before the court of first instance; but, as we are clear that the petition has no merits, we dispose of it against the petitioner on that ground alone, leaving the question of laches in the form in which we have already put it.

Ordered: The petition filed by the Stanley Instrument Company on December 7, 1904, is denied, and the mandate will issue forthwith.

## McKENZIE FURNACE CO. et al. v. GREEN ENGINEERING CO.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1905.)

No. 1,075.

PATENTS—INVENTION—FIRE-ARCH FOR FURNACES.

The Green & Gent patent, No. 676,606, for an improvement in fire-arches for furnaces, is void for lack of patentable invention in view of the prior art, and the use of the same combination of elements in fireproof ceilings.

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

This is an appeal from a decree holding appellants guilty of infringing claim 1 of letters patent No. 676,606, June 18, 1901, to Green and Gent, for improvements in fire-arches for furnaces.

Claim 1 is as follows: "(1) A fire-arch for furnaces comprising a plurality of transverse girders which rest at their ends on the side walls of the furnace, beams attached to the lower edges of the said girders and extending beneath the same, said beams being provided with lateral flanges, and fire-brick provided with lateral grooves in their side faces near their upper surfaces, adapted to engage said flanges of the beams, said fire-brick being suspended from said beams with their upper surfaces below and free from contact with said girders."

The method of assembling the parts is set forth in the description thus: "Referring first to the construction of the fire-arch and means by which the same is supported, said parts are constructed as follows: Said fire-arch as a whole is sustained by means of a plurality of transverse girders, supported at their ends in the side walls, $A^1$, $A^2$, of the furnace. Two of such transverse girders, E, E', are shown in the drawings, of which the forward girder, E, is shown as located in contact with the front plate, D, of the furnace, and the rear girder, E', is shown as located at some distance rearwardly from the same and at the rear of the water-head, c', of the boiler. Attached to the lower side of said girders, E, E', are a plurality of longitudinally arranged metal beams, F, F, arranged in parallel relation to each other and parallel with the side walls of the furnace, and therefore at right angles to the main girders, E, E'. Said girders, E, E', are provided at their lower edges with flanges, e, e', by which the beams, F, F, are attached to the said girders. Preferably, and as herein shown, the said girders are made of channel form, and are provided with flanges at their upper as well as at their lower edges; but the said girders may be of any desired form or cross-sectional shape adapted to afford the necessary strength and rigidity and to provide for the attachment of the beams thereto. Said beams, F, F, are provided on their side faces with laterally extending flanges, f, f, and the arch proper, which is flat, is formed by means of fire-brick, G, G, which are engaged with the flanges, f, f, on the beams, F, F, each brick being provided at each side with a groove, g, adapted to engage the adjacent flange on one of the beams, F. Said beams, F, are so connected with or supported from the girders as to be movable or adjustable sidewise or in a direction endwise of the girders, so that said beams may be slid or moved along the girders to bring them at the proper distance apart to receive or engage the fire-brick, it being intended that the arch be assembled by inserting a row of fire-brick, placing a beam against the same, then inserting another row of brick, placing another beam in engagement therewith, and repeating the same operation until the arch is complete. * * * As an improved means of supporting the beams, F, F, upon or sustaining them from the said girders, E, E', said beams are provided with horizontally extending prongs or fingers, f', which extend upwardly from the upper surfaces of the said beams, and are directed horizontally, so as to overlap and engage the upper surface of the horizontal flanges, e, e', on the lower edges of the said girders, E, E', said fingers serving to permit lateral sliding of the beams on the girders to correspond with the thickness of the fire-brick placed between the beams."

The record exhibits, among others, the following patents: No. 523,249, July 17, 1894, to Upson; No. 526,363, September 18, 1894. to Boileau; No. 576,470, February 2, 1897, to Pearce; and No. 626,560, June 6, 1899, to O'Meara and Calvert.

Further facts are stated in the opinion.

Thomas F. Sheridan, for appellant.

Clarence Poole, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge (after stating the facts). The so-called flat fire-arch was known before Green and Gent's time. Upson put up beams, with flanges at their lower edges, across the furnace from side wall to side wall, and suspended grooved fire-bricks between the flanges. Pearce said:

"I removably mount in the side walls the straight parallel flanged rails, E, and I string thereon the fire-bricks, F, shaped to fill the spaces between the webs and flanges of adjacent rails, E, by which said fire-bricks are supported. * * * It will also be seen that in case the fire-bricks burn out, an easy renewal thereof may be readily effected by withdrawing endwise one or more of the supporting rails through the opening provided for that purpose in the side walls of the furnace, and stringing new fire-bricks upon such supporting rails."

Upson and Pearce showed only a two-membered structure—the beams supported on the side walls, and the fire-bricks depending from the beams. But Boileau exhibited a structure of three members—a transverse girder supported on the side walls, longitudinal beams attached to and extending beneath the girder, and grooved fire-bricks sustained by the flanges of the beams, and free to be moved thereon without being obstructed by the girder. As Boileau's specification puts it, "When any one or more of the blocks becomes destroyed by heat, it can be readily slipped off the bar and replaced by another one." Boileau's structure, however, was not a fire-arch, or coking breast, which is placed above the grate at the front end thereof, but was a deflector, placed above the grate, near the rear end thereof, and in front of the bridge-wall. And the longitudinal beams were only the length of the girder's width, and but one row of fire-bricks extended across the furnace.

The O'Meara and Calvert patent is for a fire-proof ceiling. A plurality of transverse girders, with flanges at their lower edges, extend from side wall to side wall. Longitudinal beams, with flanges at their lower edges, are suspended beneath the girders by means of fingers extending upwardly from the beams and overlapping and engaging the flanges of the girders. The fingers of the beams merely rest upon their supporting flanges, and so the beams may be slidden to and fro. Fire-bricks, with grooves along their sides, are sustained by engagement with the flanges of the beams. The top surfaces of the fire-bricks are below and free from contact with the girders. The members of this fire-proof ceiling are assembled in the very way described in the quotations from the patent in suit.

It is urged that a combination of steel beams and fire-bricks in a fireproof ceiling is not a pertinent reference in considering the same combination in a "fire-arch" of a furnace. The so-called fire-

arch is not an arch geometrically, nor is it the curved arch or the flat arch of architecture; the latter of which is a span composed of wedge-shaped members, which support each other, under end pressure, by translating the vertical into horizontal or diagonal thrust. The "arch" of this patent is merely a ceiling construction. And it seems to us impossible that the brick masons and steelworkers who construct a fire-proof sky-scraper or a small vault in a bank should forget or overlook the commonly known facts of their trades when they set up a furnace. But if an outside and independent suggestion were needed that "ceiling construction" was transferable to furnaces for coking breasts and heat deflectors, Upson, Pearce, and Boileau had already furnished it.

Appellee insists, however, that an important contribution to the art of furnace building was made, in this: that the girders rest upon the side walls, that the depending beams abut against the front wall, and that the rear ends of the beams are free, whereby damaged bricks may be removed by stripping out a row or rows of bricks at the free ends of the beams. If the O'Meara and Calvert ceiling were placed in an offset or alcove or archway in a building, where the girders were upheld by side supports, and the depending beams were free at one or both ends, it is obvious that the bricks could be removed by stripping them out at the free ends of the beams. If the beams in the furnace were obstructed at both ends, and the fire-bricks formed a ceiling that came in contact with fixed obstacles on four sides, there would not be even a "new use" of the O'Meara and Calvert combination. The combination consists of the collocation of the three elements—girders, beams, and fire-bricks. It is an inevitable characteristic of the combination that the bricks may be removed whenever and wherever the combination is placed so that one end of the beams is free. But if an outside and independent suggestion were needed that such is the inevitable characteristic of the O'Meara and Calvert combination, Boileau had already shown how to remove from a furnace grooved fire-bricks from the free ends of beams supported by a girder.

True, Green and Gent were the first to couple O'Meara and Calvert's idea of the three-membered construction with Boileau's idea of the removability of the bricks from the free ends of the beams; but so was McMillin the first to apply a windlass engine to a hand capstan (Morris v. McMillin, 112 U. S. 244, 5 Sup. Ct. 2185, 28 L. Ed. 702); and so was Kitselman the first to join the diamond mesh feature of a stationary wire fence machine to the walking feature of a machine that wove a wire and picket fence (Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689).

As Mr. Justice Bradley said in Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438:

"To grant a single party a monopoly of every slight advance made, except where the exercise of invention somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in principle and injurious in its consequences."

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

## DIAMOND DRILL & MACHINE CO. v. KELLEY BROS. & SPIELMAN.

(Circuit Court, E. D. Pennsylvania. July 5, 1905.)

1. PATENTS—INFRINGEMENT—ACTIONS—BILL OF REVIEW—NEWLY DISCOVERED EVIDENCE.

In a suit for infringement of a patented belt fastener, newly discovered evidence of a witness, corroborated by two others, that he had made and used a belt fastener, the exact counterpart of that patented, some four years prior to the application for the patent relied on, and that his use was persisted in intermittently for two or three years, was sufficiently material to reopen the case and allow the filing of a supplemental bill in the nature of a bill of review, though no sample of such prior fastening was produced, and it was not regarded as of sufficient merit to induce the witness to continue its use.

2. SAME—DILIGENCE.

Where defendants had been in conversation with a witness from whom they proposed to obtain newly discovered evidence establishing a prior use of a patented device as a defense to a suit for infringement, but claimed that such witness had been only sought out in order to learn about a certain bed spring, and, except as he volunteered information, there was no means of knowing that he had any information with reference to such prior use which he did not then disclose, this evidence will not be regarded as accessible to the defendants by the exercise of due diligence.

In Equity. Petition of defendants for leave to file a supplemental bill in the nature of a bill of review.

Horace Pettit, for petitioners.
William C. Strawbridge, opposed.

ARCHBALD, District Judge.[1] By the former opinion of this court (120 Fed. 282) the patent in suit was sustained, and infringement found. And this, upon appeal, was affirmed. (C. C. A.) 123 Fed. 882, 129 Fed. 756. The case now comes up, upon petition of the defendants, for leave to file a supplemental bill in the nature of a bill of review, in order to present newly discovered evidence which it is claimed establishes a prior use of the patented device; permission to reopen the case for this purpose having been given by the Court of Appeals. 136 Fed. 855.

The finality of litigation and the stability of judicial decision both require that conclusions which have been reached as the outcome of legal proceedings in which the parties have had full opportunity to be heard shall not be disturbed except where it is necessary to prevent a miscarriage of justice. The defeated party is always disappointed, and there is a natural temptation to try by some means to regain the place that has been lost. Applications, therefore, to reopen the case in order to permit the introduction of further evidence, in the hope of effecting a change, are not looked upon with favor; the parties being required to present all the evidence which they have at the original hearing, including that which with the exercise of reasonable diligence was within their reach. The new evidence suggested in any case must in consequence not only have

[1] Specially assigned.

been unknown to the party, but practically unattainable, and must also be so clear and convincing that it is not only calculated to bring about a different result, but that there is little question as to its doing so. This is a familiar rule, which it requires the citation of no authorities to support. The only question is whether the defendants have brought themselves within it.

As this is a preliminary motion, any expression of opinion upon the proposed proofs, except so far as it is necessarily involved in the granting or refusing of the application, is out of place. Neither is the evidence here which will be produced to contradict and possibly overcome them, so that it is only their prima facie character that is passed upon. This is to be borne in mind with regard to whatever may be said. It is sufficient, therefore, for the present, to note that, if the testimony of Mr. Maier is believed, a wire belt fastener, the exact counterpart of that in suit, was made and used by him at the works of the Trenton Spring Mattress Company, at Trenton, N. J., as early as 1885, some four years prior to the application for the patent on which the complainants rely, and that this use was persisted in intermittently for upwards of two or three years. Nor is this left to rest on his statement only, but is confirmed by three others, who substantially agree with him, both as to the character of the device, and the time and place of its use. It is true that there is nothing in the way of records or material exhibits to back this up. No sample of the fastening, for instance, has been produced from among the appliances of the shop, and we have nothing therefore but the memory of these witnesses. Nor was the device apparently regarded as of sufficient merit to induce a continuance of its use after the removal of the works from Warren street. Notwithstanding this, however, it can hardly be questioned that, if the facts which have been referred to had been produced at the former hearing, the validity of the patent would have been put in serious doubt.

Whether this evidence could have been produced before, with the exercise of proper diligence, is a more difficult question, and constitutes the real weakness of the present application. It is certainly somewhat remarkable that although the defendants, through their counsel, were in touch with Maier, and interviewed him with reference to his bed-spring fastening, nothing was developed as to the similar device which he now says he made use of in his shop for uniting belt ends. The explanation suggested is that he was only sought out in order to learn about his bed spring, and, except as he volunteered it, there was no means of knowing that he had any information outside of this. The real question, then, is whether an inquiry directed to that ought to have been prosecuted, and whether the defendants were remiss in not making it. With some hesitation, I am not prepared to say that they were. The extent of the witness' information was known to himself alone, and there was nothing to intimate that he had any upon the general subject of the patent, or to prompt an inquiry along that line. And that he did not prove more communicative is not to be laid at their door. Tending, as it did, to destroy the patent of another, he may have

thought that he ought not to say anything beyond just what he was asked about. At all events, he did not; and without this the defendants could not know, except by a chance inquiry, for neglect of which they are hardly to be held.

There being enough in this to reopen the case, there is no occasion to discuss the other evidence, with regard to the means shown to have been in use for upwards of 20 years for fastening together the ends of wire cloth belts, employed for taking up and carrying the pulp in paper machines. Nor whether this was not accessible to the defendants, inquiry being bound to be made in all arts where belts of any kind were used. Neither is it necessary to consider whether the present application was made with sufficient promptness after obtaining the information which is relied upon. The Court of Appeals felt satisfied upon the subject, and, even if the question is to be regarded as an open one, there is no reason why a different view should be taken here.

The motion for leave to file a supplemental bill in the nature of a bill of review is allowed.

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## HURWOOD MFG. CO. v. WOOD.

(Circuit Court, D. Connecticut. June 23, 1905.)

No. 1,168.

1. PATENTS—SUIT AGAINST PATENTEE FOR INFRINGEMENT—ESTOPPEL.
   In a suit for infringement by an assignee of a patent against the patentee, the defendant is estopped to insist upon a narrow construction of the patent which would render it valueless.
   [Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 183.]

2. SAME—INFRINGEMENT—SCREW-DRIVER.
   The Wood patent, No. 671,039, for a screw-driver, *held* infringed on a motion for a preliminary injunction.

In Equity. Suit for infringement of letters patent No. 671,039 for a screw-driver granted to George E. Wood, April 2, 1901. On motion for preliminary injunction.

A. M. Wooster, for complainant.
Bartlett, Brownell & Mitchell, for defendant.

PLATT, District Judge. The defendant Wood assigned the patent in suit No. 671,039 to the plaintiff for value. He denies infringement, which is the only issue open to him in the circumstances, and attempts to justify because he makes the goods against which infringement is alleged under patent to Garrity, No. 723,573.

The plaintiff's contention is that the invention of the patent in suit resides broadly in the provision of means integral with the shank, and fitting into the outer end of the handle, for performing the double function of preventing rotation of the shank, when the screw-driver or other kindred tool is in use, and protecting the handle from splitting when struck; that claim 1 is for such a monopoly, and that the prior art discloses no attempt to acquire a like

monopoly; and that defendant's screw-driver, if made within the terms of Garrity's patent, invades that grant. In other words, that the square-cornered head and the correspondingly square-cornered recess of the Garrity patent are the equivalents of the laterally extending wings and the transverse slot of the Wood patent.

The defendant insists that both by the terms of the patent and by the prior art the plaintiff is confined to the exact construction set forth in the Wood patent, and obviously, if this be so, there is no infringement.

Whatever the result might be in another situation, an examination of the doctrine of estoppel, as applied in such cases, satisfies me that the plaintiff is entitled to a liberal construction of his patent, as against this defendant.

The interpretation which the defendant put upon his own invention, while acting with the plaintiff, would seem to preclude him from adopting a different interpretation now that he has voluntarily put himself in a position of antagonism. He is estopped from demanding such a construction of his own patent as will render it valueless. It is well settled that he cannot deny its validity, and it ought to be equally well settled that he should not so demean himself as to strip his own invention of its value. He cannot narrow its scope to the point of destroying its usefulness.

He was responsible in every way for the present product of the plaintiff, and took part as an officer of the plaintiff company in warning off trespassers, and thereby became a strong factor in producing the acknowledged acquiesence on the part of the purchasing public which for so long a time comforted the plaintiff. It creates a bitter taste in the mouth to find him now acting as the assignee of his brother-in-law, the Waterbury plumber, in an attempt to show the plaintiff that its fancied security was only an idle dream.

Let an injunction issue.

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## PERRY v. RUBBER TIRE WHEEL CO. et al.

(Circuit Court, S. D. New York. April 27, 1905.)

DEPOSITIONS—RIGHT TO COMPEL ANSWERS TO QUESTIONS.

The general rule is that witnesses whose depositions are being taken under Rev. St. § 863 [U. S. Comp. St. 1901, p 661], should be required to answer all questions which may possibly be material, subject to their right to be protected in their constitutional privileges.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, § 141.]

On Motion to Require Witnesses to Answer Questions.

Charles W. Stapleton, for the motion.

Wm. R. Page, opposed.

TOWNSEND, Circuit Judge. The counsel herein are engaged in taking depositions under section 863, Rev. St. [U. S. Comp. St. 1901, p. 661]. The plaintiff and her husband have refused to an-

swer certain questions, and counsel for defendant has moved for an order to direct the witnesses to answer said questions. It is thought that the rule laid down in Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521, should be applied in the taking of such depositions. There is some uncertainty as to the practice in such cases, but the duty of this court is merely to see that the witness is properly protected in his constitutional rights, and that the process of the court is not abused. Wertheim v. R. R. (C. C.) 15 Fed. 716. The question as to the admissibility of the evidence is to be tested by the laws of the forum. Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104. The general rule is that the witness should be required to answer all questions which may possibly be material. Matter of Whitlock, 51 Hun, 354, 3 N. Y Supp. 855; Matter of Strong v. Randall, 90 App. Div. 192, 85 N. Y. Supp. 1089; Id., 177 N. Y. 400, 69 N. E. 721.

An order may be entered that the witnesses Augusta L. E. Perry and John W. Perry answer the questions put to them.

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## In re ROMINE.

(District Court, N. D. West Virginia. June 13, 1905.)

1. BANKRUPTCY—REFERENCE—POWERS OF REFEREE—RULINGS ON EVIDENCE.
   Under General Bankruptcy Order xxii (89 Fed. x; 32 C. C. A. xxv), providing that the referee shall note on the deposition any question objected to, "with his decision thereon," and that the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just, the referee, in taking testimony, is required to have it taken down, preferably in narrative form, and, on objection being raised, to require the question, the objection and reason therefor, with his ruling, to be entered, and then, though he rule the question to be improper, allow it to be answered.

2. SAME—CERTIFICATE OF REVISION.
   Bankr. Order xxvii (89 Fed. xi; 32 C. C. A. xxvii) provides that, when a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any "order" made by the referee, he shall file his petition therefor, and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and the order of the referee thereon. *Held* that, where objections to evidence offered before a referee were sustained, the referee, at the request of the party offering the same, was not required to certify the objections made to the court for revision.

   [Ed. Note.—Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

3. SAME—WITNESSES—CONTEMPT.
   Where a referee in bankruptcy, in taking the deposition of a witness, ruled that certain questions which the witness refused to answer and certain documentary evidence which he refused to produce were improper, immaterial, and impertinent, he was not required to certify the witness' alleged contempt in refusing to so testify and produce evidence on the demand of one of the parties to the district judge for decision.

4. SAME—DISCOVERY.
   Where one of the creditors objecting to a bankrupt's discharge filed an amended specification, alleging on oath, as positive facts, different acts of the bankrupt, any one of which, if true, would prevent his discharge,

such creditor was not entitled to discovery of certain books belonging to a partnership existing between a witness and the bankrupt's son to prove such acts prior to the giving of evidence by the creditor himself.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Discovery, § 112.]

W. N. Miller and Dorr Casto, for creditors.

Reese Blizzard, D. C. Casto, Levin Smith, and W. E. McDougle, for bankrupt and others.

DAYTON, District Judge. George R. Romine, bankrupt, having applied for his discharge, on February 6, 1905, certain creditors filed specifications in opposition thereto, and thereupon, on that day, my predecessor entered an order referring the case to referee George W. Johnson to ascertain and report the facts touching said matter of discharge. This action is authorized by section 3 of No. xii of the General Orders in Bankruptcy (89 Fed. vii; 32 C. C. A. xvi) prescribed by the Supreme Court, reading as follows:

"(3) Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts."

In compliance with this order, the referee, on the 13th day of February, 1905, commenced the taking of testimony with a view to ascertaining such facts, and up to April 18, 1905, had made a record of 342 full typewritten pages, consisting largely of wholly immaterial matters, captious objections, remarks of counsel, reiterations of the same questions and demands, to such an extent as to trespass to the last limit upon the patience of any court required to read it. It is absolutely safe to say, in my judgment, that every fact adduced in this record that in the remotest degree could be deemed material could and ought to have been clearly and fully presented in a record of 50 such typewritten pages. This criticism, kindly made, is justified by the fact that the end of it has by no means, apparently, been as yet reached, for these "depositions" stand uncompleted and the referee's duty unperformed, because, on petition and application of the protesting creditors, an order was entered on the ——— day of April, 1905, in the nature of a rule by this court, against said referee, to cause him to answer and show cause for his alleged misconduct in refusing to admit testimony offered, and refusing to certify for review questions arising before him touching the admissibility of such evidence, and by his rulings practically causing certain witnesses to refuse both to answer certain questions and produce certain written evidence. To this petition and rule the referee has made answer, and has certified the evidence taken, and this matter is now before the court for its consideration.

It seems that the parties, all represented by counsel, started out under the idea that the referee was to sit as a court and determine upon what testimony was admissible and what was inadmissible, and that they were to be bound by his rulings in this particular. A large amount of the testimony was taken under this understanding, when, it appears, counsel for the opposing creditors objected, and,

supporting the objection with authorities that convinced the referee that he had been proceeding wrongly, he reversed his ruling, and determined that, notwithstanding his opinion and judgment was against the admissibility of certain evidence, he would nevertheless permit the witness to answer the questions and allow the evidence to go to the court. To correct the error of his first method of procedure, the referee recalled the witness Prewett, about whose testimony the trouble had arisen, and allowed all rejected matters to be inquired of under his statement and ruling that the objection should be sustained. Thereupon the witness Prewett refused to produce certain books demanded of him, and the referee refused to compel him to do so, and further refused to certify the matter to the court for revision, on the ground that, before so certifying, all the testimony should be taken, and all questions of objection certified at one and the same time. It should be added that the protesting creditors insist that his expressing his opinion touching the admissibility of the testimony encouraged witnesses to refuse to answer and produce such testimony. Thus it will be seen that substantially three practical points have arisen touching the practice to be observed by the referee in taking testimony before him: (1) How far has he the power to pass upon and determine the admissibility of evidence presented to him? (2) When is he required to certify objections made to his rulings to the court for revision? (3) What power has he to determine as to whether a witness is recalcitrant and in contempt or not, and, if held to be so, what proceeding should he take against him?

The first question presents little difficulty. In Re Wilde's Sons, 11 Am. Bankr. Rep. 714, 131 Fed. 142, it is held that a referee acting in his character of referee or as special commissioner has the right to exclude evidence which he deems inadmissible. But many other cases hold the contrary. In Re Lipset, 9 Am. Bankr. Rep. 32, 119 Fed. 379, it is held that hearings before referees are substantially the same as in equity, subject, in effect, to equity rule 67, and therefore it is the duty of the referee, although he must rule on any objections made to testimony offered, to take all excluded testimony and make the same a part of the record, with his ruling on the objections, and also the exceptions which may be taken noted in connection with such testimony. It is clearly set forth in this case that the reason for this procedure is to enable the judge on a review not to reverse a decision made because of the error of the referee in excluding evidence, but enable such judge to at once, without reference back to take such testimony, to determine the issue upon the proper testimony, disregarding that which was improper. In re Natelle De Gottardi, 7 Am. Bankr. Rep. 723, 114 Fed. 328; Dressel v. North State Lumber Co., 9 Am. Bankr. Rep. 541, 119 Fed. 531; In re Covington, 6 Am. Bankr. Rep. 373, 110 Fed. 143; Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521.

Referees are judicial officers clothed with judicial powers. They are, however, subordinate to the court above them, and should so conduct their proceedings and make up their records that a full and fair review may be made of their actions. Their decisions will not

be lightly treated, but given the consideration due to conclusions reached by conscientious officers seeking to discharge their duties to the best of their ability. "That they sometimes err is to be expected—so do the ablest judges of all the courts—but they should not be reversed except upon clear and convincing proof of error, especially as to the findings of fact, when they have seen the witnesses and heard them testify." In re Covington, 6 Am. Bankr. Rep. 374, 110 Fed. 143; In re Shriver, 10 Am. Bankr. Rep. 746, 125 Fed. 511.

But it is needless to adduce further authority touching this point, for, in my judgment, General Orders in Bankruptcy No. xxii (89 Fed. x; 32 C. C. A. xxv), fully determines it. The latter clause of this order provides:

"The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just."

It is clear to me that in taking testimony the referee must have it taken down, preferably in narrative form, but, upon objection raised, it is his duty to require the matter to be presented by question, to which the objection and reason thereof is to be clearly but briefly noted; then to enter his ruling thereon as to whether proper or not, and, although he may rule it to be improper, yet allow it to be answered. I am persuaded, however, that he is not called upon to suffer and allow counsel, as in this case, to ask and permit witnesses to answer the same question over and over again, whereby time is unnecessarily consumed and costs incurred; but that upon his noting the fact that the question has been once answered, or the demand to answer has been once positively refused, the court will justify him in preventing vain repetition. Applying these rules to this case, it is clear that the referee and the attorneys engaged all had a wrong conception of his power in the start; that they discovered their error; that the referee corrected all possible injury by recalling the witness and permitting the questions to be propounded again which he had ruled out; and that, if the witness was influenced to refuse to answer because of his ruling the questions to be improper, the referee was not blamable, because it was his duty to rule, and the witness alone could at his peril refuse to answer. There was therefore in this first proposition nothing to warrant this rule against the referee.

(2) When is a referee required to certify objections made to his rulings to the court for revision? Must he do so every time a question is asked which he rules is objectionable, or every time he may express an opinion during its taking touching the evidence? Certainly not. The very reason for the establishment of the first proposition—that he is to take down testimony which he believes and rules improper—is for the very purpose of preventing constant and vexatious certificates for revision. In any matter wherein he is by the law empowered to enter orders that under the law may become final when he has entered such order, a revision may be had—a re-

vision of his judicial act, which, unrevoked, binds parties and becomes the law of the case. General Order No. xxvii settles this:

"When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

See In re Hawley, 8 Am. Bankr. Rep. 632, 116 Fed. 428; Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521.

The referee, therefore, was right in refusing to certify for revision his rulings upon this testimony. In fact, this being a matter referred to him specially to ascertain facts alone designed to aid the court in performing its duty in determining whether the bankrupt should be discharged or not, no possible revision could be had. The utmost extent the court could go would be to discharge the referee from further consideration of the matter, and take it up and decide it without his assistance. There was therefore no excuse for this rule against the referee on this ground.

This brings us to the third proposition: What power has a referee to determine as to whether a witness is recalcitrant and in contempt or not, and, if held to be so, what proceeding should he take against him? This proposition may be dissolved into two heads: (a) his power to determine as to whether contempt exists; (b) his method of procedure. This last presents no difficulty; in fact, is well settled. In a case where a referee believes a witness improperly refuses to testify or produce written testimony—in other words, to be in contempt for any reason—it is his plain duty to set forth the contempt upon his record, certifying the facts to the district judge, who will then deal with the question as if the contempt had originally arisen in his court. In re Miller, 5 Am. Bankr. Rep. 184, 105 Fed. 57; In re McCormick, 3 Am. Bankr. Rep. 340, 97 Fed. 566; Loveland, Bky. (2d Ed.) 671, § 240.

But the question as to the referee's power to determine as to whether contempt exists in a given case presents a question of very serious difficulty. It is always to be borne in mind that the power to punish for contempt should by all courts be exercised with caution; that it is in the nature of a criminal proceeding, and the evidence to sustain it should be beyond reasonable doubt. In re McCormick, supra. It is also always to be borne in mind that it is an inherent constitutional right that a witness has to refuse testimony that is improper, just the same as it is his absolute duty to give proper testimony if in his knowledge or possession. It is true, in ordinary cases, he will not be suffered in the courts to determine for himself whether the evidence is proper or not. The court will decide that for him, and he must then answer or suffer the consequences. Still the books have given us many cases where parties have refused to answer, have appealed to a superior court, and, because the evidence was determined by it to be improper, have been released and acquitted from the charge of contempt. What shall a referee do in a case like this when his conscience and judgment tell him that the evidence is improper, immaterial, and not pertinent, and

he has so ruled? Must he nevertheless stop, and certify that a contempt has been committed, which he does not believe to be true, simply because the parties may demand it? When the right of protection guarantied by all courts to a witness is taken into consideration, I am clearly of the opinion that the referee has a right to and must determine judicially in the first place whether a contempt has been committed, and, if he thinks not, to refuse, no matter how strongly urged, to certify the matter for contempt proceedings to the judge. But what recourse has the party aggrieved who is seeking the testimony? I answer, that he may file his petition for revision, or his exception to the referee's report, in due and proper season, to have his judgment reviewed as in other matters. It seems to me that any rule less cautious than this would not properly secure the protection of a witness from wholly improper demands for disclosure of his own private matters, and from vexatious prosecution for failure to make such disclosures.

This case, it seems to me, presents a very striking illustration. I desire to refrain from discussing the evidence presented, as far as possible, at this time, because it is apparently not yet completed, and it must all be considered carefully upon the hearing of the motion for discharge. Briefly, the trouble has largely, if not altogether, arisen over the fact that witness Prewett would not comply with a general demand of the protesting creditors to furnish for their examination "the books" belonging to a partnership existing between him and Jno. W. Romine, bankrupt's son, and which by the articles of partnership was conducted alone in the name of Prewett. The procedure in the case, to say the least, has been remarkable. There are two contesting creditors, the Bank of Ravenswood and R. H. Douglass. They join in presenting a specification and an amended specification against the discharge of the bankrupt. The amended specification sets forth 16 different acts on the part of the bankrupt, any one of which should, if true, prevent his discharge, and several should cause his criminal punishment. These specifications are not made upon "information and belief." They enter into details; are charged absolutely and set forth as positive facts. They are sworn to by Douglass, who, under oath, says that he has read them, and that they are true, except so far as stated to be made upon information, which is not done in any line of the document, so far as I have found. Here is a man who is full of absolute knowledge touching the facts, or else he has presented the most reckless sworn pleading I have ever known presented in a court of justice. He is plaintiff in the issue, yet has never so far testified to these material facts. Instead, the first witness he calls is Prewett, who, in effect, he charges positively with having been in partnership with G. R. Romine, the bankrupt, instead of with J. W. Romine, the son, and with having taken a conveyance of the bankrupt's interest in the partnership fraudulently, in order to conceal it from creditors. He makes Prewett his witness. Prewett denies most positively these allegations; denies that the bankrupt had any interest in such partnership; brings forward the original written agreement whereby said partnership was established between him-

self and Jno. W. Romine (not Geo. R. Romine), dated January 1, 1902, duly acknowledged by both before a notary, near three years before this bankruptcy proceeding; also the written agreement, dated January 2, 1904, between himself and Jno. W. Romine, whereby said partnership was dissolved. He produced his cashbook, journal, ledger, the notes that had been executed that were demanded, a statement of the bankrupt's account with the firm, and made the positive statement that he had disclosed all that his books would show concerning his relations with either Jno. W. or Geo. R. Romine. Nevertheless, these protesting creditors, without even specifying what special thing they could prove pertinent to the issue, made a general demand for all the books, reiterating that demand time and again after the referee had ruled it improper for them to be produced.

It is clear to my mind that these protesting creditors had absolutely no right, under the circumstances, to demand these books. They had no right to a discovery; they needed none. Douglass by his affidavit showed himself with full and positive knowledge. Prewett was their witness; they were bound by his statement that he had produced all that in any way pertained to his relation and transactions with both Romines, until, at least, they had clearly contradicted him. The effort to do this by the witness Stone proved utterly futile. His testimony was vague, uncertain, contradictory, and unsatisfactory, if not on its face incredible. He manifestly was a willing witness, for he says, "Oh, there are some other statements I would like to make, but would rather not"—manifestly because he could not truthfully make them; at any rate, when pressed, he would not risk making them. In the single pertinent matter testified to by him he is flatly contradicted by Moss, a wholly disinterested witness. Upon analysis, I do not think the evidence of witness Gates presents itself in any better plight, and these are the two relied on to contradict their other witness Prewett and base a motion to produce books which he says related only to his private affairs, and the exposure of which might injure him and in no way aid the creditors or other parties.

It has been settled beyond peradventure for very many years that courts do not compel production of books simply to gratify curiosity, or permit "fishing" excursions into them to see what can be found that may or may not be of advantage to the parties making the demand. "A party cannot obtain a roving commission for the inspection or production of books or papers in order that he may ransack them for evidence to make out his case." "He is entitled to production and inspection only when the same is material and necessary to establish his cause of action." "The application will not be granted where the facts to be proved by the books can be otherwise established." "It will therefore be denied when the party has in his possession or under his control the means of acquiring all the information he seeks to obtain, or when the books do not in themselves contain evidence, but merely information by which evidence can be obtained. It is not permitted to enable a party to ascertain whether he has cause of action or defense, or to

ascertain the evidence on which his opponent's action or defense rests." These quotations are from 14 Cyc. pp. 370 to 382, where they and many other similar principles touching the production of private books, their use, the manner of their examination, etc., are laid down, and where more than 400 cases are collated and cited. See, also, In re Carley (D. C.) 106 Fed. 862; Southern Ry. Co. v. North Car. Corp. Com. (C. C.) 104 Fed. 700; Henry v. Ins. Co. (C. C.) 35 Fed. 15; In re Pacific Ry. Com. (C. C.) 32 Fed. 250; Triplett v. Bank, 24 Fed. Cas. No. 14,178; Abrahams v. Swann, 18 W. Va. 274, 41 Am. Rep. 692.

Without further comment or discussion, it is sufficient for me to say that I do not regard these protesting creditors to be entitled to the books of Prewett for examination under the circumstances disclosed by the testimony. Further, I do not regard any of the complaints made against the ruling and action of the referee as well founded; but, on the contrary, I regard the rule against him to have been improvidently awarded, and it will now be discharged, with direction for him to complete his reference in this case so soon as he can reasonably do so.

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**In re GORWOOD.**

(District Court, M. D. Pennsylvania. July 5, 1905.)

No. 557.

BANKRUPTCY—ASSETS—SALE—FIXTURES—TERMINATION.

Where a bankrupt constructed an addition to a leased building on leased ground, whether such building constituted a fixture, or whether it was removable, as against the landlord, by a purchaser at a sale of the bankrupt's assets, could not be determined in advance of a sale and an attempt to sever.

In Bankruptcy. On exceptions to report of referee sur petition of trustee for leave to sell certain property.

A. Mitchell Palmer, for exceptions.
W. B. Eilenberger, for trustee.

ARCHBALD, District Judge. On September 5, 1900, the bankrupt, Arthur Gorwood, leased of Sarah C. Ransberry a blacksmith shop in the borough of East Stroudsburg, Pa., 30 by 20 feet in dimensions, and two stories high, and, by the same instrument, an unimproved L-shaped piece of land immediately contiguous, 22 feet in front on the street, and 50 feet in depth along the side of the shop, with an extension or arm 20 by 20 feet directly in the rear. The shop was let for five years, and the adjoining land for ten; both to be calculated from August 1, 1900. Soon after obtaining possession of the property, the bankrupt, at a cost of about $1,000, erected a frame building, entirely covering the unoccupied land, of the same height as the blacksmith shop, and enveloping it on side and rear. The new structure was fastened to the old, and had no interior walls of its own; those of the shop being utilized instead,

and the joists of floors and roof being supported on cleats nailed thereto. A doorway was also cut through the side of the shop, and an opening made in the rear, above and below, so as to throw the two buildings together; access to the upper story being had by stairs at the side of the shop. As so arranged, the whole premises were used by the bankrupt in his trade as a wheelwright; the several parts being devoted to its different branches. The building is said to be readily removable; resting, the same as the blacksmith shop, on a stone wall which bounds the street in front, and on wooden piles in the rear; the ground falling away in that direction. But if removed the changes made in the shop would have to be repaired in order to restore it to its former condition, the cost of which it is conceded would amount to about $35.

Finding this property among the effects of the bankrupt, the trustee has petitioned for leave to sell. So far as the blacksmith shop is concerned, the lease, having less than a month to run, is of no account. But the five years left on the rest of the property has a recognized value, particularly with the building upon it. Believing, however, that more can be realized by the sale of the building by itself, and conceiving that it is a removable fixture, the trustee has asked leave to sell it separately. This the landlord opposes, holding that it is not severable; and, the referee having decided against her, the case is brought here for review.

Much as I would like to assist in determining the question in controversy between the parties, this is not the time, nor are these proceedings the place, in which to do so. It would, no doubt, be of advantage to the estate if it could be definitely settled in advance of a sale whether the building put up by the bankrupt was legally removable, so that purchasers could bid with that assurance; and, left in uncertainty, they are not likely to pay by considerable as much as they otherwise would for the property. But for all of that, I do not see how to obviate it. Even if the court should undertake to express an opinion upon the subject, it would not bind. The parties might choose to respect it, but, if they did not, it could not be enforced. It is not like a lien, which the court may order divested at will. Not till an attempt is made to sever will the question really arise, and until then it must of necessity remain undisposed of. All that the trustee is authorized to sell is the bankrupt's rights, the extent of which he cannot guaranty, nor the court pronounce upon. Such as they are, being appurtenant to the lease, they will pass to the purchaser, to be enjoyed during its continuance. So far, prospective bidders have a certainty, which, being recognized, the value of the building in part, at least, will be realized for the estate. But beyond this it is a speculation, as to which the parties concerned must act upon their own responsibility.

The order of the referee is reversed, and sale is directed to be made by the trustee of the leasehold and the improvements as a single property, to be free and clear of liens upon due previous notice in writing being given to the holders.

## In re CARTER.

(District Court, W. D. Arkansas, Texarkana Division. July 3, 1905.)

1. BANKRUPTCY—CLAIMS—PRESENTATION—PLEADING.
On presentation of claims of creditors against a bankrupt no pleadings are authorized except the claim duly verified, as provided by Bankr. Act July 1, 1898, c. 541, § 57, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], and such objections as the trustee or any creditor may interpose to the allowance thereof.

2. SAME—ORIGINAL SECURITIES—ATTACHMENT TO CLAIM—PRESUMPTIONS.
Where it did not appear that the original notes and mortgage which were the basis of a claim against a bankrupt were attached to the claim as required by the bankrupt law, but no objection was urged on that ground, it would be presumed that such original securities were present at the trial, and not attached, or that their presence was waived.

3. SAME—BURDEN OF PROOF.
Where a claimant against a bankrupt's estate presented its claim in proper form, duly verified, except in certain particulars which the court treated as waived, such claim constituted a prima facie case in favor of the claimant, and the burden of proof was thereupon shifted to the objectors.

4. SAME—PRINCIPAL DEBTOR—HUSBAND AND WIFE—EVIDENCE.
Where a bankrupt testified that the money for which notes in controversy sought to be proved as a claim against his estate were given was borrowed, and used by him in his mercantile business, and was loaned to him on the strength of his wife's signing the note with him, which evidence was uncontradicted, the facts that the wife's signature on the note was above that of her husband, that the money was placed to the wife's credit, and by her checked out to her husband, and that she gave a mortgage on her separate estate to secure the same, were insufficient to sustain a finding that the debt was that of the wife, and not that of the bankrupt.

5. SAME—RIGHTS OF SURETY—SUBROGATION.
Under Bankr. Act July 1, 1898, c. 541, § 571, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], providing that whenever a creditor whose claim against a bankrupt's estate is secured by the individual undertaking of any person fails to prove such claim the surety may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to the extent of the rights of the creditor, where a bankrupt's wife signed notes and executed a mortgage on her separate property to secure money borrowed for the bankrupt and used by him in his business, the wife, on payment of the loan, would be entitled to subrogation to the creditor's rights, or, in case the latter failed to prove the claim, to prove it in the creditor's name.

In Bankruptcy.

Webber & Webber, for trustee.
Moore & Moore, for bankrupt.

ROGERS, District Judge. The practice covering the presentation of claims of creditors to the referee in bankruptcy for allowance is correctly outlined in the case of In re Eleanor T. Sumner, 4 Am. Bankr. Rep. 124, 101 Fed. 224, and it is needless to copy it here. It is enough to say that no pleadings are necessary except the presentation of the claim, duly verified, in conformity with section 57 of the bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S.

Comp. St. 1901, p. 3443]), and such objections as the trustee or any creditor may interpose to the allowance thereof; and to the issues thus made the proof should be directed. If other pleadings are filed in the case, they are unauthorized. Under proper circumstances they may be treated as admissions; but the failure to file such pleadings cannot operate to prejudice either party. In the case at bar it does not appear that the original notes and mortgage were attached to the claim, as required by the bankrupt law. There was, however, no objection urged on that ground by the objectors, and presumably the original notes and mortgage were present at the trial, and not attached (or may have been attached and copies substituted), or their presence may have been waived. The record discloses nothing on this question. At all events, if the referee desired the notes and mortgage attached to the claim, he should have ordered them produced and declined to allow the claim to proceed further until they were, provided, of course, that they were in existence and under the control of the bankrupt. In re Eleanor T. Sumner, supra. But he did not disallow the claim on that ground. He based his disallowance on the ground that it was not really the debt of the bankrupt, but in fact the debt of his wife. This finding, in the opinion of the court, is so manifestly erroneous as to not require discussion. The bank presented its claim in proper form, and duly verified except in the above particulars, which the court treats as waived. This made a prima facie case for the bank, and under the bankrupt law it had the right to rest at that point, and the burden be shifted to the objectors. In this case the objectors offered no proof whatever; but the bank, in addition to proving the claim, offered the testimony of the bankrupt, and he testified that "the money for which the note in controversy was given, was borrowed and used by me in my mercantile business. * * * The money was loaned me on the strength of Mrs. Carter's signing the note with me." No other testimony was offered by either party, and this witness was not cross-examined at all. Neither one of the bank officers was examined or cross-examined, although the bank is located in the same town where the hearing was had. What is there in this record to overturn the positive proof of the cashier, who made proof of the claim, and of the bankrupt who gave this evidence? The court finds nothing in the record, except that it appears on the face of the note that the wife's signature is above that of her husband, coupled with the additional fact that when the first note was given (it being for the sum of $2,500) the money was placed to the credit of the wife, and she checked the whole sum out to the husband, who used it in carrying on his business. It may be added that the wife also gave a mortgage to secure the notes on her separate estate. Are any of these facts necessarily inconsistent with the positive testimony of the cashier of the bank and the bankrupt himself? Should these facts (call them suspicious if you will) be permitted to overturn the positive testimony of two witnesses who stand unimpeached, who testify positively to the contrary? The question is its own answer. The giving of a mortgage by the wife on her separate estate

to secure a debt of her husband is not an uncommon thing. Many wives very foolishly do this very thing. Nor is it inconsistent at all with the fact that the husband is the borrower. It may be admitted that it is not usual for a surety to sign a note above the principal; but that fact is not inconsistent with the claim of the bank that the bankrupt was the borrower, and his wife the surety, or joint maker. The fact that the money procured on the first note—i. e., $2,500—was deposited to the wife's credit may be treated as a suspicious circumstance; but it is greatly weakened by the additional fact (which stands undisputed) that the money borrowed on the notes subsequently given (which were executed in exactly the same way) was deposited to the credit of the bankrupt, and not his wife. It may be, in view of the course pursued, that if the bank or the bankrupt had been called upon to explain why it was that the money procured on the first note was placed to the wife's credit it would have been satisfactorily explained; but, as stated, the officers of the bank, who were in the same town, and the bankrupt, were on the witness stand. The bank officers were not examined, and the bankrupt was not cross-examined. The inference is—indeed, must necessarily be—that the objectors felt that their case would not be strengthened by the examination of the bank officers and the bankrupt. The finding of facts, therefore, by the master, to the effect that the wife was the borrower, is not sustained by the proof, and is manifestly erroneous and unjust.

However, in the opinion of the court, the conclusion reached is not decisive of the case. The case, as made by the record, stands in this way: The bankrupt has borrowed the money upon which the bank's claim is based. His wife has signed the notes, and become the joint maker with the bankrupt, and has executed a mortgage on her separate estate to secure the same (and confessedly the money was borrowed for the bankrupt, and was used by him in his business). In this state it was held in Goldsmith v. Lewine, 70 Ark. 516, 69 S. W. 308: "A married woman may mortgage her separate property to secure her husband's debts, whether existing or to accrue." If the wife in this case should be called upon to pay, out of her separate estate, her husband's debts, she would be entitled to be subrogated to whatever rights the bank has as against her husband's estate. By section 57i of the bankrupt act it is provided:

"Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor."

It thus appears that by the very terms of the bankrupt act itself, if the bank should fail to prove its claim against the estate of the bankrupt, the wife would have the right to do it in the bank's name; and, if the bankrupt should probate the claim, the wife would have the right to step in and pay the entire indebtedness of the bank, and be subrogated to the rights of the bank in the estate of the bankrupt.

The action of the referee is therefore vacated and set aside, and an order will be made allowing the claim of the bank for the full amount, with accrued interest.

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UNITED STATES ex rel. GREENBRIER COAL & COKE CO. v. NORFOLK & W. RY. CO. et al.

(Circuit Court, S. D. West Virginia. June 24, 1905.)

1. INTERSTATE COMMERCE—FEDERAL COURTS—MANDAMUS.

The only authority for the issuance of mandamus by a federal court in a suit by a shipper to prevent unlawful discrimination by an interstate railroad is conferred by Act Cong. March 2, 1889, c. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3157], supplementary to the interstate commerce act and its amendments, providing that the federal Circuit and District Courts shall have jurisdiction, on relation of any person, firm, or corporation, alleging violation by a common carrier of any of the provisions of the act which prevents relator from having interstate traffic moved on terms or conditions as favorable as those given by the common carrier for like traffic under similar conditions to any other shipper, to issue mandamus to prevent such discrimination, etc.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 93.]

2. SAME—CONTRACTS.

Where an interstate railroad contracted with complainant and other shippers to furnish coal and coke cars to such shippers on a basis that each shipper should receive such proportion of the total car supply as the number of his coke ovens bore to the whole number of coke ovens operated in the field, and relator admitted the validity of such contract, and that a distribution according thereto was equitable, but alleged that it was discriminated against, in that it did not receive the proportion of cars to which it was entitled according to such distribution, a mandamus proceeding to compel an equitable distribution of cars according to such proportion was in effect a proceeding to enforce private contractual obligations, and not to prevent discrimination in violation of interstate commerce act, as amended by Act Cong. March 2, 1889, c. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3157], and was therefore unsustainable.

Upon Motion to Quash the Alternative Writ

C. W. Dillon and Price, Smith & Spillman, for relator.

Jos. I. Doran and Holt & Duncan, for Norfolk & Western Ry. Co.

Vinson & Thompson, for Empire Coal & Coke Co., Elkhorn C. & C. Co., and McDowell C. & C. Co.

Brown, Jackson & Knight and David E. Johnston, for Turkey Gap C. & C. Co.

KELLER, District Judge. The Greenbrier Coal & Coke Company, suing in the name of the United States of America, exhibited its petition against the Norfolk & Western Railway Company, a corporation engaged in transporting interstate commerce, alleging a violation of the act of Congress approved February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], entitled "An act to regulate commerce," and of the several acts amendatory and supplementary thereto. In the petition the other defendants were named as parties which had profited by the alleged unlawful discrimination against the relator, and they were therefore made parties, that they might appear and protect their interests.

The main averments of the petition, omitting certain special allegations, which, under the view of the case taken by me, have no pertinency upon the present motion, are briefly: That the defendant railway company is a railroad corporation operating a railroad in the states of Virginia, West Virginia, and Ohio, and is engaged in interstate commerce. That the other defendants are corporations organized under the laws of West Virginia, and are engaged in mining and shipping coal from points along the line of the railway company in West Virginia. That the relator is a like corporation, and engaged in a like business of mining and shipping coal from a point on the line of the railway company in McDowell county, W. Va., to various markets in other states than the state of West Virginia. "That on the 1st day of April, 1904, and previous thereto, the defendant railway company agreed with the Greenbrier Coal & Coke Company, and all of the other coal companies herein mentioned as defendants, that the car supply upon which said coal companies were to ship their coal and coke to market should be furnished upon what was and is known in the particular coal field where said mines are located as the 'coke-oven basis.' That is to say, the coke ovens owned and operated by the respective coal shippers along its line were to form the basis of car distribution, and that the car supply furnished by the said railway company between the respective coal shippers mentioned herein should be distributed to each shipper in proportion as the number of coke ovens owned and operated by such shipper bore to the whole number of cars available for the shipment of coal from said field." That the relator owned and operated 200 such coke ovens, and the defendant coal companies respectively operated the numbers of coke ovens given in the petition, aggregating 9,307 in all. That "said agreement and understanding to supply cars for the shipment of coal and coke upon said coke-oven basis was and is equitable and fair, and accepted by the relator and the other defendant coal companies, and according to which said basis of car supply the Greenbrier Coal & Coke Company was since the 1st day of April, 1904, and is now, entitled to two and one-eleventh per cent. of the total number of coal and coke cars furnished by said railway company for the shipment and distribution of coal and coke to said markets from the mines of the relator and the said defendant coal companies. That on the day and year last aforesaid, and since that time, it was always agreed and understood by and between said railway company, the relator, and the said defendant coal companies that cars and facilities for the transportation of coal mined and coke manufactured at the mines of the relator would be furnished by said railway company according to said basis of distribution, and that, if there should be a scarcity of cars, there would be no discrimination in the distribution of the same to the several miners and shippers of coal along the lines of the defendant railway company, but the same would be prorated between the relator and the other defendant coal companies according to said coke oven basis." That the relator has made repeated demands upon the railway company for cars for shipment of its coal to various points

without the state of West Virginia; that the railway company has discriminated and is still continuing to discriminate unjustly in favor of the defendant coal companies and against the relator, by giving to said defendant coal companies an undue and unreasonable proportion of cars for the transportation of coal and coke, and giving to relator much less than the fair proportion of cars justly due it. That in consequence of such discrimination the relator has suffered great loss and damage, and is unable to retain the services of its miners and employés, and is subjected to loss of custom and to threatened suits for damage, etc.

Upon the presentation of the petition an alternative writ of mandamus was awarded, agreeably to the practice prevailing in West Virginia, returnable on the 6th day of June, 1905, at which time the parties appeared, and a motion was duly interposed on behalf of the principal defendant, the railway company, and certain of the other defendants to quash the alternative writ, and each paragraph thereof. This motion is in writing, and in substance alleges that the facts and allegations set up in the alternative writ (which, under the practice prevailing in this state, contains all the averments of the petition) do not set forth a case of which the court has jurisdiction under the act of March 2, 1889, c. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3157]. It is contended in support of the motion that the writ shows that the relator is seeking to enforce an alleged agreement with the railway company for the distribution among its shippers of its coal cars available for use in the coal field where the mines of the relator are situated, and not for the enforcement of the provisions of the so-called interstate commerce act in the manner provided by the act of March 2, 1889, and that the court therefore has no jurisdiction to award the writ.

I have already quoted the averment of the writ (and petition) setting up the existence of an agreement between the railway company, the relator, and the defendant coal companies for the distribution of coal cars in accordance with what is termed the "coke-oven basis." I now quote the language of the first command of the alternative writ, which is based on the first prayer of the petition therefor, and is as follows:

"That in the event of the scarcity of cars to be furnished by you, the said Norfolk & Western Railway Company, to shippers of coal along your lines, the proportion to which the said Greenbrier Coal & Coke Company is entitled shall be fixed and determined to be at least two and one-eleventh per cent. of the total car supply furnished to such shippers in the particular field wherein its mine is located, or whatever percentage of the whole number of cars furnished to the shippers of coal in the field where its mine is located the total number of coke ovens owned and operated by it bears to the whole number of coke ovens owned and operated by the other shippers of coal from said coal field."

It is admitted that, except as conferred by statute in special cases, the courts of the United States have no original jurisdiction in mandamus, but their only power to issue the writ is in aid of jurisdiction already acquired. See Graham v. Norton, 15 Wall. 427, 21 L. Ed. 177; Bath Co. v. Amy, 13 Wall. 247, 20 L. Ed. 539; and the recent case of U. S. ex rel. Interstate Commerce Commissioners v.

Lake Shore, etc., Ry. Co. (decided by the Supreme Court April 10, 1905) 25 Sup. Ct. 538, 49 L. Ed. 870, in which it was held that jurisdiction "in a federal Circuit Court of an original proceeding by mandamus to compel an interstate carrier to make the report which the Interstate Commerce Commission is authorized by the act to regulate commerce to require cannot be inferred from the grant of authority to the commission to enforce that act, or from the direction to district attorneys of the United States or the Attorney General to institute all necessary proceedings for the enforcement of its provisions."

The only authority, then, for the exercise of jurisdiction by way of mandamus in a case like the present, is to be found in the act of March 2, 1889, supplementary to the Interstate Commerce Act and its amendments, and which provides:

"That the Circuit and District Courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms, or conditions as favorable as those given by said common carrier for like traffic under similiar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ."

It is equally elementary that mandamus will not lie for the enforcement of mere private contractual obligations. Miller v. State Board of Agriculture, 46 W. Va. 192, 32 S. E. 1007, 76 Am. St. Rep. 811; State v. Paterson, etc., R. R., 43 N. J. Law, 505, affirmed 45 N. J. Law, 186; Rosenfeld v. Einstein, 46 N. J. Law, 479; State v. N. O., etc., R. Co., 37 La. Ann. 589; State v. Zanesville, etc., Turnpike Co., 16 Ohio St. 308; State v. Howard Co. Court, 39 Mo. 375; State v. Republican River Bridge Co., 20 Kan. 404; People v. Dulaney, 96 Ill. 504; Parrott v. Bridgeport, 44 Conn. 180, 26 Am. Rep. 439; Bailey v. Oviatt, 46 Vt. 627; High on Extraordinary Remedies, § 25; Merrill on Mandamus, § 16; Spelling on Injunctions & Other Extraordinary Remedies, § 1379.

It is unquestionably true that the pleadings of the relator do set up the existence of an agreement between the railway company, the relator, and the defendant coal companies for the distribution of all the coal and coke cars of the railway company available for shipments of coal and coke from the coal field where the mine of the relator is situated, and that the petition prays, and the writ nisi, following its prayer, commands, that the railway company be required to furnish the relator with cars in accordance with the terms of that agreement. It is a cardinal principle that pleadings should be true, and upon this motion to quash, which is in the nature of a demurrer for want of jurisdiction apparent upon the face of the pleadings, the allegations of the writ and petition are to be conclusively taken to be true. We have it then, for the present purposes, as a fact, that such a private and general agreement for

car distribution was made and entered into, and, as alleged by relator, has not been kept by the railway company.

It is ingeniously argued by counsel for the relator that the facts set forth as to the agreement for distribution of cars are merely by way of recital, and that, inasmuch as it is alleged that said agreement provided for a fair and equitable distribution of the car supply, it was in harmony with, and merely declaratory of, the requirements of the interstate commerce act, and where, as in this case, there is an averment of dereliction of duty under the act, the court is empowered and it is its duty to assume jurisdiction and issue the writ. The question presented is somewhat novel, but the view of counsel for relator presents some difficulties to my mind. I consider that it must be true that in any investigation of alleged discrimination in car supply, under the interstate commerce act, made by this court upon the relation of a shipper of interstate traffic, it is not only competent, but necessary, for the court to hear evidence concerning and render its independent judgment upon the question as to what proportion of the cars available for interstate traffic the relator is entitled to, and upon such finding to issue its peremptory writ, commanding the respondent to furnish the car equipment found to be the share or allotment justly due the relator. Now, in the case at bar, assuming that the allegations of the petition are true, and that the respondent, in its return, should affirm the existence of the agreement asserted in paragraph 5 of the petition and alternative writ, and aver that it had furnished relator with such proportion of cars as said agreement provided for, nothing would be left for ascertainment, under the pleadings, except the bare fact whether the respondent had in fact furnished to the relator its due proportion of cars under the agreement recited in the petition. In other words, there would be left no issue upon which evidence could be taken as to whether the relator had received its due proportion of cars for interstate traffic under the law, or what that due proportion was. But assuming that the court undertook to brush aside the mere state of the pleadings, and to make its own inquiry as to facts and conditions; following, let us say, the recent case of U. S. ex rel. Kingwood Coal Co. v. West Virginia Northern R. Co. (C. C.) 125 Fed. 252, and arriving at the due proportion of cars for relator by an investigation of the relative capacity of all the coal companies interested in the distribution, what would be the result? In the event that the proportion thus ascertained exactly tallied with the proportion due relator under the contract, the court might, it is true, award its peremptory writ, but in any other contingency I do not see how it could do so. As it appears by the record that all the parties interested in the distribution of these cars entered into an agreement for such distribution according to an arbitrary basis, which agreement, as between themselves, they had a right to make, I can see no ground upon which the court could award any writ impairing the obligation of that agreement. If I am right in this view, it follows that the court could act by way of mandamus only in so far as its findings coincided with the terms of the said agreement, and a proceeding by

way of mandamus under the statute in name, would in fact be merely a proceeding to enforce by peremptory writ the execution of such agreement or contract. If a contract exists, that contract measures the duty of the railway company, for it is surely true that a shipper need not take all the cars he may be entitled to under the provisions of the law. If no contract exists, the shipper may demand under the law, and the law measures the duty of the railway company by those general principles adopted by the courts for guidance in its ascertainment.

Has the court a right to entertain jurisdiction for the purpose of determining whether or not a valid agreement exists, where the existence of such an agreement is asserted by the relator? This is not the case of a relator asserting the invalidity of a contract it was induced to make, and asserting its rights under the statute, but of one asserting the validity and essential legality and equality of the contract under the law, and seeking its enforcement by aid of the writ. Neither is this such a case as would be presented upon a petition declaring simply upon the statutory rights of relator, and asserting that under the law it was entitled to a certain number or a certain percentage of all cars available for interstate coal traffic. If in such a case the return of respondent asserted a contract between the parties regulating the question of car supply, and the relator replied generally to such return, the court would, of course, inquire into the existence and legality of such contract. If it were found to exist and to be legal, the court would be bound to dismiss the proceeding. If found not to exist or to be illegal, the court would administer relief. But suppose the relator, instead of replying generally to such a return, were to admit the existence and legality of the contract pleaded by respondent. We would then have a case much like the one at bar, save that the question would arise later in the proceeding. Such a case has arisen under the interstate commerce act, though not in a proceeding by way of mandamus, and has been passed upon by a very able judge, then chairman of the Interstate Commerce Commission, namely, the late Judge Cooley, of Michigan. In Haddock v. Delaware, L. & W. R. Co., 4 Interst. Com. Com'n R. 296, where complainant, a miner and shipper of anthracite coal, complained of a preference in the rates given for carriage of coal, the company set up as a defense that complainant was not entitled to be heard, because he had entered into a contract with the defendant before the passage of the statute by which the rates were determined. Complainant admitted the contract, but contended that certain sizes of coal which were not marketed when the contract was entered into ought not to be governed by the terms of the contract, but the commission held that no evidence could be admitted to show that the rates on such coal ought to be different from those fixed in the contract; Judge Cooley, in the opinion (page 314) saying:

"If the rate of transportation were not fixed by contract, we might have jurisdiction to determine what it ought to be; but, when the contracts before us made by the parties themselves have undertaken to determine how the rates shall be fixed, that matter is taken entirely out of our hands. We say

this assuming all the while that the contracts are valid, just as the parties assume them to be, and expressing no opinion for ourselves on that point."

I might almost paraphrase this language and apply it to this case, for, doubtless, if the question of car supply were not fixed by agreement, and complaint was made of a violation of duty under the interstate commerce act, the court might have jurisdiction to determine what the car supply of the relator ought to be; but when the relator asserts an agreement which it says is fair and equitable, by which the parties have undertaken to determine how the cars shall be distributed, that matter is taken out of the hands of the court; and, even though there may have been a breach of that agreement by the respondent, this court is powerless to aid the relator by the writ of mandamus.

I am of opinion that the pleadings herein do not present a case for relief under the act of March 2, 1889, and accordingly order that the alternative writ heretofore issued herein be quashed, and the petition dismissed.

Let an order be entered in conformity with this opinion.

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## VIRGINIA HOT SPRINGS CO. v. HEGEMAN & CO.

(Circuit Court, S. D. New York. July 3, 1905.)

1. TRADE-MARKS AND TRADE-NAMES—UNLAWFUL COMPETITION.

Complainant and R. purchased parts of a tract of land containing springs which since 1845 had been known as "Healing Springs." R. named his springs the "Rubino Healing Springs," and sold the water under the name "Rubino Healing Springs Natural Lithia Water," while complainant's water was sold under the label, "Healing Springs. A Table & Medicinal Water," etc., until after R. began successfully to market his waters, when plaintiff imitated R.'s labels by dropping the words "A Delicious Table Water," and using the words "Uric Acid Solvent," suggested by R.'s labels, containing the words "Eliminates uric acid." Up to the time R.'s labels appeared, complainant had said nothing in its labels of "Healing Springs, Va.," used in R.'s labels, except: "Healing Springs. A Table & Medicinal Water. From the Great Thermal Region of the Appalachian Ranges"—and ending its label with the words, "For sale by leading druggists in the United States, or can be ordered direct from the Virginia Hot Springs Company, Hot Springs, Bath Co., Virginia," after which complainant changed its labels, and added the words, "Healing Springs, Bath County, Va." It also appeared that all of the springs were at a place having a post office known as "Healing Springs." *Held*, that R.'s labels so clearly differentiated the waters sold by him from those marketed by complainant that he was not guilty of unlawful competition.

2. SAME—LACHES.

Complainant having been idle in the development of its springs from 1895 to 1896 or 1897, while R. was building up the springs in that locality and expending large sums of money in the enterprise, and until 1903, when it filed the bill for injunction, and in the meantime having imitated and copied R.'s methods, labels, and mode of advertising, it was guilty of such laches as estopped it from maintaining the suit.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 95.]

3. SAME—WORDS—RIGHT TO USE.

Where certain springs on an entire tract of land were known as the "Healing Springs," a purchaser of a portion of such tract, containing a part of the springs, was not entitled to the exclusive use of such name as against a purchaser of the balance, with the springs known as "Little Healing Springs," or "New Healing Springs," thereon.

In Equity.

Suit for injunction perpetually restraining defendant, Hegeman & Co., from in any form or manner whatsoever making use of the name "Healing" or "Healing Springs" in connection with any water not from the spring of the complainant, and from in any form or manner placing or causing to be placed upon containers of water not containing water from such spring, or upon the advertising indicia relating to such water, the name "Healing" or "Healing Springs," or any name or names substantially resembling such names "Healing" or "Healing Springs," and also from holding itself out to the public as the owner of the name or mark "Healing" or "Healing Springs," or as the owner of the springs known as the "Healing Springs," in Bath county, Va., and also from placing on containers of water, other than those holding water from the springs of the complainant, or upon the advertising indicia relating thereto, the twin waterfall mark shown in an exhibit attached to the bill of complaint. The defendant denies the existence of the alleged right to these names in complainant, and denies that it has in any way violated any of the complainant's rights. Further facts will appear in the opinion. Defendant gets its water from one Mr. Rubino, who is the real defendant, and who sells the water from his springs under the name, etc., complained of.

Joseph A. Stetson (Melville E. Ingalls, Jr., of counsel), for complainant.

Stern & Rushmore (Charles E. Rushmore, of counsel), for defendant.

RAY, District Judge (after stating the facts). The complainant is a corporation of the state of Virginia, and owns and operates three properties in the county of Bath, in said state, all in the same section, known respectively as "Healing Springs," the "Warm Springs," and the "Hot Springs." It was incorporated about April, 1892, and then became the owner of part of what is called the "Healing Springs Property." The complainant bottles and sells water from its spring known as the "Healing Springs," and on its bottles and other retainers for such water has certain labels and trade-marks containing the words "Healing Springs." In the bottles used for marketing this water up to 1894 were blown the words "Healing Springs Water, Bath County, Va." Since 1845 these springs now owned by complainant have been known as the "Healing Springs." Prior to 1892 there was a hotel there known as "Healing Springs Hotel." People came there and drank of the waters, and bathed in them. The property on which this spring, or these particular springs, was situated since 1845 has been known and designated in deeds and other papers and conveyed as the "Healing Springs Property." These statements refer generally to the property now owned in part by complainant, but largely by defendant.

In a book, "Mineral Springs of the United States and Canada," by Walton (3d Ed.), published in 1883, we find: "Healing Springs." "Location and Post Office—Healing Springs, Bath County, Vir-

ginia. * * * Hotel, Healing Springs." Then follows a long article giving a description of the waters and their properties, and an analysis thereof. Originally the lands upon which these springs of complainant are situated were of considerable extent, and embraced a stream of water including the Cascades and Twin Falls. These are small waterfalls on such stream. As compared with present times, the shipments and sales of water from the springs (now complainant's) were small, but still the business was carried on. No pains were taken with the grounds or springs, and no particular attention was given to making the hotel and surroundings attractive. It does not appear what amount of money is invested in complainant's hotel and cottages, bath and bottling house, but it is not very large. The evidence of sales and shipments of water from complainant's springs is that this commenced about 1868 to 1870, and that up to 1892 or 1894 the sales were made through a firm of druggists in Richmond, Va. The volume of business done up to 1894 or 1895, when the complainant came into the property, is not shown. At some time this property known as the "Healing Springs Property" was divided. The complainant became the owner of a small portion of the whole, containing what was formerly the main springs of the place, and one Jacob Rubino, who is defending this action, became the owner of the remainder, including the Cascades and the Twin Falls, and—what is quite important—a second group of springs on the undivided property when it and the springs took their name "Healing Springs." In one or more recent deeds of the Rubino property it has been spoken of as the "Little Healing Springs property, adjoining the Healing Springs property."

Mr. Rubino's springs have medicinal qualities quite similar to complainant's from which they are distant less than half a mile. Mr. Rubino has expended very large sums of money in laying out his grounds, building a hotel, etc., with baths and bathing houses, and is doing a very large business. He has advertised at very large expense, and evidently with good judgment. Before Mr. Rubino became the owner of these premises, this group of springs now owned by him had been generally known in that vicinity as "Little Healing Springs," or "New Healing Springs," and at one time two small cottages were built there; and the waters of these particular springs were quite generally utilized, but were not bottled or put on the market. The other springs were sometimes called "Old Healing Springs." This was undoubtedly done, when done, after the new or little springs came generally into use to distinguish them. When Mr. Rubino came into possession of this property and began his improvements, he named it "Rubino Healing Springs," and it has continued to be so known. He so advertises them. All along there has been a "Healing Springs Creek," known and called such, running through this property—the part now owned by defendant. In literature advertising these springs prior to 1894, we find a reference to "The Cascades of Healing Springs Creek." In the book by Walton published in 1883, and above referred to, we find the author, in giving a description of the properties of these Healing Springs, saying, "It [the water] has

been well named, as it finds appropriate application to all ulcerated conditions, whether of the skin or mucous membrane." He then describes the ulcers, etc., this water will cure or heal. The evidence shows that these springs were named "Healing Springs" because of the healing properties of the waters.

In complainant's Exhibit No. 12, advertising pamphlet for season of 1896 put out by A. M. Stimson, manager, we find pictures of "Healing Springs Hotel," "Cottages," "Cottage Row," "Lion Rock," "Through the Gap," "Healing Springs Falls," and "Cascade Healing Springs." Both the Falls and Cascade are on the property now owned by Rubino. On Rubino's labels he has a picture of these Falls somewhat changed, while on complainant's labels we find a picture of the Cascade. Both show a double waterfall, but the fall of the Cascade is slight as compared with that of the Falls. It is doubtful whether or not the picture of the "Healing Springs Falls" shows a double fall, but it is clear that the picture on Rubino's label is not made to imitate or intended to imitate that on complainant's label. In 1899 Rubino registered a trade-mark, No. 33,415. The material part reads:

"My trade-mark consists of the representation of waterfalls and surrounding shrubs and trees, with a stream in the foreground and mountains in the background. This has generally been arranged as shown in the accompanying fac simile, in which the representation has the appearance of a medallion bounded by a circular outline. The shape of the medallion may be changed without altering the character of the trade-mark, the essential feature of which is the representation of waterfalls and surrounding shrubs and trees, with a stream in the foreground and mountains in the background. This trade-mark has been continuously used in my business since July 1, 1897. The class of merchandise to which this trade-mark is appropriated is beverages, and the particular description of goods comprised in said class upon which I use the said trade-mark is mineral water. It is usually displayed on bottles, casks, and cans containing the goods by placing thereon a printed label on which the described trade-mark is shown."

This trade-mark is the modified picture of these falls. The background of mountains does not show in the advertisement of 1896, and it is not clear that such advertisement shows a double fall. Complainant has never used this as a trade-mark or as a mark to designate or distinguish its goods or waters. It was not made to imitate or simulate the Cascades of the complainant's label, nor does it simulate them. If it be a true picture of anything or of any natural object, it is something Rubino has the right to use. If it truly represents the "Healing Springs Falls" mentioned in the advertising pamphlet of 1896, and there shown, Rubino has the right to use it, if not used with a fraudulent intent, or a purpose to mislead and palm off on the public waters from Rubino's springs as water from complainant's springs, for it represents scenery on his own property, not appropriated or used as a trade-mark by the complainant. If complainant, before Rubino came into the market, and before he became the owner of the Falls, had appropriated as his trade-mark, whether registered or not, the picture of these Healing Springs Falls, it may be doubtful whether Rubino, on becoming the owner, would have had the right to adopt a picture of such Falls as his trade-mark. An interesting question would be

presented, but one not in this case—one not necessary to be decided here. It may seem hard to deprive a man of the right to use a picture or an engraving of a natural object on his own premises as he sees fit in advertising spring water coming from a spring on the same premises; but, if the owner of springs on lands formerly constituting part of the same premises has appropriated such picture as his trade-mark and used it without objection, it may be that he is to be protected, even as against the owner of the premises, and consequently the owner of the object itself. If the one picture was liable to be mistaken for the other, the use of it by the owner of the object might in some cases be a fact, with other facts, tending to establish unfair competition in trade. But all this is aside from the questions in this case. Complainant uses as its trade-mark an engraving on its labels, etc., of the "Healing Springs Cascades." Rubino, we will assume, uses as his trade-mark an engraving on his labels, etc., of the "Healing Springs Falls." It is not done with intent to mislead or defraud, nor alone can such use have that effect.

The complainant put out its bottles, etc., of water from its springs, with labels reading as follows:

"Healing Springs. A table & Medicinal Water. From the Great Thermal Region of the Appalachian Ranges.

"Analysis by Dickore & Morgan, Analytical Chemists, Cincinnati, O.

"Combinations.

"Magnesium Carbonate, 3.435 gr. per gallon.
"Magnesium Sulphate, 6.076 gr. per gallon.
"Calcium Sulphate, 2.380 gr. per gallon.
"Calcium Carbonate, 23.065 gr. per gallon.
"Sodium Sulphate, 1.673 gr. per gallon.
"Sodium Chloride, 0.143 gr. per gallon.
"Potassium Sulphate, 2.586 gr. per gallon.
"Potassium Chloride, 0.183 gr. per gallon.
"Lithia Carbonate, 0.0356 gr. per gallon.
"Ferrous Carbonate, 0.193 gr. per gallon.
"Alumina, 0.048 gr. per gallon.
"Silica, 2.677 gr. per gallon.

"Especially adapted to all forms of disease in which there exists torpidity of any of the organs connected with digestion; also of remarkable benefit in all affections of the skin.

"A delicious Table Water.

"For sale by leading druggists in the United States, or can be ordered direct from the Virginia Hot Springs Company, Hot Springs, Bath Co., Virginia."

In the center of this reading matter is found an engraving of the "Healing Springs Cascade." The label is nearly white.

In 1896 Rubino used this advertisement, viz.:

"Wait Orders. Wait Orders. Wait Orders. Wait Orders. Rubino Healing Springs Natural Lithia Water. From the Thermal Region of the Alleghany Mountains of Virginia, U. S. A. Analysis by Prof. Chas. F. Chandler, of Columbia College, N. Y. A perfect table and medicinal water. Also for sale at Acker, Merrall & Condit, and at Schoonmaker's Pharmacy, 42d St. & Park Avenue.

"Eliminates uric acid, aids digestion, prevents biliousness, strengthens the nervous system, conduces sleep, exceedingly efficacious in all forms of skin diseases; and is a specific in rheumatism and gout. Prescribed and recommended for 28 years by Dr. Henry S. Pole, resident physician, Hot Springs,

Bath County, Virginia. Testimonials and references from leading officials, business men and physicians.

"All communications addressed to The Rubino Healing Springs Co., Healing Springs, Bath County, Virginia. New York Agency & Salesroom, 7 W. 42d St."

He then used a "temporary label" as follows:

"Temporary Label.

"Lithia Water from the Rubino Healing Springs, Bath Co., Va. Eliminates uric acid, aids digestion, prevents biliousness, strengthens the nervous system, conduces sleep, exceedingly efficacious in all forms of skin diseases and is specific in rheumatism and gout.

"Prescribed and recommended for 28 years by Dr. Henry S. Pole, resident physician Hot Springs, Bath Co., Va.

"Rubino Healing Springs Co. Temporary New York Office: 3 Broad St., Drexel Building."

And then this label, viz.:

"Rubino Healing Springs Natural Lithia Water. From the Thermal Region of the Alleghany Mountains of Virginia, U. S. A. Analysis by Prof. Chas. F. Chandler of Columbia College, N. Y. A perfect table and medicinal water. For sale by all leading druggists and grocers. Eliminates uric acid, aids digestion, prevents biliousness, strengthens the nervous system, and is a specific in rheumatism and gout. Prescribed and recommended for 28 years by Dr. Henry S. Pole, resident physician, Hot Springs, Bath Co., Va.

"The Rubino Healing Springs Co., Healing Springs, Bath County, Virginia. New York Office, 56 West 45th St."

In the center of this we have an engraving of the double falls—it may be, of the "Healing Springs Falls."

Mr. Rubino has also put out advertising pamphlets and material reading in the heading, and on first page, as follows:

"Rubino Healing Springs Natural Lithia Water. Railroad Station, Hot Springs, Virginia, office and salesroom 7 West 42d St., New York City."

This address is changed to "56 West 45th St." He also says:

"Is unexcelled as a table water. Clubs and families will find in the Rubino Healing Springs Natural Lithia Water a delicious antidote for overindulgence in eating or drinking. * * * Each and every bottle bears the signature of the Rubino Healing Springs Company on the label across mouth of bottle."

In this and another advertising pamphlet Rubino gives the analysis of his water as follows:

"Analysis of Prof. Chas. F. Chandler, Columbia College, New York:

| | Grains per U. S. Gallon. |
|---|---|
| Sodium Chloride | 0.3215 |
| Sodium Sulphate | 2.7658 |
| Potassium Sulphate | 2.3436 |
| Calcium Sulphate | 6.4841 |
| Lithium Bicarbonate | 0.5167 |
| Strontium " " | trace |
| Calcium " " | 25.9330 |
| Magnesium " " | 12.8567 |
| Iron and Alumina | 0.1516 |
| Silica | 1.1956 |
| Total | 52.5686" |

On all of these advertisements we find Rubino's trade-mark—the double waterfalls, with stream in front and a background of mountains.

It will be noted that in this advertising label of the complainant's water there is no reference to "Lithia Water," while in the Rubino label not only are the words "Healing Springs" preceded by the word "Rubino," in the same large, conspicuous type, but followed by the words "Lithia Water." Then these labels are signed conspicuously by "The Rubino Healing Springs Co." It appears in some of the exhibits that on complainant's property there are two springs, the medicinal qualities or properties of which are substantially the same. See complainant's Exhibit 7, pp. 18, 25. Rubino has several springs, and in his advertising he speaks specially of springs 5 and 6 as "Lithia Water." After Mr. Rubino had come upon the market with his waters from his springs, and had put out his bottles or other containers with labels naming the water "Lithia Water," and stating among its properties "eliminates uric acid," the complainant changed its labels to imitate and compete successfully with Mr. Rubino by adding the words "Lithia Water" (words it had not before used), and by dropping the words "a delicious table water," and using the words "Uric Acid Solvent" (words not found in its prior labels, and suggested by Mr. Rubino's labels). Mr. Rubino on his labels placed the words as a signature and address: "The Rubino Healing Springs Co. Healing Springs, Bath County, Virginia. New York Office, 7 West 42d St."

Up to the time Rubino's labels appeared, complainant had said nothing in its labels of "Healing Springs, Virginia," except: "Healing Springs. A table and medicinal water. From the Great Thermal Region of the Appalachian Ranges"—and ending its label: "For sale by leading druggists in the United States, or can be ordered direct from the Virginia Hot Springs Company, Hot Springs, Bath Co. Virginia." These words of this label were as suggestive that the complainant's waters came from the Hot Springs as that they came from the Healing Springs. But now complainant changed its labels and also added the words "Healing Springs, Bath County, Virginia."

The evidence shows that there are several mineral springs, or springs with medicinal qualities, in different parts of the United States, known as "Healing Springs," and having that name. From the evidence in the case it appears clear to the court that instead of Mr. Rubino having done anything to imitate and palm off on the public the waters from his springs as water from the springs of complainant, or to deprive complainant of its trade and business, or to injure the complainant in its said business, or to confuse the public, he has done much to aid complainant in its business—much to bring the waters of complainant into prominence and into the market, and to give prominence to this Healing Springs section of Virginia. True, he does not use the word "Little" or "New." The complainant does not use the word "Old." All these springs are "Healing Springs." All these springs are at a place having a post office known as "Healing Springs." Mr. Rubino has prefaced the

word "Healing" with the word "Rubino," and he has added words "Lithia Water," and a trade-mark which so clearly distinguish and differentiate the waters he places on the market from those marketed by the complainant that the court fails to see how confusion can arise—how the complainant can be or is injured.

The complainant was idle from 1895 to 1896, or 1897, at the very latest, while Mr. Rubino was building up the springs, the locality, and the trade, and expended tens of thousands of dollars in the enterprise, and until November, 1903, when it filed this bill. In the meantime it was imitating and copying Rubino, appropriating his methods, and getting ideas from him. It imitated and copied his labels and mode of advertising, and his mode of filtering the waters. It comes into court too late, even if it ever had cause of complaint. The court finds and holds that Mr. Rubino has not intended to defraud or mislead or deceive the public, or take away any part of complainant's trade or indulge in unfair competition, and that his acts do not have those effects, or any one of them. The court also finds that the complainant has not only acquiesced in, but has copied and approved, Mr. Rubino's methods. That complainant has been guilty of such laches that it is estopped from maintaining this action. The labels and advertisements used by Mr. Rubino are so different from those of complainant that confusion and injury cannot arise. The use of the word "Rubino" before "Healing Springs," and of "Lithia Water," etc., sufficiently differentiates them. It is clear that complainant has no exclusive right to use the name "Healing" or "Healing Springs" in connection with the waters from these springs on this property now owned by complainant and by Rubino in two parcels. It had one owner, and was held as an entirety—an entire property—when it and the springs thereon took the name "Healing Springs." The defendant is simply selling the waters put up by Rubino, and, as he does not offend, the defendant does not. It is unnecessary to refer to the decided cases.

The defendant is entitled to a decree dismissing the complaint, with costs.

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## In re SHANKER.

(District Court, M. D. Pennsylvania. July 7, 1905.)

No. 524.

BANKRUPTCY—DISCHARGE—HEARING—ATTENDANCE OF BANKRUPT.

Under Bankr. Act July 1, 1898, c. 541, § 7, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], providing that the bankrupt shall attend the first meeting of his creditors if directed by the court or a judge thereof to do so, and the hearing on his application for a discharge if filed, the bankrupt's attendance before the referee on hearing of objections to his application for a discharge demanded by creditors cannot be dispensed with by the referee.

In Bankruptcy. On certificate from referee sur application of bankrupt for a discharge.

W. C. Kress and R. B. McCormick, for objecting creditors.
C. S. McCormick, for bankrupt.

ARCHBALD, District Judge. The bankrupt having applied for a discharge, and the case coming up for a hearing before the referee on objections thereto, the objecting creditors refused to proceed because the bankrupt was not in attendance. The referee, however, was of opinion that this was not necessary; and, not being convinced that any good would be accomplished by it (the bankrupt having been fully examined at the first meeting of creditors with regard to the matters covered by the objections), and believing that advantage was merely being taken of the fact that the bankrupt had fled the country because of having to pay the costs in a criminal case, he declined to require it. To this the creditors except, and the case is now brought here for review.

Among the duties enjoined by the bankruptcy act on the bankrupt (section 7, Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]) is that he "shall attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed." This apparently imposes upon him the absolute obligation to attend in the one instance, although not in the other, without an order; and, while there has been no express decision of the question, so far as I have been able to find, this is the accepted construction put upon it by the leading text-book writers upon the subject. Commenting upon this section of the act (this provision of it as well as others), it is said in Collier on Bankruptcy (5th Ed.) p. 103:

"Four things should be noted: (a) The bankrupt is not obliged to attend the first or any other meeting of creditors, unless ordered to do so; (b) if his home or usual place of business is more than one hundred and fifty miles from the place of meeting, he cannot be required to attend, save for cause shown; (c) if ordered to attend a meeting other than in the place of his residence, he is entitled to actual expenses out of the estate; and (d) that, none of these limitations seeming to apply to a hearing on a discharge, he must attend such a hearing wherever it is, and at his own expense, even though not ordered to do so."

So in Loveland on Bankruptcy (2d Ed.) § 212, it is said:

"It is the duty of the bankrupt to attend the hearing upon his application for a discharge, if filed, without an order of court, or service of notice or process. He cannot object to attending on account of the distance, where the hearing is at the recognized place of holding court."

While in Brandenburg on Bankruptcy (3d Ed.) § 210, this is assumed to be the effect of the statute, although there is no express deliverance with regard to it; it being observed that, where the bankrupt is dead, so that "it is impossible to comply with the requirement as to his personal attendance" at the hearing on his application for a discharge, the court or the referee may proceed notwithstanding his absence. The construction which is so adopted by these several authors is the natural and obvious one, and it is difficult to see how to escape it. The opposite construction is based upon the assumption that the qualifying words, "if directed by the court or a judge thereof to do so," which appear in the clause in question, apply to the hearing on the application for a discharge, the same as to the first meeting of creditors. In re Parker, 1 Am. Bankr. Rep. 615, 618. But this is not the way it reads, nor

is it the grammatical connection; and, while it is not an impossible construction, it is not the logical nor the natural one. Neither is it consistent with the proviso at the end of the section, where, as already noted in the quotation from Collier, it is declared that the bankrupt "shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him" (all of which duties are enjoined upon him in the preceding part of the section), "unless ordered by the court or a judge thereof, for cause shown;" in which connection it is further provided, that "the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town or village of his residence." No mention is here made of the hearing on an application for a discharge, although previously spoken of at the head of the section, and it certainly is not included in anything which is otherwise referred to. Such a hearing is not a meeting of creditors; nor is it essentially an examination of the bankrupt, although it may result in that. It is simply the occasion assigned for the trial of the issues raised by the exceptions to his discharge, in which, unlike the other proceedings subsequent to an adjudication, the bankrupt is an immediate and interested party. As such it is no hardship upon him to require that he shall be on hand to meet any demand in the way of evidence that may be made upon him, and it would be contrary to all rule if his attendance could only be procured by express order, for cause shown, at the expense of the estate (which in many cases, as here, would mean at the expense of creditors), where such hearing was not at the place of his residence. It is true that the testimony of the bankrupt taken at the first meeting of creditors may be used against him; but at that early stage in the proceedings the issues are not well defined, and the examination is more to secure information to be used in administering the estate than for the purpose of deciding anything. Neither are creditors confined to what is there elicited; while the separation of that which is relevant from that which is not, by a new examination, is likely to aid materially in the correct disposition of the questions raised. It may be, in the present instance, as intimated by the referee, that captious advantage is being taken of the absence of the bankrupt; but, if the parties are within their rights, we cannot go into motives. Neither can we say for a certainty that a further examination of the bankrupt will serve no purpose. The creditors call for it, and, as I read the law, they cannot be denied. If hardship seems to result, it is to be remembered that a discharge of the bankrupt from his debts is a large privilege, and, while it cannot be refused, where the law has been complied with, except upon the grounds there mentioned, yet the steps leading up to it must be followed before it can be claimed of right.

It follows that the bankrupt must attend before the referee at the further hearing upon his application for a discharge, on being given opportunity therefor, and that upon his failure to do so, the application must be dismissed. And it is so ordered.

## TABER v. TRUSTEES OF STATE HOSPITAL FOR INSANE OF SOUTHEASTERN DIST. OF PENNSYLVANIA.

(Circuit Court of Appeals, Third Circuit. June 16, 1905.)

No. 3.

MASTER AND SERVANT—IMPLIED RENEWAL OF EMPLOYMENT—ACTION OF BOARD OF TRUSTEES.

Plaintiff was elected resident physician for a state hospital for the insane, for several terms of one year each. At the expiration of one of such terms the board of trustees postponed action on the election of a physician, and continued to postpone the matter for several meetings, when a successor to plaintiff was elected, and she was notified of such fact. She had full knowledge of the action taken at each meeting. *Held* that, under such circumstances, there was no implied contract employing plaintiff for another year, but at the expiration of the year for which she had been elected her employment was subject to termination at any time either by the board or by herself.

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

See 127 Fed. 174.

Charles A. Chase, for plaintiff in error.

J. S. Prichard, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The plaintiff in error brought an action against the defendants in error to recover $2,072.50, with interest, which she claimed to be due and owing to her by reason of her removal from the position of resident female physician of the State Hospital for the Insane of the Southeastern District of Pennsylvania. The court below directed a verdict for the defendants, which was accordingly rendered, and, judgment thereon having been duly entered, this writ of error was sued out.

The facts were undisputed, and may be briefly summarized. The plaintiff was appointed resident female physician of the hospital on October 1, 1896, for one year. She was re-elected in October of 1897, of 1898, and of 1899, and in each instance for one year. At the annual meeting of the board in October, 1900, when, in the usual course, the election of such physician for the then ensuing year would have taken place, the election was "postponed for the present." A meeting was held in November, 1900, at which, so far as appears, nothing material transpired; another in December, 1900, at which the secretary was authorized to advertise for a resident female physician, "and submit the application to the board at the stated meeting January 4, 1901"; and another on January 4, 1901, at which an election was entered upon, but no choice made; and, finally, there was a meeting upon January 18, 1901 (to which time the meeting of January 4, 1901, had been adjourned), at which the following resolution was adopted by the board:

"That the secretary notify Susan J. Taber that the board of trustees, at a meeting held this day, elected as her successor, as chief resident physician of the female department, Dr. Mary M. Wolf, to enter upon her duties Feb-

ruary 1, 1901; and that Dr. Taber be further notified to deliver to Dr. Wolf on that date all the books, papers, records, and property of the hospital in her possession."

As stated in the brief filed on her behalf:

"The claim of the plaintiff in error here is that having failed to dismiss her from the office which she held at the expiration of the year, but allowing her to remain in the exercise of the duties of her office, was, in legal effect, an employment for another year; and that the dismissal on the 1st day of February, 1901, was in violation of her contract with the hospital, and that she is entitled to recover the balance of her yearly salary, and a sum sufficient to cover her living expenses for the balance of the year."

The legal proposition which has been invoked to support this claim is inapplicable to the present case. It is true, no doubt, that where a person employed for one year continues in the employment, by mutual acquiesence, after the expiration of the year, the inference ordinarily is that the term of the employment has been extended for another period of one year; but in this instance that inference cannot be deduced. No renewal of the plaintiff's employment for any fixed period can be implied, because the established facts do not admit of it. She was not re-elected in October, 1900, and she knew it. She was informed, too, of all the proceedings which have been referred to, from time to time as they occurred. They were contemporaneously recorded in the minutes of the board, and she testified that she always looked at the minutes; that it was part of her duty to do so. She saw fit to remain in her position with full knowledge that the question of her re-election was an open one, and she could not have failed to understand that, until an election should actually take place, her employment was but temporary, and subject to termination at any time, either by the board or by herself. She had no ground whatever for supposing that, if not re-elected, she would be retained precisely as if she had been; and her contention that there was, in legal effect, an employment for another year, is without force, because the implication of an agreement to that effect is absolutely precluded by the circumstances which the evidence conclusively disclosed.

The second section of the Pennsylvania statute of June 4, 1879 (P. L. 98), to which our attention has been called, provides that the appointment of a female physician for such a hospital as this shall be for a term not exceeding five years, and that she shall not be subject to removal within that term, except for cause. But as the plaintiff was not removed within any term for which she had been appointed, this provision is wholly irrelevant.

The judgment of the Circuit Court is affirmed.

## SWIFT & CO. v. JOHNSON.

(Circuit Court of Appeals, Eighth Circuit. June 24, 1905.)

No. 1,991.

1. DEATH BY WRONGFUL ACT—RIGHT OF RECOVERY—COMMON LAW—STATUTES.
By the common law no action lies for an injury resulting in death. Where a right of action is given by statute, an action can be maintained only for the benefit of the persons named in the statute, and then only for the recovery of such damages as are contemplated by it.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 10, 11.]

2. SAME—MINNESOTA STATUTE—BENEFICIARIES—DAMAGES.
The right of action given by the Minnesota statute is for the exclusive benefit of (a) those who have demands for the support of the deceased during the time, if any, intervening between his injury and his death; (b) those who have demands for his funeral expenses; and (c) the widow and next of kin. Where the deceased leaves no widow or child, the Minnesota statute makes the father, if living, the sole next of kin, to the exclusion of a surviving mother and sister. The damages which may be recovered under the Minnesota statute for the benefit of whoever may be next of kin is limited to compensation for the loss of such pecuniary benefit as could have been reasonably expected to result to the beneficiary or beneficiaries, as of legal right or otherwise, from the continued life of the deceased, excluding all consideration of punitive elements, loss of society, wounded feelings of the survivors, and suffering of the deceased.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 35–48, 112.]

3. SAME—TRIAL—RULINGS CALCULATED TO CAUSE JURY TO GIVE CONSIDERATION TO LOSS OF OTHERS THAN LEGAL BENEFICIARY.
In an action to recover for death by wrongful act, where the father is the sole beneficiary and the recovery will be for his exclusive benefit, the admission of evidence of the mother's expectancy of life, and other rulings calculated to cause the jury to believe that any recovery will or can be so distributed by the probate court that the mother may participate in the distribution, are prejudicial to the defendant, and clearly entitle it to have the jury plainly instructed in the final charge that no damages can be given for any loss sustained by the mother, and that no part of the recovery will be for her benefit.

4. SAME—INFANTS—EMANCIPATION.
Where deceased's father willfully abandoned him when nine years of age, and contributed nothing to his support up to the time of his death, a period of seven years, during which he was obliged to support himself, the law implies an emancipation, and recalls the father's right to the child's services and earnings.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, § 167.]

5. SAME—PECUNIARY LOSS MUST APPEAR BY EVIDENCE AND CANNOT BE MERELY CONJECTURED.
The law, in confining the compensation to the pecuniary loss, does not run along the lines of the imaginary and the possible, but rather along the lines of the actual and the probable, and therefore the loss must be made to appear by the evidence. Conjecture cannot supply the absence of evidence, or avoid the effect of evidence which is presented.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 55–57, 502, 509.]

6. SAME—REASONABLE EXPECTATION OF PECUNIARY BENEFIT FROM CONTINUANCE OF LIFE—EVIDENCE.
Where a father willfully abandoned his family, including deceased, then nine years of age, and did not communicate with them or contribute

anything to their support up to the time of the death of the deceased, a period of seven years, and where the deceased actually turned all of his earnings over to his mother, to be used for the support of his younger sister and himself, evidence that prior to his death deceased had made statements that, if his father was in need of anything, he would give him a dollar, or something, and that he would always carry money in his pocket, and, if he ever met his father, he would offer him money, if he would take it, while affording basis for conjecture respecting a possible restoration of the natural relations of father and son, had the son lived, was too unsubstantial to sustain a finding by the jury of a reasonable expectation that the continued life of the son would have been of pecuniary benefit to the father.

7. SAME—DIRECTED VERDICT FOR NOMINAL DAMAGES.

Where an action to recover for the death of a minor son is prosecuted for the sole benefit of the father, who is conclusively shown to have lost his legal right to the services and earnings of the son during his minority, and where, apart from this legal right, there is no substantial evidence of a reasonable expectation of pecuniary benefit to the father from the continued life of the son, the recovery should be limited to nominal damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 97.]

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

This was an action by an administratrix, on behalf of the next of kin, to recover damages for the death of her intestate. There was substantial evidence tending to show that the death resulted from an injury caused by the negligence of the defendant, which would have given the deceased a right of recovery, had he lived. The injury and death occurred at South St. Paul, Minn., March 13, 1903. The deceased was about 17 years of age, and left surviving him a father, aged 38 or 39 years, a mother, and a younger sister, but no widow or child. In 1896 the father informed the mother that she must go out washing, and that he would not provide for her or the children. He then separated from them, and did not thereafter contribute anything to their support or have any communication with them, save that on one occasion he inquired of the son if he liked the work which he was doing, and told him to be good, and on another occasion gave him 50 cents. After the separation the children lived with the mother, who for the next three or four years supported them and herself by the proceeds of such employment as she could obtain. She then obtained a divorce and married again, the children continuing to live with her as before. From about that time the son had regular employment, and gave all of his earnings to his mother, who used them chiefly in supporting the children. At the time of his death he was earning $45 per month. He was a strong and industrious lad, of fair education for one of his opportunities, and with a strong affection for his mother and sister. The only evidence respecting the son's disposition toward his father was this: The mother testified: "I don't know if he gave him anything. I don't know; but he said, if his father was in need of anything, he should give him a dollar." "He would very seldom speak of him. He always said, if his father was in need of anything he would give him something." And another witness, intimately acquainted with the family, and who had seen the son frequently, testified: "Q. Did you ever hear him express his feelings toward his father? A. Not until I spoke about how destitute his father was, and that I had got him some things. He said he would always carry money in his pocket, and, if he ever met his father, he would offer him money, if he would take it." When the father separated from the family he was a saloonkeeper at South St. Paul, was greatly addicted to the excessive use of liquor, and when intoxicated was inclined to use harsh and unkind language toward his wife and children. He was improvident and squandered whatever came into his hands. In 1901 he was still in South St. Paul, but doing nothing. In the spring of 1902 he was in destitute circumstances at Hastings, Minn., where he obtained employment until November of that year, when he received about $200 in wages, and went away with the purpose to

engage in the saloon business elsewhere. What became of him after leaving Hastings is not shown. During his employment at that place he remained sober, and was heard to speak affectionately of his children, but he did nothing toward resuming his parental duties, or toward restoring between himself and his children the natural and usual relations of parent and child. It does not appear that he took any interest in the prosecution of the action by the administratrix, or that he even knew of the death of the son. There was a verdict and judgment for plaintiff for $2,500, which defendant seeks to have reversed upon this writ of error.

Robert E. Olds (Frank B. Kellogg, C. A. Severance, Alfred H. Veeder, and Henry Veeder, on the brief), for plaintiff in error.

S. C. Olmstead, for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

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

The principal questions presented upon this record are: (1) For whose benefit was the action maintainable? (2) What was the proper measure of recovery?

By the common law no action lies for an injury resulting in death, but the state of Minnesota, like most or all of the other states, has enacted a statute, modeled after Lord Campbell's act in England, which modifies the common-law rule, and authorizes the maintenance of such an action. Gen. St. 1894, § 5913. Being entirely statutory, the action can be maintained only for the benefit of the persons specified in the statute, and then only for the recovery of such damages as are contemplated by it. Nash v. Tousley, 28 Minn. 5, 8 N. W. 875; Scheffler v. Minneapolis & St. Louis Ry. Co., 32 Minn. 125, 19 N. W. 656; St. Louis, Iron Mountain & Southern Ry. Co. v. Needham, 3 C. C. A. 129, 52 Fed. 371; Western Union Telegraph Co. v. McGill, 6 C. C. A. 521, 57 Fed. 699, 21 L. R. A. 818; Sanders v. Louisville, etc., Co., 49 C. C. A. 565, 111 Fed. 708. Repeated and uniform decisions of the highest court of the state have given to the statute a settled meaning and effect, which may be summarized as follows: The right of action which the statute creates is for the exclusive benefit of (a) those who have demands for the support of the deceased during the time, if any, intervening between his injury and his death; (b) those who have demands for his funeral expenses; and (c) the widow and next of kin. The damages recoverable for the benefit of the widow and next of kin are confined to compensation for their strictly pecuniary loss, excluding all consideration of punitive elements, loss of society, wounded feelings of the survivors, and suffering of the deceased; and the extent of the loss is to be determined solely with reference to the pecuniary benefit reasonably expected by the widow and next of kin, as of legal right or otherwise, from the continued life of the deceased. Shaber v. St. Paul, Minneapolis & Manitoba Ry. Co., 28 Minn. 103, 107, 9 N. W. 575; Scheffler v. Minneapolis & St. Louis Ry. Co., 32 Minn. 518, 21 N. W. 711; Robel v. Chicago, Milwaukee & St. Paul Ry. Co., 35 Minn. 84, 89, 27 N. W. 305; Bolinger v. St. Paul & Duluth R. Co., 36 Minn. 418, 31 N. W. 856,

1 Am. St. Rep. 680; Hutchins v. St. Paul, Minneapolis & Manitoba Ry. Co., 44 Minn. 5, 9, 46 N. W. 79; Gunderson v. Northwestern Elevator Co., 47 Minn. 161, 164, 49 N. W. 694; State ex rel. v. Probate Court of Dakota County, 51 Minn. 241, 53 N. W. 463; Sykora v. Case Threshing Machine Co., 59 Minn. 130, 60 N. W. 1008; Sieber v. Great Northern Ry. Co., 76 Minn. 269, 275, 79 N. W. 95; Foot v. Great Northern Ry. Co., 81 Minn. 493, 84 N. W. 342, 52 L. R. A. 354, 83 Am. St. Rep. 395. As a matter of pleading, it is also settled by the decisions of the state court that a complaint does not show a right of recovery in respect of a widow or next of kin unless it alleges (stating names and how related) that the deceased left a widow or next of kin, who are entitled to compensation, and does not show a right of recovery in respect of demands for the support of the deceased or for his funeral expenses unless it alleges that there are such demands. Schwarz v. Judd, 28 Minn. 371, 10 N. W. 208; Sykora v. Case Threshing Machine Co., supra; Barnum v. Chicago, Milwaukee & St. Paul Ry. Co., 30 Minn. 661, 16 N. W. 364.

The deceased left no widow or child, but was survived by a father, mother, and younger sister. In these circumstances, the statutes of the state make the father the sole next of kin. Gen. St. 1894, § 4477, cl. 6; Id., § 4471, cl. 3. The complaint contains no allegation of the existence of any demand for the support of the deceased between his injury and his death, or for his funeral expenses, and no evidence upon that subject was offered at the trial. The action was maintainable, therefore, exclusively for the benefit of the father, and without any regard to the loss sustained by the mother or sister, because as respects their loss no right of recovery exists by the common law or by the statute.

It is said in the brief of counsel for the administratrix:

"It was not questioned upon the trial, and is not questioned now, that a surviving father is the next of kin to his child, under the statutes of the state of Minnesota, and that the damages recoverable are to be regarded as wholly compensatory for the father's pecuniary loss."

But this statement is not fairly sustained by the record. The complaint alleges:

"That at the time of his death said Charles Benson was an infant of the age of sixteen years on the 6th day of April, 1902. That he was unmarried, and left surviving him his father, August Benson, and his mother, Mathilda Johnson. That his said father and mother, and each of them, have been damaged by and through the death of said Charles Benson in the sum of five thousand dollars."

And among the things occurring at the trial were these:

The plaintiff, over the defendant's objection, was permitted to introduce evidence of the mother's expectation of life. The defendant sought to show what had become of the father after his separation from the family, and in ruling upon the plaintiff's objection thereto the court observed:

"Generally the 'next of kin' means nearest of blood, and there certainly could be no person nearer to the plaintiff than his mother; and if the authority cited by the judge in the case (Thompson v. Chicago, etc., Co. [C. C.] 104 Fed. 845) which I refer to is correct—that the father has ceased to have

any right to the services of the son while the latter remains a minor, but that the mother, from the fact that she continues to perform her parental duties, is entitled to his services—it seems to me as though that ought to place her in the condition or position with reference to the child which the father has given up and surrendered. But it is not the duty of this court to distribute, or to indicate what should be the proper distribution of, the damages, if any are recoverable in a case of this kind. That is a matter for the court to which the administratrix is answerable. A verdict covering an amount which any beneficiaries may be entitled to recover under the statute is for a gross sum."

In that connection, counsel for the defendant inquired, "Do I understand your honor to rule upon this question whether the father is the next of kin in this case?" and the court responded, "No; I do not rule upon that. I think it is immaterial." At the conclusion of the evidence, and before the instructions to the jury were given, these statements were made:

"The Court: In this state, especially in view of the language in this very act—that the recovery shall be distributed the same as the personal property of the deceased would be distributed under the laws of the state—I think, under that statute, the father, if living, would be the next of kin. Mr. Olmstead (for plaintiff): I think I will have to concede that, whatever money may be recovered in this action, the title to it would stand in the father. The Court: I think, as far as the distribution of the money is concerned, that is a matter that the court which has charge of the administration can attend to."

Thus, by the allegations of the complaint, and by the introduction of evidence of the mother's expectation of life, the plaintiff asserted a right to have the recovery include compensation for the mother's loss, or at least to have the amount of the recovery computed and determined with some regard to her loss; and in the course of the trial this contention received the approval of the court to a degree which was well calculated to make a strong impression upon the minds of the jurors, to cause them to give attention to the testimony bearing upon the mother's loss, to arouse their sympathies in her behalf (she being the administratrix and a principal witness), and to produce an award of damages in an amount which would enable her to obtain some substantial benefit therefrom through a distribution which it was indicated would be made by the state court exercising probate jurisdiction. The jurors could hardly have failed to understand that "distribution" meant division; and yet there could be no distribution of the recovery, in the sense of a division, because there was but a single beneficiary (the father), and the recovery, whatever the amount, would be for his exclusive benefit, as compensation for his pecuniary loss, and none other. The concession made by counsel for the plaintiff was not calculated to correct the erroneous impression theretofore conveyed to the jurors, because, when considered with the observation made by the court at the time, the concession was to the effect that the title—counsel immediately spoke of it as "the legal title"—to the money recovered would be in the father, but that the money would still be subject to distribution; in other words, the jurors were still left to infer that there would be a disposition or division of the money, in which the mother would or might be a participant and beneficiary.

Conceiving that the admission of evidence of the mother's expectation of life and the recognition which had been given to her loss and claim to compensation would operate prejudicially to it, the defendant requested the court to affirmatively charge the jury that no damages could be given for any loss sustained by the mother, and that no part of the recovery would be for her benefit. The request was refused, and error is assigned upon that ruling. The request should have been granted. The admission of evidence of the mother's expectation of life was error, and the recognition which was given to her loss and claim to compensation plainly tended to operate prejudicially to the defendant. When, in the course of a jury trial, inadmissible evidence is admitted, or erroneous rulings are made, or incorrect opinions are expressed by the court, which are calculated to attract the attention of the jury to matters outside of the issues, or to otherwise operate prejudicially to either party, it is clearly the right of that party to have the jury plainly instructed in the final charge in a manner which will distinctly withdraw the objectionable evidence from their consideration, remove from their minds any erroneous impression arising from the mistaken rulings or opinions, and prevent any resultant prejudice. St. Louis & San Francisco Ry. Co. v. Farr, 6 C. C. A. 211, 216, 56 Fed. 994, 1000; Pennsylvania Co. v. Roy, 102 U. S. 451, 460, 26 L. Ed. 141; Waldron v. Waldron, 156 U. S. 361, 383, 15 Sup. Ct. 383, 39 L. Ed. 453; Washington Gaslight Co. v. Lansden, 172 U. S. 534, 555, 19 Sup. Ct. 296, 43 L. Ed. 543; Throckmorton v. Holt, 180 U. S. 552, 567, 21 Sup. Ct. 474, 45 L. Ed. 663. It is said that the error was corrected, the jury properly enlightened, and prejudice prevented, by the court's final charge, in which the jury were told that the statute gave a right of action to the administratrix for the benefit of the next of kin, that the amount recoverable was the pecuniary loss to the next of kin, and that the next of kin was the father. Probably this instruction would have been sufficient if the matter had not been previously put before the jury in a manner calculated to mislead them, but the circumstances required something better designed to correct the previous error or mistake—something which the jury would plainly recognize as intended to entirely withdraw from their consideration the mother's loss, and all expectation that she would or might participate in the recovery through its distribution by another court.

Error is also assigned upon the court's refusal to give an instruction requested by the defendant limiting the recovery to nominal damages. The correctness of the ruling depends upon two questions: (1) Did the evidence conclusively establish that the father had lost his legal right to the services and earnings of the son during his minority? (2) Apart from this legal right, was there any substantial evidence of a reasonable expectation of pecuniary benefit to the father from a continuance of the life of the son?

Generally the father, as head of the family, is entitled to the services of his minor children, or to their earnings, if by his permission they are employed by others. He is also under obligation

to support his children during their minority. The right and obligation are correlative, and where the father neglects or refuses to support his child, denies him a home, or abandons him, so that he is obliged to support himself, the law implies an emancipation, and recalls the father's right to the child's services and earnings. Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Wodell v. Coggeshall, 2 Metc. (Mass.) 89, 35 Am. Dec. 391; McCarthy v. Boston & Lowell R. R., 148 Mass. 550, 20 N. E. 182, 2 L. R. A. 608; Farrell v. Farrell, 3 Houst. 633; McGarr v. National & Providence Worsted Mills, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122, 96 Am. St. Rep. 749; Nugent v. Powell, 4 Wyo. 173, 194, 33 Pac. 23, 20 L. R. A. 199, 62 Am. St. Rep. 17; Winslow v. State (Ala.) 9 South. 728; Savannah, etc., Co. v. Smith (Ga.) 21 S. E. 157; Clark v. Northern Pacific Ry. Co. (Wash.) 69 Pac. 639, 59 L. R. A. 508; Thompson v. Chicago, etc., Co. (C. C.) 104 Fed. 845.

Without conflict, the evidence established these facts: The father had willfully abandoned his family when the son was nine years of age, and the daughter six. He had wrongfully cast the burden of supporting the children upon the mother, whom he left in necessitous circumstances. He had thus obliged the son, when far within his minority, to obtain employment and assist in the support of himself and sister. He had wholly neglected his paternal obligation for a period of seven years preceding the son's death. His neglect had been the same whether he was employed or unemployed, and whether he was free from the influence of intoxicants or under their influence; and his neglect had been intensified by an almost absolute cessation of communication with his children. No other conclusion was permissible under the evidence than that there had been an emancipation of the son, and that the father had forfeited and lost the right which otherwise he would have had to the son's services and earnings during his minority.

As the extent of the loss which is intended to be compensated under the statute is not to be determined solely by the legal rights of the beneficiary, but with reference to the pecuniary benefit which he may have reasonably expected, as of legal right or otherwise, it is yet to be considered whether or not there was any substantial evidence of a reasonable expectation of pecuniary benefit to the father, otherwise than as of legal right. The law, in confining the compensation to the pecuniary loss, does not run along the lines of the imaginary and the possible, but rather along the lines of the actual and the probable, and therefore the reasonable expectation must be made to appear by the evidence. Conjecture, speculation, and fancy cannot supply the absence of evidence, or avoid the effect of the evidence which is presented. The conditions surrounding the beneficiary and the deceased at the time of the death, their past relations, and the law of human experience are the sole criteria of the expectation and of its reasonableness. Other conditions or changed relations, not reasonably probable, cannot be conjectured and assumed merely because of the possibility of their accomplishment and their conformity to higher ideals.

As was said by Mr. Justice Brewer, when a member of the Supreme Court of Kansas:

"The enigma of the future of a life is not to be solved by the mere matter of faith and hope, or even by the natural possibilities of accomplishment, but mainly and chiefly by the experiences of the past, and what the life has already been." Atchison, etc., Co. v. Brown, 26 Kan. 443, 460.

The natural influence or prompting of kinship is always an important factor in cases like this, and is to be carefully considered, but it is not controlling. A father can have no reasonable expectation of pecuniary benefit from the continued life of a son who, although possessing a strong filial love, is without property and is incapacitated from labor of all kinds, or who, although possessed of property or earning capacity, has unmistakably shown that he is insensible to the natural influence or prompting of kinship. So, also, a father who willfully abandons a minor son, and for several years proves insensible to every legal, moral, and natural obligation to him, can have no reasonable expectation of pecuniary benefit from his continued life while that situation continues. The case before us is of this type. The evidence is without conflict, and has been already commented upon. The father not only willfully abandoned his son, but the circumstances of the abandonment and of its continuance for seven years unmistakably show that he was insensible to the influence and prompting of kinship; that he was an unnatural father. More than that, the mother and sister, in consequence of their abandonment by the father, had naturally and deservedly become objects of the son's special consideration; and it was reasonably probable that he would be disposed to employ his surplus means, if any, in administering to their wants and comfort. He was without property, his opportunities had been restricted, and his earning capacity did not reasonably promise to be large. There was also the possibility, if not probability, that he would marry and have a family of his own, for whose support he would be obligated both legally and morally. These matters precluded a reasonable expectation that his continued life would be of pecuniary benefit to the father.

As is shown in the statement preceding this opinion, there was some evidence that the father and son retained some affection each for the other; and it is urged that, had the son lived, the natural relations of father and son might have been restored. A restoration was possible, but this evidence was too slight to overcome the effect of the seven years of willful abandonment, neglect, and separation. It afforded a basis for conjecture, but not for belief. Notwithstanding these transient manifestations of affection, there was no resumption of communication between the father and the son. The father remained utterly indifferent to his legal, moral, and natural obligations, and the son continued to turn all of his earnings over to his mother. Contrasted with the character and duration of the abandonment, neglect, and separation, the evidence of continued affection was at best only a scintilla, and was not sufficient to make its effect a question for the jury. In the federal courts, when the evidence upon a question of fact is so clearly prepon-

derant 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 the duty of the court to withdraw the question from the jury and direct their finding; and thus, before the question of fact is submitted to the jury, a preliminary question of law always arises for the decision of the court, and that question is not whether there is literally no evidence, but whether there is any substantial evidence, the consideration of which is properly within the province of the jury. Chicago, St. P., M. & O. Ry. Co. v. Belliwith, 28 C. C. A. 358, 83 Fed. 437; Patillo v. Allen-West Commission Co., 65 C. C. A. 508, 131 Fed. 680; Improvement Co. v. Munson, 14 Wall. 442, 448, 20 L. Ed. 867; Commissioners v. Clark, 94 U. S. 278, 24 L. Ed. 59; Randall v. Baltimore & Ohio R. Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; Southern Pacific Co. v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485; Coughran v. Bigelow, 164 U. S. 301, 307, 17 Sup. Ct. 117, 41 L. Ed. 442; Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

Decisions of the Supreme Court of Minnesota are referred to as indicating that, notwithstanding the conditions surrounding the father and son at the time of the latter's death, and their past relations, it was permissible for the jury to speculate upon the restoration of the natural relations of father and son, and, because of its possibility, to award substantial damages for the father's benefit. There are expressions in some of the decisions of the state court which, taken by themselves, give slight color to the contention; but certainly the better, if not the only permissible, view of these expressions is that they refer, perhaps not happily, to the difficulty of getting at the amount of the damages with precision and accuracy, and are not at all intended to declare that the right to damages or their amount may be rested upon so uncertain a basis as mere speculation upon possible—not reasonably probable—occurrences in the future. The nature of the question justifies a statement of what has been said by the state court respecting it. In Scheffler v. Minneapolis & St. Louis Ry. Co., supra, it is said:

"Any estimate of the pecuniary benefit which will be derived by the next of kin from the continuance in life of a child who dies at the age of 18 months must be little, if any, better than mere guesswork, yet the statute appears to authorize an action even in such a case."

In Robel v. Chicago, Milwaukee & St. Paul Ry. Co., supra, it is said:

"Obviously and necessarily the amount of such damages must in any case be to a great extent conjectural, and much must be left to the judgment of the jury."

But it is to be observed that it is also said in that case:

"But the statute contemplates an assessment of damages, and not a merely arbitrary award. Such assessment must be based upon the reasonable expectation of benefit to the surviving next of kin from the life of the deceased. Where such beneficiaries were so related to him that they would not have been legally entitled to support, service, or contribution from him, it may be accepted as the law that no substantial recovery can be had without proof of such facts and circumstances as render it probable that actual and sub-

stantial benefit would have accrued to them from his continued life. * * * Although the evidence in this case was exceedingly meager, yet, in view of the facts that the father of Robel would have been entitled to the fruits of his labor for a period of nine months subsequent to the time of his death, and that Robel was actually engaged in an active employment, presumably yielding compensation, we think that a recovery might have been had of more than a merely nominal amount."

It is said in Gunderson v. Northwestern Elevator Co., supra, that:

"The question of damages must in such cases be committed largely to the sound practical sense and fair judgment of the jury," and that "in the case of a minor child the recovery is not limited to the probable value of the services or earnings during his minority, but may also include the reasonable expectation of pecuniary benefit beyond that period."

But it is to be observed that it is also said in that case:

"It must however be determined judicially and upon the evidence, and the damages assessed must be reasonably appropriate to the case made by it, and are not left to the uncontrolled discretion of the jury."

And in Sieber v. Great Northern Ry. Co., supra, it is said: "But at best the amount of damages must be largely a matter of conjecture," but in the same connection it is also said:

"It is undoubtedly true that the reasonable character of the expectation of pecuniary benefit from the continued life of the deceased and of the probable amount of that benefit must appear from the facts in proof."

The true meaning of these decisions is indicated in Bolinger v. St. Paul & Duluth R. Co., supra, where it is said: "The determination of the amount of damages however must be a judicial one, and is not left to the uncontrolled discretion of the jury," and in Hutchins v. St. Paul, Minneapolis & Manitoba Ry. Co., supra, where it is said:

"But even in those cases the determination of the amount of damages is by no means left to the uncontrolled discretion of the jury. Their estimate must be based on facts in evidence." And also: "True, it is possible that he [deceased] might have become more thrifty in future, but this was not at all probable, in view of his age and past history. He might have met with some extraordinary streak of good luck, such as the discovery of a valuable mine or drawing a large prize in a lottery, but these contingencies are altogether too speculative to form a legitimate basis for an estimate of damages."

This statement of what has been said by the Supreme Court of the state shows the rule of that court to be that the right to substantial damages and their amount must be determined judicially, not arbitrarily, and must be determined upon the evidence, and not upon mere speculation, conjecture, or fancy. But if the decisions of that court were properly susceptible of the interpretation suggested, but not acceded to, they would not in that respect be obligatory upon this court. The state court has uniformly held that the statute authorizes the recovery of compensatory damages only, excluding all punitive elements, and this court is therefore controlled by the rule of general law applied by the federal courts, which, in respect of the right to and the assessment of purely compensatory damages, excludes all consideration of matters which rest in speculation, conjecture, or fancy. Richmond & Danville R. Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728; Boston & Albany

R. Co. v. O'Reilly, 158 U. S. 334, 336, 15 Sup. Ct. 830, 39 L. Ed. 1006; Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96; Chicago & Northwestern R. Co. v. De Clow, 61 C. C. A. 34, 124 Fed. 142.

Because the evidence conclusively established that the father had lost his legal right to the services and earnings of the son during his minority, and because, apart from this legal right, there was no substantial evidence of a reasonable expectation of pecuniary benefit to the father from a continuance of the life of the son, the instruction limiting the recovery to nominal damages should have been given. Atchison, Topeka & San Fé R. Co. v. Weber, 33 Kan. 543, 551, 6 Pac. 877, 52 Am. Rep. 543; Coal Co. v. Limb, 47 Kan. 469, 471, 28 Pac. 181.

By the common law an adult child is under no legal obligation to support either parent, but by statute the state of Minnesota imposes an obligation upon children, if of sufficient ability, to support dependent parents residing in that state. Gen. St. 1894, §§ 1951, 1952. No reference to this statute, or claim under it, seems to have been made or considered in the court below, and none has been made in this court; nor has it been claimed that the father was a resident of Minnesota at the time of the son's death. Therefore the effect of the statute in a case to which it would be applicable has not been considered.

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

HOOK, Circuit Judge (specially concurring). I concur in the reversal of the judgment in this case upon the ground that, being influenced by the evidence and the rulings of the court, the jury probably included in their award of damages the pecuniary loss of others than the next of kin, and that it was not made sufficiently clear to them that they should not do so.

## SHARP v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 12, 1905.)

No. 2,070.

1. FEDERAL OFFICERS—BRIBERY—INDIAN LANDS—LEASE—INDICTMENT—CERTAINTY.

Where an indictment against a United States Indian agent for bribery alleged that he, having charge of the execution and completion of certain leases for certain tracts of land in a specified Indian reservation, commonly known as the Ponca Pasture, etc., feloniously and corruptly accepted and received the sum of $1,500 from one A. for the purpose of influencing his action on the completion of such leases—the subject-matter of the leases being mere matter of inducement, and the gravamen of the offense the acceptance of and the asking of the bribe—the indictment was not defective for failure to describe the leases with sufficient certainty.

2. SAME—POWER OF AGENT.

Rev. St. U. S. § 2058, provides that each Indian agent within his agency shall manage and superintend the intercourse with the Indians, and execute and perform all regulations and duties not inconsistent with the law that may be prescribed by the President, Secretary of the Interior, or Commissioner or Superintendent of Indian Affairs. Act Cong. Feb. 28, 1891, 26 Stat. 795, c. 383, § 3, Supp. Rev. St. U. S. pp. 897, 898, provides that where purchased lands occupied by Indians are not needed for farming or agricultural purposes, or desired for individual allotments, they may be leased, by authority of the council, on such terms and conditions "as the agent in charge of the reservation may recommend," subject to the approval of the Secretary of the Interior. *Held*, that an Indian agent, in the execution and completion of leases of such land, was charged with such an official trust that his receiving a bribe to influence his official action thereon rendered him subject to punishment under Rev. St. U. S. § 5501 [U. S. Comp. St. 1901, p. 3709], providing that every officer or person acting for or on behalf of the United States in any official capacity, etc., who asks or accepts any money, etc., with intent to have his action on any question pending before him in his official capacity or in his place of trust or profit influenced thereby, shall be punished.

3. SAME—GRAND JURY—SELECTION.

Where the clerk, in sending to the judges of election the number of jurors to be drawn from the ballot boxes, failed to accompany it with the form of oath to be taken by the judges, as required by St. 1893, § 3098 (6), and the clerk, prior to the general election at which the grand jurors in question were drawn, made only a partial apportionment of the jurors to the different precincts, and directed the judges of election of certain precincts not to return any jury list therefrom, in violation of such section, a grand jury drawn from lists returned was illegal.

4. SAME—DRAWING GRAND JURY—EXCUSING JURORS.

Under a statute declaring that the names first drawn from the jury box shall constitute the grand jury, and the latter the petit jury, for the term to which they are drawn, a grand jury from which jurors whose names were first called were improperly excused, and their places filled by persons whose names were thereafter drawn from the box, was illegal.

In Error to the Supreme Court of the Territory of Oklahoma.

For opinion below, see 76 Pac. 177.

S. H. Harris, for plaintiff in error.

Horace Speed, for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff in error, an Indian agent within the Ponca Indian Reservation, Okl. T., was indicted, in Noble county, in said territory, for receiving and soliciting a bribe in his official capacity, and was convicted, on trial to a jury, and sentenced to pay a fine of $750, with imprisonment for two years, upon each of the two counts on which conviction was had.

The first count, in its substantive effect, charged that on the 11th day of February, 1898, within the reservation aforesaid, which is under the exclusive jurisdiction of the United States, and attached to said county for judicial purposes, the said Asa C. Sharp was an officer of the United States, to wit, an Indian agent, acting for and on behalf of the United States, in his official capacity, under and by virtue of the authority of the office of the Commissioner of Indian Affairs of the government of the United States, and, under and by virtue of the authority of the Interior Department of said government, said Sharp, as such officer and as such person acting in his official capacity as aforesaid, "then and there had charge of the execution and completion of certain leases for certain tracts of land in the Ponca Indian Reservation, commonly known as the East Ponca Pasture and the west Ponca Pasture, and also of certain other leases for four certain other tracts of land in the Otoe and Missouri Indian Reservation, commonly known as the west half of the West Otoe Pasture, the east half of the West Otoe Pasture, the west ten thousand acres of the East Otoe Pasture, the east forty-three thousand acres of the East Otoe Pasture, the execution and completion of which leases were then and there pending before him in his official capacity aforesaid, and in his place of trust as such officer and as such person acting for and on behalf of the United States under the authority aforesaid." The indictment then proceeded to charge that in said capacity, and so having charge of the execution and completion of the leases, said Sharp feloniously, corruptly, etc., accepted and received money in the sum of $1,500 from one Henry E. Asp, to have his action upon the execution and completion of the leases aforesaid influenced thereby. The second count differs from the first only in that it charges that said Sharp solicited the sum of $2,000 from one W. F. Smith and one Frank Witherspoon, to have his action in the matter aforesaid influenced.

The first question raised by the assignment of errors is whether or not the indictment states facts sufficient to constitute a public offense, so as to warrant the conviction of the plaintiff in error.

The first objection to the indictment is that the leases are not described with sufficient certainty. The gravamen of the offense charged was the acceptance of and asking a bribe. The subject-matter touching which he consented to be corrupted was mere matter of inducement in pleading. It concerned leases of lands in certain named pastures, of a given designation. The description of the location of the lands was sufficient to advise the defendant

as to the transactions concerning which he offended, and to enable him to make preparation for his defense, as the names of the parties who tendered the bribes were given. This is all the certainty in description, in matter of inducement required in such an indictment. State v. Miles, 89 Me. 142, 36 Atl. 70; Lapham's Case, 156 Mass. 480, 31 N. E. 638; Walsh v. People, 65 Ill. 64, 16 Am. Rep. 569; Glover v. State, 109 Ind. 391, 10 N. E. 282; Rieger v. United States, 107 Fed. 922, 47 C. C. A. 61; 3 Chitty, Crim. Law (4th Ed.) 689–695.

It is further objected to the indictment that an Indian agent, although an officer of the United States, is not empowered either by law or by direction of the Department of the Interior or the Indian Office to execute leases to Indian lands, and that, having no jurisdiction to do the act referred to, he could not be guilty of bribery in relation thereto. The prosecution was predicated of section 5501 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3709], which is as follows:

"Every officer of the United States, and every person acting for or on behalf of the United States, in any official capacity under or by virtue of the authority of any department or office of the government thereof; and every officer or person acting for or on behalf of either house of Congress, or of any committee of either house, or of both houses thereof, who asks, accepts, or receives any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may, at any time, be pending, or which may be by law brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be punished," etc.

Section 2058 of the statute provides that:

"Each Indian agent shall, within his agency, manage and superintend the intercourse with the Indians, agreeably to law; and execute and perform such regulations and duties, not inconsistent with law, as may be prescribed by the President, the Secretary of the Interior, the Commissioner of Indian Affairs, or the Superintendent of Indian Affairs."

By the act of Congress of February 28, 1891, 26 Stat. 795, c. 383, § 3, Supp. to Rev. St. U. S. pp. 897, 898, it is provided that:

"Whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act, or any other act or treaty cannot personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations and conditions as shall be prescribed by such Secretary, for a term not exceeding three years for farming or grazing, or ten years for mining purposes: provided, that where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior."

Criticism is directed to the allegation of the indictment that Sharp, as such officer, etc., "had charge of the execution and completion of certain leases," etc., when their execution and completion rested ultimately with the Department of the Interior. The fur-

ther allegation of the indictment, however, is that "the execution and completion of which leases were then and there pending before him in his official capacity aforesaid, and in his place of trust as such officer and as such person acting for and on behalf of the United States, under the authority aforesaid." As such lands could be leased "in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend," this officer performed an important part and trust in effecting the leases. As he was on the ground, representing the government, on the one hand, and on the other the Indians, as the wards of the government, the department at Washington depended upon his action and trusted to his fidelity in making the recommendations for the consummation of the lease contracts. The fact that the lands could and probably would be leased in such quantities and on such terms as this agent recommended made him such a factor in the execution of the leases as to charge him with an official trust "in the execution and completion of [the] certain leases." The legal effect of the allegations of the indictment is that the matter of making the leases was committed to the Indian agent for execution and completion, and that he solicited and accepted bribes to influence his action in recommending them to the department for approval. The gravamen of his offense was not the making, executing, or recommending the leases, but the acceptance and solicitation of bribes to influence his official conduct.

The remaining error assigned is that the grand jury which returned the indictment was not properly and legally constituted, and that the trial court committed error in overruling the motion of the plaintiff in error to set aside the indictment. The statutory provisions for the selection and organization of the grand jury are sui generis, specific, and mandatory. The statute of 1893, § 3093 (1), prescribes the qualifications of electors and jurors. No juror can be summoned except by order of the District Court to the clerk. Section 3098 (6) requires that the county clerk, at the time of preparing the pollbooks for election in the different precincts of the county, shall have printed thereon a blank form of oath to be taken by the judges of election of each precinct, to the effect that when the polls are closed, and at the time of making a poll of the votes cast, they would examine the list of names on the pollbooks, and therefrom select a given number of names, and return the same to the county clerk, to serve as jurors; that in making such selection they would select only such persons as are known to them to be of good moral character, sound judgment, and unquestionable integrity; that they would not select any person in the habit of becoming intoxicated, or who has been convicted of any felony, or is engaged in the sale of intoxicating liquors, or known to be a participant or engaged in any unlawful business, or whom they believe could be bribed, or who are of doubtful qualification as jurors. This oath was to be administered to the judges of election by the person swearing them in as judges. The statute further imposed upon the county clerk the duty, before said pollbooks were delivered to the judges, of estimating the number of jurors that

would be required to be drawn from each election precinct to make up the number of 350, in the ratio the vote cast in any election precinct at the last general election bears to the whole vote cast in the county, and to order the judges of election to return that number. If the election precincts be changed, then the county clerk must estimate the number of jurors to be drawn in the newly established precinct as best he could, by taking into consideration the territory embraced and the number of votes cast in the precinct or precinct of which the new precinct forms a part, and fill in the blank oath on the pollbooks the number of jurors so ordered for each precinct. It further commanded that at the close of the election, and when the ballots were counted, the judges of election should examine the list of names on the pollbooks, and under their oaths select the number of persons designated by the clerk, with the qualifications aforesaid, as jurors, and make a list of the same, sign it under their hands, and return it to the clerk. When received by the clerk it was made his duty to write out all the names returned on separate slips of paper, and place them in the box with a lock and key, and keep the same locked, and from the names so placed in the box the grand and petit jurors should be drawn. "The names first drawn shall constitute the grand jury and the latter the petit jury for the term, to which they are drawn. If from any cause the judges of election shall fail to make returns of jurors from their precincts, it shall be the duty of the county commissioners to take the poll books returned from that precinct and to select the number of persons required to serve as jurors from that precinct. * * * Provided, however, that no indictment shall be set aside for the reason that such indictment was found by a grand jury drawn from a list containing more or less than three hundred and fifty names." The general statute respecting grand jurors and indictments prescribes the grounds of challenge to grand jurors. It declares inter alia that neither the territory nor the person indicted could take advantage of any objection to the panel or to an individual grand juror unless it be by challenge before the grand jury is sworn, except that after the grand jury is sworn, before indictment found, the court, in its discretion, upon good cause, may receive and allow the challenge.

It would seem that because of the peculiar conditions which arose in the selection of grand jurors in the territory, and to prevent what, in the opinion of the Legislature, constituted some abuses in the organization of the grand jury to bring about indictments, the Legislature in 1895 (Sess. Laws 1895, p. 193, c. 41) amended the existing statute as follows:

"No grand juror who has not made known his excuse to the office[r] summoning him shall be excused unless it be made clearly to appear that he is wholly unable to attend and perform the duties of a grand juror. The officer returning a juror not found or unable to serve, must by affidavit set out in full the facts relating to each juror so returned, must swear to and file the same with the clerk of the court where it shall be preserved. False swearing in such affidavits shall constitute perjury. If a sufficient number of grand jurors fail to appear, or be unable to serve, there shall be drawn from the jury box the names of other persons in the same manner, and they

shall be summoned and the panel thus filled. The persons selected and empaneled for a federal grand jury may be empaneled and sworn as a territorial grand jury."

This amendatory act further declared (page 196) inter alia that:

"The indictment must be set aside by the court in which the defendant is arraigned, and upon his motion in either of the following cases: First, when it is not found, endorsed, presented, or filed, as prescribed by the statutes of the territory, or when the grand jury is not drawn or empaneled as provided by law, and that fact is known to the defendant at or before the time the jury is sworn to try the cause. * * * When a grand juror has been fully examined as to his qualifications to sit, and has answered under oath that he is qualified, and has been received by the court and permitted to act, his incompetency shall not thereafter be shown as a ground of objection to any indictment returned by that grand jury."

Section 5111 of the former statute was amended as follows:

"If the motion to set aside the indictment be not made, the defendant is precluded from afterwards taking the objections mentioned in the last section except the one that the grand jury was not drawn and empaneled as provided by law, and that may be shown as ground for new trial, when a showing is made that those facts were not known to the defendant or his counsel until after the jury was sworn for the trial of the cause." Laws 1895, p. 197, c. 41.

Upon the return of the indictment in question into court the plaintiff in error challenged it by motion, duly sworn to. As the facts set up and sworn to in said motion were not controverted, they stand as admitted. Neal v. Delaware, 103 U. S. 394, 395, 26 L. Ed. 567. Among other things, it showed that the clerk, in sending out to the judges of election the number of jurors to be drawn from the ballot boxes, failed to accompany it with the form of oath to be taken by said judges, and that such oath was not in fact taken or returned by them as by statute provided. The motion further showed that the clerk of the court, prior to the general election at which the grand jurors in question were drawn, made only a partial apportionment of the jurors in the voting precincts, and did not apportion them among all the precincts, as by statute directed; that he instructed the judges of election in the Second Ward of the city of Perry to return only 21 jurors, when there were 250 votes cast in said ward, making 1 juror to every $11^{19}/_{21}$ population, which instructions were complied with; that at another precinct said clerk instructed the judges to return 21 names as jurors, which was short of the number to be apportioned; that prior to the general election the town of Billings was organized in said county, and the inhabitants thereof were qualified to vote and to take part in said election, and did so participate, casting 136 votes; that it constituted a voting precinct, and was a part of what was formerly known as Bunch Creek township, a voting precinct in the county; that by note or memorandum entered on the pollbooks said county clerk directed the judges of election not to return any jurors from said town, which directions were followed, and no jurors were otherwise selected from said town or voting precinct and placed in the jury box.

If the county clerk could thus disregard the imperative requirements of the statute in these important particulars, he could thwart

the will of the Legislature in writing them into the statute. The evident purpose of the Legislature was, first, to put the judges of election upon their conscience, under the pains and penalties of perjury, in pursuing the course prescribed by the statute in selecting and placing the names of jurors in the jury box. In the second place, it was to prevent the packing of juries by drawing them from particular communities, by requiring the list to be made up, proportioned to the number of voters in each precinct in the county. If the clerk of the court could direct the judges of election to omit one precinct or another from which the jury list should be drawn, he could, by the same assumption, designate what particular precincts from which the selection should be made. This the law governing his action interdicted.

The motion to set aside the indictment disclosed the further fact that on the suggestion of the attorney for the government the court excused two of the grand jurors called—one for the reason that, in the court's opinion, he had not lived sufficiently long in the county, when the only evidence on the examination showed that the juror was qualified in that respect. Another juror, on the suggestion of the prosecuting attorney, was excused by the court on the ground that, being in the employ of another person as a driver of a wagon and team, he sometimes, under direction of his employer, hauled beer for delivery to customers of his employer. The disqualification of grand jurors, imposed by the statute, pertaining to the subject-matter of liquor, is as to "any person licensed to sell liquor, or a habitual drunkard." As this juror was not shown to be either, his exclusion was illegal. The right of peremptory challenge either to the array or poll does not exist at common law. It must therefore follow that such challenge obtains only for the causes specified in the statute, to be exercised by the persons therein named. Thompson & Merriam on Juries, 519; Jones v. State, 2 Blackf. (Ind.) 475; State v. Davis, 22 Minn. 423; Keitler v. State, 4 G. Greene, 291. The statute of Oklahoma Territory does not confer such right on the prosecutor for the government. And while it may be conceded, for the purposes of this case, that at common law a large measure of discretion may be and ought to be intrusted to the presiding judge, in exercising a supervisory jurisdiction over the constitution of juries, to keep the array and panel as free as possible from improper characters, such as seem to him would impair the morale of the body, and that this discretion ought not to be interfered with by the reviewing court where it does not appear that any essential injustice to the accused resulted therefrom, yet if it be that the local Legislature has interdicted or limited this right, for reasons satisfactory to itself, the logical presumption is conclusive that it is hurtful to the defendant when the statute is not obeyed. The amendatory statute of 1895, as above quoted, expressly declares that "the indictment must be set aside by the court in which the defendant is arraigned upon his motion * * * when the grand jury was not drawn and empaneled as provided by law," and that fact is known to the defendant at or before the time the jury is sworn to try the cause. As evidence of the positive purpose

of the Legislature to make this statute effective, beyond any discretion of the court, the amended statute of 1895 declared that, if the motion to set aside the indictment be not made, the defendant is precluded from afterwards taking the objection above mentioned, "except the one that the grand jury was not drawn and empaneled as provided by law, and that may be shown as ground for new trial when a showing is made that those facts were not known to the defendant or his counsel until after the jury was sworn for the trial of the cause." The grand jury was not drawn as the statute commands. It also commanded that "the names first drawn shall constitute the grand jury." When, therefore, the court, contrary to the policy of the statute, peremptorily excused and discharged from the array two qualified jurors, in the order in which they were called, and substituted others below them on the list, "the names first drawn" did not enter into the constitution of the grand jury, and therefore, "the grand jury is [was] not drawn and empaneled as provided by law." As the statute, in unmistakable terms, declares that for such causes the indictment must be set aside by the court in which the defendant is arraigned, upon his motion, and such motion was timely made, it does not admit of debate that the court erred in denying the motion.

Whatever may be the personal views of this court of such extreme legislative acts, whereby the interest of public justice in the particular case may be thwarted in the escape of an offender, and however unseemly it may appear to the court that the legislative branch of the territory should thus express such lack of confidence in the integrity and judicial discretion of the judges of its courts, the policy of such enactments rests with the legislative department, which the judicial department can neither control nor disregard.

It is true, as suggested by the attorney for the government, that the Supreme Court of the territory reached a different conclusion in construing the statutes in question; but, as the rulings of that court are by statute made reviewable by this court, its construction placed upon the local statutes of the territory is not conclusive.

Other objections are urged against the proceedings in the court below, which we deem it neither necessary nor expedient to discuss.

It results that the action of the Supreme Court of Oklahoma Territory in affirming the judgment of the district court, and the action of the district court in denying the motion to set aside the judgment, are reversed, and the case is remanded, with directions to the district court to set aside the judgment of conviction and to set aside the indictment, and for further proceedings in conformity with this opinion.

## LOEW SUPPLY & MFG. CO. v. FRED MILLER BREWING CO.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

No. 1,108.

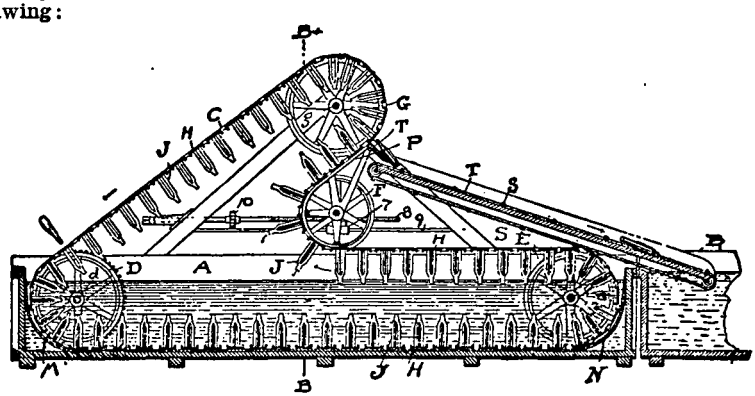
1. PATENTS—CONSTRUCTION OF CLAIMS—NEW COMBINATION OF OLD ELEMENTS.
One who selects and combines elements from the inventions of others into a new structure adapted to accomplish the old result is entitled to a patent only for his own particular form of adaptation.
[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 27.]

2. SAME—INFRINGEMENT—MACHINE FOR WASHING BOTTLES.
The Cobb patent, No. 690,563, for a bottle-washing machine, covers a new combination of devices known in the prior art, and is limited to the specific adaptation of such parts shown. As so construed, it is not infringed by the machine of the Volz patent, No. 736,037.

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

Appellant's bill on account of the alleged infringement of letters patent No. 690,563, January 7, 1902, to Cobb, assignor, for improvements in bottle-washing machines, was dismissed for want of equity.

The general nature of the Cobb machine can be read from the accompanying drawing:




The claims alleged to have been infringed are these:

"(1) In bottle-washing machines, a solution-tank, an endless flexible carrier, and a series of rolling supports over which said carrier travels and is reversed in relation to the tank, said carrier having openings through which the bottles are inserted from the outside, and receptacles inside the carrier about said openings to receive the bottles bodily, substantially as described."

"(4) A bottle-carrier for a bottle-washing machine, comprising a pair of endless chains, straight cross-pieces at intervals connecting said chains, and constructed each with holes to accommodate a row of bottles, and bottle-receiving baskets on the inside of said cross-pieces about said holes, of a size to receive substantially the entire bottle, substantially as described."

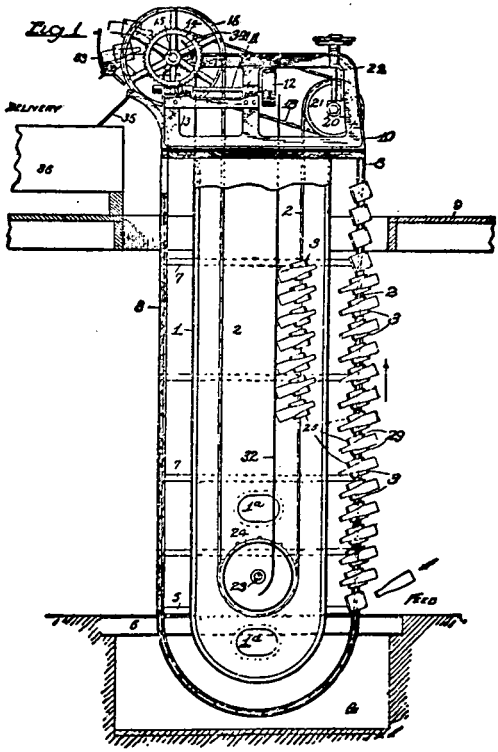
"(9) In bottle-washing machines, an endless carrier having a series of cross-plates with holes of a size to pass the bottles through to the inside of the carrier, and holders for the bottles on the inside of said cross-plates about said holes, of a size to receive the entire bottle within the carrier, said holders having their inner free ends constructed to expose the mouth of the bottle to the solution, and to hold the bottle from dropping out into the tank when inverted, substantially as described.

"(10) In bottle-washing machines, an endless flexible carrier constructed of a set of chains, cross-plates with holes for bottles fixed to said chains, and an open-work bottle-holder fixed about each hole in said plates on the inside thereof, said holes and holders being of a size to allow the bottle to drop out through the carrier by gravity, and a series of wheels over which said carrier travels, one of said wheels being arranged to reverse the position of the bottles on the carrier, and thereby bringing them to place of free discharge, substantially as described.

"(11) The tank and the endless carrier having holders on its inside for the bottles and wheels supporting said carrier, one of said wheels being arranged to reverse the position of the bottles in respect to the carrier, and a support for the bottles outside the carrier, and terminating at the point of their discharge from the carrier, substantially as described."

"(13) In bottle-washing machines, a solution-tank and an endless bottle-carrier provided with receptacles having openings at their top out of which the bottles are adapted to drop by gravity when said openings are downward, and supports over which the said carrier travels in a circuit, in combination with guards independent of the carrier, to confine the bottles along portions of the line of their travel, whereby when the bottles are inverted they ride on said guards and are kept in their receptacles, substantially as described."

Appellee's machine is made under letters patent No. 736,037, August 11, 1903, to Volz. Figure 1 of the Volz patent drawings follows:




Some of the distinctive claims of the Volz patent are the following:

"(12) A bottle-soaking machine comprising a tank, an endless conveyer having a series of bottle-racks, each consisting of a frame having a single transverse row of openings for bottles, and provided with a rear wall having

a single transverse row of holes to loosely receive the necks of the bottles, the frames being secured to the conveyer along their central transverse axis.

"(13) A bottle-soaking machine comprising a tank, an endless conveyer adapted to travel therein, and having a series of bottle-racks, each consisting of a frame open at top and bottom, and having a single transverse row of bottle-openings, fastening-lugs secured respectively to the conveyer and to the frames at the central axis thereof."

"(15) A bottle-soaking machine comprising a tank, an endless conveyer arranged to travel therein, a series of bottle-racks operatively connected with the conveyer, and arranged transversely and obliquely to the plane or line of travel of the conveyer, a guide arranged within the tank adjacent the line of travel of the conveyer to prevent the bottles from falling out of their racks, each rack consisting of a frame having on its inner or rear side a series of openings larger than the necks of the bottles, and through which such bottle-necks pass and project."

"(21) A bottle-soaking machine comprising a vertical tank extending substantially from floor to floor of a building, a bottle-conveyer arranged to travel partly within the tank, and having stretches outside the tank along the sides thereof and underneath the same, rolling supports arranged above the top of the tank and on a substantial level with the upper floor and over which such conveyer passes, and a series of bottle-racks arranged in said conveyer, and adapted to be fed with bottles at the lower floor and to be discharged at the upper floor after traversing the tank."

The record exhibits the following prior patents: No. 237,501, February 8, 1881, J. M. Dodge; No. 287,048, October 23, 1883, E. Norton and J. G. Hodgson; No. 354,061, December 7, 1886, W. W. Horner; No. 373,315, November 15, 1887, N. J. Simonds; No. 393,170, November 20, 1888, L. McMurray; No. 410,300, September 3, 1889, R. Steegmuller; No. 498,371, May 30, 1893, E. A. Wadsworth; No. 530,583, December 11, 1894, A. F. and A. C. Dumke; No. 566,471, August 25, 1896, E. R. Richards; No. 582,505, May 11, 1897, E. Kersten; No. 587,397, August 3, 1897, B. V. Nordberg and A. Uihlein; No. 602,277, April 12, 1898, G. W. Swift, Jr.; No. 606,757, July 5, 1898, W. J. Cunningham; No. 627,612, June 27, 1899, B. Fischer et al.; No. 647,082, April 10, 1900, A. Goetz; No. 651,329, June 5, 1900, F. J. Hagen; No. 654,712, July 31, 1900, A. Cerruti; No. 666,607, January 22, 1901, J. A. Hughlett; British patents No. 2,540 (1877), James S. Clarke; No. 13,170 (1890), William L. Wise; No. 15,156 (1896), Josef Wild; No. 10,739, George A. Crawford.

Wm. Raimond Baird, for appellant.

H. P. Doolittle, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge (after stating the facts). Goetz shows a bottle-washing machine which "consists essentially of two tanks for containing the liquids, endless chains having connected therewith bottle-holding devices, and extending within a tank containing the cleaning solution, and thence upward above the same, means for automatically releasing the bottles, and a suitable conveyor to receive the bottles and convey the same into another tank containing water or other suitable liquid for removing the cleaning solution." The bottle-holding device is a hole in the carrier plate through which the neck of the bottle is thrust, and a spring-latch to seize and hold the neck. When the point of discharge is reached, a fixed arm disengages the spring, and the bottle falls upon the moving apron, down which it is carried into the rinsing tank.

For their endless conveyor of the bottles through the solution tank, Nordberg and Uihlein use a wheel or drum. The bottle-holding device is a pocket or receptacle inside the carrier to receive

the bottle bodily. When the receptacle is inverted, a "guard independent of the carrier confines the bottle."

Cobb was not entitled to a generic patent for putting pockets and guards, disclosed by Nordberg and Uihlein, into the Goetz type of bottle-washing machine. Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co., 125 Fed. 761, 60 C. C. A. 529. "Industry in exploring the discoveries and acquiring the ideas of others, wise judgment in selecting and combining them, mechanical skill in applying them to practical results—none of these are creations; none of these enter into the inventive act." Robinson, § 78.

There is room for such an adapter to have only a specific patent for his particular form of adaptation, and he is not privileged to exclude others from gleaning in the same general field. Milwaukee Carving Co. v. Brunswick-Balke-Collender Co., 126 Fed. 171, 61 C. C. A. 175.

The claims in suit, if construed generically, would be void; limited to the specific form of adaptation, we do not find them infringed.

The grant of the Volz patent for a specific form of adaptation of the prior art raises the presumption that the differences are substantial, not merely colorable.

This presumption is not overborne by a comparison of the machines. Cobb has a long horizontal tank, taking up considerable floor space. Volz's upright tank was not taken from Cobb; it was any tank of the prior art adapted by Volz to his purpose of saving floor space and enabling the dirty bottles to be fed into the machine in the basement and discharged clean on the floor above, where they are to be used. Volz's arrangement of the familiar chains and sprockets was not copied from Cobb, but was designed to balance the ascending and descending chains and bottles. Volz did not extend a "straight cross-piece" from chain to chain to make his carrier, "said carrier having openings through which the bottles are inserted from the outside, and receptacles inside the carrier about said openings to receive the bottles bodily"; but between the chains he fastened an integral openwork rack by means of lugs at its central axis. One side of the rack would be as much a straight crosspiece as the other. Instead of being a colorable evasion of Cobb's specific "receptacle," Volz's rack is an adaptation of Dodge's integral centrally-secured buckets to bottle-holding purposes, well designed to co-operate with the upright tank and the particular arrangement of the chains and sprocket wheels therein. On a vertical chain a balancing of weight on each side thereof is manifestly desirable.

These, and all the other differences, were before the Patent Office. The granting of Volz's claims under the circumstances was a virtual finding that Volz was an independent improver in an open field, and we think such a finding is correct.

The decree is affirmed.

DONCHIAN v. KINGSTON et al.

(Circuit Court, D. Massachusetts. June 14, 1905.)

No. 1,798.

PATENTS—INFRINGEMENT—CARPET FASTENER.

The Donchian patent, No. 541,320, for a carpet fastener, consisting of two sections, one to be attached to the carpet, and having a projecting stud, and one to be fastened to the floor, and provided with a central opening, is limited by the language of its claim and by the construction given it by the patentee when before the Patent Office to a structure having two distinct and material features, namely, a base section shaped to snugly fit the concaved under surface of the upper section, and a central opening in the base section, the walls of which fit closely about the stud at both its ends to give a compact, solid, and firm union between the two. As so construed, *held* not infringed by a structure in which the two sections are loosely connected to permit the upper to rock freely upon the lower section.

In Equity.

Emery, Booth & Powell, for complainant.
Nathan Heard, for defendants.

HALE, District Judge. This is a bill in equity for the infringement of letters patent No. 541,320, granted June 18, 1895, to the complainant, Samuel B. Donchian, for improvements in rug fasteners. The only claim is as follows:

"In combination in a carpet fastener, a stud section provided with means for attachment to a carpet, the concave under surface of said section having a projecting stud, the stud having a locking groove, a base section shaped to snugly fit the concaved under surface of the upper section and having a central opening, the walls of which closely fit about the stud at both its ends, and having a recess for a split ring within the base section, and the split ring loosely fitted within the recess and adapted to engage the stud at the grove, all substantially as described."

The object of the invention is stated in the specification as follows:

"My invention relates to the class of devices designed for use in securing rug, carpet, or like article to a floor, and the object of my invention is to provide a device of this class that shall be thin and compact, so as not to cause an unevenness on the rug by reason of a hump at the place where the fastening device is used, and that shall at the same time securely hold the rug in place; and a further object is to provide a device of this class that shall be strong enough to withstand the strains which shall be brought upon it under the peculiar conditions of use."

In pursuance of this general object, the device consists of two sections, one a dome-shaped rug section having a concaved under surface, and adapted to be stitched to the under side of the rug; from this concaved under side of the rug section extends a grooved stud. The other section is a base section, nailed to the floor by slender nails. This floor section is fully described by the expert:

"This floor section has a central opening which will receive the stud. About this opening is a portion shaped to provide a recess, and in this recess is a split spring ring which is slightly smaller than the stud. When the stud is thrust in-

to the opening the ring grasps the reduced portion of the stud and prevents its withdrawal until sufficient force is applied to cause the ring to expand and let the stud out. The opening through the floor section is of such size and shape that as the spring yields under transverse strains the stud engages the solid walls of the floor section and is held by them rather than by the spring. And as the floor section fits within the concavity of the rug section the wall of the rug section comes into contact with the edge of the floor section and assists the stud in sustaining transverse strains. The concavity of the rug section not only provides a receptacle for the floor section, but also produces a dome-shaped structure, which, while low, is very stiff and strong, so that it will not crush when stepped upon, nor produce a hump in the rug which is perceptible to the eye or to the foot. The Donchian specification points out that the holes made by the small wire nails used to fasten the floor section can be filled with wax if the section is removed, and that the threads which are used to fasten the rug section project so as to prevent any marring of the floor by that section."

The testimony tends to show that previous to the production of this fastener there had been several methods of temporarily fastening a rug to a floor. One of these was by the so-called "pin and socket" method. This method involved a hole bored in the floor, into which was forced a metal sleeve or socket. The rug was punctured above the hole. A pin was thrust through the rug into the hole, the pin having a flat head, which overlaid the rug and held it in position. Another mode of fastening was by the "peg and grommet." By this method the rug was punctured, and the grommet or eyelet inserted in the puncture. This was then slipped over the projecting head of a peg which had been screwed or driven into the floor. Another method of fastening was by using a fastening screw passing through the rug and threaded into the floor, or a socket in the floor, the screw having a head projecting above the rug, by which it could be grasped for turning. The above methods were unpatented. There were also two methods provided in the patented art—one by an old patent to Culver in 1857, which provided for a metallic plate attached to the under side of a carpet having a hole which was slipped over the projecting head of a wood screw partially screwed into the floor. Another method was provided later by the Hellmuth patent, which was a modification of the "peg and grommet" fastener. All these methods of fastening involved the mutilation of either the floor or the rug, and in most cases of both.

With reference to the state of public knowledge at the time of the Donchian invention, the evidence shows that ball and socket fasteners were in common use in the fastening of gloves and in many other fastenings. But the ball and socket fasteners, as applied to gloves, were, when screwed in the floor, crude, unsatisfactory, and easily displaced by pressure. The advantages of the invention are fully stated in the specification quoted and in the evidence of the expert, to which reference has been made.

The defense is noninfringement. In seeking to find what the inventive thought of the patentee was, and what construction should be given to the claim in the patent, aid is derived from following the course of the invention through the Patent Office. In his application the patentee did not claim that there was anything new in adapting the ball and socket fastener to a rug. He set forth his

general purpose in the beginning of his specification which has been quoted. He went on further to say in his specification:

"My invention consists in the details of the several parts making up the device as a whole and in the combination of such parts as more particularly hereinafter described and pointed out in the claim."

In describing his device more fully, he said:

"A central opening, 11, extends through the base section and is formed of a size to closely fit the stud, 5, on opposite sides of the recess, 9. The base section, 7, is made to conform to the shape of the concavity in the stud section so as to lie closely therein, and a flat spring is preferably used in the recess, 9, as greater strength can be secured in this form of spring with a given thickness; and this construction of the spring, of the concaved stud section, and the base section closely fitting therein provides an extremely thin device, while at the same time possessing the necessary holding qualities. The split ring, 10, is preferably formed of a size to loosely fit within the recess, 9. The base section is secured to the floor as by means of very small wire nails or the like, and this does not materially damage the floor, as when they are removed the comparatively small holes can be easily filled with wax and polished over, and the thread used to secure the plate or stud section to the rug, as shown in the drawings, projects on the under surface of the plate, and prevents any marring of the floor by the slight rubbing of the plate in use. An important advantage of my improved device resides in the construction of the stud to closely fit the central opening through the base section. This affords means whereby the stud is securely held against any lateral strain which would tend to loosen it from the grasp of the spring, these strains being continuously exerted in the peculiar use of the device as by walking on the rug."

An examination of the file wrapper shows that in his original application to the Patent Office he concluded as follows:

"I am aware that various devices have been used in which a stud from one part has been frictionally held within an opposite part, and I do not broadly claim such a construction. Such devices, however, have been used in an entirely different manner from the use to which my device is put, and in this latter use would become inoperative from the fact that they would be destroyed by the pressure which would be brought to bear upon them as by being stepped on, and my improved device possesses the advantages over such devices in that it is practically indestructible in the peculiar use to which it is put, and is so compact that an unevenness of the rug or carpet is not caused by its use."

In that application he made three claims, as follows:

"(1) In combination in a rug fastener or the like, a stud section provided with means for attachment to a rug concaved on its under surface and having a stud projecting therefrom, a base section fitting the concavity of the stud section and having a central opening therethrough for the reception of the stud, a recess within the base section, and a split ring adapted to grasp the stud at the groove therein, all substantially as described.

"(2) In a rug fastener or the like, in combination, a stud section concaved on its under portion and provided with means for fastening to a rug or the like, a base section fitting the concavity of the stud section, and having a central opening closely fitting about the stud on the stud section, a recess, and a split ring loosely fitting in the recess to securely grasp the stud at the groove therein, all substantially as described.

"(3) In combination with a rug or the like, a rug fastener consisting of a stud section secured thereto and provided with a concavity on its under surface, a stud extending from the stud section, and having a groove extending around the stud, a base section fitting the concavity of the stud section and with a central opening closely fitting the stud, a recess in the stud section, and a split ring loosely fitting within the recess and firmly grasping the stud at the groove; all substantially as described."

It thus appears that in the first claim he described in a "rug fastener or the like" a base section fitting the concavity of the stud section, but did not say anything about its fitting snugly or closely. In claim 3, however, he added the additional limitation of a base section fitting the concavity of the stud section, and with a central opening closely fitting the stud, but said nothing about the central opening fitting the stud closely at both its ends. These three claims, as filed, the Patent Office at once rejected, saying:

"The claims of this application seem to be all of substantially the same scope, and they are objected to for this reason.

"The claims seem to cover merely a double use of the fasteners for gloves covered by patents cited as follows:

"Richardson, Mar. 5, 1889, 399,161. } Clasps &
"Kreatzer, Mar. 22, 1887, 359,615. } Buckles
"Kershaw, Dec. 2, 1890, 442,056. } Glove Fasteners.

"See, also, patent of Culver, Nov. 17, 1857, 18,631 (Builders Hardware—Carpet Fasteners).

"The claims are rejected in view of the prior art disclosed in the references cited above."

Whereupon the patentee canceled the larger part of the closing paragraph of his specification, which took the ground that prior ball and socket fasteners had not been used in connection with rugs. He substituted the following:

"In none of these prior devices has provision been made for the close fitting of the engaging parts and for a secure holding of the stud against a strain tending to upset it. A material feature of my invention resides in providing the base section with a stud socket above and below the spring-member whereby any rocking action of one part on the other is effectually prevented, and any strain transversely of the stud prevented from prying or tilting the latter out of engagement."

He pointed out specific features of difference between his patent and the patent cited against him in the prior art. In the above substitution in the specification he introduced for the first time the fit of the base section upon the stud section above and below the ring, and this he claimed to be a material feature of his invention. He struck out the three claims, and substituted the following two claims:

"(1) In combination in a sectional fastening device a stud section provided with attaching means and having a stud projecting therefrom, the stud having a locking recess, a base section having a central opening for the reception of the stud, a recess in the base section for holding a split ring, the walls of the socket embracing the stud both above and below the split ring, and the split ring located in the socket and adapted to grasp the stud at the groove therein; all substantially as described.

"(2) In combination in a carpet fastener, a stud section provided with means for attachment to a carpet, the concave under surface of said section having a projecting stud, the stud having a locking groove, a base section shaped to snugly fit the concaved under surface of the upper section and having a central opening, the walls of which closely fit about the stud at both its ends, and having a recess for a split ring within the base section, and the split ring loosely fitted within the recess and adapted to engage the stud at the groove; all substantially as described."

An examination of these claims shows that the patentee had abandoned the limitation to a rug fastener; that he had set forth the material feature of the invention in claim 1 as "the walls of the socket

embracing the stud both above and below the split ring"; and in claim 2 as "the walls of which closely fit about the stud at both its ends." It will be seen further that in claim 1 he made no restriction as to the fitting within the concavity of the lower section, but in claim 2 he made this limitation: "A base section shaped to snugly fit the concaved under surface of the upper section."

In discussing the Culver patent, he referred to the closely fitting element in his patent as being a limiting element and an important feature of the claims as he then submitted them. He concluded thus:

"It is extremely important in the construction of a fastener of the form devised by applicant that the socket piece should have the closed bearing for the stud at the opposite extremities of the latter, as has been described and set out in the amended claims. Without the peculiar form of close-fitting parts and the special arrangement of the holding ring in a recess midway of the stud, the transverse strains upon the fastener would disengage the parts, and make the device practically inoperative. It is held that applicant has now clearly set out and distinguished the peculiar features of invention, and a reconsideration and allowance of the case is requested."

After the filing of this amendment the Patent Office again rejected the claims, the examiner giving the following grounds for rejection:

"It is found that it is old to provide a catch plate for a stud to engage the stud both above and below an annular groove in the stud. See the following patents:

"Cushman, Aug. 12, 1890, 434,177,

"Drake, Sept. 23, 1890, 437,103 (both in Clasps, Buckles & Buttons—Separable). It seems that to utilize this expedient in a carpet fastener instead of in clasps for other purposes is a colorable change."

The complainant then canceled claim 1, and amended claim 2, restricting it to a carpet fastener. The effect of this amendment was to eliminate the breadth of claim 1 and to confine the invention to use as a carpet fastener, and restrict it to a combination having in one structure two elements, namely, "a base section shaped to snugly fit the concaved under surface of the upper section," and the feature "that the walls of the base section shall closely fit about the stud at both its ends." These two elements were in combination with the split-ring fastener. The argument of the patentee in reference to the Drake patent is important as bearing upon the construction which he then gave to his claim. He said:

"The latter patent does not show a fastener section having a concaved under surface which is a limitation of the claim as now presented. This concaved lower surface is of importance in giving to the fastener as a whole a stability not possessed by the fastener of the Drake device. The socket in the Drake fastener does not embrace the stud, but contains an intermediate spring. The claim now presented in the case recites a central opening 'the walls of which closely fit about the stud at both its ends.' This feature is not found in the Drake patent."

In the conclusion of his argument he distinctly stated what he regarded as new in his invention:

"The fastener is new in the provision for the close fit of the lower section in the concaved under surface of the upper. It is new in the direct contact of the stud and the walls of the socket when a split ring forms the holding

device. The claim recites the limiting and distinguishing features, and it is submitted that on the question of sufficiency of invention the applicant should be given the benefit of any doubt and be allowed to reap the benefit of his invention to that extent which the production of the novel article which fills, and has immediately supplied, a large demand entitles him to."

The court cannot escape the conclusion that the claim of the patentee as amended embraces two distinct and material features, namely, a base section shaped to snugly fit the concaved under surface of the upper section, and a central opening in the base-section, the walls of which fit closely about the stud at both its ends. The inventive thought upon which the patentee chose to rest his patent was a carpet fastener having these two distinct, material, and closely defined elements. He invented this construction because it was a compact, solid, firm construction which would not yield to pressure. He preferred and patented this close, compact method of resisting pressure. He confined himself to this limited construction. A careful examination of the claim itself as it finally appears in the patent is sufficient to bring the court to this conclusion. But a court may often find, and does find in this case, assistance from the arguments of the patentee himself when obtaining his patent, and from the amendments which he purposely and understandingly accepted. In Ball & Socket Fastener Co. v. Ball Glove Fastener Co., 58 Fed. 818, 824, 7 C. C. A. 498, 504, Judge Putnam says:

"The rule touching the effect of such amendments has been several times laid down by the Supreme Court in patent causes, although it is only a peculiar application of the general principles of law relative to the interpretation of instruments. In the case at bar the amendments relate to the very pith and marrow of the alleged improvement, touch directly the question of novelty, and were understandingly and deliberately assented to."

In the case now before us the amendments made by the patentee relate to the "pith and marrow" of the invention. It would be unjust to the public, and to all the parties involved in the construction of the patent, if a patentee were allowed to "understandingly and deliberately" limit the scope of his patent while he is obtaining it, and were afterwards allowed to escape from his limitation when the patent is construed. He ought not to be heard to demand one rule of interpretation in the Patent Office and another in the courts. The ordinary principles relating to the interpretation of a contract are the principles which prevail in construing a patent. The understanding of parties to an agreement at the time it is made is always held to be of importance in the construction of such agreement. Courts often find aid in construing a contract by considering what the parties have said and what they have done when the contract was made. This court has had occasion to refer to the language of Lord Sugden in Attorney General v. Drummond, 1 Drury & Warren, "Tell me what you have done under a deed, and I will tell you what that deed means." In Greene v. Buckley, 135 Fed. 531, Judge Townsend, speaking for the Circuit Court of Appeals in the Second Circuit, says:

"Where the patentee specifies a particular form as a means by which the effect of the invention is produced, or otherwise confines himself to a particu-

lar form of what he describes, he is limited thereby in his claim for infringement. Walker on Patents (4th Ed.) § 363, and cases cited. Where a patentee acquiesces in a rejection of claims, and amends the same so as to be more specific, such claims must be read and interpreted with reference to the rejected claims and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the Patent Office or disclosed by prior devices. Knapp v. Morss, 150 U. S. 221, 225, 14 Sup. Ct. 81, 37 L. Ed. 1059; Roemer v. Peddie, 132 U. S. 313, 10 Sup. Ct. 98, 33 L. Ed. 382. 'Where a patentee has modified his claim in obedience to the requirements of the Patent Office, he cannot have for it an extended construction which has been rejected by the Patent Office; and in a suit on his patent his claim must be limited, where it is a combination of parts, to a combination of all the elements which he has included in his claim as necessarily constituting that combination.' Phœnix Caster Co. v. Spiegel, 133 U. S. 360, 368, 10 Sup. Ct. 409, 33 L. Ed. 663. The words of limitation inserted in a claim must be construed in the light of the circumstances surrounding the issuance of the patent in order to prevent an undue broadening of the scope of the invention. Singer Mfg. Co. v. Cramer, 192 U. S. 265, 285, 24 Sup. Ct. 291, 48 L. Ed. 437. In interpreting such a patent, the admissions and declarations of the patentee in the Patent Office, and amendments made by him which relate to the essence of alleged improvements, and are directed to the question of invalidity, when understandingly and deliberately assented to, are binding upon him. Reece Button Hole Machine Co. v. Globe Button Hole Machine Co., 61 Fed. 958, 10 C. C. A. 194"—citing also other cases.

Does the defendants' fastener infringe the claim of the patent in suit? It is undoubtedly in some respects similar to the fastener of the patent. Each has a stud section with means for attachment to the floor. Each has a projecting stud provided with a groove. Each has a base section provided with a central opening. Each has a recess in the central opening provided with a split ring loosely fitted and adapted to engage the stud. The claim of the patent provides that the stud section shall be fastened to the rug and the socket section to the floor. The defendants' device is arranged in the opposite way. But one way may be considered the immaterial reversal of the other. I have already found, however, that the claim of the patent presents two material features: First, the close fit of the base section within the concavity of the upper section; and, second, the close fitting of the aperture of the base section about both ends of the stud. The inventive thought of the patentee made these two elements important and decisive. His inventive idea was to resist pressure and strain by the closeness of fit in respect to these two elements. The defendants' device does not, in my opinion, infringe these two elements. The constructive idea of the defendants is distinctly and essentially different from the inventive idea of the patentee. The defendants' device does not have the close fitting of one section within the concavity of the other. It is designed to allow the rocking or tipping of one part on the other, whereby undue strain of the parts is sought to be prevented. When in place, all pressure is transmitted through the rigid stud to the floor. The stud section thus resists the strain, and the other section is not required to be of close, solid construction. The close fitting of the aperture of the base section about both ends of the stud was made in the specification "a material feature" of the patentee's invention. His claim provides that the walls must closely fit about the stud at both its ends; and he insisted that an old pat-

ent, which had an intermediate spring functionally like the split ring of his patent, did not meet the terms of his claim. But in the device of the defendants the stud section can touch the socket section only through the medium of the split ring. It cannot be held to present a close fit of one section upon the other. In reference to the shape of the stud the defendant Kingston says:

"In the construction of the shape of the stud, I concaved it so that in use on the different kinds of velvet carpeting it would, by its shape and friction, on the gradual curve of the stud towards the top, act as a lever when the various strains would be brought to bear upon this particular part."

The defendants do not attempt to form their construction upon the basis of a "locking groove," but rather upon a gradual curve of the stud, and in general upon a loose mechanical construction. Some features of this construction are found in certain old patents. In speaking of the action of the socket section upon the stud, their expert says:

"This action results directly from the special construction of stud with a reduced shank portion instead of a locking groove, the loose fit of the ring about the stud, and the extremely loose fit of the stud in the aperture, which permits the socket section to rock to its furthest extent without bringing the walls of the aperture into the engagement with the stud."

The construction of the stud in defendants' fastener is designed to permit the free rocking or tilting of the socket section with relation to the stud section, instead of presenting the close fit called for by the claim of the patent.

The court is of the opinion that the loosely fitting arrangement of elements employed by the defendants cannot be held to be an equivalent of the close, solid construction of the complainant. In my opinion, the defendants' device is based upon a constructive thought different from the inventive idea of the patent, and cannot be held to be an infringement of it.

Bill to be dismissed, with costs.

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## VIRGIL PRACTICE CLAVIER CO. v. VIRGIL.

(Circuit Court, S. D. New York. June 14, 1905.)

PATENTS—INFRINGEMENT—INSTRUMENT FOR TEACHING PIANO PLAYING.

The Virgil patents, Nos. 344,462, 344,464, 391,439, and 479,339, relating to an instrument for teaching the playing of the piano, in which non-musical sounds are substituted for the musical tones of the piano, and to improvements thereon, disclose patentable invention, and are valid. Also *held* infringed.

Suit in equity to enjoin alleged infringement of United States letters patent to Almon K. Virgil for instruments for teaching the playing of the piano, viz., No. 344,462, June 29, 1886, claim 4; No. 344,464, June 29, 1886, claim 1; No. 391,439, October 23, 1888, claim 1; and No. 479,339, July 19, 1892, claims 1 to 12, inclusive, and claims 14, 17, and 18.

Livingston Gifford, for complainant.

Worth Osgood, for defendant.

RAY, District Judge. Patents Nos. 344,462 and 344,464 have expired since the commencement of this action and before the final hearing, and as to them a reference to a special master to take an account is all the decree can award. The demurrer to the bill for multifariousness is not sustained. The defense as to patents No. 344,464 and No. 344,462 that the assignments of the patents were not recorded as alleged is overruled.

The defendant's counsel says:

"In defendant's construction each of the elements, separately considered, are shown to be old; and they are employed in new combinations and arrangements which are not disclosed in complainant's patents, and which are not subordinated by any of the claims in any of these patents, if they are real, in connection with the previous art."

That the elements of defendant's construction are all old is plain, but that we find any new combination or new or different or improved result than that found in complainant's patents, and disclosed thereby, cannot be found by this court. The field is limited. Almon K. Virgil, the patentee, is entitled to be regarded as a pioneer in the art to which his invention relates. His first patents showed invention and were valid, but they did not prove a success commercially, because of certain defects. He persevered, thought, labored, expended time and money, and succeeded. It was when he succeeded that defendant came in, and, by borrowing, if not abstracting, ideas, etc., began infringement.

The invention is partially described by complainant as follows:

"The object of this new art was instruction in piano playing, for which purpose prior to these inventions only two classes of instruments had been employed, namely, either the piano itself, or a mute keyboard. The mute keyboard, or dumb piano, as it was sometimes called, was employed for the gymnastic drill or exercise of the fingers and hands of the pupil. It was made mute or dumb so as to entirely eliminate the hearing as a factor in the exercise, and cause the fingers and hands to acquire strength and flexibility without dependence upon the ear, as also to permit the pupil to practice without disturbance of neighbors. It was impossible for the pupil to learn to play a new piece by the mere use of a mute keyboard. To do so, he must needs resort to the regular piano. Mute keyboards were therefore in no sense substitutes for the piano in learning the art of playing, but merely adjuncts or helps in the direction of physical and muscular development, the same as any gymnastic exercise is to a sport for which it may prepare the muscles without instructing the mind. The new art that Virgil invented for the purposes of piano instruction differed from the old in that, whilst it excluded the musical tone of the regular instrument, it still combined the action of the ear and the hands. Virgil conceived the idea that by accompanying each movement of the fingers with a short, distinct, nonmusical sound or click, the pupil and his instructor would gain all the benefit of the combined instruction of ear and hand, without the distracting influences of music; in other words, Mr. Virgil expresses it as 'getting the mind into the hand.'"

Complainant concedes:

"Although this was not Virgil's first patent in point of time, it was nevertheless the pioneer patent in point of success, and as such is entitled to all of the consideration of a pioneer. Virgil says: 'The Techniphone (patent 344,464) and Practice Clavier (patent 479,339) introduced a new art of instruction, namely, the art of instructing in piano playing by the aid of nonmusical sounds. The Techniphone was the pioneer instrument in this art, but, like many pioneer machines, it lacked sufficient perfection to make the art a success. I may add that the Practice Clavier is to be credited with the success

of the art, for the reason that it removed the shortcomings of the Techniphone that stood in the way of the success of the new art.' The reason why the Practice Clavier of patent 479,339 was thus able to convert failure into success, and to entitle itself to the credit of the pioneer successful machine, was because of the radical changes which it made over patent 344,464 in each of the following respects, each of which constitutes an element of one or more claims of 479,339, and which will be treated under separate heads: (1) In the time of the clicks; placing them at the extremes of the key strokes, instead of at intermediate points. (2) In the separate control of the clicks; enabling either to be used with or without the other. (3) In the 'touch'; assimilating it to the piano touch. (4) In the quality of click. (5) In the regulation and indication of the tension."

The defendant is shown to have had knowledge of these patents, and it also appears she was striving to evade infringement; that is, to make such changes and variations as would enable her to plead noninfringement. The purpose and thought displayed was not for the purpose of inventing, but of evading.

The defense of nonpatentability in view of the prior art is not sustained. The complainant is entitled to a decree that its patents are valid, that the named two have expired, that all have been infringed by defendant, for a perpetual injunction as to those still in force, and for an accounting as to all.

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## REVERE RUBBER CO. v. CONSOLIDATED HOOF PAD CO.

(Circuit Court, S. D. New York. June 16, 1905.)

No. 7,956.

1. PATENTS—INVENTION AND INFRINGEMENT—HOOF-PADS.
   The Kent patent, No. 646,148, for a hoof-pad intended for use between a horse's hoof and the shoe, and having a ventilating part or chamber in the center, was not anticipated, and discloses invention, and is not invalid for prior public use. Claims 1, 2, 5, and 6 also *held* infringed.

2. SAME—EVIDENCE OF INVENTION—SUCCESS OF ARTICLE.
   The commercial success and success in actual use of a patented article is evidence of patentable invention.
   [Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 39.]

In Equity. Bill in equity for injunction restraining alleged infringement of United States letters patent No. 646,148, issued March 27, 1900, to Elizabeth Kent and Roscoe R. Bell, assignees of the alleged inventor, William J. Kent, for hoof-pad. Application filed July 26, 1899.

Arthur C. Fraser and Joseph A. Stetson, for complainant.

James Harold Warner (Clarence G. Galston, of counsel), for defendant.

RAY, District Judge. Claims 1, 2, 5, and 6 of the patent in suit only are in question. The patent is for a hoof-pad, bears date March 27, 1900, and is No. 646,148. The hoof-pad in question aims to cushion the foot of the horse against the shocks of travel upon hard roads and pavements, and to prevent direct contact between the hoof and the shoe. It is claimed that these hoof-pads will pre-

serve a natural and healthful condition of the hoof, and prove light and comfortable in use. The patent in suit provides a pad containing a thin, yielding portion to intervene between the hoof and the shoe; a thick heel-cushion for crossing the frog of the foot, and for supporting the heels at the rear of the shoe when a three-quarter shoe is used; a flexible downwardly extending center for filling the space within the shoe beneath the sole of the foot; an air-chamber under the center of the foot, and between it and the pad; means for supplying air to and expelling it from such air-chamber; a ring-like leather attacher covering the outer edge of the body of the pad, and having an aperture opposite to, and of approximately the full area of, the air-chamber; and a socket for fitting the frog of the foot; and a stiffener for resisting expansion or contraction of the hoof or of the pad. These pads may be formed of any desired materials, but the patentee states:

"I prefer to construct it with a bottom face of rubber or rubber composition, and with a top face or re-enforce of leather, fibrous, or textile material to form an attacher cut out at the center; the two being attached by stitches, cement, or otherwise, and the stiffener being imbedded in the rubber during molding of the latter."

He further says that the re-enforce or attacher covers the outer edge of the pad-body, and has an aperture opposite to, and approximately the full area of, the air-chamber. He also states that the pad is thus held against movement relatively to the hoof, but leaves the hoof free and exposed to the air. It is claimed in the specifications that the heel-cushion will cushion all heel shocks, and remove the danger of the formation of corns on this part of the hoof, and the central pneumatic portion will conform to the irregularities of the adjacent portion of the roadway, and give a firm grip against either forward or rearward or lateral slipping. It is further claimed that this hoof-pad removes all danger of lodgment of gravel or foreign matter against the sole of the hoof. It is also stated that the sole of the hoof will be constantly ventilated, and practically out of contact with any substance, while the bearing-strip between the shoe and the hoof will both protect the latter from shocks from the shoe, and save it from direct contact with the shoe. The specifications also state "that the invention is not limited to the particular details of construction, arrangement, or combination of features set forth as embodying its preferred form, since it can be employed in whole or in part, according to such constructions, arrangements, or combinations of features as circumstances or the judgment of those skilled in the art may dictate, without departing from the spirit of the invention."

The claims in issue read as follows:

"(1) In hoof-pads, the combination with a bearing-strip for receiving the sole of the hoof, of a hollow central portion for covering the sole of the foot inwardly of such bearing-strip, and a re-enforce on said bearing-strip extending around said hollow portion, and having an open center.

"(2) In hoof-pads, a body for covering the sole of a hoof, having a bearing-strip for contacting with the edges of the sole, a cavity under the center of the sole, and a leather re-enforce on said bearing-strip, extending around said cavity, and having an open center."

"(5) In hoof-pads, a flexible body adapted to be fastened to the sole of a hoof, and having a pneumatic chamber open at its upper side beneath the hoof, and a ring-like leather attacher connected to and covering the outer edge of said body, and having an aperture opposite and of approximately the full area of said chamber, whereby the air-chamber is in direct communication with the face of the hoof.

"(6) In hoof-pads, a body for contacting with the sole of a hoof, having an elastic downwardly bulging portion beneath the center of the hoof, and a confined air-chamber open at top under the hoof and within such portion, and a ring-like leather attacher connected to and covering the outer edge of said body, and having an aperture opposite and of approximately the full area of said chamber, whereby the hoof itself constitutes the sole top wall of said chamber."

The complainant is now the owner of the patent in suit. It is shown by the evidence that this pad met with great success in the market, and is practically very useful. It affords ventilation, reduces concussion, prevents slipping and forging, and is durable. It solves the problem, it is claimed, of applying a leather sole with a pneumatic pad. There was a pad known as the "Sheather Pad," which had no leather sole, and this brought the rubber part of the hoof-pad directly against the foot of the horse. There is evidence that some horseshoers refused to use the Sheather pad, because it brought the rubber directly against the foot. There is also evidence that rubber directly against the foot of the horse has an unhealthy effect, and draws the foot of the horse, the same as it will that of a human being. It appears from the file wrapper that claims 2, 5, and 6 were limited to a leather re-enforce or attacher, and that the claims 1, 2, 5, and 6 are limited to such re-enforce or attacher having an open center, so that the air-chamber is opened at its upper side beneath the hoof. These were inserted after the application was filed, and are to be given their full force and effect. The claims in suit were allowed after amendment, having been rejected as first presented upon certain patents, to which attention has been called on the final hearing, viz.: Hale patent, No. 28,473; Fanning patent, No. 489,896; Hallanan patent, No. 586,030; Jarvis patent, No. 478,435; Sheather British patent, No. 17,911 of 1890; Sheather British patent, No. 20,347 of 1891.

It has been necessary in the consideration of this case, owing to the nature of the defense, and the large number of patents urged upon the consideration of the court, to examine them all, with a view to ascertaining the state of the prior art. The study of the prior art is interesting, but it would not be profitable to detail it here. I find and hold that the defense of prior public use or sale has not been proven. It is well settled, and the court will not stop to cite cases, that the defense of prior public use or sale must be proven beyond a reasonable doubt. It must be conceded that the evidence in this case is somewhat conflicting. In patent cases we find conflicting evidence usually and almost invariably as to the merits of the patent, as to prior use when that is claimed, as to anticipation when that is claimed, and as to utility when want of utility is alleged, and as to nonpatentability when that defense is alleged. A large number of exhibits have been displayed before the court. The court has also had considerable experience with these pads,

and is perhaps justified in taking that experience into consideration in passing judgment on the utility of the pad in suit.

This court cannot sustain the alleged defense of aggregation. The elements of the patent in suit co-operate and coact so that they produce new and useful results. There is a difference, and a substantial difference, between the combination of elements in the patent in suit and the combination found in the other pads to which attention has been called. Those who have had experience with horses and the shoeing of horses understand how important the shape and fit of the shoe is. It is easy to lame a valuable horse by a slight misfit of the shoe. It is as important, and in fact more important, to have the shoe or hoof-pad for a horse of a closer and better fit and form than in the case of a human being. The man or woman can tell "where the shoe pinches." The defect can be remedied, if any, in the shoe in use, in the next one made or purchased. With the horse it is different. The horse may show by its mode of travel or by lameness that there is trouble somewhere, but just where, only experts can tell, and oftentimes their skill fails. The proof of a good horseshoe or hoof-pad is in the using, and in its success in actual use.

This court finds and holds that there was patentable invention in the so-called Kent pad, the patent in suit. It is, of course, true that the success of a patented article does not of itself prove patentability, but commercial success and success in actual use is evidence of patentability. See Gandy v. Main Belting Co., 143 U. S. 587, 12 Sup. Ct. 598, 36 L. Ed. 272; Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658. The established fact that the Kent pad has driven out others and gone into general use is evidence that it involved invention. Kinloch Tel. Co. v. Western Electric Co., 113 Fed. 659, 51 C. C. A. 369. See, also, Packing Co. v. Magowan, 27 Fed. 362, affirmed in 141 U. S. 332, 12 Sup. Ct. 71, 35 L. Ed. 781.

In this case it cannot be denied that the defendant has infringed the complainant's patent. It has closely copied it—so closely that the court is compelled to find infringement.

The Sheather pad of 1890 and the Sheather pad of 1891 do not show or establish anticipation.

The complainant's pad is declared valid. Infringement by the defendant is found. The complainant is entitled to a decree for an injunction and an accounting.

## REGINA CO. v. NEW CENTURY MUSIC BOX CO.

(Circuit Court, S. D. New York. June 15, 1905.)

PATENTS—INVENTION—MUSIC BOX.

The Brachhausen & Reissner patent, No. 500,371, for a music box, is void for lack of patentable invention, in view of the prior art, which discloses every element of the combination shown in the patent that involves invention, in substantially the same combination.

In Equity.

Suit to restrain alleged infringement of United States letters patent No. 500,371, dated June 27, 1893, application filed December 19, 1892, and issued to the alleged inventors, Gustav A. Brachhausen, of Hoboken, N. J., and Paul Reissner, of Eutritzsch, Germany. The suit originally claimed infringement of United States letters patent No. 637,367, but, after the evidence disclosed the state of the art at the time that patent was applied for, the complainant withdrew all claims of infringement of that patent. The defenses are summed up in the proposition that in view of the prior art the patent in suit, No. 500,371, fails to disclose patentable invention; also clear anticipation. Prior public use is alleged.

Briesen & Knauth (Antonio Knauth, of counsel), for complainant.

Holden & Rogers (Henry Samuel Morton, of counsel), for defendant.

RAY, District Judge. The patent in suit relates to that kind of music boxes in which discs or rotary note plates are used to operate the vibrating tongues. It consists of a mechanism designed to facilitate the removing and putting in place of these discs. This frequent removal is necessary to change the tunes. This mechanism also drives or rotates these discs by means of small openings or depressions in the discs near the outer edge or periphery thereof, which engage with a sprocket wheel. There is also a hinged rod having friction wheels at short distances apart, which, when the rod is in position, press gently upon the revolving disc, which is turned or revolved by the said sprocket wheel, and thereby (such pressure) keep the disc evenly upon the vibrating tongues placed in line from near the center to the circumference of said disc, and beneath same, and also under the said rod. There is a central pin or pivot about which the disc revolves, and from this the disc is easily removed by lifting it up after the rod spoken of is raised. There is an adjustable sleeve on this pin or pivot beneath the disc, when in place, which supports the disc. The rod spoken of is hinged outside the outer edge of the disc, and may be swung completely over, so as to point away from the pin or pivot; but, when in position for use, such rod, with its friction wheels, has the free or unhinged end attached to the central pivot and fastened by a latch. Unhitch the latch, throw back the rod, and lift off the disc; place another disc in the same position, engaging one of the openings with the sprocket wheel, bring the rod back into place, and fasten it with the catch. These are the movements for removing and replacing the discs. The disc, as stated, is turned by the revolving sprocket wheel

which engages with the openings or depressions near the periphery of the disc.

The following quotation from the specifications points out the defects or difficulties claimed to exist in the prior art, and which this alleged invention described in the patent in suit was designed to remedy or overcome:

"Our invention relates to that class of music boxes wherein discs or rotary note plates are used to operate the vibrating tongues, and consists in the novel arrangement and combination of parts hereinafter described, and specifically pointed out in the claims. Heretofore in this class of instruments rotary note plates or discs have been driven from a shaft located in the central portion thereof, which shaft was operated by suitable mechanism. This was objectionable for many reasons. The motion imparted by the shaft located as above described was jerky and unsteady, which is a serious disadvantage in this character of devices. It required, in music boxes built upon a large scale, that the power for rotating the disc be very great, and it was found difficult to operate the disc to the slight degree often required. The object of our invention is to provide a simple device, which, with comparatively little power, will rotate the disc in a steady, positive manner, and to the smallest degree when necessary."

It seems clear that these specifications allege (1) that in the prior art the music discs were rotated by means of a revolving shaft at the central portion of the disc (the shaft, however, not being integral with such disc), which shaft was operated or turned by suitable mechanism; (2) that the rotating of the music disc by means of this centrally located revolving shaft gave to such disc an uneven, jerky, unsteady motion, and necessarily interfered with the musical sounds produced, and perhaps with the contact of the disc with the vibrating tongues; (3) the movement of the disc by this means, when the machine was operating, required great force, and it was difficult to impart slight, even motion. The purpose or object of the invention was to overcome these alleged defects or difficulties.

The claims of the patent are as follows:

"(1) In a music box, the combination of the disc, A, having apertures, b, near the outer edge, and having playing edges, i, with the sprocket wheel, c, adapted to engage in said apertures, b, and means substantially as described for holding the disc down by pressure from above, substantially as and for the purpose specified.

"(2) The combination of the disc, A, means substantially as described for rotating said disc from the outer part thereof, rod, d, and friction wheels, e, mounted thereon, and adapted to bear upon the outer face of said disc, A, substantially as described.

"(3) The combination of the disc, A, provided with apertures, b, near the outer edge thereof, sprocket wheel, c, adapted to engage in said apertures, central pin, a, and adjustable sleeve, z, for supporting said disc, A, and upper bar, d, having friction wheels, e, all arranged substantially as and for the purposes set forth.

"(4) The combination of the disc, A, provided with apertures, b, near the outer edge, with sprocket wheel, c, adapted to engage in said apertures and rotate the disc, hinged rod, d, friction wheels, e, hung thereon, and adapted to bear upon said disc, A, central pin, a, and latch, g, substantially as described."

Of these claims, claim 4 is the more specific. It mentions all the elements of the combination referred to in all the others, except the adjustable sleeve for supporting the disc at the center. If these defects and difficulties existed in the prior art, and had not been met

and overcome by others by substantially the same means or mechanism, or combination of means or elements, and Brachhausen & Reissner, by the combination and means before described, and more fully described in the patent itself, met and overcame them, and it required or demanded more than the skill of the ordinary mechanic, skilled in the construction and operation of such devices or instruments, to make and apply the combination described in the patent, there was a field for invention, and this patent came in and occupied the field, and is valid. I find and hold there was invention—inventive skill displayed—in transferring the power for moving the disc from the center to the periphery, supporting the disc both at the center and a point near the circumference, and holding the disc in place by means of the rod and friction wheels.

The elements of the combination described in the patent are: (a) The disc with holes or depressions near the circumference to engage the sprocket wheel. (b) The sprocket wheel so located as to engage these openings or depressions in the disc. (c) The central pivot or pin, on which is a movable or adjustable sleeve. These support the disc at the center, and keep it in place. (d) The hinged rod with friction wheels to keep the disc steady and even, and pressed upon or against the vibrating tongues.

But while there was invention in transferring the power from the center to the circumference, adopting means for steadying the disc, etc., the question is, are the patentees in the patent in suit entitled to the credit? Did they originate this change? Did they make this combination?

The statement in the patent in suit, "Heretofore, in this class of instruments, rotary note plates or discs have been driven from a shaft located in the central portion thereof, which shaft was operated by suitable mechanism," gives the distinct impression that means for rotating or driving the discs by power applied at or near the periphery of the disc were theretofore unknown, or at least that these discs in such machines had not been rotated in that manner. The other statements already quoted are to the effect that, because driven by power applied at or near the center, the difficulties to be remedied arise. The inventive idea, if there be one, seems to reside in transferring the means for rotating the disc from near the center to near the circumference thereof.

Turning to the prior art, in United States letters patent No. 267,482, dated November 14, 1882, for music box, issued to Miguil Boom, of Port Au Prince, Hayti, we find a brass or other metal annular disc rigidly mounted on a short vertical shaft journaled in a base, and a top crossbar. The disc is thus adapted to rotate in a horizontal plane. The disc is provided at its edge (circumference) with a projecting flange or ridge which fits into a notched or recessed guide lug attached to the inner side of the frame of the music box, whereby the disc is guided, and vibrations thereof are prevented. A circle of teeth project from the underside of the outer edge of the disc, and these engage a pinion (a cogwheel with teeth) which is mounted on the inner end of a shaft which is turned or revolved by a crank, or any machinery, or by clockwork. The disc

is provided with grooves and teeth. The bar has a comb, with teeth, etc., and as the disc revolves the music is produced. We have here a disc revolved or turned by means of power applied at or near its periphery. We have double means for keeping the disc in place and in steady contact with the teeth. The circle of teeth projecting from the underside of the disc, with which the teeth of the pinion or cogwheel mounted on the shaft for turning it, engage, form an element, or combination of elements, which are the mechanical equivalent of the openings or dents in or near the periphery of the disc in the patent in suit and the sprocket wheel, and which engage with each other to turn or revolve the disc. The whole idea of revolving the disc by power applied at the periphery instead of the center of the disc is there. So of the bar. They are not equivalents in the strict sense, but the general idea is there. Turning again to the prior art, we find that November 28, 1892, 20 days before the filing of the application for the patent in suit, one O. P. Lochmann, of Leipsic, Germany, filed an application for a patent for a musical box, in which were two claims, viz.:

"In musical boxes, a second disc, A, laid upon the note disc so as to cover the same, both discs being held in position by stud, C, said disc, a, being driven by engagement at its circumference with the driving mechanism, for the purpose specified, substantially as described and shown. (2) In musical boxes, a driving mechanism, T, which is carried in a frame fixed to one of the sides of the musical box so as to be readily removable, for the purpose specified, substantially as described and shown."

Turning to the drawings which accompany the claims and specifications, we find the music plate or disc adapted to turn or rotate, as in the patent in suit, on a suitable pin or pivot in the center, and removable therefrom. The same is true of the second disc. We have also a sleeve which supports these discs, but it does not appear whether or not it is adjustable. In place of the hinged rod of the patent in suit, we have a second disc, nonmusical, superimposed on the first or musical disc, and which at the circumference extends beyond the main or musical disc, being of greater diameter. Near the center pin or pivot is a stud which holds and carries this second disc on the same spindle or center pin or pivot as the main or musical disc is carried. This second disc lying on top of the musical disc keeps that rigid and steady, and, in a degree, prevents the jerky and unsteady motion referred to in the specifications of the patent in suit, and also maintains even contact with the vibrating tongues below. In this second disc, at its periphery, as in the disc of the patent in suit, are holes, apertures, or depressions which engage with the teeth of a sprocket wheel as in the patent in suit, and which wheel is the same in all essentials, if not exactly the same, as in the patent in suit, and is located in the same place, and acts in the same way to rotate the musical disc, except that in the patent in suit we have the apertures or depressions to engage the sprocket wheel in the circumference of the musical disc, while in the Lochmann application and patent (for it was subsequently patented) we have them in the supplemental disc. The great advantage of this is that with this construction it is only necessary to have apertures,

holes, or depressions in the nonmusical plate, instead of in each of the musical plates. In this application of Lochmann we find no suggestion of anything new or novel in having the driving mechanism at the periphery instead of near the center of the disc, and an engagement there of the disc with the sprocket wheel. Lochmann seems to assume in his application that it was old in the art to revolve the disc or musical plate by means of power, sprocket wheel, or other wheel with teeth, engaging with the disc at its periphery instead of near the center. That such was the fact is apparent. Indeed, this court will take judicial notice of the fact that it was old more than 30 years ago to turn wheels with cogs on the edges, or on the underside of the edge, and revolving on a pin at the center, by means of engagement with another cog or sprocket wheel turned by the water or steam power, located at or very near the edge of such first-mentioned wheel, answering in this music-box construction to the disc or musical plate. The said application of O. P. Lochmann was granted May 30, 1893, 27 days before the patent in suit was granted, and, so far as the two relate to means for revolving or turning the disc by wheels or other means situated near and engaging with the disc at the periphery thereof, they are substantially identical. The ideas of means are the same. The construction differs but little, not materially. I can find no patentable invention in the hinged bar with friction wheels. The idea of pressing evenly on a given surface to keep it engaged with another surface or with other things below it is old, and a dozen different ways of accomplishing the purpose will readily occur to any skilled mechanic. The rod might lie on the revolving plate, but in so doing we would have too much friction. Place the rod made round in a single roller of the general shape and construction of gas pipe, and the purpose is accomplished. Have one or ten or twenty pieces, as necessary. Make them short or long, as desired. The idea of antifriction wheels has been old ever since carts and cars and wagons and other wheeled vehicles took the place of stoneboats and like construction for long-distance transportation purposes. Each and every element found in complainant's patent is old. Is the combination new, and does it produce new and useful or beneficial results? Do these old elements so coact as to produce a new and a beneficial result, or some old result in a much better or improved way? Have we a mere aggregation, so far as the addition of this hinged arm provided with friction wheels is concerned?

In the prior art we find United States letters patent No. 374,127, issued to O. P. Lochmann November 29, 1887, application filed September 8, 1887, for "musical box," and which "has for its object to provide novel means for rotating the circular note plate [disc] of a music box," and in which the musical disc is supported at the center by a nipple and threaded bolt (the equivalent of the central pin or pivot of the patent in suit), around which it rotates. It is kept in place by a nut, instead of the end of the pivoted rod with friction wheels, and is supported at the outer edge or periphery. Here, at the outer edge (periphery), is located the power by which the disc is rotated, and here such disc is engaged therewith and ro-

tated in three different modes. One of these constructions, says the specifications, is:

"The note plate is conducted in a slot on the nipple, e, but on the upper surface of the nipple. The shaft, f [part of the means for rotating the disc], is in this case provided with a collar, m, lying with an elastic washer, n, upon the note plate [disc], p. In turning the crank [which revolves the shaft, f, which connects with the cogwheel or sprocket wheel that rotates the disc], a pressure is exerted on the shaft, f, which pressure is transmitted by the elastic washer to the note plate, p, so that the latter is conducted between the collar, m, and the nipple, e. Any vibration of the note plate is avoided by this arrangement, which, moreover, has the advantage that the note plate can be more easily put in and changed, as after the removal of the crank the note plate does not find any resistance in its periphery."

There are found in the prior art, and in substantially the same constructions, means to accomplish the same purposes mentioned in the patent in suit. Everything is done in substantially the same way, except to press the note plate evenly by means of the hinged rod with friction wheels. This, in the patent in suit, acts independently of the other elements. It is hinged at one end, and, when in place, fastened or locked to the center pin or pivot at the other. It simply exerts a pressure on the note plate, and serves to insure its contact with the vibrating tongues. It has no other function, and nothing whatever to do with serving or accomplishing the purposes of the patent. Its action is distinct. It does not coact with the other elements of the combination of the patent. I fail to find invention in adding this element to the prior art. We have no new result by so doing—no improved result from the combination.

Attention should be called to the United States letters patent, No. 425,935, April 15, 1890, to Ehrlich—music sheet for mechanical musical instruments. In this we have an arm answering to, and serving the same purpose as, the pivoted arm in the patent in suit, and that patent says:

"The bar, f, is hinged at one end to the chest, p, while at the other end it is secured in such a manner that it may with facility be released and lifted in order to allow the disc, a, to be exchanged."

It seems to me clear that, in view of the prior art, no patentable invention is disclosed in the combination of the patent in suit. I must so find, having in mind the presumption of validity that attends the complainant's patent, and the necessity for strict and convincing and satisfactory proof of the prior art.

It has well been said, in substance (Lourie Implement Co. v. Lenhart, 130 Fed. 122, 64 C. C. A. 456):

"A copy of the thing described in a patent, either without variation, or with such variations as are consistent with its being in substance the same thing, is for all the purposes of the patent law the same device as that described in the patent. Burr v. Duryee, 1 Wall. 531, 573, 17 L. Ed. 650. One who claims and secures a patent for a new machine thereby necessarily claims and secures a patent for every mechanical equivalent for that device, because, within the meaning of the patent law, every mechanical equivalent of a device is the same thing as the device itself. A device which is constructed on the same principle, which has the same mode of operation, and which accomplishes the same result as another by the same means, or by equivalent mechanical means, is the same device, and a claim in a patent of one such device claims and secures the other. Machine Co. v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935.

The sliding, slotted, adjustable plate of the appellant, with its thickened, flattened lower edge or foot by the side of, and seven-eighths of an inch distant from, the edge of the share of the plow, involves the same principle, has the same mode of operation, and performs the same function—the regulation of the tilting of the plow—by mechanical means equivalent to the adjustable sliding plate of Lenhart, with its thin edge bent against the plowshare, so that it may slide under its edge when it is depressed below it. One may not escape infringement by adding to or substracting from a patented device, by changing its form, or by making it more or less efficient, while he retains its principle and mode of operation and attains its result by the use of the same or of equivalent mechanical means. Walker on Patents, §§ 347, 348; Sewall v. Jones, 91 U. S. 171, 183, 23 L. Ed. 275; Coupe v. Weatherhead (C. C.) 16 Fed. 673, 675."

In the patent in suit I find nothing done that an ordinary mechanic skilled in this art would not have done in the exercise of that skill, having the prior art in mind and before him.

The complainant's patent is invalid, and the defendant is entitled to a decree dismissing the bill, with costs.

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## PETTIBONE, MULLIKEN & CO. v. VERONA TOOL WORKS.

(Circuit Court, W. D. Pennsylvania. June 12, 1905.)

No. 16.

PATENTS—VALIDITY AND INFRINGEMENT—RAIL BENDER.

The Storm patent, No. 344,793, for a rail bender, used by track hands for bending railroad rails, adds nothing to a device previously in use, except its equipment with rollers to grasp the rail, and by means of which the machine may be moved along to successive positions without releasing the pressure by which it holds the rail, and is entitled to only a narrow construction, restricting it to the particular mechanism shown. Claim 1 is void, as too broad, in view of the prior art. Claim 6 *held* not infringed.

In Equity.

Dyrenforth, Dyrenforth & Lee, for complainant.

Bakewell & Byrnes, for respondent.

BUFFINGTON, District Judge. This is a bill in equity brought against the Verona Tool Works by Pettibone, Mulliken & Co., assignee of patent No. 344,793, granted June 29, 1886, to one Storm, for a rail bender. Infringement of the first and sixth claims is alleged. The defenses are noninfringement and invalidity of the patent. An examination of the prior art satisfies us that the patentable novelty disclosed by the patent was such that its claims were necessarily restricted to a comparatively narrow compass. The device is one used by track hands for bending railroad rails. Such work was successfully done before this patent by machines of other types, which still continue in use by large and progressive railroad systems. The most common form of bender now and prior to the patent in suit was called the "Jim Crow." This consisted of a heavy, bowed frame, first bent upwards at the outer ends, and then turned downward into hooks. These hooks grasped the outer side of the rail, and afforded resistance points to a screw placed

midway between them, but on the other side of the rail, and reaching back to and sleeved in the bight of the bow. Pressure on the screw was effected by turning a nut shouldered against the bow. As the two hooks and the pressure point of the screw were all on one side of the bender, its construction was such that the machine could be operated by dropping it in place upon a rail lying on the ground. When thus applied, pressure was applied by turning the screw. When the pressure was released, the machine was moved along the rail, and pressure again applied at successive points until the rail was brought to the desired curvature. This was what was known as the "step by step process." The device of the patent in suit consisted, in substance, in equipping the Jim Crow bender with rollers. This was done by seating in the grasping hooks at each end of the bow of a vertical nonactuated roller, adapted to engage the head of the rail, and a third roller at the end of the screw, adapted to engage the other side of the rail head. This latter roller was provided with a squared spindle head, adapted to be revolved by a wrench. When this roller was forced against the rail head by the screw pressure from the nut seated against the bow, and the rail properly bent at that point, the machine could be moved along the rail by turning the spindle-headed roller, and the curving pressure applied at successive points, without releasing the initial pressure. This method imparted mobility to the machine, and permitted such mobility while the machine maintained curving pressure. It will thus be seen the device substituted mechanical or roller-moving mechanism for the step by step mobility theretofore in use. The mechanical result of this change was to permit mobility under bending pressure. In the light of the views expressed by the Circuit Court of Appeals of this Circuit in the case of Carnegie Steel Company v. Brislin, 124 Fed. 215, 59 C. C. A. 651, on the subject of imparting mobility to a machine, we are quite clear that no patentable novelty is involved in Storm's device. In that case the imparting to a stationary machine, adapted to perform one part of a process only, of lateral mobility, which enabled it to work at other lateral points, and thereby complete a process which it had never entirely completed before, was held not to involve patentable novelty. The court there say:

"We will not pause here to consider whether the thought or idea of laterally moving this device for the purpose stated was one worthy of being called a patentable invention, apart from the specific mechanical means devised for such lateral movement. We will only remark, in passing, that the suggestion of the moving of such a table on a carriage or truck laterally, so as to bring the same successively in front of stands of rolls placed side by side, does not seem to us to so involve patentable invention as to be entitled to the monopoly accorded to such invention by the present law."

In the present case the entire process of rail bending in the method of Storm's device had been employed before, and he simply equipped with rollers a machine which did such work. Moreover, the prior art was such that the nature of the advance was necessarily restricted in sphere. The Jim Crow device showed three resistance points of pressure, all located on the lower side of the device, and adapted to exert binding pressure from above. This

made that device applicable to a rail lying on the ground. The Vojacek device showed a movable bender provided with rollers and three resistance points, but so constructed that it could not be placed on a rail, but it necessitated threading. The device of the English patent of Hain, while employed in a stationary machine, showed the use of three pressure points on the upper side of a plane adapted to have a rail placed on it, instead of threaded into it, and equipped with rollers at the three points to move a rail through it. Under these facts, we are justified in confining these claims to the limits of the particular specific device which the patentee contributed to the art, or to the mechanical equivalents of the means he employed. In the light of these facts, we are of opinion the patentee was not entitled to the broad monopoly covered by claim 1, and that the same is void. As to claim 6, we are of opinion the respondent's device does not infringe. It has not the elements of the screw, D, and nut, E, of Storm's device for imparting pressure. In it pressure is not imparted by means of a screw, but through a shaft with an eccentric seated in the bend of the bow. In substance, this method of eccentric pressure is found in Emerson's patent of 1869—a device which has been employed in an extensively used bender of that name. It is true that upon the respondent's pressure shaft there is a sleeve, thread, and nut mechanism; but these are not used for imparting pressure, but to so adjust the length of the shaft as to secure through the eccentric different degrees of curvature. After due consideration, we are clear that infringement of this claim is not shown.

A decree may be drawn dismissing the bill.

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## BRADLEY v. ECCLES.

(Circuit Court, N. D. New York. June 12, 1905.)

No. 6,961.

1. PATENTS—VALIDITY—PRIOR PUBLIC USE.

Under Rev. St. § 4886 [U. S. Comp. St. 1901, p. 3382], the public use of an invention for more than two years before the application for a patent therefor, although in but a single instance, will defeat the right to a patent.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 103.]

2. SAME—PUBLIC OR EXPERIMENTAL USE.

If an inventor passes his invention into the hands of different persons to use and test as to the usefulness of the device before application for a patent, such use by them must be restricted to experimental use; and if they are permitted to use the device publicly as a nonpatented article, and it is either sold or given away to even a few persons, their use of it will be a prior public use which may deprive the inventor of his right to a patent.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 95, 98, 103.]

3. SAME—THILL-COUPLING.

The Hannan reissued patent, No. 11,260 (original No. 456,117), for improvements in thill-couplings, while it discloses patentable invention, is

void for prior public use; it being shown to the satisfaction of the court, beyond a reasonable doubt, that the inventor either knowingly and intentionally or negligently permitted the public use of the invention for more than two years prior to his application for a patent.

Bill of complaint in equity to perpetually enjoin alleged infringement of reissued letters patent No. 11,260, granted to William Henry Hannan, assignor to William Herbert Hannan, dated August 16, 1892, for improvements in thill-couplings, and an accounting. The original letters patent, No. 456,117, bore date July 14, 1891. Application therefor was filed November 17, 1890. Application for reissue was filed September 2, 1891. Such reissued letters patent were duly assigned to complainant.

See 120 Fed. 947.

Howard P. Denison, for complainant.

William A. Megrath, for defendant.

RAY, District Judge. The complainant alleges infringement of claims 1 and 2 of reissued letters patent No. 11,260, above referred to, and which claims read as follows:

"(1) The combination with the draft-eye, composed of a fixed section and a movable section, of a spring-arm secured at one end and free at the other, a cam-lever pivoted to the free end of said spring-arm, and a tie attached to the cam-lever outside of its fulcrum, and connecting the cam-lever with the movable section of the draft-eye, whereby the spring-arm exerts a constant pressure upon the movable section, and also holds the cam-lever yieldingly in a locked position, substantially as set forth.

"(2) The combination, with the axle, of a draft-eye composed of a forwardly projecting fixed section and a movable section hinged to the front end of the fixed section, a spring-arm secured to the axle, and projecting forwardly therefrom, a cam-lever hinged to the free front end of the spring-arm, and a tie attached to the cam-lever outside of its fulcrum, and connecting the cam-lever with the hinged section of the draft-eye, substantially as set forth."

The defendant alleges two defenses: (1) That the thill-coupling, etc., covered by the said claims is not, in view of the prior art, a patentable invention; and (2) that such coupling was in public use and on sale in the United States for more than two years prior to November 17, 1890, the date of the filing of the application for the original letters patent.

The elements of claim 1 are (1) a draft-eye composed of a fixed section and a movable section; (2) a spring-arm secured at one end and free at the other; (3) a cam-lever pivoted at the free end of such spring-arm; and (4) a tie attached to the cam-lever outside its fulcrum, and connecting the cam-lever with the movable section of the draft-eye. There is no disagreement as to the elements of claim 1. Nor is there any real difference between the parties as to the elements of claim 2. Defendant says it contains the following:

"(1) The axle; (2) a draft-eye composed of a forwardly projecting fixed section and (3) a movable section hinged to the front end of the fixed section; (4) a spring-arm secured to the axle, and projecting forwardly therefrom; (5) a cam-lever hinged to the free front end of the spring-arm; (6) a tie (bail) attached to the cam-lever outside of its fulcrum, and connecting the cam-lever with the hinged section of the draft-eye."

In enumerating the elements, defendant adds the axle, and divides the draft-eye into two elements—a forwardly projecting fixed section, and a movable section hinged to the front end of such fixed section.

The specifications state:

"This invention is a specific improvement of the thill-coupling for which I have obtained United States letters patent No. 341,235, dated May 4, 1886. The object of my present invention is to provide the thill-coupling with a locking device which shall be more secure and reliable in its operation, and capable of compensating for the wear and abrasion of the coupling-pin and draft-eye; and, to that end, the invention consists in the improved construction and combination of parts, as hereinafter more fully described and set forth in the claims."

Complainant admits and states in his brief:

"Upon comparing this claim [2] with claim 1, it is noted that the only difference is that it specifies 'a forwardly projecting fixed section,' and also 'spring-arm secured to the axle, and projecting forwardly therefrom.'"

The whole thill-coupling made and sold by the defendant is a substantial copy or duplicate of the complainant's coupling; the only difference of note being that while the complainant attaches the spring-arm to the rear part or end of the fixed section of the draft-eye (being that part called the 'clip-tie,' where it comes against the axle, so that this end of the spring-arm is fixed between the back end of the draft-eye and the axle, and so held in place), the defendant attaches this fixed end of the spring-arm to the underside of the draft-eye at a point beneath the place where the thill-iron is embraced within the jaw of the draft-eye formed by the shutting down of the movable end of this eye upon the fixed end thereof. Attached in either place, so as to be held firmly in position, this end of the spring maintains a fixed relation to the axle, and at right angles therewith, which is all that is necessary or intended. Attached in either place, the idea of means, means and mechanical working, and result attained are the same.

I have carefully examined the evidence and prior patents put in evidence to show the prior art, and am satisfied that the coupling in question, in view of the prior art, discloses patentable invention. It is true that there was a locking of the parts in the prior art, but the devices for locking were different, and the construction of the coupling, as a whole, was quite different. In the field to which this patent in suit relates, the improvement is useful and important. The defendant's expert said, in substance, speaking of the patents of the prior art in evidence:

"I do not find a spring-arm secured at one end and free at the other, a cam-lever pivoted to the free end of said spring-arm, and a bail attached to the cam-lever outside of its fulcrum, and connecting the cam-lever with the movable section of the draft-eye; but I do find a construction by which a constant pressure on the bail is secured, and a construction in which the cam-lever will be held in its closed or locked position."

A careful examination of the patents to which reference is made, viz., Hannan patent, No. 341,235, of May 4, 1886, Miller and Wright patent, No. 376,606, of January 17, 1888, and Miller and Wright patent of August 21, 1888, No. 388,144, and Holden patent of Feb-

ruary 18, 1890, No. 321,713, satisfies me that anticipation is not shown, and that, in view of such patents, there is patentable invention disclosed in the production of the complainant's device.

Coming to the other defense—that of prior use—I have had more difficulty in arriving at a satisfactory conclusion. It is claimed by the defendant—and much evidence has been given of a more or less satisfactory and conclusive nature tending to show such alleged fact—that the patented thill-coupling described in the patent in suit was in public use more than two years prior to the filing of the application for the patent in question. It is, of course, well settled that, under section 4886 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3382], when a device has been in public use and on sale in the United States for more than two years prior to the filing of the application on which a patent has been granted, the patent will be void. Edgarton v. Furst & Bradley Mfg. Co. (C. C.) 9 Fed. 450; Manning v. Glue Company, 108 U. S. 462, 2 Sup. Ct. 860, 27 L. Ed. 793; Detroit Company v. Lunkenheimer (C. C.) 30 Fed. 190; Andrew v. Hovey, 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 160; Andrew v. Hovey, 124 U. S. 694, 8 Sup. Ct. 676, 31 L. Ed. 557.

In Manning v. Glue Company, supra, the court said:

"It is the policy of the patent laws to forbid the issue of a patent for an invention which has been in public use before the application therefor. The statute of 1836 (5 Stat. 117, c. 357, § 6) did not allow the issue of a patent when the invention had been in public use or on sale for any period, however short, with the consent or allowance of the inventor; and the statute of 1870 (16 Stat. 201, c. 230, § 24; Rev. St. § 4886 [U. S. Comp. St. 1901, p. 3382]) does not allow the issue when the invention had been in public use for more than two years prior to the application, either with or without the consent or allowance of the inventor. Under either of these statutes the patent relied on in this case was improvidently issued, for there was a public use, with the consent of the inventor, for more than two years prior to the application. The patent is therefore void. McClurg v. Kingsland, 1 How. 202, 11 L. Ed. 102; Egbert v. Lippmann, ubi supra; Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92, 24 L. Ed. 68; Worley v. Tobacco Co., 104 U. S. 340, 26 L. Ed. 821."

One well-defined case of prior public use in the United States is all-sufficient. Egbert v. Lippmann, 104 U. S. 333, 26 L. Ed. 755; Clark Co. v. Ferguson (C. C.) 17 Fed. 79; Brewster v. Shuler (C. C.) 37 Fed. 785; U. S. Co. v. Edison Co. (C. C.) 51 Fed. 24; Swain v. Holyoke Co., 109 Fed. 154, 48 C. C. A. 265.

In Egbert v. Lippmann, supra, the court said:

"We observe, in the first place, that, to constitute the public use of a patent, it is not necessary that more than one of the patented articles should be publicly used. The use of a great number may tend to strengthen the proof of public use, but one well-defined case of public use is just as effectual to annul the patent as many."

In the case of Clark Co. v. Ferguson, supra, the court said:

"A number of witnesses, who are unimpeached, swear to the use of the combination in 1873, and even before that year. It is true that several persons were called by the complainant who testify that they heard nothing of its use, though living in the immediate neighborhood. It is also true that some of the defendant's witnesses are contradicted and otherwise discredited. Bearing in mind, however, the rule that proof of but one instance of public use more than two years prior to the application for the patent is sufficient

to defeat it, the court would hardly be justified in disregarding the testimony of the numerous witnesses who positively affirm that they used the rack cloths and frame in 1871, 1872, 1873, 1874. Egbert v. Lippmann, 104 U. S. 333, 26 L. Ed. 755; Manning v. Glue Co., 108 U. S. 462, 2 Sup. Ct. 860, 27 L. Ed. 793."

It is well to bear in mind always that a certain reasonable degree of experimental use prior to the application for a patent is permitted. However, experimental use should be distinguished from public use. The public should not be permitted by the inventor to use a machine or a device, supposing it to be free to the public, and then subjected to suits for infringements. This will be the result unless the rules as to prior use, as distinguished from experimental use, are defined and maintained. A few cases will illustrate the difference between public use and experimental use: Smith & Griggs Co. v. Sprague, 123 U. S. 249, 8 Sup. Ct. 122, 31 L. Ed. 141; Brush v. Condit, 132 U. S. 39, 10 Sup. Ct. 1, 33 L. Ed. 251; Root v. Third Ave. Co., 146 U. S. 210, 13 Sup. Ct. 100, 36 L. Ed. 946; Smith & Davis Co. v. Mellon, 58 Fed. 705, 7 C. C. A. 439; Swain v. Holyoke Co., 111 Fed. 408, 49 C. C. A. 419; Thompson Co. v. Lorain Co., 117 Fed. 249, 54 C. C. A. 281.

In Brush v. Condit, 132 U. S. 39, 10 Sup. Ct. 1, 33 L. Ed. 251, the Supreme Court declared invalid reissued patent No. 4,718, dated May 20, 1879, to one Brush, for an improvement in electric lamps, and, in so doing, said:

"Where there had been a public use, well-known, practical use in ordinary work, with as much success as was reasonable to expect at that stage in the development of the mechanism belonging to electric-arc lighting, of the exact invention which was subsequently made by the patentee, held, that although only one article like the patented invention was ever made, which was used two and one-half months only, and the invention was then taken from the lamp, and was not afterwards used with carbon pencils, it was an anticipation of the patented device, under the established rules upon the subject."

This defense of prior public use must be established by clear, credible, and satisfactory evidence, and the fact must be established to the satisfaction of the court beyond a reasonable doubt. It is not satisfactory to determine such a question of fact from a printed record, without seeing the witnesses. However, when the evidence is taken and printed, and then submitted to the court for its determination, the court must do the best it can, and pass upon the credibility of the witnesses from the printed record before it. The court will assume that the witness speaks the truth unless there be impeaching testimony, contradictory testimony, inherent improbabilities in the statements, or circumstances surrounding the transaction testified to tending to throw discredit upon the statements made. In this case nearly all of the evidence given by the defendant to establish prior use is uncontradicted, unimpeached, and free from inherent improbabilities. So far as appears, the witnesses are entitled to credit, and speak of transactions within their personal knowledge, in which they had an interest, and whereof they know. In some instances facts were brought out tending to shake the force of the testimony given. This, however, is not true of the evidence taken as a whole. It may be that the inventor had it in

mind that he was allowing an experimental use of his patent, only—that he had no idea he was giving the invention to the public—but from the evidence I cannot find that the prior use clearly proved by the defendant was experimental in the legal sense, or experimental within the decisions referred to. In my judgment, if the inventor passes the machine or structure covered by the patent into the hands of different persons—say two or more—for them to use and test as to the usefulness, etc., of the device, such use by them must be restricted to experimental use. If such persons and others are permitted to use such structure or device or machine publicly as a nonpatented article, and the article is either sold or given away even to a few persons, such public use will, or at least may, become a prior public use, and deprive the inventor of the benefit of his invention.

In the case now before the court, the court is satisfied that the inventor either knowingly and intentionally or negligently permitted the public use of the alleged invention during a long period of time—more than two years—prior to his application for the patent in suit, and that this defense is established. This court entertains no reasonable doubt on this question, and is compelled to this conclusion, notwithstanding the fact it is satisfied there was patentable invention in the complainant's device, and, if the patent could be sustained, that infringement has been proved.

The defendant is entitled to a decree dismissing the bill of complaint, with costs.

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## BRADLEY v. ECCLES.

(Circuit Court, N. D. New York. June 12, 1905.)

PATENTS—INVENTION—THILL COUPLING.

The Bradley patent, No. 485,856, for a thill coupling, consisting of a spherical knuckle on the end of the thill iron, and a draft eye composed of two parts, one rigid and one movable, hinged together at the front end, and having a spherical cavity in which the knuckle fits, was not anticipated, and discloses invention. Claims 1 and 2 also *held* infringed.

In Equity.

Suit in equity to restrain alleged infringement of United States letters patent No. 485,856, granted to Christopher C. Bradley November 8, 1892 (application filed August 10, 1891, serial No. 402,203), for "Thill Coupling." The defendant alleges three defenses: Anticipation, want of invention, and noninfringement.

Howard P. Denison, for complainant.

William A. Megrath, for defendant.

RAY, District Judge. The patent in suit, No. 485,856, dated November 8, 1892, is for a new and useful improvement in thill couplings. Say the specifications:

"This invention relates to that class of thill-couplings which are provided with a divided draft-eye, a coupling pin or wrist, and a clamping device connected with the draft-eye, whereby the latter is tightened and the thills are enabled to be attached to or detached from the vehicle in an expeditious man-

ner. Heretofore the coupling wrist or pin was of cylindrical form and provided with collars, whereby lengthwise movement of the wrist in the draft-eye was prevented. The wear upon the cylindrical surface of the wrist was automatically taken up by the clamping device, but any wear on the collars permitted the wrist to move lengthwise in the draft-eye and caused rattling.

"The objects of my invention are to produce a thill-coupling of this character in which the shoulders for preventing lengthwise movement of the wrist in the draft-eye are dispensed with, so as to avoid rattling; also to provide a lubricating device whereby the bearing-surfaces of the wrist and draft-eye are lubricated in a simple and convenient manner; also to provide means whereby the thill-iron is prevented from becoming detached from the draft-eye when the clamping device of the latter becomes broken.

"The wrist of the thill-iron consists, preferably, of a spherical knuckle connected with the thill-iron by a narrow neck, k, and seated in correspondingly shaped sockets or bearing-surfaces formed in the draft-eye sections. This form of wrist permits the thill to rock freely in any direction in the draft-eye and wear the parts uniformly, without causing any rattling, owing to the tension of the spring, I, which exerts a constant pressure upon the sections of the draft-eye, thereby centering the wrist and preventing the same from moving laterally in the draft-eye.

"Heretofore the wrist of the thill-iron was cylindrical in form, and provided with collars bearing against opposite sides of the draft-eye sections, between which the cylindrical wrist was clamped. These shoulders wore rapidly, owing to the lateral strain applied to the wrist by the great leverage of the thills, so that the parts soon became loose.

"In constructing the thills with cylindrical wrists, it is extremely difficult to secure the thill thereto so that the wrists are axially in line. When the wrists are not in line, it becomes necessary to spring them into place in the draft-eyes. This causes a constant strain and wear upon the wrist and its collars, which eventually permits the wrist to move lengthwise in the draft-eye, and causes rattling.

"The spherical form of the thill-iron wrist and of the sockets in the draft-eye sections permits the wrists to adjust themselves freely within certain limits without binding or cramping, and compensates for any inaccuracies in the relative position of the draft-eyes and the wrists of a pair of thills. The spherical form of the wrist and the draft-eye section embracing the same also increases the bearing-surfaces between these parts, and causes them to wear longer. A similar result is produced by forming the wrist in the shape of an oval, as represented in Fig. 4, or with a conical taper toward opposite ends, as represented in Fig. 5, in both of which modifications the draft-eye sections are provided with correspondingly shaped cavities, and the wrist is centered upon drawing the eye-sections together."

There are three claims in this patent, viz.:

"(1) The combination with the thill-iron, provided with a wrist or knuckle having its face rising from its ends toward its middle, of a clip provided with a rigid eye-section and a movable eye-section hinged to the front end of the rigid section, both sections embracing said wrist and provided with corresponding bearing-surfaces, a tension-spring secured with one end to said clip, a clamping-lever pivoted to the opposite end of said spring, and a loop connecting the movable eye-section with said clamping-lever, substantially as set forth.

"(2) The combination with the thill-iron, provided with a wrist or knuckle having a convex spherical surface, of a clip provided with a forwardly-projecting rigid eye-section, a movable eye-section hinged with its front end to the front end of the rigid eye-section, both eye-sections embracing said wrist and provided with corresponding concave spherical bearing-surfaces, a tension-spring secured with one end to said clip, a clamping-lever pivoted to the opposite end of said spring, and a loop detachably connecting the rear end of said movable eye-section with the clamping-lever, substantially as set forth.

"(3) The combination with the wrist, having a recess in its bearing-surface, of an absorbent plug arranged in said recess, and a draft-eye embracing said wrist, substantially as set forth."

Claims 1 and 2 only are involved here. In the original application filed three other claims were included, viz.:

"(1) In a thill coupling, the combination with the wrist or knuckle, having its face rising from its ends toward its middle, of a draught eye provided with a movable section, and a clamping device whereby the draught eye is tightened upon the wrist, and the latter is centered in the draught eye, substantially as set forth."

"(4) The combination, with the wrist, of a draught eye provided with a movable section, a stop whereby the opening movement of said movable section is limited, and a clamping device whereby the draught eye is tightened upon the wrist, substantially as set forth.

"(5) The combination with the thill iron, provided with a wrist, of a forwardly projecting rigid eye section provided with a shoulder on its front side, a movable eye section hinged with its front end to the front end of the rigid eye section, a stop formed on the front end of the movable eye section, and adapted to strike against the shoulder of the rigid eye section and thereby limit the opening movement of the movable eye section, and a clamping device whereby the draught eye sections are tightened upon the wrist, substantially as set forth."

These were rejected by the Patent Office, the first one on Smith patent No. 305,539, of September 23, 1884, and the others on patent to Smith and Pride, No. 328,726, of October 20, 1885. Thereupon Bradley, the applicant, amended his application by erasing and dropping the rejected claims. The claims allowed stand as in the original application, without modification or limitation.

The defendant has not shown that the prior United States patents now relied on to show anticipation, etc., were not called to the attention of the officials and examiners in the Patent Office. There is no legal presumption that such examiners were ignorant of their existence. An examination of the evidence and exhibits shows beyond any question whatever that the defendant here is using and vending the exact construction and combination covered by the complainant's patent. The defendant's expert was asked, "Do you find in the prior art any one patent, publication, or construction which embraces each and all of the elements of either claims 1 and 2 of the patent in suit?" He answered, "No, if by each and all of the elements you include the thill coupling of the Hannan patent provided with either, broadly, a wrist, a knuckle having its face rising from its ends towards the middle, or, specifically, a knuckle having a convex spherical surface with corresponding seats in its draft-eye sections." Defendant's expert was then asked, "And I suppose that, if claims 1 and 2 of the patent in suit are valid, complainant's exhibit," defendant's thill coupling, "would come within the terms of claims 1 and 2, would it not?" The answer was "Yes." The real question in this case is, in view of the prior art, does the patent in suit disclose patentability? Conceding that each element of the combination is to be regarded as old, still have we not a new combination producing new or vastly improved results in a new way? The prior art indicates that others had had in mind the possibility of using in thill couplings a thill iron provided with a wrist or knuckle having a convex spherical surface, or something of that kind, and also eye sections provided with corresponding concave spherical bearing surfaces embracing such wrist or

knuckle, but fails to show that such element had been practically used in a thill coupling. Its necessity in the art was recognized fully just as soon as the element was introduced by Bradley into his combination. The new combination proved a great success. It removed inconveniences, and did away with annoyances and dangers attending the use of the prior devices. The necessity for something of the kind was known before. Bradley found what was wanting in the combination, and found a way to introduce it therein, and have as a result a practical, cheap, safe, and exceedingly useful coupling. This spherical form of the knuckle, inclosed as it is in the corresponding sockets, allows the wrists of the thill irons, and consequently the thills, to accommodate themselves to the movements of the horse. As a consequence, there is no wringing and twisting of the iron wrist and knuckle in the socket, no undue friction and wearing away of the parts and consequent weakening of the parts. The wearing spoken of is, of course, followed by rattling and danger of breaking; here we have no wearing loose by unnecessary friction. The natural movements of a horse in harness hitched to a vehicle tend to work the knuckles not only up and down, but sidewise in the sockets. This spherical form permits a free rolling movement in all directions without strain. It may seem simple now. The placing the point in the heavens to catch the lightning seems simple now. It is easy to confine and utilize the steam now—after it is done. Eccles followed Bradley, and took, and takes and uses, what he invented and secured by letters patent. If there was patentable invention in the case of Washburn and Another v. Barbed Wire Company, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154, there is invention here. In Krementz v. Cottle, 148 U. S. 558, 13 Sup. Ct. 720, 37 L. Ed. 558, the court said:

"It is not easy to draw the line that separates the ordinary skill of a mechanic, versed in his art, from the exercise of patentable invention; and the difficulty is specially great in mechanic arts, where the successive steps in improvements are numerous, and where the changes and modifications are produced by practical mechanics. In the present instance, however, we find a new and useful article, with obvious advantages over previous structures of the kind."

It was much more than the ordinary skill of the mechanic versed in the art, or even the extraordinary skill of the mechanic, that did what Bradley did here. It was invention, and complainant is entitled to the benefit of his thought and work.

The defenses are not sustained, and complainant is entitled to a decree for an injunction and an accounting.

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## MILLER & ENGLAND v. WALKER PATENT PIVOTED BIN CO.

(Circuit Court, E. D. Pennsylvania. June 20, 1905.)

No. 22.

1. PATENTS—ANTICIPATION—REJECTED APPLICATION FOR PATENT.

While a rejected application for a patent is not a bar to a subsequent patent to another for the same device, the fact of such rejection does not of itself characterize the invention as an abandoned experiment,

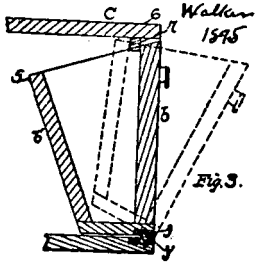
and if it, in fact, had passed beyond the experimental stage and was in practical and successful use, it cannot thereafter be appropriated and patented by another.

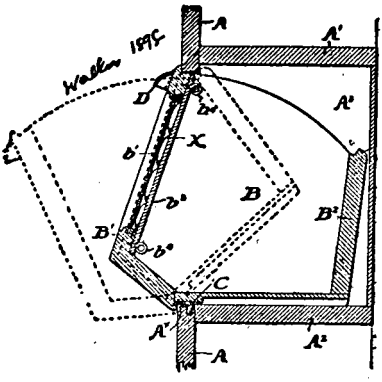
2. SAME—TILTING BINS.
The Bacon patent, No. 447,532, for a tilting bin, is void, the bin shown having been previously made and put into use by another.

In Equity. Suit for infringement of letters patent No. 447,532, for a tilting bin, granted to Byron R. Bacon March 3, 1891. On final hearing.

Henry E. Everding, for complainants.
Ernest Howard Hunter, for defendants.

ARCHBALD, District Judge.* The Walker Patent Pivoted Bin Company, defendants, are manufacturers of pivoted or tilting, counterbalanced, store bins, one style of which conforms to the Walker (1895) patent, and the other to the patent issued to the same inventor three years later. In both, the axis of oscillation is at the front edge of the inclosing casing or bin chamber, those manufactured under the later patent being distinguished by a swell front, as a special feature, which adds materially to their efficiency. The general subject of tilting bins was discussed, and the state of the art reviewed, by this court in Walker Patent Pivoted Bin Co. v. Brown & Krause, 110 Fed. 649, where the Walker (1898) patent was considered and sustained; and it came up again in Walker Patented Pivoted Bin Co. v. Miller & England (C. C.) 132 Fed. 823, with a like result, infringement also being found. Since that suit was instituted, however, Miller & England, the present complainants, who were defendants there, have become the owners of the Bacon (1891) patent, and now charge that its essential features are appropriated by both the Walkers, under which the defendants operate, and—the tables being turned—that they infringe upon it.



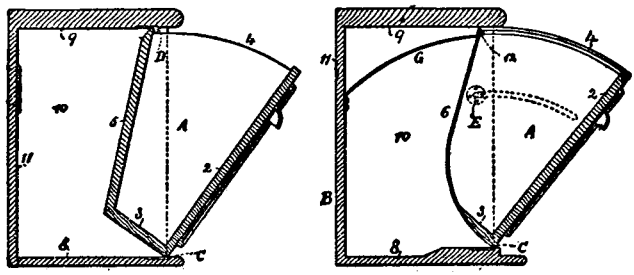

The tilting or pivoted bin covered by the Bacon patent is one of a general class, of which there are many types, among which it is by no means the first. This is admitted by the inventor in the specifications, the particular points of improvement which he had in mind being thus expressed:

"Bins or holders for grain and other substances have been incased and pivoted, so as to be swung into or out of the case to give access to the open

* Specially assigned.

upper end of the bin, and the pivots have sometimes been at the sides, and nearly in line with the center of gravity, and sometimes near the middle or outer edge of the bottom. In these cases the weight may sometimes tend to close the bin back into its place when open, or to partially open the bin after being swung back to place. My improvements relate to the peculiarities of construction set forth hereinafter, whereby the bin will remain either open or shut, and, when closed, the weight of the bin and of its contents serves to keep the bin firmly closed against the case."

The form of bin adopted to accomplish this purpose by the inventor is made narrower at the bottom than the top, and is pivoted at the lower front edge of the casing, with regard to which it is further said:



"If the bin were rectangular, the weight of the material in the bottom of the bin might cause the bin to swing back automatically after having been opened. To prevent this, the bin is made sufficiently narrow at the bottom—by inclining the back, or using a curved back—for the center of gravity of the bin to come forward of the hinges when the bin is opened, * * * thereby causing the bin to remain open; but, when closed, the center of gravity is always to the rear of the hinges, and the weight keeps the bin tightly closed against the casing."

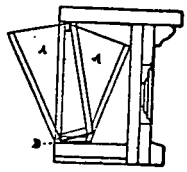
Upon this the following claim is formulated:

"(1) The combination, with an inclosing case, of a bin fitting within the case and narrower at the bottom than at the top, and pivots at the bottom edge of the front of the bin for connecting the same to the case, and a stop to limit the movement of the bin as it is swung open, substantially as set forth."

The essential and distinguishing characteristics of the invention as thus specified and claimed are: (1) That the bin shall be narrower at the bottom than the top; (2) that it shall be pivoted to the case at the front lower edge; and (3) that it shall be provided with a stop to limit its forward swing. The only possible novelty in this combination is the form of the bin, by which it is made tapering from the bottom upwards, whereby the center of gravity is thrown forward or back of the axis of oscillation, securing stability of position when the bin is open or closed. The idea of tilting was not new (Schultz, 1861); nor of pivoting at the front edge of the casing, which is shown in the Potter cabinet (1879) and the Hunter bin (1888), to say nothing of the Hessler music stand (1879) or the Tyler office desk (1882); nor of tapering or flaring the sides of the bin, which appears in the Bloomer flour box (1886); nor yet of having a stop to prevent the bin from swinging out of the casing,

an obvious expedient, which it involved no invention to supply; but which is also found in the Hunter (1888).

Conceding, however, that the exact combination described in the patent is not anticipated in any of the references so given, and assuming that it would be valid if original with the patentee, it is clearly shown that he was not the real inventor. The fact is that early in 1878 Mr. Walker, the president of the defendant company, who was then in the grocery business at Pottsville, Pa., devised and installed in his store a tilting bin, of which the Bacon is an exact duplicate and reproduction. It was narrower at the bottom than the top, was pivoted at the front lower edge of the casing, and had a cleat or stop to engage the back and limit the forward swing. In March, 1878, Mr. Walker made application for a patent, and the character of his device is not only established by the description there given, but by the drawings which accompanied it. The model which was required, by the rules of the Patent Office which then prevailed, is also produced, and shows the same construction. This is evidence over which there can be no controversy, and the only question is as to its effect. A distinction is sought to be made with regard to this bin, because it was pivoted on a rounded edge of the casing, which fitted into a groove on the bottom, on which the bin rocked. But this is not material. That was the construction of the defendants' bin in the Brown and Krauss Case, 110 Fed. 649, and yet it was not regarded as sufficient to distinguish it from the patent there in suit, which called for a pivoting at the front edge of the casing. It is also said that there was no stop or cleat to prevent the bin from falling forward. But, however true this may have been of those which were actually installed in Mr. Walker's store, it cannot be said of the invention as applied for, where this feature is clearly shown.



It appears, however, that the Walker application was unsuccessful, a patent being refused by the examiner, and the attempt is thereupon made to have it discarded as an unsuccessful and abandoned experiment. Undoubtedly a rejected application is no bar to a subsequent patent to another for the same device. Corn Planter Patent, 23 Wall. 181, 211, 23 L. Ed. 161. But it does have a bearing on the question of prior invention or discovery, where that is raised. Westinghouse v. Chartiers Valley Gas Co. (C. C.) 43 Fed. 582. It is true that, as stated by Mr. Justice Bradley in the Corn Planter Patent:

"If, upon the whole of the evidence, it appears that the alleged prior invention or discovery was only an experiment and was never perfected or brought into actual use, but was abandoned and never revived by the alleged inventor, the mere fact of having unsuccessfully applied for a patent therefor cannot take the case out of the category of unsuccessful experiments."

But this is not to be misunderstood. It does not follow, because an application has been rejected, that the invention stands as an abandoned experiment. The application may not suffice to rescue it, if that is its real condition, but its rejection does not necessarily

give it that character. If the invention has advanced beyond the experimental stage, having been completed and put into operative shape, and particularly if it has gone into practical and successful use, the mere fact that an application for a patent has not met with favor at the hands of the Patent Office does not condemn or dispose of it as an invention; and that is the situation here. As already stated, Mr. Walker, prior to his application, had several of these bins constructed and installed in his store at Pottsville, where they were in actual and successful use for upwards of a year, until he gave up his business and removed to Philadelphia. While so in use, moreover, they were seen by one W. H. Douty, who was so pleased with them that, with the permission of Mr. Walker, and upon the understanding that a royalty should be paid if the patent which had been applied for was granted, he had similar bins constructed and set up in the store of Douty & Purcell at Shamokin. When the present controversy arose, these bins were looked up, and one of them was found in its original position on the premises, which had meanwhile been turned into a saloon, still in use, under the bar or counter, as a receptacle for crackers. This bin was produced and exhibited in court at the argument, and bears out all that is claimed for it, except, possibly, in the matter of a stop or cleat, which is not material. It thus appears that the ideas embodied by Walker in his application were not experimental, but represented a complete, practical, and useful device, fully as much so as that of Bacon which duplicates it, and equally worthy, it may be added, of a patent. It was not so considered, it is true, by the patent examiner, the principle involved being held to have been already appropriated. But that does not affect the completeness or the character of the device, whereby, whether patented or not, Walker, and not Bacon, is shown to have been the real inventor. No doubt, after the rejection of his application, he relinquished his proprietary rights by not only himself making use of this style of bin in his business, but by permitting it to be adopted and used by others for a long term of years. But that did not leave it open to be appropriated and patented by a third party, however independently he may have conceived and worked out the same idea. It was thenceforth public property, which any one could make use of without question. Bacon invented nothing new, therefore, and his patent is worthless. Whatever merit there is in the bin which is there shown, so far as this record goes, it was the conception of Walker, against whom it is now set up, who reduced it to practice, but abandoned it as a patentable invention upon the adverse action of the Patent Office.

Complainants' patent being invalid, the question of infringement is not important. It will not be out of course, however, to observe that, to say the least, it is doubtful. On the strength of the defendants' catalogue, I have assumed above that they are making a bin which is modeled on the lines of the earlier (1895) Walker patent. A bin of that character is there shown, which, if the Bacon patent were valid, would undoubtedly infringe it. But there is no proof of manufacture outside of the catalogue, and that hardly comes up to what is called for. With respect to the other style of

bin, manufactured under the Walker (1898), it may be that, disregarding the swell front, and measuring strictly at top and bottom, it is wider at the one than the other, thus apparently fulfilling the terms of the patent in controversy. But the outward bulging of the front is an essential feature which enters into the efficiency of the device, bearing directly on the counterbalancing of the bin and its stability when in open or closed position, and cannot be disregarded. Being cast advisedly in that shape for a purpose, it must be taken according to its general effect, by which it clearly broadens downwards and not up, the opposite of the Bacon, on which it does not therefore infringe. As already stated, however, the question of infringement is not material. Contenting myself with these observations until it becomes so, I will therefore make no definite decision with regard to it. It is enough to know that the patent cannot be sustained.

Let a decree be drawn dismissing the bill because of the invalidity of the patent, with costs.

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## MISSISSIPPI GLASS CO. v. FRANZEN.

(Circuit Court, W. D. Pennsylvania. July 3, 1905.)

No. 5.

PATENTS—ASSIGNMENT—INVENTION OF EMPLOYÉ.

Where a patent was applied for after the termination of an employment under a contract providing that the employé would execute any and all assignments in writing which might be deemed by the employer proper and necessary to transfer and vest in it the entire right, title, and interest to all inventions and discoveries made by the employé during the term of his employment, the patent vested in the employé, and the burden was on the employer to show by the weight of proof that the invention covered thereby was made by the employé during his employment.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 125.]

Arthur J. Baldwin and Wm. L. Pierce, for complainant.
Christy & Christy, for respondent.

BUFFINGTON, District Judge. This is a bill in equity filed by the Mississippi Glass Company, a corporation of Missouri, against Nicklas Franzen, a citizen of Pennsylvania, to compel him to assign, in pursuance of a contract made by him, dated February 4, 1901, patent No. 741,125, issued October 13, 1903, covering a certain process for making wire glass, and an apparatus application for using said process, which is still pending. This contract provided that Franzen, who was employed by the complainant as an assistant superintendent, "will when required, make and execute any and all assignments in writing which may be deemed by the employer proper or necessary to transfer and vest in the employer the entire right, title and interest in all inventions and discoveries made by the employed [Franzen] during the term of his employment." Franzen terminated his employment with the company May, 1903. On June 17th following he applied for the patent in question, and

the same was granted October 13th following. We assume for present purposes, but without deciding that question, that this unilateral contract, wherein it is agreed that "no breach by the employer of any contract of employment or any other contract, and no act or omission by the employer, shall be deemed or considered an excuse or justification for any violation of any of the obligations herein contained on the part of the employee," will be enforced by a court of equity. It is clear, however, that this patent, being applied for subsequent to the termination of the employment, vests the ownership thereof in Franzen, the patentee, and the burden is upon the complainant to show by the weight of the proof that the invention covered thereby was made by Franzen during his employment. This burden, we think, the complainant has failed to meet. No witness affirmatively proves Franzen did invent the device during the term of his employment, and the latter, when called by the complainant as a witness, fixes the time as antedating such employment. The testimony introduced by complainant is merely negative, and there is an absence of positive, affirmative testimony which establishes the making of this invention as occurring during Franzen's employment. In view of the lack of such proof, we are of opinion that he cannot be deprived of that property which became his by the issue of the patent. Moreover, there is testimony corroborating Franzen in his contention that the invention was made at an earlier period than that of his employment by complainant.

Upon full consideration, we are of opinion this bill should be dismissed, and it is so ordered.

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## THE ASBURY PARK.

(District Court, E. D. New York. June 7, 1905.)

1. SHIPPING—INJURY TO VESSEL AT DOCK FROM SWELL—NEGLIGENT NAVIGATION OF STEAMER.

   A large steamer, proceeding in New York Harbor at such speed that her swell caused the sinking of a schooner a mile away, by striking her against a dock at which she was discharging, *held* liable for the damage caused; it being shown that, either from her construction or the speed with which she was customarily navigated, she was known to be peculiarly liable to cause swells dangerous to other shipping, which required the exercise of unusual care in her navigation.

   [Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 345.]

2. SAME—LIABILITY FOR DAMAGES.

   It is not a defense to a suit to recover for an injury to a vessel caused by the swell of a passing steamer that other vessels were not injured, or that the one injured might have prevented the injury by taking unusual precautions.

In Admiralty.

Alexander & Ash, for libelant.

De Forest Bros. (R. D. Benedict, of counsel), for claimant.

THOMAS, District Judge. The schooner Annie E. Webb on June 24th, at 12:30 p. m., was properly moored on the south side of

the dock at the foot of Bay Ridge avenue, Brooklyn. The tide was flood, and the weather clear. The pier is about 700 feet long, and is built on piles, which are about 10 feet apart. All the timbers laid on or between the piles are so arranged that their edges do not project beyond the face thereof. The schooner, with a cargo of brick partially discharged at the time of the accident about to be stated, was entirely below the top stringers, and carried fore and aft fenders. About 1:30 p. m. the discharge of her cargo began, and was in progress when the steamship Asbury Park passed outside of the red buoy off Owl's Head, at a distance of about 1 mile from the dock; and her swells caused the port side of the schooner to strike against the dock, whereby two of her planks were broken in. She sank shortly thereafter. The steamer left Rector street at 3:46; her running time to Owl's Head was 16½ minutes; thence to Craven Shoals 12½ minutes; and she arrived at the Highlands at 4:54, thus making the distance of about 20½ miles in an hour and 8 minutes. Her horse power is about 6,000; her length 306, and her beam 51, feet. The steamer was making her usual speed under the conditions existing. While other passing vessels made swells that reached the dock, she caused larger swells. Was she culpably negligent? Her navigators did not insure the safety of other vessels, but were bound to exercise good business prudence, lest her swells cause injury to them. Should they, in the exercise of requisite care, have known that her swells would reach a vessel a mile away, and cause injury? Prior to this her swells are not shown to have caused injury to vessels at this dock, although there was evidence of subsequent injury to a vessel at the same dock from the same cause. Accidents arise from the presence of favoring conditions. A negligent act may be repeated often, and yet meet with no object so situated as to be harmed thereby. It is not always possible to point out why one ship escapes injury from given forces, while another does not. The vessel's shape, the nature of her construction, her strength, her cargo, her relation to the dock, her moorings, among other things, would qualify the effect of swells upon her; and, moreover, apprehension of danger from such swells, and consequent safeguarding of the vessel against them, would avoid or modify injurious effects. Indeed, the government patrol ship Argus, as at the time in question, often trailed from the end of the dock by a line, with some special reference to harm that the Asbury Park, in passing, might cause. Swells of the size and violence disclosed by the evidence, that necessitate such practical care and foresight on the part of vessels using a dock, show some usurpation of the water way by the vessel that causes them. The owners and navigators of the Asbury Park had full opportunity to observe the size, progress, and range of her waves, and to judge of the force of their contact with vessels at either side of a water way. Her capacity for harm, so familiar to other navigators, should not have eluded the notice of her owners or pilot. In the exercise of reasonable care, they should have known what consequences would result naturally from her customary navigation. It often happens that the restraint of the law

is inefficient to check the speed of vehicles using public highways, so that cars, automobiles, carriages, and vessels are often driven at a speed that is in fact negligent, although the watchfulness of those endangered thereby may prevent injury from such negligence. Such operation is wrongful, deprives others of their rights, and imposes upon them greater care than the law demands. In such cases, when injury arises, it is not sufficient answer that person or property had not been injured previously thereby. The reputation of the Asbury Park as a menace to navigation, on account of her swells, fully appears from the evidence; and, even if it be the duty of the court to be oblivious of her frequent summoning to court for injuries arising therefrom, the present record shows sufficiently that there was something in her construction or use, or both, that subjected vessels rightfully in the harbor and adjacent waters to unusual peril. The persons responsible for her navigation were aware, actually or constructively, of her peculiar ability to do injury; and it is concluded that, had they made proper observation or inquiry, they would have discovered that her swells reached the dock in question, and that their size and velocity were calculated to injure vessels moored there.

The libelant should have a decree.

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## In re PERLEY & HAYS.

(District Court, E. D. Missouri, N. D. May 29, 1905.)

BANKRUPTCY—PARTNERSHIP—INSOLVENCY.

A partnership is not insolvent, within the meaning of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], when the property of the partnership, together with that of the individual members, exceeds in value the indebtedness of the firm and members.

In Bankruptcy. Hearing on involuntary petition.

Seneca Taylor, for creditor.

O. P. Barton and G. W. Whitecotton, for bankrupts.

ROGERS, District Judge. This is an involuntary petition in bankruptcy by a single creditor against the partnership of Perley & Hays. A jury was waived, and the case submitted to the court for trial. The evidence on the part of the creditor shows that the bankrupts were burned out in business; that after being burned out they represented, in substance, that they could not pay the debt of the petitioning creditor, and could not "rake or scrape" more than 80 per cent. of his claim, which was $3,320. The bankrupt Perley also represented to the agents of the petitioning creditor that, if the latter did not settle in his way, he could never get half of what they offered, viz., 80 per cent. of the claim; that he had fixed his own individual property in such a way that they could not reach it. The proof also shows that Perley had, since the fire, conveyed a large part of his real estate—part to his wife, and 15 or 20 lots to another person. These facts prima facie make out a case of in-

solvency, and of a fraudulent intent to hinder, delay, and defraud the creditors of the bankrupt firm.

On the trial the bankrupt Hays testified that he had about $600 in bank to his own credit, and had two horses worth $200. The bankrupt Perley testified that the firm of Perley & Hays has $1,000 in bank to its credit, the proceeds of the sale of the remnant of their stock, and practically nothing else; that he himself has a residence worth $2,500, mortgaged for $1,000; another house worth $2,500, mortgaged for $1,500; a note for $3,500, secured by mortgage, and assigned to secure a loan of $1,300; and another mortgage note for $600. Omitting from consideration the residence and the mortgage upon it, in view of the exemption laws of the state, the assets of the firm and of the two individuals may be stated as follows:

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|---|---|
| Cash belonging to the firm | $1,000 |
| Equity in $3,500 note | 2,200 |
| Amount received on note | 1,300 |
| Equity in the other residence | 1,000 |
| Cash of Hays | 600 |
| Two horses | 200 |
| Total | $6,300 |
| Debt of the petitioning creditor | 3,320 |
| Balance of assets | $2,980 |

Under this state of case, should the partnership be declared bankrupt?

I am satisfied from the testimony that the admissions of Perley, which were testified to by the traveling salesman and the manager of the petitioning creditor's business in St. Louis, to the effect that he (Perley) could not rake or scrape more than 80 per cent. of the debt, were true; but the statement itself, I am satisfied, was false. It was made in an effort by Perley to drive a sharp settlement of the claim, by making the petitioning creditor bear 20 per cent. of the losses by fire, for which it was in no sense liable. And there is no evidence that the statements now made by the bankrupts as to their property are not true. I am inclined to accept as the real truth the values which they now place upon their estate, and that they have a surplus of assets of $2,980, or thereabouts—certainly a sum considerably in excess of their liabilities.

The question arises as to whether or not the properties of individual members of a firm are to be taken into consideration when the issue of insolvency is raised of the partnership of which they are members. It is, I think, settled that a partnership, under the existing bankrupt law, is a distinct legal entity, which may be adjudicated a bankrupt by voluntary or involuntary proceedings, irrespective of any adjudication of the individual partners as bankrupts. At all events, it has been held by the Circuit Court of Appeals for the Second Circuit in Re Meyer et al., 98 Fed. 977, 39 C. C. A. 368. That case seems to indicate that, in order to put a firm into bankruptcy, the act of bankruptcy complained of must have been committed by the firm. In this case, however, if that were the only question involved, I should hold that the sale of the

remnant of goods, after the fire, and within the four months, and the refusal to pay the petitioning creditor, and the concealment of the money, were of themselves intended to hinder, delay, and defraud the creditor. But if I should so hold, the real question in this case still remains. It is whether or not the bankrupts were insolvent, within the meaning of the present bankrupt law, or, to state it in another way, whether or not the individual properties of the partners are to be considered in determining the question of insolvency. It has been held in a number of cases that the individual properties must be considered, and I find no case to the contrary. Vaccaro et al. v. Security Bank of Memphis et al., 103 Fed. 436, 43 C. C. A. 279. This case, while not binding on this court, was decided by the Court of Appeals of the Sixth Circuit. The same doctrine is distinctly held in the case of Davis et al. v. Stevens et al., by Judge Carland, of this circuit, in 104 Fed. 235–242. In both these cases the question was carefully considered, and those cases have the approval of this court.

The court therefore finds the issues in favor of the defendant, and the petition in bankruptcy will be dismissed.

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## HUMES v. CITY OF LITTLE ROCK.

(Circuit Court, W. D. Arkansas, E. D. November 2, 1898.)

1. LICENSES—POWER OF CITY TO IMPOSE LICENSE TAX—GIFT ENTERPRISES.
   In Sand. & H. Dig. Ark. § 5132, authorizing cities to tax, license, and suppress certain occupations named, among them "gift enterprises," such term means schemes for the distribution of property into which some element of chance enters, and the statute does not confer power on a city to impose a license tax upon the occupation of selling trading stamps to merchants, which are given by them to cash customers as a premium, and redeemed by the seller in merchandise at their face value in whatever sums presented by such customers.

2. SAME—CONSTITUTIONALITY OF ORDINANCE—OCCUPATION OF SELLING TRADING STAMPS.
   The selling of trading stamps, redeemable by the seller in merchandise at their face value whenever presented, to merchants, to be given by them to cash customers as a premium, is a lawful and legitimate vocation, not injurious to the public, and a city ordinance imposing a license tax on such occupation of $50 per week is void as unreasonable and an infringement upon the constitutional liberty of the citizen.

3. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.
   In a suit to enjoin the enforcement of an ordinance imposing a license tax on complainant's business, alleged to be prohibitory, the amount in controversy, for the purpose of determining the jurisdiction of a federal court, is the value of such business.

4. EQUITY JURISDICTION—FEDERAL COURTS—SUBSTANTIVE RIGHT GIVEN BY STATE STATUTE.
   The Arkansas statute (Sand. & H. Dig. § 3778), authorizing an injunction against all unauthorized taxes or assessments by counties, cities, or other local tribunals, boards, or officers, does not merely affect the remedy, but gives a substantive right, which may be enforced on the equity side of a federal court.

In Equity. Suit for injunction. On final hearing.

Rose, Hemingway & Rose, for complainant.

W. J. Terry, City Atty., W. S. McCain, and Jacob Trieber, for defendant.

WILLIAMS, District Judge. The city of Little Rock has passed the following ordinance:

"An ordinance for the better regulating the license on gift enterprises.

"Be it ordained by the city council of the city of Little Rock:

"Section 1. That it shall be unlawful for any person, firm or corporation to engage in, exercise or pursue the avocation, business or enterprise of selling, giving away, distributing or otherwise disposing of periodical tickets or premium stamps, without first having obtained and paid for a city license therefor from the proper city authorities, as provided in the next section.

"Sec. 2. Every person, firm or corporation engaging in, exercising or pursuing the avocation, business or enterprise of selling or giving away, distributing or otherwise disposing of periodical tickets or premium stamps shall pay a license of fifty dollars per week in advance.

"Sec. 3. Whosoever shall engage in, exercise or pursue the avocation, business or enterprise of selling or giving away, distributing or otherwise disposing of periodical tickets or premium stamps without having first obtained and paid for the same as above provided shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not to exceed twenty-five dollars for the first offense, fifty dollars for the second offense and fifteen dollars for each subsequent violation of this ordinance, and each day which said ordinance may be violated shall be a separate offense."

The plaintiff, alleging that the license demanded is prohibitive in its amount, and that the ordinance was passed for the purpose of suppressing his business, has brought suit for an injunction, and a temporary restraining order has been issued. It is conceded that the bill accurately describes the business carried on by him, and the case comes on for final hearing upon its allegations.

The method of conducting the complainant's scheme is thus described in the bill:

"He [complainant] solicits the merchants of the city to patronize him, and to such as agree to do so he issues stamps, for which they pay. He issues a great number of copies of a little book in which these stamps can be pasted, and which contains a directory, giving the name and address and the occupation of all the merchants who agree to patronize him. He sends out a large number of canvassers, who place copies of the book in every household in the city, and explain to every one the advantages of patronizing the merchants holding the stamps. When a person purchases goods from a merchant who does business with your orator, and pays cash for the amount of his purchase, or pays his bill therefor promptly on first presentation at the end of the month, he is entitled to demand and receive stamps issued by your orator in exact proportion to the amount of his purchase. Your orator has a store in the said city, in which he keeps a stock worth several thousand dollars, embracing a vast assortment of useful and ornamental articles for the home, varying in cost from mere trifles to things of considerable expense; and the persons receiving these stamps can, whenever they desire, present them at your orator's store, and receive in exchange therefor any article which they may select of the value of the stamps surrendered."

1. It will be observed that no element of chance enters into the plan. There are no drawings; no opportunities to win a larger sum upon a wager of any kind. The stamps have the same purchasing power in the hands of every one, and every one has the same right of selection among the complainant's stock. The question presented by the bill is, has the city council the power to license or suppress an enterprise of this character?

That a city can only pass such ordinances as its charter authorizes is the established law of the state. Tuck v. Waldron, 31 Ark. 465; Ex parte Martin, 27 Ark. 467; Geotler v. State, 45 Ark. 454. Hence it is necessary to inquire under what statute this ordinance was adopted, and we find that section 5132 of Sandels and Hill's Digest authorizes cities to tax, license, and suppress a number of occupations, all of them either necessarily or probably detrimental to public health or morals, and among them "gift enterprises." No definition of the term is given, and we are therefore compelled to look elsewhere to ascertain its meaning.

So far as our researches, aided by the industry of counsel, have enabled us to discover, the term has been judicially defined only in one case (Lohman v. State, 81 Ind. 15), where the court holds that it means "a scheme for the division or distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme." This definition has been approved by Anderson and Black in their law dictionaries, and impresses us as correct. There is nothing immoral in a gift, and, indeed, giving is often to be commended. It is not likely, at least in our time, to grow to such dimensions as to constitute an evil threatening the well-being of society. To be pernicious, a gift must be a mere cover for a lottery, and the evil company in which "gift enterprises" are found in the statute indicates that it is the gifts of fortune that are referred to. The Legislature was apparently apprehensive lest the term "lottery" should be held to apply only to cases where money was at stake, and added gift enterprises to cover all other similar devices where articles of property were disposed of by chance. It is apparent that such devices are highly pernicious, and they are plainly within the legislative intent.

The statute having given no definition of what it means by "gift enterprise," we do not feel privileged to ignore the only judicial definition that the term has received, particularly when it has been accepted by the two latest compilers of legal dictionaries. The law is sufficiently uncertain without our making it more so by differing from the only existing authorities. We therefore conclude that "gift enterprises," as used in the statute, imply an element of chance, and that, as no such element is to be found in the plaintiff's scheme as described in the bill, it does not fall within the terms of the enactment, and the defendant has no power either to license or suppress it.

We have not overlooked the able decision of the Supreme Court of the District of Columbia in Lansburgh v. District of Columbia, 11 App. Cas. 512. But that case is clearly distinguishable from this. The act of Congress governing the District prescribes what is meant by gift enterprises, and its definition precisely covered the trading stamp concern. That definition is not binding here. It may be that Congress defined the kind of business that it intended to reach by the term "gift enterprises," because it knew that the term in its ordinary acceptation would have a more restricted meaning, just as in the new bankrupt act many terms are defined in the opening section as applying to things that would not otherwise

be included. Then, too, the court in that case lays stress on the fact that the holder of the stamps could get nothing unless he accumulated stamps representing purchases to the extent of $99, and, as few did that, it was held that the uncertainty of ever getting anything on the stamps introduced an element of chance. No such element exists in the case at bar, as it is alleged that every holder of stamps, however small an amount, is entitled to a premium proportioned to his holdings.

2. Nor, if we are in error in this, do we conceive that it should make any difference in our decision. The freedom of labor is perhaps the most sacred of all those that are guarantied by the national and state Constitutions. A man has the right to earn his livelihood and support his family by following any vocation not harmful to society. It is not sufficient that it may seem useless to the court. Things that are useless to one man are articles of prime necessity to another. To be within the legislative power of suppression, an occupation must be deleterious in its nature, or likely to become so, such as theaters and public balls, which, without police supervision, are apt to degenerate into indecency and riot. A large part of the pursuits of life are not of apparent utility, do nothing to secure food, shelter, or clothing to mankind, yet they assist some in that pursuit of happiness which the Declaration of Independence proclaims to be one of the inalienable rights of men.

Mr. Justice Bradley, in Live Stock Association v. Crescent City Company, 1 Abbott, C. C. 398, maintains this right in language which has been repeated by courts and jurists until it has become almost a legal classic:

"We may safely say that it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit, without unreasonable regulation or molestation. These privileges cannot be invaded without sapping the very foundation of republican government. A republican government is not merely a government of the people, but it is a free government. Without being free it is republican only in name, and not republican in truth, and any government which deprives its citizens of the right to engage in any lawful pursuit, subject only to reasonable restrictions as are reasonably within the power of the government to impose, is tyrannical and unrepublican."

In Powell v. Pennsylvania, 127 U. S. 692, 8 Sup. Ct. 1257, 32 L. Ed. 253, Mr. Justice Field is still more emphatic. He says:

"With the gift of life there necessarily goes to every one the right to do all such acts and follow all such pursuits, not inconsistent with the equal rights of others, as may support life and add to the happiness of its possessor. The right to pursue one's happiness is placed by the Declaration of Independence among the inalienable rights of man, with which all men are endowed, not by the grace of emperors or kings or by the force of legislative enactments, but by their Creator; and to secure them, not to grant them, governments are instituted among men."

And again in Butchers' Union Company v. Crescent City Company, 111 U. S. 757, 4 Sup. Ct. 652, 28 L. Ed. 585, the same great judge says:

"Among those inalienable rights, as proclaimed in the great document (the Declaration of Independence), is the right of men to pursue their happiness,

by which is meant the right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their property or develop their faculties, so as to give them their highest enjoyments."

In Thomas v. Hot Springs, 34 Ark. 558, 36 Am. Rep. 24, the same distinction is made between harmful and innocent pursuits, and it was held that, while drumming for gaming houses and other iniquitous concerns could be prohibited, there is no power to suppress drumming for hotels, boarding houses, and other legitimate forms of business.

Among the cases in which this subject is discussed, In re Jacobs, 98 N. Y. 106, 50 Am. Rep. 636, and People v. Marx, 99 N. Y. 386, 2 N. E. 29, 52 Am. Rep. 34, are especially noteworthy; but the most conclusive presentation of the questions now before us is found in the able and exhaustive opinion of Judge Peckham, now Mr. Justice Peckham, in People v. Gillson, 109 N. Y. 389, 117 N. E. 343, 4 Am. St. Rep. 465. That involved a scheme precisely like this, save that the counter where the tickets were surrendered and the premiums were selected was in the same store, which seems to us an immaterial difference. He examines the question in every conceivable light, and holds that the New York statute forbidding such devices is an infringement of the constitutional liberties of the citizen. His opinion was followed by the Supreme Court of Maryland in Long v. State, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268, and commends itself to our approval.

It may be that some persons may be led by complainant's scheme into foolishly buying more than they need, merely to get the stamps, and it is certain that in the end the premiums must be paid for by the public. But these are commercial, not judicial, considerations, and the remedy must be sought in the wisdom and experience of the citizen, not in the legislative interference. Ours is not a paternal government. The freedom of our institutions often permits the unwary to be entrapped, but the advantages derived from the resulting spirit of independence and enterprise far more than outweigh any evil that can follow the incidental abuses of liberty.

3. It is said that this court has no jurisdiction because the amount in controversy is insufficient. But it is alleged that the amount of the license is intentionally made prohibitory, and that, if it is enforced, the plaintiff will be driven out of business. The amount in controversy is therefore the value of that business, which is alleged to exceed $2,000. Moreover, the license imposed amounts to $2,600 per annum, and it is alleged that it would require more than a year to test the matter in the law courts. In the meantime the license would have to be paid, and the amount would exceed the amount required to give this court jurisdiction.

4. Then it is said that the remedy is at law. But the Arkansas statute (Sand. & H. Dig. § 3778) authorizes an injunction against all unauthorized taxes or assessments by counties, cities, or other local tribunals, boards, or officers; and it has been held by the Supreme Court of the United States in Cummings v. National Bank, 101 U. S. 157, 25 L. Ed. 903, that this statute does not merely affect the

remedy, but gives a substantive right that may be enforced on the equity side of this court.

Furthermore, it is alleged that the defendant's financial condition is such that a judgment against it cannot be enforced, so that if plaintiff should pay the license he could not recover it back. Under such circumstances, the remedy at law is not merely inadequate; it is no remedy at all.

The motion to dissolve the injunction is therefore denied.

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## TREAT et al. v. WOODEN et al.

(Circuit Court, D. Massachusetts. June 13, 1905.)

No. 1,792.

BANKRUPTCY—SUIT AGAINST TRUSTEE—JURISDICTION.

A Circuit Court is without jurisdiction of a suit in equity against trustees in bankruptcy to require them to pay over the proceeds of property claimed by complainant, but which was sold by defendants under an order of the bankruptcy court as assets of a bankrupt estate, having no power to interfere with the possession of such court of the property or its proceeds, and the remedy against the trustees, if any, being at law.

In Equity. On demurrer to bill.

Charles G. Gardner, for complainants.

Charles H. Beckwith and William H. Brooks, for defendants.

LOWELL, Circuit Judge. This was a bill in equity, brought against trustees in bankruptcy. It alleged a conversion by them of goods belonging to the complainant; that these goods were subsequently sold, pursuant to a decree of the court of bankruptcy, and that the defendants intend to disburse the proceeds in the settlement of the bankrupt estate. The bill further alleged that the defendants were not of sufficient financial responsibility to satisfy any judgment which the complainant might obtain in an action of law; "and that, if the proceeds of said goods and property in the hands of said defendants, and to come into the hands of said defendants as aforesaid, are not applied to the satisfaction of your orators' said claim, they will be entirely without remedy against said defendants." The bill prayed for a discovery not under oath; that the defendants be directed to pay to the complainant the proceeds of the sale; that the defendants be enjoined from disposing of the property or proceeds thereof; that this court determine damages. Defendants demurred.

The court must first decide if it has jurisdiction in the case presented. In White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, the Supreme Court decided that a state court has no jurisdiction to replevy property in the possession of a trustee in bankruptcy. The jurisdiction of the Circuit Court has like limitations. In Re Spitzer (C. C. A.) 130 Fed. 879, the Circuit Court of Appeals for the Second Circuit decided that a trustee in bankruptcy can be sued in trover in a state court, because an action of trover

does not disturb the possession of the court of bankruptcy. How far the Court of Appeals would permit the action of trover to proceed, and upon what property it would permit a levy of execution, does not appear. To levy execution upon the individual estate of a trustee in bankruptcy in order to satisfy a judgment for damages arising from his compliance with an order for the sale of specific property made by a court of competent jurisdiction seems to bear hardly upon the trustee. Even the Court of Appeals, however, expressly refused to disturb the control of the court of bankruptcy over the bankrupt estate. In the case at bar the bill cannot be sustained as a bill for discovery. The control of a court of bankruptcy over the property in the possession of the trustees, whether the original goods or their proceeds, cannot be disturbed, and so no injunction can issue restraining the defendants from dealing with the property or its proceeds as the court of bankruptcy shall direct. If there be any remedy prayed for in the bill other than that which is excluded by the bankrupt act from the jurisdiction of this court, it is a remedy obtainable in an action at law. It follows, therefore, that the equitable relief sought in the bill is beyond the jurisdiction of the court, and any relief within the jurisdiction of the court is not obtainable in equity, because obtainable at law.

Demurrer sustained. Bill to be dismissed, with costs.

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## In re GRADY.

(District Court, D. Vermont. June 24, 1905.)

BANKRUPTCY—EXEMPTIONS—VERMONT STATUTES.

Under V. S. 1805, which allows a debtor an exemption of horses used for team work not exceeding $200 in value, a bankrupt having a number of horses, exceeding $200 in value in the aggregate, is not entitled to $200 from their proceeds when sold, but is required to select his exemption, not exceeding that amount in actual value, of which the appraisal is prima facie evidence, and may then select a wagon and other articles named in the statute to bring the total up to the value of $250.

In Bankruptcy. On review of referee's report as to exemptions.

WHEELER, District Judge. The bankrupt appears to have had six horses, any two of which are worth over $200, and one, selected by him, $150. He claims $200 in the proceeds of the horses, if entitled to that, with the right to two, if they do not sell for more than $200. But the exemption is not of $200 in value in horses, nor of horses that do not bring at sale more than $200; it is of horses not exceeding in value $200, which is the actual value, of which the appraisal is at least prima facie evidence. Two horses include one, and any one may be exempt, if within the value of $200, and kept and used for team work. V. S. 1805. The one selected worth $150, and so kept and used, appears to be exempt, and the bankrupt does not appear to be entitled to any more as exempt out of the horses. That appears to be the measure of his right in that behalf. The bankrupt appears to be entitled to either of the three team

wagons mentioned, one of the value of $60, and the others $35 each, as he may select, as neither will make the exemption in that respect above $250, with the horse, which is the limit as to that kind of property. When the selection of a team wagon is made, the remainder of the $250 in value, after deducting the amount of the value of the horse and wagon selected, is to be set out as selected from the other articles named in the statute to an amount in value not exceeding that limit of $250.

Let exemptions in this behalf be set out accordingly.

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## THE LA KROMA.

(District Court, E. D. Pennsylvania. June 12, 1905.)

No. 80.

1. SHIPPING—SHORTAGE IN WEIGHT OF CARGO DELIVERED—EVIDENCE TO EXONERATE SHIP.

A ship is relieved from liability for a shortage in weight of a shipment of vegetable fiber in bales under a bill of lading containing the clause, "Not responsible for weight, nor quality, nor for loose bales," where it shows that all the bales shipped were delivered.

2. SAME—DAMAGE TO CARGO—BURDEN OF PROOF.

A ship has the burden of explaining the cause of damage to cargo shown to have been received in good condition to relieve itself from liability for such damage.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 479–482.]

In Admiralty. Suit to recover for shortage and damage to cargo.

Anson M. Beard, White, White & Taulane, and Ernest E. Prevost, for libelant.

Henry R. Edmunds, for respondent.

HOLLAND, District Judge. This libel was filed for the recovery of damage to a shipment of 2,700 bales of vegetable fiber from Oran, in Algiers, consigned to libelants at Philadelphia on the steamship La Kroma on the 24th day of January, 1903, and arrived in Philadelphia on February 23, 1903. The fiber was sold to Peter Woll, Jr., importer, of Philadelphia, on delivery weight, upon the arrival of the steamer at this port. The bill of lading under which the cargo was shipped, as translated from the Italian, is as follows:

"Oran, 24th of January, 1903.

"There has been shipped by Mr. Jules Borgeaud on the ship called The La Kroma of which Captain * * * for to carry and conduct to destination Philadelphia and consigned to order, merchandise hereinafter mentioned and marked as against her. See contra tax 300½ tons, freight $3.50, $1,051.75 B. O. numeral 1–2700, number of bales 2700 bales, Crin vegetable fibre 305,256 kilos.

"Repeated in letters. Having received them in good condition without being damaged or deteriorated you will pay the freight.

"The charger
"Jules Borgeaud

Not responsible for the weight, nor quality, nor for loose bales.

"[Signed] Captain R. D. Paravich."

Oran is an open roadstead, and when the La Kroma arrived at that port the fiber was loaded from lighters upon which it had been placed awaiting her arrival. The number of bales placed upon the vessel was 2,700, and according to the weight at Oran there was 305,256 kilos, which equals 674,615 pounds. Owing, however, to the fact that the bales were loose when loaded, the captain, before signing the bill of lading, insisted upon inserting the clause, "Not responsible for the weight, nor quality, nor for loose bales." The vessel arrived in Philadelphia on the 23d day of February, 1903, and the captain requested a survey of the cargo. Four experienced sea captains were appointed, who made an examination, and afterwards testified that the cargo, consisting of spiegel iron, magnesite ore, and 2,700 bales of vegetable fiber, was properly stowed and dunnaged, but that the fiber was damaged from sweatage of the ship. The cargo was discharged at this port, immediately upon the arrival of the vessel, by Thomas Grace, a stevedore at this port, and the fiber was weighed by John W. Davis, a weigher appointed by the purchaser. The evidence shows that many of the bales were loose in place, as the strand of fiber with which they were bound had broken, but left them in such shape as to enable the stevedore to count the bales, although a very considerable number of them fell apart as soon as moved. The number, however, of bales, of whatever weight, was ascertained to be 2,700 by the stevedore who did the work. The weigher found 2,584 bales intact, weighing 602,364 pounds, and 22,083 pounds in bulk, making a total of 624,447 pounds, which was 49,832 pounds less than the weight shown by the bill of lading. All of the bales were damaged to some extent, 55 of which had a layer of blackened material, similar to decayed vegetable, half way up the height of the bales; and the remainder of the bale was musty, moldy, and discolored, graduating up to the top, where it was nearly normal in color. On 196 bales there was a loss of about 40 per cent., on 106 bales the loss was about 25 per cent., and on the remaining bales the loss was about 10 per cent. The damaged material was entirely useless.

The libelants made an allowance to the purchaser in the sum of $490.50, and presented a claim to the vessel, after she had been discharged, in the sum of $251.34 for shortage in weight, without mentioning anything as to the damaged material; but for this they made a claim against the insurance company, alleging perils of the sea as the cause of the damage. This claim was rejected by the insurance company, and within a year suit was brought against the vessel in this port upon her arrival here on a subsequent trip. The libelants claim the sum of $300 for short weight, and $900 the value of the damaged material.

It appears that in the transportation of this article of merchandise there is a shrinkage in the weight of from 3 to 34 per cent., and in this case there was a decrease in weight of 18 per cent.; but whether this difference in the weight resulted from the usual shrinkage, or from the manner of weighing it by the different weighers, or partly from both causes, I am convinced that all the bales shipped at Oran arrived at this port. The bill of lading expressly states

that respondent is "not responsible for weight, nor quality, nor for loose bales," and the evidence establishes the fact that all the bales of fiber which were shipped were delivered here. The burden of accounting for the discrepancy has thereby been met, and the respondent cannot be held liable for the difference. Fertilizer Co. v. Elder et al., 101 Fed. 1001, 42 C. C. A. 130.

As to the cause of the damage to the fiber, the evidence is somewhat conflicting. It is claimed by the libelants that the fiber was shipped in good condition at Oran, and the persons who handled it there were called and testified to that effect. The evidence, however, discloses that this fiber, the same as all other of a similar nature, will become musty and blackened if stowed away while damp. It was shipped in an iron vessel, in which there is ordinarily considerable sweatage, and especially is this the case where they come from a warm to a cold climate. The expert chemists called by both the libelants and respondent show that the condition of this fiber could not have been brought about by contact with the other part of the cargo. The stain and discoloration of the fiber was not only found on the outside, where it might come in contact with the spiegel iron and magnesite ore, but it extended up through the entire bale in many instances, and much of the fiber was damaged in places that were entirely away from any influence or effect that the other material in the vessel could have upon it. So that from the whole evidence it would seem that the damage might have been by the usual sweatage of the iron vessel passing from the warm climate of Algiers to the cold climate of Philadelphia in midwinter, but this is not clear. In fact, the respondent fails to explain the cause of the discoloration.

There are no exceptions from liability provided for in the bill of lading other than the notation of the captain that the vessel was "not responsible for the weight, nor quality, nor for loose bales." Having delivered all of the bales which were shipped, although some of them were found to be loose in place upon arriving at this port, without any fault on the part of the management of the vessel, they are relieved of any liability therefor. The disclaimer in the bill of lading of any responsibility for the "quality" can mean no other than the commercial quality of the fiber shipped, and cannot now be held to mean that the vessel shall be relieved from any liability for a damaged condition of the fiber delivered here, when the evidence shows it was in good condition when shipped at Oran, and the uncontradicted evidence is to the effect that the fiber was in good condition when it was placed aboard the La Kroma, and the burden rests upon the respondent to explain the cause of the damage to the merchandise in transit. Argo Steamship Co. v. Seago et al., 101 Fed. 999, 42 C. C. A. 128; Fertilizer Co. v. Elder et al., 101 Fed. 1001, 42 C. C. A. 130; Clark et al. v. Barnwell et al., 53 U. S. 272, 13 L. Ed. 985. This it has failed to do, and it should therefore pay to the libelants the damage they have suffered by reason of the musty and discolored condition of the fiber upon its arrival at Philadelphia.

The evidence, however, is not sufficiently full to enable the court to ascertain this amount, and a decree will therefore be entered in favor of the libelants in accordance with this opinion, and the matter, upon application, will be referred to a commissioner for the purpose of ascertaining the amount due.

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FIRST NAT. BANK OF GARRETT, PA., v. A. E. APPLEYARD & CO.

(Circuit Court, E. D. Pennsylvania. June 13, 1905.)

No. 106.

REMOVAL OF CAUSES — TIME FOR FILING PETITION — TIME TO "ANSWER OR PLEAD."

A petition for the removal of a cause from a court of common pleas of Philadelphia county, Pa., in which, by rule of court, the defendant is given four days from service of statement on him to file any dilatory plea, and by the procedure act fifteen days within which to file affidavit of defense, must be filed within the four days, which is the time when he is required to "answer or plead" within the meaning of the removal statute.

[Ed. Note—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 136, 141–146.]

On Motion to Remand to State Court.

Warner & Houseman, for plaintiff.
Louis B. Runk and Read & Pettit, for defendant.

HOLLAND, District Judge. This is a motion to remand a suit to the court of common pleas No. 4 of Philadelphia county, in this district. Suit was instituted in the state court in December, 1904, and a statement of claim was filed on December 14th, a copy of which was served on defendant on that day. Under rule 30, § 12, of the court of common pleas of Philadelphia county, the defendant is allowed four days after statement served to file any dilatory plea. The last day in this case would have been December 18th, and under the procedure act of 1887, in actions of assumpsit, an affidavit of defense is required to be filed within fifteen days after the filing of the statement of claim, and rule to file affidavit and service of a copy of both upon defendant. So that under the rules of the state court the defendant had four days from the 14th of December to file any dilatory plea, and under the procedure act fifteen days from that time to file an affidavit of defense. Under the removal clause in the act of Congress of 1887–88, requiring the filing of petitions for removals "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," the defendant was bound to file its petition for removal before the 30th of December, as that would be sixteen days after service of the statement and rule to file its affidavit of defense, which was one day beyond the time at which it was required to answer the statement, and twelve days beyond the time at which it was required to file any dilatory plea. Whichever of these

two dates is taken as the latest time at which a removal can be moved in this case, the defendant is too late, as the Supreme Court has held under the provisions of the act of March 3, 1887, c. 373, 24 Stat. 552; Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509], by which a petition for the removal of an action from a court of a state into the Circuit Court of the United States is to be filed in the state court at or before the time when the defendant is required by the law of the state or by rule of the state court "to answer or plead to the declaration or complaint of the plaintiff," the petition should be filed as soon as the defendant is required to make any defense whatever, either in abatement or on the merits, in that court. Martin v. Baltimore & Ohio Railroad Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311. The right of removal is created and regulated by the act of Congress, and its enjoyment cannot be claimed except within the time and in the manner prescribed by the statute. It is firmly settled that the time within which the removal may be had cannot be enlarged by continuances, demurrers, motions to set aside service of process, pleas in abatement, or by stipulations of the parties, or by orders of the court extending the time to answer. This doctrine rests upon the solid foundation that the statute is mandatory, and that the right of removal ceases to exist when the time limited therefor has elapsed. * * * An inflexible rule of law determines the time within which an application to remove must be made, and the court possesses no discretionary power to enlarge it. Daugherty v. Western U. Tel. Co. (C. C.) 61 Fed. 138. It has been held by the Supreme Court in Pennsylvania that a petition for a removal of a cause to the federal courts should be filed before the defendant is required to file an affidavit of defense. Muir v. Preferred Ins. Co., 203 Pa. 338, 53 Atl. 158. This order of removal was returnable to the first Monday of April, 1905, at which time it is required the full record shall be filed in this court. This has been done, and it is before the court in the consideration of this case, and it is not, therefore, necessary to consider the question as to whether or not the motion to remand was filed too early.

In view of the decision of the Supreme Court in Martin v. Baltimore & Ohio Railroad Co., supra, in which it is held that the words "to answer or plead to the declaration or complaint" make no distinction between different kinds of answers or pleas, and all pleas or answers of the defendant, whether in matter of law, by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court, or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, are said, in the standard books on pleading, to "oppose or answer" the declaration or complaint which the defendant is summoned to meet, the motion to remand the case to the court of common pleas No. 4 of Philadelphia county is sustained, and it is so ordered.

## THE MARS.

(District Court, E. D. Pennsylvania. June 15, 1905.)

No. 47.

SEAMAN—INJURY IN COURSE OF DUTY—LIABILITY OF VESSEL.

A tug is not liable for an injury to a fireman received accidentally while tightening nuts on the machinery, which was in general good repair—the work being such as he was familiar with, and not in itself dangerous—but is liable for the expense of his cure, and his maintenance in the meantime while he is disabled.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, §§ 39–42, 187.]

In Admiralty.

Howard M. Long, for libelant.

J. Frank Staley, John F. Lewis, and Francis C. Adler, for respondent.

HOLLAND, District Judge. The libelant brought suit to recover damages for personal injuries received by him while at work as a fireman upon the tug Mars on or about March 30, 1904. The libelant was hired by the owners of said tug to work as a fireman on the 29th day of March, 1904, and went on board that evening. He went on watch at midnight of March 30th, and about 1 o'clock on March 31st the libelant and another fireman were engaged in hoisting ashes from the fireroom to the deck of the tug by means of a steam hoist. While engaged in hoisting the ashes, the valve in the stuffing box was whistling, and steam was issuing thereout. The second engineer ordered the libelant to fix the valve, and he at first refused; but, upon the engineer insisting that he must go, the libelant obeyed the order. He had performed the same kind of work before, and knew the nature of it. The escape of the steam indicated that the nuts on the valve of the stuffing box required tightening, in order that the packing might prevent the escape of the steam, and the libelant knew how this was done.

There is considerable evidence offered for the purpose of showing that the machinery was generally out of order, but I am not convinced that this was the case. It was the ordinary experience with machinery that requires constant attention in order that it may be kept up to the standard. It was not defective or out of repair to an extent that the tug would be liable for any injuries resulting therefrom, and for this reason we do not think the respondent is liable to the libelant in damages for the injury. There was no failure on the part of the owners of the tug to furnish an entirely safe place for the libelant to do his work, and the machinery about which he was working and the implements used in the performance of his work were safe and in good condition, save and except the ordinary current repairs necessary to keep them in such condition. The injury to the libelant was the result of an accident while performing certain work with which he was acquainted, and which should have been performed in a careful manner to avoid the very injury he re-

ceived. He is therefore not entitled to recover damages against the respondent.

The libelant, however, is entitled, under the prayer for general relief, to recover for his maintenance and cure, and whatever cost he has incurred for that purpose can be awarded to him in this proceeding. The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760; McCarron v. Dominion Atlantic Railway Co. (D. C.) 134 Fed. 762; The Troy (D. C.) 121 Fed. 901; The Kenilworth (D. C.) 137 Fed. 1003.

The evidence, however, fails to show what, if any, moneys have been expended by the libelant in maintenance and cure, and we do not think that it is necessary to refer this matter to a commissioner for that purpose. We will allow the libelant until August 1, 1905, to take further testimony to show the amount he has already expended for this purpose, and any further sum, if any, required to be expended in order to effect a cure, so far as medical aid can accomplish it.

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## In re EASTERN DREDGING CO.

### THE SCOW NO. 34.

(District Court, D. Massachusetts. June 6, 1905.)

No. 1,669.

1. SHIPPING—LIMITATION OF LIABILITY—VESSELS SUBJECT TO PROCEEDINGS.
A scow 110 feet long, employed in carrying mud in Boston Harbor and adjacent waters, or other waters subject to the jurisdiction of admiralty courts, is a "vessel" for the purposes of admiralty jurisdiction and the maritime law, and her owner may maintain proceedings for limitation of liability on account of collision under Rev. St. §§ 4282, 4289, as amended by Act June 19, 1886, c. 421, § 4, 24 Stat. 80 [U. S. Comp. St. 1901, pp. 2943, 2945].

[Ed. Note.—Limitation of shipowner's liability, see The Longfellow, 45 C. C. A. 387.]

2. SAME—SUFFICIENCY OF PETITION.
A petition for limitation of liability *held* sufficient to give the court jurisdiction as against a special plea.

In Admiralty. Petition of the Eastern Dredging Company, as owner of scow No. 34, for limitation of liability.

Carver & Blodgett, for petitioner.
J. Oscar Teele, for Winnissimmet Co.

DODGE, District Judge. Under this petition for limitation of liability, the petitioner's scow No. 34, alleged to have been in collision on March 13, 1904, with the ferryboat City of Boston, has been appraised, and the usual stipulation has been given for the payment of her appraised value. Thereupon, on November 6, 1904, the monition and restraining order provided for by admiralty rule 54 were issued, and have been duly served. All parties claiming damages by reason of the collision were thereby cited to appear and prove their claims on or before March 3, 1905. The Winnissimmet Company, owner of the ferryboat, which had brought suit in the

state courts for alleged damage to its ferryboat in the collision referred to, appeared in these proceedings before March 3, 1905, but has filed no answer to the petition, nor presented any proof of its claim. It has filed on March 5, 1905, a special plea, the effect of which is to deny that the petition presents a case in which the court has jurisdiction to grant the relief prayed for. Upon this special plea a hearing has now been had. The Winnissimmet Company contends that upon the allegations of their petition the owners of the scow are not entitled to the limitation of liability provided for in Rev. St. §§ 4282, 4289, as amended by Act June 19, 1886, c. 421, § 4, 24 Stat. 80 [U. S. Comp. St. 1901, pp. 2943, 2945].

All that is to be gathered from the petition regarding the character of the scow, the waters upon which it was employed, and the nature of its employment, is as follows: Article 2 of the petition describes the scow as "an ordinary mud scow of 110 feet long and 34 feet wide." From the allegations of article 10 it is to be inferred, although this is nowhere expressly stated, that the scow was without motive power of its own, and had to be towed whenever it was moved from place to place. Article 10 alleges that the scow was "being employed by your petitioner in carrying mud from Boston Harbor to the dumping ground, in fulfillment of its contract for excavation with the United States of America," and that the scow had on board a cargo of mud at the time of the collision. The dumping ground referred to is also in article 10 stated to be "outside Boston Harbor." The value of the scow is alleged in the petition to be not over $9,000. The appraisal which has been had has since fixed the value at $5,500.

It is conceded that such a scow is a "vessel," according to the definition of that word contained in Rev. St. U. S. § 3 [U. S. Comp. St. 1901, p. 4]. The waters of Boston Harbor and the adjacent waters of Massachusetts Bay being waters within the jurisdiction of the admiralty courts, a craft of the dimensions stated in the petition, employed on and navigating those waters, as therein stated, used in transporting cargoes of mud, and therefore capable of use in transporting cargoes of other kinds, is a vessel for the purposes of admiralty jurisdiction and of the maritime law. A contract relating to the repair or employment of such a vessel is a maritime contract, damage negligently done by it to other vessels is a maritime tort, and such contracts or such torts give rise to maritime liens enforceable in admiralty against the vessel itself. The Robert W. Parsons, 191 U. S. 17–30, 24 Sup. Ct. 8, 48 L. Ed. 73; Endner v. Greco (D. C.) 3 Fed. 411, 413; The Wilmington (D. C.) 48 Fed. 566, 567; McMaster v. Dredge (D. C.) 95 Fed. 832. Such a scow is of necessity, therefore, regarded as a vessel and dealt with as a vessel by persons concerned with maritime affairs. The general provisions of the maritime law apply to her, and, since the statutes under which owners of vessels are allowed to limit their liability are enacted by Congress in amendment of the maritime law of the United States (Ex parte Garnett, 141 U. S. 1, 12, 11 Sup. Ct. 840, 35 L. Ed. 631), those statutes apply to her, unless it can be shown that such application was not intended by Congress.

The statutes in question are those sections of the Revised Statutes above referred to under which this petition is brought. They may be conveniently referred to as the "Limited Liability Act." From the time of their enactment in 1851, they have made the limitation of liability for which they provide available in general terms to "the owner of any vessel" (section 4283); but before June 19, 1886, these words were limited by the express exception, then contained in section 4289, that the act was not to apply to "the owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation." By the amendment of 1886, section 4289 ceased to except any vessel or any owners from the application of the act, and became instead a declaration that the act should thereafter apply "to all seagoing vessels," and also to all vessels used "on lakes or rivers or in inland navigation, including canal boats, barges and lighters." The act in its present form, therefore, applies in general terms to the owners of all vessels, without exception, and the waters referred to in section 4289 as amended, viz., seas, lakes, rivers, and inland waters, comprise all the waters to which the admiralty jurisdiction extends. The law to be administered by the courts exercising that jurisdiction is the maritime law of the country. In the exercise of its power to amend and modify that law, Congress has not only substituted in place of the exceptions formerly made from its general grant of the privilege of limiting liability, a declaration that the privilege shall now be allowed to the owners of vessels used on all the waters within admiralty jurisdiction, but it has also included by express mention the only classes of vessels which were previously so excluded. These facts seem to me to require the conclusion that all craft which are vessels for the purposes of the maritime law are vessels within the intent of the act as it now stands.

It is contended on behalf of the Winnissimmet Company:

(1) That the act does not and was not intended to apply to scows. It is true that section 4289, while it now expressly includes canal boats, barges, and lighters among the vessels to which the act is to apply, does not mention scows. No such difference, however, in character or construction, is understood to exist between a "scow" and a "barge" or "lighter" as would support the conclusion that the express inclusion of barges and lighters indicates any intention to exclude scows. For the purposes here material, a scow, and particularly a scow of the dimensions stated in the petition, seems to me a vessel of the same kind as a barge or lighter. All of them, if used as this scow was, in navigation and transportation upon the waters referred to in section 4289, are, in my opinion, vessels for the purposes of the act.

(2) That the act does not and was not intended to apply to vessels or other craft not engaged in the business of carrying merchandise or passengers or both, nor to those engaged in purely local trade, or not run on any particular route. The amendment of 1886 has, in my judgment, rendered it impossible to maintain any of these objections. There were decisions under the act, as it stood before that amendment, to the effect that it was not the intent of

Congress to grant the privilege of limiting liability except to the owners of vessel engaged in what is ordinarily understood as maritime commerce, and that a vessel not so engaged, even though she might be brought within the language of the act, was not within its intent. The Mamie (D. C.) 5 Fed. 813; Id. (C. C.) 8 Fed. 367; Simpson v. Story, 145 Mass. 497, 14 N. E. 641, 1 Am. St. Rep. 480. These decisions derived their chief support from section 4289 as it then stood. The change since made in that section requires a different view of the intent of Congress. According to a decision of this court in 1892, the change referred to has extended the act to fishing vessels, held in Simpson v. Story to be excluded. Whitcomb v. Emerson (D. C.) 50 Fed. 128. There is no expression in the act, as it now stands, to indicate that the nature of the employment in which a vessel is engaged is to be considered in determining whether or not the act is to apply to her. That question is made to depend entirely upon the waters whereon she is used. The waters whereon the petition alleges this scow to have been used are unquestionably waters within the admiralty jurisdiction, and, having held her to be a vessel within the meaning of the act, I am unable to regard the nature of her employment as in any way material.

By the provisions of the act, when limitation is allowed, it is to be to the value of the vessel and her "freight then pending." It is argued that this indicates an intention on the part of Congress to deal in the act, even as amended, only with vessels carrying passengers or merchandise or both. In the case of a vessel carrying neither, which is claimed to be the case of this scow, no freight, it is said, could ever be pending. Such a construction of the act would prevent its application to tugboats, yet they have often been allowed to avail themselves of it. The Bordentown (D. C.) 40 Fed. 682; The Battler (D. C.) 58 Fed. 704; The S. A. McCaulley (D. C.) 99 Fed. 302; Van Eyken v. Erie R. R. Co. (D. C.) 117 Fed. 712—are instances, and others might be cited. Whaling vessels also are within the act, although it has been decided that no freight is pending on a whaling voyage. The Ontario and the Helen Mar, 2 Lowell, 40, 53, Fed. Cas. No. 10,543, affirmed on appeal, Swift v. Brownell, 1 Holmes, 467, Fed. Cas. No. 13,695. In my opinion, the words of the act referred to have no other effect than to provide that whenever freight is pending it must be surrendered.

Although the question whether the scow had any freight pending or not is regarded as immaterial for the purposes of this decision, it is not to be taken for granted at this stage of the case that she had none. Freight may have been pending, so far as the petition is concerned, which asks in the ordinary way for limitation to the value of the scow and her pending freight. The report of the appraisers that no freight was pending does not preclude further inquiry regarding the matter, if desired by any damage claimant.

(3) The remaining objections are that the collision described in the petition was such as could not have occurred without the petitioner's privity or knowledge, and that the petition does not show that a light was placed and maintained on the scow. As to the first of these objections, the petition alleges that the collision occurred

without the privity or knowledge of the owner of the scow, and neither what it elsewhere alleges nor what it does not allege regarding the circumstances of the collision warrants a determination, in advance of any hearing on the facts, that this allegation is necessarily false. As to the second objection, also, negligence on the petitioner's part being denied, the questions whether the scow was lighted or not, and, if not, whether the absence of a light was negligence on her part, must be left for determination at the trial, if then raised. The allegations of the petition are sufficient to give the court jurisdiction.

The special plea is overruled.

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## A. J. WOODRUFF & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 15, 1905.)

Nos. 3,462, 3,463.

CUSTOMS DUTIES—CLASSIFICATION—SURGICAL NEEDLES.

The provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 620, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], for "hand sewing" needles, relates to such as are used by persons generally who use needles, and does not include surgical needles.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision in question G. A. 5,481, T. D. 24,795, affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by A. J. Woodruff & Co. The opinion of the Board of General Appraisers reads as follows:

FISCHER, General Appraiser. The merchandise in question consists of surgical needles of various shapes and sizes contained in leather cases. Duty was assessed thereon at the rate of 25 per cent. ad valorem, under the provisions of the act of July 24, 1897, c. 11, § 1, Schedule C, par. 165, 30 Stat. 165 [U. S. Comp. St. 1901, p. 1643], which reads as follows:

"Needles for knitting or sewing machines, including latch needles, one dollar per thousand and twenty-five per centum ad valorem; crochet needles and tape needles, knitting and all other needles, not specially provided for in this act, and bodkins of metal, twenty-five per centum ad valorem."

The importers claim that the articles are entitled to free entry under the provisions of paragraph 620 of said act (chapter 11, § 2, Free List, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685]), which reads as follows: "Needles, hand sewing and darning." The testimony of the importers' witness shows that the term "hand sewing needles" is not a trade-name. Regarding this as true, we must determine the classification of the merchandise according to common understanding. Beyond all question, the term "hand sewing needles," as commonly understood, includes only that species of needle which is used by tailors, seamstresses, sail-makers, and other artisans for sewing fabrics or other material by hand. Surgical needles are always understood and recognized as a distinct class by the name "surgical needles." The Century Dictionary defines a "needle" as follows: "A small, slender, pointed instrument, usually of tempered steel, containing an eye to carry thread through a fabric in sewing. Any instrument shaped like or used as a needle; as, a surgeon's needle. Needles used in surgery are named frequently from the object they are used upon; as, a cataract needle, fistula needle, hare-lip needle, ligature needle, suture needle." And the same authority defines a sewing needle as "any ordinary needle for hand sewing."

In G. A. 582, T. D. 11,223, which arose under the act of 1890, this board, in passing upon similar articles, said: "Stitching together portions of the human anatomy is not commercially known as 'hand sewing,' and we do not think surgical needles can properly be classified as hand sewing or darning needles."

In G. A. 4,147, T. D. 19,356, which arose under the act of 1894. this board also held to the same effect, sustaining the importer's claim that surgeons' needles in leather cases were dutiable under the provision for needles of all kinds, and that the leather cases were usual coverings.

The illustrative samples introduced by the importers do not sustain their contention; for while it is true that some varieties of hand sewing needles are somewhat shaped like surgical needles, that fact is not conclusive of their designation. Very many articles of commerce resemble each other in general appearance, yet differ in essential features. All sewing needles are slender, pointed instruments, and have eyes to carry thread, and so have surgical needles, but they are not dutiable alike by virtue of the tariff provisions.

The protests are overruled, and the decisions of the collector affirmed.

W. Wickham Smith, for appellant.
Chas. D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. These are surgical needles, and have been assessed as needles not otherwise provided for, under paragraph 165 of act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 165 [U. S. Comp. St. 1901, p. 1643], against a protest that they are free as "hand sewing" needles under paragraph 620 of the Act of 1897, c. 11, § 2, Free List, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685]. No testimony has been taken and there is nothing by which to change the classification. Hand sewing needles would seem to be such as are used by persons generally who use needles, and not such as are used only by professional persons in surgical operations to which they are specially adapted.

Decision affirmed.

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## In re NATIONAL HOTEL & CAFÉ CO.

(District Court, E. D Pennsylvania. June 21, 1905.)

No. 2,239.

ACTS OF BANKRUPTCY—PREFERENCE—LEGAL PROCEEDINGS.

Bankr. Act 1898, c. 541, § 3, cl. 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], declares that an act of bankruptcy shall consist of a person having suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged the same. *Held*, that the consummation of the act of bankruptcy under such section was not the date of an actual sale of the bankrupt's property under an execution, but that the act was completed five days before the day of such sale if at that time the bankrupt had failed to dissolve the levy.

In Bankruptcy. Sustaining demurrer to petition.

Robert J. Byron and John W. Speckman, for petitoners.
Henry P. Brown, for alleged bankrupt.

HOLLAND, District Judge. On May 3, 1905, an involuntary petition in bankruptcy was filed against the National Hotel &

Café Company, and subsequently amended so that the act of bankruptcy alleged is as follows:

"Your petitioners further represent that the said National Hotel & Café Company was on the 23d day of December, 1904, and now is, insolvent, and that within four months next preceding the date of this petition the said National Hotel & Café Company committed an act of bankruptcy, in that it did heretofore, to wit, on the 23d day of December, 1904, permit a judgment to be entered in the sum of $15.867.15 in favor of the Anheuser-Busch Brewing Association, entered in the court of common pleas No. 3 of Philadelphia county as of December term, 1904 (No. 1,564), and, after an execution had been issued on said judgment, did permit the sheriff of Philadelphia county to seize and levy upon personal property of it (the said National Hotel & Café Company) upon December 24, 1904, and the said National Hotel & Café Company permitted the sheriff, under said execution, to sell the said property on January 4, 1905, without causing the said execution and sale to be vacated, thereby suffering and permitting the said Anheuser-Busch Brewing Association to procure a preference through legal proceedings."

It will be seen that the intention of the petitioners is to charge the act of bankruptcy set forth in Bankr. Act July 1, 1898, § 3, cl. 3, (30 Stat. 546, c. 541 [U. S. Comp. St. 1901, p. 3422]), which reads as follows:

"Or (3) suffer or permit, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

It will also be noted that the petition does not allege that the act of bankruptcy was a failure on the part of the alleged bankrupt "to vacate or discharge a preference obtained through legal proceedings at least five days before a sale or final disposition of the property," but the allegation is that the bankrupt "permitted the sheriff under said execution to sell the said property on January 4, 1905, without causing the said execution and sale to be vacated; thereby suffering and permitting the said Anheuser-Busch Brewing Association to procure a preference through legal proceedings."

The reason on the part of the petitioners why they did not allege the act of bankruptcy to be a failure to vacate or discharge such preference obtained through legal proceedings at least five days before the sale or final disposition of the property arises from the fact that the petition in this case was presented and filed in this court more than four months after a date five days prior to the sale of this personal property, and if the act of bankruptcy was committed five days prior to the sale, which occurred on January 4, 1905, then the petition in this case would have been filed more than four months subsequent to the act of bankruptcy alleged. The question therefore to be determined is whether the act of bankruptcy was committed by the alleged bankrupt upon its failure to vacate or discharge the lien of the judgment five days prior to the sale, or on January 4, 1905, the date upon which the sale took place. It seems clear to me that it was the intention of Congress, in framing this clause, to fix the consummation of the act of bankruptcy at a period five days before a sale. If this were not so, and the act of bankruptcy is held not to have been consummated until a sale had taken place, creditors could not file involuntary petitions in

bankruptcy until after the property of the alleged bankrupt had been swept away by an execution. In other words, it seems to me that it was the intention to fix the consummation of the act of bankruptcy upon an alleged bankrupt five days before the day of sale, if at that time he had failed to lift a levy on his property. A petition can then be filed before the sale, and the property administered in bankruptcy for the benefit of all the creditors.

While this precise question has never been determined, so far as I have been able to ascertain, the reasonings in the following cases sustain the above conclusions: In re Aaron Meyers, 1 Am. Bankr. Rep. 1; Metcalf Bros. & Co. v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, 9 Am. Bankr. Rep. 36; Parmenter Mfg. Co. v. Stoever et al., 97 Fed. 330, 38 C. C. A. 200; Collier on Bankruptcy (5th Ed.) p. 42.

The act of bankruptcy in this case having occurred more than four months prior to the time the petition was filed, it is not necessary to consider the other grounds of demurrer.

The objection to the petition that it fails to allege an act of bankruptcy within four months of the time it was filed is sustained, and the petition is dismissed.

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## HAAS-BARUCH & CO. v. PORTUONDO.

(District Court, E. D. Pennsylvania. July 8, 1905.)

No. 1,937.

BANKRUPTCY—CLAIMS—ALLOWANCE.

On a cigar manufacturer being adjudged a bankrupt, claimant was entitled to receive from him 40,750 cigars, for which claim was filed before the referee in bankruptcy. Thereafter a corporation was organized to continue the bankrupt's business, purchase his assets, etc., and, desiring claimant to continue to act as its sales agent, agreed to protect claimant in its claim, and suggested that, as the claim was a legal one against the bankrupt's estate, if claimant would assign the same to the corporation's attorney he would prove the claim before the receiver, to which claimant replied that it would present its claim to the receiver, and, if the corporation so shipped the cigars, claimant would return to it any dividend received on its claim. *Held*, that such arrangement did not operate as a payment of the claim against the bankrupt, and that claimant was entitled to prove the same against his estate.

In Bankruptcy. On Certificate of Referee.

J. Martin Rammel, for trustee.
Samuel W. Salus, for claimant.

HOLLAND, District Judge. In May, 1904, Vincente Portuondo was adjudicated a bankrupt, and a claim was duly filed against the estate by the plaintiff for the sum of $1,202.13, which was the value of 40,750 Portuondo cigars, at $29.50 per 1,000. The claim was excluded by the referee. Whereupon exceptions were filed to this finding, and a request made that the referee certify the matter to this court. It appears that the plaintiff company was the agent of the bankrupt for the sale of cigars, and the referee finds as a fact

that under the contract existing between them the plaintiff company "was entitled in April, 1904, to 40,750 cigars, the price of which was twenty-nine and fifty-hundreths dollars ($29.50) per thousand"; total, $1,202.13. It further appeared that shortly after the defendant was adjudicated a bankrupt the Vincente Portuondo Cigar Manufacturing Company, a corporation, was organized for the purpose of taking over the assets of the bankrupt, and it purchased the stock which the bankrupt had at the time of bankruptcy from the receiver. This company was anxious to retain the service of the plaintiff company as a customer or agent for these cigars, and for that purpose wrote to Messrs. Haas-Baruch & Co. on May 16, 1904, as follows:

"We are in receipt of your favor of the 10th inst. and in reply to same would state, that we are the purchasers from the Receiver of the plant, assets, good will etc. of the bankrupt concern of Vincente Portuondo, and we learn from Mr. Jacoby that the bankrupt had agreed to give you an extra deal on the Chico cigar to the extent of 40,875 for goods sold during the period of thirty days.

"As stated to you by Mr. Jacoby, we are fully prepared to protect your interests as we appreciate the value of your account, but as your claim is a good and legal one against the bankrupt estate, in order that we may realize something on it we would request that you immediately on receipt of this forward Power of Attorney to collect the claim against the bankrupt estate to Sam'l W. Salus, Esq., 737 Land Title Building, who is our attorney in this matter. We have already instructed Mr. Salus to put in your claim to the Receiver, and upon receipt of your Power of Attorney he will prove same."

Subsequently, on May 28, 1904, the plaintiff company wrote the newly formed corporation as follows:

"We beg to acknowledge receipt of your valued favor of the 23rd inst., from which we note that the draft of which we tried to stop payment, has been cashed. We shall now hand our account against Vincente Portuondo to the receiver. We would prefer, however, not to wait until we receive a dividend on it, but expect you to ship us 40,750 Portuondo Cigars in liquidation of our claim, and as promised by you, and if we receive any dividend from the Receiver of Vincente Portuondo, we will be glad to return it to you, and remain."

It is very clear from an examination of this correspondence that it was not the intention of the Vincente Portuondo Cigar Manufacturing Company, or the plaintiff in this case, that the receipt of the cigars from the manufacturing company was to be regarded as a payment of the plaintiff's claim against the bankrupt. The manufacturing company stated in its letter of May 16th that, in view of the fact that the plaintiff's claim was a legal one against the bankrupt's estate, it would protect the plaintiff in its claim, and then pointed out the method by which the claim could be enforced against the bankrupt's estate; and the plaintiff, in its letter to the manufacturing company, dated May 28th, promised to return to the manufacturing company such dividends as it would receive from the bankrupt estate. I am unable to see the merit in the claim of the trustee that the bankrupt's estate should be relieved from this obligation because the manufacturing company, in order to secure the plaintiff company as a customer, agreed to protect it in the collection of its entire claim. There is nothing to indicate that the parties regarded their arrangement as a liquidation or payment of the plain-

tiff's claim against the defendant, but, on the other hand, they expressly indicate an intention to collect it, as shown by the letters in evidence. In my judgment, the referee was in error in excluding the claim. Advantage of a payment by a third person cannot be taken by the debtor as a discharge of his indebtedness unless it was intended by the payor and the creditor to operate as a discharge. Am. & Eng. Ency. of Law (2d Ed.) vol. 22, p. 536. Where a debt is justly due, and it has been guarantied or advanced by a third party for any reason, with the understanding between the third party and the creditor that such guaranty or payment was not made for the purpose of liquidating or discharging the debt due, there is no good reason why the creditor should not be permitted to collect the same from the debtor for the third party. Merryman v. State, 5 Har. & J. (Md.) 423; Whiting v. Ins. Co., 15 Md. 297; Smilie v. Walton, 41 Vt. 174; Bank v. Shaw, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319.

The order of the referee excluding this claim is set aside, and the claim allowed in favor of the plaintiff.

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## SUNDHEIM v. RIDGE AVENUE BANK.

(District Court, E. D. Pennsylvania. July 8, 1905.)

No. 2.

1. BANKRUPTCY—PREFERENCES—INSOLVENCY—NOTICE.

That a creditor receiving payment from the bankrupt within four months prior to bankruptcy had reasonable cause to believe that it was intended to give a preference does not require proof that the creditor had either actual knowledge or actual belief that the bankrupt was insolvent at the time, but only proof of such surrounding circumstances as would lead an ordinarily prudent business man to so conclude.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 256, 257.]

2. SAME—EVIDENCE.

In a suit by a bankrupt's trustee to recover an alleged preference, evidence *held* to require submission to the jury of the question whether defendant had reasonable cause to believe that a preference was intended by the bankrupt.

Overruling Motion for a New Trial.

E. Clinton Rhoads, for trustee.
Charles F. Warwick, for Ridge Avenue Bank.

HOLLAND, District Judge. This is a suit under section 60b of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], to recover an alleged preference, as defined by section 60a of the same act. The amount claimed by the plaintiff is $1,320, which was paid to the defendant by the alleged bankrupt under the following circumstances: The Kensington Leather Company had been manufacturing leather under a secret process, which was supposed to be very valuable. The business was not profitable, and in order to raise money the directors indorsed a note of

$3,000 for the company, which was discounted by the defendant, and became due on March 23, 1904. The note was renewed on that date, with the same indorsers, for three months, and again fell due June 23, 1904. At the time of the renewal on March 23, 1904, there was no payment on account, and the bank officers were told by the makers of the note that there was no money to pay it, but that there was leather waiting to be sold. On the 2d day of June, about three weeks before the note again fell due, Edgar S. Gardner, the vice president of the bank, informed Roger J. Maynes, who seemed to be managing the leather company's business, that the board would insist upon a satisfactory settlement of the note when it fell due. At that time the leather company had on deposit with the defendant the sum of $650, out of which Maynes drew a check on that date, to wit, June 2, 1904, for $500, and paid on account of the note, which was not yet due. Mr. Gardner informed him that this payment would not be satisfactory, when he was told by Maynes they still had the leather on hand, which they were unable to sell, and therefore unable to reduce the note any further, but informed Gardner that, if he would sell the leather for the company, the proceeds could be appropriated on account of the note. Mr. Gardner called up a Mr. Orr, who was in the leather business, and as a result the leather was accepted by the bank and sold, and $820, the proceeds thereof, credited on the note when it fell due on June 23, 1904, and a new note was given for the difference. At the time of the transfer of this property to the bank by the leather company there was an inquiry as to the solvency of the leather company, and the bank was informed by Mr. West, then secretary of the company, and also by Mr. Maynes, that the company was solvent. There was, however, no further inquiry on the part of the bank to ascertain the correctness of this statement, notwithstanding the fact that the company was unable to pay in cash, and had transferred part of its assets for the purpose of meeting the demands of the defendant. The defendant, by its officer, at the trial of the case insisted that it had no knowledge of the insolvency of the leather company at the time these payments were made. Subsequently, within four months from the time of these payments to the bank, the leather company was declared insolvent, the plaintiff was appointed trustee, this suit was brought, and at the trial before a jury on March 16, 1905, a verdict was rendered in favor of the plaintiff for the sum of $1,380.20. The question of the insolvency of the leather company at the time the payments were made, together with the question as to whether the bank had reasonable cause to believe that it was intended by such payments to give a preference, was left to the jury, with proper instructions, to which no objections were made, and the verdict was in favor of the plaintiff for the sum above specified.

On the motion for a new trial there are four reasons assigned, but the only question raised, according to the rules to be considered, is the third, which was in the form of a request to the court to charge the jury that, "under all the evidence in this case, your verdict must be for the defendant," which was refused. In

this we are still of the opinion there was no error. Reasonable cause to believe that it was intended to give a preference does not require proof that the defendant had either actual knowledge or actual belief, but only such surrounding circumstances as would lead an ordinarily prudent business man to conclude that a preference was intended. And whether or not the facts and circumstances in the possession of the defendant in this case at the time the payments were made to it were sufficient to cause an ordinarily prudent business man to conclude a preference was intended was a question for the jury, and not for the court. Wetstein v. Franciscus (C. C. A.) 133 Fed. 900; In re Andrews (D. C.) 135 Fed. 599; Thomas v. Adelman (D. C.) 136 Fed. 973.

The motion for a new trial is overruled.

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MACK MFG. CO. v. VAN DUERSON et al.

(Circuit Court, E. D. Pennsylvania. July 10, 1905.)

No. 39.

JUDGMENT—VACATION—DEFENSES—DISCHARGE IN BANKRUPTCY.

Where a bankrupt was not ruled to plead in an action against him until more than three months after his discharge in bankruptcy, but failed to interpose such discharge as a defense until after judgment, he was not entitled to have the judgment set aside in order that he might interpose such plea, on the ground that he was led to believe that the receiver would protect his interest and interpose such defense.

Rule to Open Judgment Discharged.

E. O. Michener, for plaintiff.

Jos. H. Brinton, for defendant.

HOLLAND, District Judge. Harry V. Oliver presents a petition to open a judgment for the purpose of allowing him to interpose his discharge in bankruptcy as a defense to a judgment recovered against him on April 8, 1904. The petitioner had been declared a bankrupt, and his discharge was entered October 3, 1903, in the state of New Jersey. This suit had been instituted against him prior to that time, but he was not ruled to plead until January 21, 1904. On the following day, to wit, January 22, 1904, more than three months after his discharge in bankruptcy, he entered a plea in this case in this court of non assumpsit, payment, and notice of the special matter set forth in the affidavit of defense, but did not plead his discharge in bankruptcy. Subsequently, on April 8, 1904, a jury was called, and a verdict rendered against the defendant for $4,164.40. He now requests that this judgment be opened, in order that his discharge in bankruptcy may be interposed. The only excuse he gives for the delay in taking advantage of this plea is that he was led to believe that the receiver would take care of his interests and make defense for him in this court, but there is no explanation as to why he failed to enter this plea on January 22, 1904, when he entered the other pleas above mentioned.

There is no reason why this plea should not have been entered at that time, and, having failed to do so, we do not think he has shown any reason why this judgment should now be opened.

The rule is therefore discharged.

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In re HESS.

(District Court, E. D. Pennsylvania. June 19, 1905.)

No. 1,993.

BANKRUPTCY—ADVERSE CLAIM TO PROPERTY.

Evidence *held* insufficient to sustain an adverse claim to property in possession of a bankrupt on the ground that he obtained it by fraud, it appearing that when claimant sold the property he fairly understood the bankrupt's financial condition.

In Bankruptcy. On report of referee.

See 136 Fed. 988.

Samuel P. Tull, for trustee.

William F. Johnson and Saul S. Myers, for petitioners.

HOLLAND, District Judge. Nickelsburg Bros. & Co. presented a petition for an order on the trustee in this estate to deliver to them certain goods which were found in the possession of the bankrupt at the time of adjudication and which passed into the possession of the trustee. There was no answer filed, and the petition was referred to Edward F. Hoffman, Esq., who, in a very full and satisfactory report, recommends that the petition be dismissed.

The petitioners claim the merchandise was obtained by fraud, and no title passed; but the whole transaction shows the financial standing of the bankrupt was fairly understood by petitioners in making the contract. The evidence, considered with the transaction, fails to make out such a case of fraud as to entitle them to a return of the property claimed.

I am convinced the order made by the referee should be approved, and it is so ordered.

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In re HOOKS SMELTING CO.

(District Court, E. D. Pennsylvania. June 19, 1905.)

No. 1,995.

1. BANKRUPTCY—EXAMINATION OF OFFICER OF BANKRUPT CORPORATION.

The president and treasurer of a bankrupt corporation, on his examination before the referee, may properly be required to make known to the trustee the combination of a safe owned by the corporation and alleged to contain assets.

2. SAME—CLAIM OF PRIVILEGE.

Where an officer of a bankrupt corporation is under indictment in a state court for embezzlement of funds of the corporation, he cannot be required, on his examination before the referee, over his claim of privi-

lege, to state whether or not he appropriated certain money of the corporation to his own use, but he may be required to state whether or not he has in his possession or under his control any property belonging to the bankrupt estate.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1026–1037.]

In Bankruptcy. On certificate from referee.

Henry J. Scott, for trustee.
William H. Peace, for William S. Tryon.

HOLLAND, District Judge. A certificate was filed in this court on May 11, 1905, by the referee, wherein he reports that several orders were made against William S. Tryon with which he refuses to comply:

(1) On March 23, 1905, William S. Tryon, president and treasurer of the bankrupt company, was directed to make known to the trustee the combination of a safe alleged to belong to the bankrupt company at the time the petition was filed. It is alleged that the safe contains assets belonging to the estate, and the trustee should be permitted to examine the contents of the safe for the purpose of ascertaining the truth of this allegation. There is therefore no reason why the witness should not, upon examination before the referee, inform the trustee of the combination, and William S. Tryon is directed to comply with this order by appearing before the referee and stating, upon examination, the combination of the safe.

(2) The referee's finding in favor of the validity of the claim of $103.50, of Robert J. Ruby, an expert accountant, and the bill of Mrs. Anna B. Elliott for $45, is approved.

(3) The report of the accountant, Robert J. Ruby, was called for by counsel for William S. Tryon, during the examination of Mr. Ruby, when he was testifying in support of his claim of $103.50. The referee refused to make an order on the trustee to produce it, and thereupon Mr. Peace, attorney for Tryon, requested that the matter be certified. There is nothing to show the purpose for which the report was wanted, nor why the referee refused to make the order. It might or might not be important in considering the question of Mr. Ruby's claim. There is not sufficient information upon which an order can be made by the court.

(4) During the examination of William S. Tryon on March 21, 1905, he was asked certain questions, which he refused to answer, upon the ground that his answers would tend to incriminate him, inasmuch as he was under a criminal charge of embezzling the funds of the Hooks Smelting Company. It appears that Mr. Tryon was the president and treasurer of the bankrupt company, and he has been indicted for embezzling its funds during the time he occupied these official positions. The indictments are pending in the Philadelphia court. At the examination on the above date, questions were propounded to him to ascertain (1) whether he had taken any part of a certain $40,000 belonging to the bankrupt company and appropriated it to his own use, and (2) whether he now

had in his possession or control any property belonging to the bankrupt estate. The questions directed to the witness for the purpose of ascertaining this information extended over more than 50 pages, and need not be repeated here. As to the first, one of the questions asked was as follows: The witness having stated that $40,000 had been borrowed on mortgage by this company, and that part has been used in a certain purchase, he was asked, "How much of it did you take?" This question he refused to answer, upon the ground that it might incriminate him. In view of the fact that indictments for the taking of this money from the company are pending against him, he cannot be compelled to answer this question if its answer would incriminate him, and the referee was therefore in error in directing him to answer it. But as to the other questions, directed to the ascertainment of the fact as to whether he now has any property in his possession or control belonging to the bankrupt, he is directed to answer. He can state the fact, and, if he has such property, it is his duty to turn the same over to the trustee. We do not see how this could incriminate the witness by informing the trustee as to whether or not he possessed property belonging to the bankrupt.

(5) William S. Tryon and Albert Cempini were ordered to appear before the referee for further examination. The bankrupt act authorizes the referee to make such an order, and they are directed to comply with this order upon receipt of notice from the referee fixing the date for their further examination.

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## MONTGOMERY v. McNICHOLAS.

(District Court, E. D. Pennsylvania. June 21, 1905.)

No. 2.

BANKRUPTCY—FRAUDULENT TRANSFER OF PROPERTY BY BANKRUPT—ACTION TO RECOVER.

Instructions considered and approved in an action by a trustee in bankruptcy to recover the value of property alleged to have been transferred by the bankrupt with intent to hinder, delay, and defraud his creditors.

At Law. On motion for new trial.

Thomas Leaming, for plaintiff.

J. Washington Logue, for defendant.

HOLLAND, District Judge. This action was brought by the plaintiff as trustee of the estate of Samuel J. Ferguson, bankrupt, to recover from the defendant the value of a retail liquor license transferred to him by the bankrupt in fraud of his creditors one day before the petition in bankruptcy was filed. The suit was brought under section 67, subd. e, Bankr. Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], which provides that all conveyances of his property by a bankrupt within four months prior to the filing of the petition in bankruptcy, with intent

on his part to hinder, delay, or defraud his creditors, shall be null and void as against the creditors of the debtor, "except as to purchasers in good faith and for a present fair consideration." The section in question provides that property so transferred shall remain a part of the assets of the estate of the bankrupt, and shall pass to the trustee, whose duty it shall be to recover the same, by legal proceedings or otherwise, for the benefit of the creditors.

The defendant purchased this license from Samuel J. Ferguson, the bankrupt, on July 9, 1903, for the price or sum of $7,250, which is averred in the statement to be a consideration grossly inadequate, as it is claimed therein that the license is worth $15,000. The petition in bankruptcy filed against Samuel J. Ferguson alleged as the act of bankruptcy that he had conveyed the property in question with intent to hinder, delay, and defraud his creditors. He filed an answer denying this, demanded a jury trial, which was had on February 2, 1904, and a verdict rendered sustaining the allegation set forth in the petition, and on February 8, 1904, an adjudication in bankruptcy was accordingly entered. At the trial of the case against McNicholas a recovery was urged solely upon the ground that the price paid was not "a present fair consideration."

The first two reasons filed for a new trial cover the objections raised, and are as follows:

"(1) The learned trial judge erred in leaving to the jury the question whether or not the bankrupt had transferred his license with intent to hinder, delay and defraud his creditors, there being in evidence a special verdict of a jury in this court finding that the said bankrupt had so done.

"(2) The learned trial judge erred in charging the jury that in order to find for the plaintiff they must find that the defendant was a purchaser not in good faith and not for a fair consideration."

The record of the verdict of the jury finding that Samuel J. Ferguson committed an act of bankruptcy, in that he transferred this liquor license with intent to hinder, delay, and defraud his other creditors when he was insolvent, was offered in evidence by the plaintiff. The objection to its admission was sustained, and no exception was taken to this ruling of the court. The whole record in the trial of the case on the question of bankruptcy was subsequently admitted for another purpose. It was, however, used as evidence before the jury for the purpose of showing that the transfer of the license by Ferguson was with intent to hinder, delay, and defraud his creditors. This was not disputed by the defendant, and in the charge of the court the jury was told:

"There was offered in evidence a finding in this court that he did transfer his property with the purpose of hindering, delaying, and defrauding his creditors. That was ruled out because the proceeding was not between these two parties, but counsel for the plaintiff stated it and argued it before you as though it had been admitted in evidence. It is before you, and we will consider later the effect of arguing it to the jury after it had been ruled out. But just now, for the purpose I have mentioned, I state to you that was the finding of a jury in this court."

There were no further instructions given the jury on this point, and the record here referred to, which was admitted for another purpose, was with the consent of both sides used as evidence for

the purpose of showing that Ferguson made the transfer of this license to the defendant with intent to hinder, delay, and defraud creditors. As this record was not admitted for the purpose of showing the intent of Ferguson, we think the court was right in the instructions given to the jury.

As to the second reason for a new trial, an examination of the whole charge will show that the jury was instructed with considerable detail and elaboration that they must find that the defendant purchased the license in good faith and for a present fair consideration, and that if the purchase was made not in good faith, or without a present fair consideration, the plaintiff was entitled to recover. In fact, both the plaintiff and defendant, in summing up to the jury, agreed that there was only one question in the case for the jury to consider, to wit, whether or not $7,250 was a present fair consideration. It was conceded by both sides that the transfer was made by Ferguson with the intent on his part to hinder, delay, and defraud his other creditors, and that the defendant, John J. McNicholas, made the purchase in good faith. The jury found the consideration paid was a full and fair value of the license.

The motion for a new trial is therefore overruled.

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## BASSFORD v. FITZGERALD et al.

(Circuit Court, E. D. Pennsylvania. June 12, 1905.)

No. 44.

SALE—ACTION TO RECOVER PRICE PAID FOR ACCOUNT—CONSTRUCTION OF GUARANTY.

Defendants contracted to do certain advertising in their newspaper, and to take in payment two automobiles at a stated price, and the balance of the account in machinery made by a certain company. Plaintiff desired to buy the account so far as machinery could be obtained therefor, and in the belief, induced by defendants, that the whole account would be paid in machinery, at his option, he purchased and paid for the same, but took a written guaranty from defendants that, if it was not so paid, they would refund the amount received. The advertiser delivered machinery to the amount in excess of the price of the automobiles, but, as to them, insisted upon the terms of the contract. *Held*, that the purpose of the contract of guaranty was to protect plaintiff in such contingency, and that he was entitled to recover thereon the amount paid for that portion of the account for which he could not obtain machinery.

At Law.

Walter J. Knight and Gilbert F. Schamberg, for plaintiff.
F. F. Brightley, for defendants.

HOLLAND, District Judge. William K. Bassford brings suit against Harrington Fitzgerald and Hildebrandt Fitzgerald to recover the sum of $1,800, and alleges that the amount is due upon the following state of facts: The defendants were publishing a paper known as the "Philadelphia Item" in the city of Philadelphia, and had entered into a contract with the World's Dispensary Medical

Association to do certain advertising for it, and to take in payment therefor two automobiles, for $3,000 each, making a total of $6,000, and machinery of the American Engine Company for any balance that may become due for advertising in the defendants' paper, over and above the $6,000. This contract was made on the 19th day of April, 1889, and had run along until on or about the 25th day of September, 1903, when William K. Bassford called upon Harrington Fitzgerald, one of the defendants, in the city of Philadelphia, for the purpose of purchasing from him orders on the World's Dispensary Medical Association for machinery due the defendants for the advertisement which they had published in their Philadelphia paper on account of the contract. From the evidence I find that Bassford knew about this contract, and was informed, either from information outside or from Mr. Fitzgerald, that there was an agreement to accept automobiles as part payment; but he was assured by Mr. Fitzgerald that, notwithstanding the fact that the agreement called for the acceptance of $6,000 in automobiles, the defendants had an option to either accept automobiles in payment, or machinery of the American Engine Company, and Bassford was so informed, and with the understanding that, whatever amount the World's Dispensary Medical Association owed the defendants for advertising, they could either take machinery of the American Engine Company for the total amount, or accept $6,000 in two automobiles, and the balance in machinery, as the defendants might elect. And upon this Bassford agreed to purchase the defendants' right to the delivery of machinery or automobiles for the price or sum of 30 per cent. on the dollar, and Bassford, who purchased this machinery, took it because of the assurance that he could get machinery from the American Engine Company for the entire amount; and, in order to be sure of this, he took from the defendants a written guaranty in the following language:

"Philadelphia, September 25th, 1903.

"Mr. William K. Bassford, Jr.—Dear Sir: We enclose you herewith machinery order for the amount of ten thousand four hundred seventy-nine ($10,479.62) dollars, sixty-two cents, according to our trade contract, and we guarantee the World's Dispensary Medical Association will deliver you American Engine Company's machinery, upon presentation of the orders, or we will refund the amount you have paid us.

"Yours truly,

Fitzgerald and Sons,
"Philadelphia Item."

This guaranty had been drawn by Mr. Bassford on September 24th in the defendants' office in Philadelphia, and left with them. They afterwards, upon examination of their books, ascertained the amount due them from the World's Dispensary Medical Association, and made orders for the amount of machinery to Mr. Bassford, together with the above guaranty, and a draft for $3,143.89; being 30 per cent. on the above-mentioned amount of machinery, which was to be delivered to the plaintiff by the World's Dispensary Medical Association as the amount due the defendants for advertisements in their Philadelphia paper. Upon these orders the plaintiff received $4,479.62 worth of machinery from the American Engine Company at prices at which it was to be delivered to the defend-

ants for their advertisements, but the World's Dispensary Medical Association refused to deliver American Engine Company machinery for the amount of $6,000 on this contract, for the reason that, as claimed through its president, Dr. Pierce, the defendants were to accept two automobiles, for $3,000 each, making a total of $6,000; and, when the plaintiff presented his orders for delivery of American Engine Company machinery to the amount of this $6,000, he was informed that he could not get such machinery, but would be required to take automobiles. This was contrary to what he had agreed with the defendants to accept, and they had guarantied to him that the World's Dispensary Medical Association would deliver American Engine Company machinery for the $6,000. Plaintiff immediately called upon the defendants, and informed them that the World's Dispensary Medical Association had refused to deliver machinery instead of automobiles for the $6,000, and requested the return of $1,800, in accordance with the guaranty. At that time the defendants did not agree to return or refund any of the money. On October 5, 1903, the plaintiff wrote the defendants again, requesting the return of $1,800, which was 30 per cent. on the $6,000, and inclosed a copy of his guaranty to the defendants, in order to show him to what extent he had made himself liable as a guarantor for the delivery of machinery instead of automobiles. The defendants made no reply, and subsequently letters were written to the defendants, to which there was no reply, or any indication as to what the defendants would do with regard to a repayment of the $1,800 in accordance with the guaranty dated September 25, 1903. The orders for machinery given by the defendants to the plaintiff were retained, and are still in his possession.

The defense, which is no doubt true, is that Bassford knew that the contract called for automobiles, and that it was thought that the World's Dispensary Medical Association could be induced to deliver American Engine Company machinery instead of automobiles, and it was agreed that they would both endeavor to bring about this result; but the evidence shows that Bassford was not willing to take the chance of this being accomplished, and required of the defendants to give him a guaranty that in case of failure they would refund the amount which is paid to them. Subsequent events demonstrated that the World's Dispensary Medical Association were unwilling to deliver American Engine Company machinery, or any other kind of machinery, for the $6,000, but insisted upon payment of that amount with two automobiles, in compliance with the original contract; and the plaintiff, having failed to receive this machinery, insists now he is entitled to recover back the 30 per cent. on this amount. The written contract certainly entitles him to this recovery, and it makes no difference what arrangements they had preliminary to its execution as to the delivery of machinery or automobiles. It developed that the plaintiff was unable to secure machinery, and the defendants had guarantied a delivery of machinery or a refund of money. As he failed to secure the one, he is entitled to the other, and therefore judgment is awarded the plaintiff in the sum of $1,800, with interest from November 1, 1903.

## Ex parte ROGERS.

(District Court, D. Vermont. July 3, 1905.)

1. CRIMINAL LAW—MURDER—SENTENCE—SOLITARY CONFINEMENT.

V. S. §§ 4886, 2007, fix the punishment of murder in the first degree at death, and declare that at the time sentence of death is pronounced, if six months intervene before execution, the sentence shall be to hard labor in the State Prison until three months before execution, and to solitary confinement from the time of hard labor to the time of execution. Sections 1997 and 1998 authorize a new trial to be granted by two judges of the Supreme Court, and require, if they do so, that they shall allow a stay; and section 1999 declares that if the petition is refused the court shall appoint a time for execution; and Const. § 11, c. 2, provides that in cases of murder the Governor may grant a reprieve until after the next session of the Assembly, but no pardon. *Held*, that where petitioner was sentenced in December, 1903, for murder, to imprisonment at hard labor until three months before February 3, 1905, and to solitary confinement during that time, and then to be executed, but she was reprieved until June 23d, the keeping her in solitary confinement subsequent to February 3d constituted a separate severe punishment, to which she had never been sentenced, and was a deprivation of her right to be freed therefrom without due process of law.

2. SAME—FEDERAL COURT—JURISDICTION.

The federal court has no jurisdiction to interfere in any manner with state proceedings for the execution of a sentence against a convicted criminal, except to prevent any of the privileges or immunities of such person under the federal Constitution from being infringed.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 1383.]

Fred M. Butler, Thomas C. Moloney, and Edward B. Flinn, for petitioner.

Clarke C. Fitts, Atty. Gen., for the State.

WHEELER, District Judge. By section 4886 of the Vermont Statutes, the punishment of murder in the first degree is death. By section 2007, the court, at the time of sentencing to death, if it is six months before execution, is to sentence to hard labor in the State Prison until three months before execution, and to solitary confinement from the time of hard labor to the time of execution. The prisoner may bring a petition for a new trial to the Supreme Court, and, by sections 1997 and 1998, two judges may allow it to be filed, and, if they do so, they are to allow a stay; and, by section 1999, if, on hearing, the petition is refused, the court is to appoint a time for execution. In cases of treason or murder, by the Constitution (section 11, c. 2), the Governor may grant a reprieve, but not pardon, until after the next session of the Assembly. The petitioner here was sentenced by the Bennington county court in December, 1903, to hard labor until three months before February 3, 1905, and to solitary confinement during that three months, and then to be executed. Before that day she was reprieved by the Governor to June 2, 1905. A petition for a new trial was allowed to be filed by two judges, with a memorandum that the reprieve was a sufficient stay. This took her case into court again, where she was entitled to have the time of execution fixed by the court, if her petition for a new trial should be denied. The petition was re-

fused by the court before June 2d, without appointing any time for the execution of the sentence, but leaving the time to which she was reprieved to stand as such. She was further reprieved from June 2d to June 23d, leaving the sentence of execution to be carried into effect then. She appears to have been kept in the same solitary confinement since February 3d that she was during the three months before February 3d until she was produced on this writ, without further sentence than that of Bennington county court, which expired on that day.

In Medley's Case, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835, solitary confinement, with the sentence of death, appears to have been considered and held to be of itself a separate and severe punishment, in addition to being in custody until execution by hanging; and he appears to have been discharged from that confinement because the state of Colorado had, by statute going into effect after the commission of the crime, provided for the punishment of solitary confinement for a time before the execution. In this case the statutes require the keeper of the prison, having custody, to inflict solitary confinement until February 3d, as it was imposed by sentence of Bennington county court. The prisoner was left to suffer that punishment after February 3d by the reprieve of the Governor, and has been suffering it ever since. The Governor could only reprieve to a certain time, and the Supreme Court could only appoint a new time for execution. Neither could resentence, and she has been suffering the punishment of solitary confinement since February 3d, without sentence, and has been brought from such confinement on this writ. The fourteenth amendment to the Constitution of the United States provides that no state shall deprive any person of life, liberty, or property without due process of law. The petitioner apparently has been kept in solitary confinement, not imposed as a sentence by any court anywhere, but because the statute (section 2007) left that to be done, and by that law the state of Vermont required the prison officials to inflict that punishment in addition to that of hanging. It was not the Governor nor the Supreme Court of the state. So this appears to be a deprivation of liberty by the state, to the extent of this solitary confinement. She might prefer to have the time of execution fixed by the Supreme Court rather than by the Governor, and the judgment of death would not cut off any of her rights to such consideration. This situation led to the granting of this writ. The question now is whether it is sufficient to require holding the petitioner out of the custody of the State Prison officials and discharging her, because she has been unlawfully made to suffer that punishment until now, and, if remanded to the full custody of the prison officials, would have to suffer it till the time of execution, left to stand according to the reprieves, without being fixed by the court. Due process of law would seem to require that the person be present and have an opportunity to be heard at the time of the sentence, and that the time of execution after it be fixed by the authorized tribunal. No court anywhere would probably sentence to such severe punishment as solitary confinement without the pres-

ence of the prisoner. She had not been present at any sentence to that infliction, and therefore appears to have been deprived of the right to be free from it by the state without the due process of law guarantied by the federal Constitution. It follows that she should be discharged from that solitary confinement if it can and should now be done, and altogether, if leaving the time of the reprieve to stand as the time of execution without otherwise fixing it would not be fixing it, and therefore not due process of law. This court has no authority in any manner to interfere with the state proceedings, except to prevent any of the privileges or immunities of the person under the Constitution of the United States from being taken away or abridged. She has all the while had the right to apply to the state courts for relief from this solitary confinement and holding for execution, by habeas corpus proceedings like these. According to Storti v. Massachusetts, 183 U. S. 138, 22 Sup. Ct. 72, 46 L. Ed. 120, and other cases, as understood, these matters should to the extent of denial or failure be followed out in the state courts. A discharge from the solitary confinement on this writ now would be so near the time of execution under the expiration of the reprieve as to be practically inoperative, while it could have been applied for sooner in the state courts or here; and, on the whole, these seem to be so far matters of state procedure that the petitioner should be remanded. It appears that an application for a writ of error to the state Supreme Court has been before Mr. Justice Peckham, and his decision thereon has been referred to. If the questions here had been involved there before him, of course, they would not have been examined here, but it is understood that they were not. An application for a writ of error to review the proceedings of the Supreme Court on the petition for a new trial would not seem to involve any question as to the custody of the petitioner pending that petition or after a reprieve. The facts stated as to the petition for a new trial, the memorandum of the two judges thereon, its disposition, and the omission therefrom of any appointment thereon by the Supreme Court of a time of execution, are found from concessions made by the Attorney General of the state and counsel for the petitioner in her presence at the hearing; and the fact of solitary confinement since February 3d, the same as before, as stated, is inferred from the returns and like concessions of the prison officials.

Petitioner remanded.

After the petitioner was remanded an appeal to the Supreme Court of the United States was applied for and opposed by the state. In Storti v. Massachusetts an appeal was denied promptly by the judges of the Circuit Court to give "counsel an opportunity to seasonably reach the Supreme Court, or some justice thereof." An appeal appears to have been allowed afterwards by Mr. Justice Gray. In re Storti (C. C.) 109 Fed. 807. Here there was no sufficient time—only about one day before execution—in which to reach a justice of the Supreme Court, and no one else could allow an appeal if it should be denied here. What seems to be more of

a federal question than any involved or determined there arises here, and to deny an appeal, which is largely a matter of right, would arbitrarily cut off all chance to have it reviewed. The Governor appears to have granted a further reprieve till the 8th of December, after the sitting of the Supreme Court at which the appeal may be determined. After that the appeal was allowed.

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UNITED STATES v. HEYFRON, County Treasurer.

(Circuit Court, D. Montana. April 24, 1905.)

No. 690.

INDIANS—ADOPTION OF HALF-BREED INTO TRIBE—TRIBAL RIGHTS.

The various acts of Congress relating to Indians, including those relating to the Flathead Indian Nation, as well as the practice of the executive departments of the government, recognize the right of a tribe to adopt as a member thereof an Indian of the half blood who has continued to reside on the reservation as an Indian, and one so adopted has all the rights of a tribal Indian and a ward of the United States, including the exemption from state taxation of his property held on the reservation, so long as his tribal relation continues.

In Equity. Suit for injunction.

Carl Rasch, U. S. Atty. (Marshall & Stiff, of counsel), for plaintiff.
Woody & Woody, for defendant.

HUNT, District Judge. The United States brought this bill against the county treasurer of the county of Missoula, within the state of Montana, praying for a writ of injunction to restrain the said treasurer from enforcing the collection of certain taxes which he was seeking to collect from Michel Pablo. It is alleged that Pablo is an Indian person and a member of the Flathead Indian Nation, and was such during the year of 1903, when the defendant attempted to collect taxes; that, under the laws of the United States and the treaties heretofore entered into by the United States with the Flathead Indian Nation, the said Pablo became, and, as a member of the Flathead Indian Nation, is, a ward of the United States, and entitled to own and hold personal property on the said Indian reservation in his own right, free from taxation by the state and the county of Missoula. The answer denies that Pablo is an Indian or a member of the Flathead Nation, and denies that he is entitled to own and hold property on the Flathead Reservation exempt from taxation.

There is but one question presented by the pleadings, which is, was Michel Pablo a ward of the government of the United States, by reason of his being an Indian and maintaining tribal relations with certain Indian tribes? The facts are these: Michel Pablo was born about 58 or 60 years ago, east of the Rocky Mountains, in what is now known as part of the state of Montana, and which was at the time of his birth a section recognized as Indian country, occupied by Blackfeet Indians. His father was a Spaniard, and his mother a full-blood Piegan Indian. His father died when he was

young, and after the death of the father the boy accompanied his Indian mother to the Colville Reservation, in the territory of Washington. His mother died there, and he remained on the Colville Reservation until he was about 13, associating in his boyhood with Indian boys. Then he went to De Smet, Mont., which is now within Missoula county; and after staying there a short time he went to the Flathead Reservation, and has lived there ever since, or for about 42 or 43 years. About 4 years after he removed to the Flathead Reservation a council of Indian chiefs of the Indian tribes and Indians was called for the purpose of considering the question of the adoption of Pablo. This council was held in 1864. Pablo himself was present at the council. The chiefs announced his adoption after the council, and ever since that time he has been treated as a member of the tribe by the Indians themselves, and has complied with all the laws, rules, and regulations of the tribe. He married a member of the tribe, and has reared a family, and never has severed his tribal relations, but without interruption has maintained the habits and customs of the Indians. The government of the United States has made no difference in its treatment of Pablo from that accorded to Indians of the tribe, and Pablo has participated and acted with the tribes and nations in tribal affairs and councils and otherwise. His name appears upon the official roll and the annuity roll of the government of the United States, and about 20 years ago, when the Northern Pacific Railroad Company obtained a right of way through the reservation, and paid the Indians about $21,000 therefor, Michael Pablo received a share in the distribution of the fund, participated in the council of the Indians held in respect to the matter, and was in all respects recognized as entitled to the privileges and rights of membership in the tribe.

From these facts, and the law to be applied to them, I conclude that Michael Pablo was adopted by the Indians rightfully upon the reservation, and that he became tied to the tribes by a relationship lawfully made, and was and is, in law, an Indian sustaining tribal relations. That the Indians had right of adoption, without doing violence to the Stevens treaty of 1856, is inferable from the several acts of Congress bearing upon rights of Indians, and particularly from the provisions of section 1 of "An act to provide for the removal of the Flathead and other Indians from the Bitter Root Valley in the territory of Montana," approved June 5, 1872, c. 308, 17 Stat. 226, wherein it was provided that the President should remove as soon as practicable "the Flathead Indians (whether of full or mixed bloods), and all other Indians connected with said tribe, and recognized as members thereof, from Bitter Root Valley, in the territory of Montana, to the general reservation in said territory (commonly known as the Jocko Reservation), which by a treaty concluded at Hell Gate, in the Bitter Root Valley, July sixteenth, eighteen hundred and fifty-five, and ratified by the Senate March eighth, eighteen hundred and fifty-nine, between the United States and the confederated tribes of Flathead, Kootenai, and Pend d'Oreille Indians, and was set apart and reserved for the use and occupation of said confederated tribes."

The right accorded to all persons who are in whole or in part of Indian blood or descent, who are entitled to allotments of land under any law or treaty, to sue in the Circuit Court of the United States, is also recognition of Congress that those who are but part Indian in blood or descent may be entitled to rights of allotments of land accorded other Indians under laws or treaties. Act Cong. Feb. 6, 1901, c. 217, 31 Stat. 760, amending Act Aug. 15, 1894, c. 290, 28 Stat. 286; 3 Fed. Stat. Ann. p. 503. The act of Congress approved April 23, 1904 (St. 1903–1904, c. 1495, 33 Stat. 302), providing for the survey and allotment of lands within the limits of the Flathead Indian Reservation, expressly authorizes allotments to be made "to all persons having tribal rights, with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States"; and by section 14 of the same act provision is expressly made for certain expenditures "for the benefit of the said Indians and such persons having tribal rights on the reservation," etc. Taking these several acts of Congress together, I gather from their language that Congress has dealt with the Indians and persons having tribal rights on the reservation with the clear intention to make no distinction between them in the extension of benefits of allotment provisions, and, by expressly including Indians and such persons as have tribal rights on the reservation, it is manifest that Congress intended to and did recognize that tribal relations might be created in a way recognized by other acts of Congress or by executive and judicial interpretation.

We find another instance of the recognition of the practice of Indian tribes, in section 1 of the act of Congress approved June 7, 1897, c. 3, "making appropriations for current and contingent expenses of the Indian department, and for other purposes" (30 Stat. 90), wherein it is provided "that all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior act of Congress shall be construed as to debar such child of such right."

Turning now to the opinions of the courts regarding the status of persons claiming to be members of Indian tribes, we find that in the case of Sloan v. United States (C. C.) 118 Fed. 283, Judge Shiras held that:

**"Recognition of persons as members of an Indian tribe might be had and allotments of land might be made where the tribe clearly deemed such person as a member; and the right of the Interior Department in making an allotment to persons other than actual resident members of the tribe was recognized where the Indians had acted in open council, and had declared persons to be members of the tribe, and entitled to share in the allotments of tribal lands."**

The learned judge distinguishes between the rights of persons not recognized by the Indians as members of the tribe and those that had by action of the council been placed in tribal relation on the reservation.

In United States v. Higgins (C. C.) 103 Fed. 348, after a careful review of the class to which half-breed Indians belong, Judge Knowles used this language:

"Considering the treaties and statutes in regard to half-breeds, I may say that they never have been treated as white people entitled to the right of American citizenship. Special provision has been made for them—special reservations of land, special appropriations of money. No such provision has been made for any other class. It is well known to those who have lived upon the frontier in America that, as a rule, half-breeds or mixed-blood Indians have resided with the tribes to which their mothers belonged; that they have, as a rule, never found a welcome home with their white relatives, but with their Indian kindred. It is but just, then, that they should be classed as Indians, and have all the rights of the Indian."

In 7 Op. Attys. Gen. 746, it is said, "Half-breed Indians are to be treated as Indians, in all respects, so long as they retain their tribal relations."

The Supreme Court, in Roff v. Burney, 168 U. S. 218, 18 Sup. Ct. 60, 42 L. Ed. 442, recognized the Chickasaw Nation of Indians, and reaffirmed previous decisions declaring that the Indian tribes possess attributes of nationality, holding them to be not foreign, but domestic, dependent nations. Effect was there given to a legislative act of the Chickasaw Nation, and the validity of an Indian law, withdrawing citizenship from the wife of the plaintiff, and the consequent withdrawal from the plaintiff of all the rights and privileges of citizenship in the Chickasaw Nation was decided as determined by the authority of that nation, without being subject to correction by any direct appeal from the judgment of the Chickasaw courts.

In Nofire v. United States, 164 U. S. 657, 17 Sup. Ct. 212, 41 L. Ed. 588, it was decided that the Cherokee Nation had a right to recognize one as a citizen by adoption of the nation, and that, where there had been such adoption, jurisdiction over certain offenses was vested in the courts of the Cherokee Nation.

In Raymond v. Raymond, 83 Fed. 721, 28 C. C. A. 38, adoption through intermarriage under the laws of the Cherokee Nation was also recognized.

It is true that the stipulations and treaties entered into between the Cherokee Nation and the United States are especially referred to in these decisions, but I cite them upon the general principle that, no treaty provision to the contrary existing, the courts have recognized a general right of adoption by Indian tribes of certain persons who have lived upon the reservation and married members of the tribe, and who have affiliated with the tribes, who are themselves mixed bloods, and whose habits and associations have been and are similar to and with the adopting tribe or tribes.

Counsel for the treasurer of Missoula county relies with some confidence upon the decision of the Supreme Court of Montana in the case of Stiff v. McLaughlin, 19 Mont. 300, 48 Pac. 232. There

it was generally said in an opinion rendered by Justice Buck that the provisions of article 2 of the treaty of 1855 with the Flathead Indians, providing that there might be placed on their reservation "other friendly bands of Indians of the territory of Washington," who might agree to be consolidated with the Flathead Nation, did not authorize the adoption into the tribe of a quarter-breed Chippewa who was married to a Flathead woman. But in the case as it was presented to the Supreme Court the question of the authority of the various tribes which constituted the Flathead Nation to adopt other Indians as members of the tribes was not discussed as necessary to a decision. Upon the sufficiency of the pleaded defense the court rested its decision. If the answer had set up adoption and the right of adoption, and had pleaded more fully, I do not believe the dictum of the learned justice who wrote the opinion would have found the place that it has.

We find, too, that the executive authority of the general government has recognized the status of persons situated as Pablo is as that of tribal Indians. In an opinion rendered by Atty. Gen. Olney, reported in 20 Op. Attys. Gen. 711, he advised the Secretary of the Interior that the laws and usages of the tribe of Indians should determine the question whether any particular person was or was not an Indian, within the meaning of an agreement that had been entered into between the Sioux Nation and the government of the United States. He regarded those questions as rather of fact pertaining to local usages, and, citing the decision of the Supreme Court in Smith v. United States, 151 U. S. 50, 14 Sup. Ct. 234, 38 L. Ed. 67, advised that "presumptively a person apparently of mixed blood, residing upon a reservation and claiming to be an Indian, is in fact an Indian." In the United States v. Higgins, supra, Judge Knowles also followed the doctrine that courts will generally conform to the executive and political departments of the government in their recognition of persons as Indians, where they are at least half bloods, whose fathers were white men, and where the half blood has lived and resided with the tribe to which the mother belonged.

As a result of these several considerations, I conclude that under the facts Pablo is a ward of the government; that his ties with the Indians were long since established, and, being unbroken, still exist; and that he is therefore entitled to immunity from state and county taxes.

The injunction will be made permanent.

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UNITED STATES v. HEYFRON, County Treasurer.

(Circuit Court, D. Montana. April 24, 1905.)

No. 691.

INDIANS—ADOPTION INTO TRIBE—TRIBAL RIGHTS.

A quarter-blood Indian, who has during the most of his life resided with the Indians, and who, on his marriage to a member of the Flathead Nation, was adopted by such nation, and has since resided on the reservation, and has been treated as a member by the tribe and by the United

**States, is entitled to the same rights as other members of the tribe, including the exemption of his property from state taxation.**

In Equity. Suit for injunction.

Carl Rasch, U. S. Atty. (Marshall & Stiff, of counsel).
Woody & Woody, for defendant.

HUNT, District Judge. This case involves questions similar to those just decided in the case of the United States v. Dan J. Heyfron, as County Treasurer of Missoula County, in the State of Montana, 138 Fed. 964, but the injunction here sought is to restrain the treasurer of Missoula county from collecting taxes alleged to be due by one Allen Sloan. Sloan, whom the government claims is its ward, is 40 years old, and was born at Crow Wing, Minn., where he lived until he was 10 or 11 years old. Crow Wing was at the time a trading post in the Indian country, and inhabited by Mississippi Chippewa Indians. Sloan himself is a quarter-breed Chippewa, his mother being a half-breed Chippewa. When the boy lived at Crow Wing he associated with Indians. When he was 10 or 12 years of age he moved to St. Cloud, Minn. St. Cloud was a village in the state of Minnesota. He lived there until he was 17 years old. He then worked as lumberman and at various pursuits in Dakota, and came to the Flathead Reservation in 1884, where he has lived ever since; having married in 1884 a half-breed Kootenai Indian woman. In the same year of his marriage he was adopted by the Flathead Nation, two councils having been held for the purpose of such adoption. At one of the councils there were present Chiefs of the Pend d'Oreille Indians, while the second council was a general one of the Flathead Nation. Ever since his adoption, Sloan has been treated as other members of the tribe have been. He has drawn rations, annuities, and payments, and has enjoyed the privileges accorded to full-blood Indians on the reservation. The government and the Indians have regarded him as a member of the Flathead Nation. He has participated in the Indian councils as a member of the tribe, and voted on matters transacted by the councils. He was enrolled as a member of the Flathead Nation upon a roll prepared by a special agent of the Indian Department of the United States, and, after special evidence had been called for by the general government, in order that it might be better satisfied of his right to be placed upon the roll before its approval by the Indian Office in Washington, additional testimony was sent, and thereafter instructions were given to have Sloan's name placed upon the roll, provided he should relinquish his rights on the White Earth Reservation.

Upon the facts, Sloan's case is not as strong as Pablo's; yet, upon the authority of the decision in Michel Pablo's case, it is ordered that the injunction prayed for by the United States be made permanent.

## FRANCIS H. LEGGETT & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 20, 1905.)

No. 3,562.

1. CUSTOMS DUTIES—BOTTLES—DUTIABLE VALUE—FITTINGS.
   *Held*, that the cost of the fittings for filled bottles, consisting of corks, caps, capsules, labels, and wiring, should be treated as part of the value of the bottles on which the ad valorem duty should be assessed which is provided on filled bottles by paragraph 99, Schedule B, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633].

2. SAME—FILLED BOTTLES—DISTRIBUTION OF CHARGES.
   Under Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924], which provides that the dutiable value of merchandise subject to an ad valorem duty shall include "the value of all cartons, cases," etc., containing the merchandise, *held*, as to importations of goods in bottles, which are dutiable under one provision of the tariff act and the bottles under another, that the value of the cases containing the goods should be distributed between the bottles and their contents according to the value of each, the value of the bottles for this purpose being inclusive of the cost of their fittings, consisting of corks, caps, capsules, labels, and wiring.

On Application for Review of a Decision of the Board of United States General Appraisers.

This case relates to the assessment of duty by the collector of customs at the port of New York on merchandise imported by Francis H. Leggett & Co. The goods in question consisted of olive oil in bottles. The oil was assessed with duty at the specific rate provided for olive oil in bottles under paragraph 40, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 153 [U. S. Comp. St. 1901, p. 1629], and the bottles at the rate of 40 per cent. ad valorem, the duty found applicable under paragraph 99, Schedule B, § 1, of said act, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], relating to "bottles * * * filled or unfilled, not otherwise specially provided for, and whether their contents be dutiable or free." These bottles were fitted with corks, caps, tin foil capsules covering the top, and labels pasted on the side. They were also wired, the wiring having no use as a protection to the bottles, being of a very light character, running over the cork, down the sides and across the bottom, the last knot in the wire being officially sealed. The office of this wiring and sealing is to prevent opening of the bottles and substitution of inferior contents before the consumer is reached. The collector treated the corks, caps, capsules, labels, and wire, as parts of the bottles, and included their cost as part of the value of the bottles on which the duty of 40 per cent. ad valorem should be assessed. In including the value of the cases in the dutiable value of the importation, as required in Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924], which prescribes that the dutiable value of merchandise subject to an ad valorem duty shall "include the value of all cartons, cases," etc., containing imported merchandise, the collector distributed the amount of the invoice charges for the cases between the bottles and their contents, according to the value of each, and took for this purpose the dutiable value of the bottles, found as stated above, which included the cost of the fittings in addition to that of the bottles themselves. The importers contended that these invoice items for the fittings and cases "properly and legally pertain to the value of the imported merchandise, which was the contents of the bottles"; that "the bottles, like the corks, labels, and all other charges, were mere adjuncts of said contents, and had no value save as a means to the importation of the latter"; and that, "so far as the contents were * * * dutiable at other than ad valorem rates, the value of all the adjunct items referred to, save only the bottles, was duty free." The Board of General Appraisers affirmed the assessment of duty on

the authority of two previous decisions involving similar issues, and reported as In re King, G. A. 5,290, T. D. 25,262, and In re La Montague, G. A. 5,578, T. D. 25,361, which followed the decision of the Circuit Court for the Southern District of New York in West v. U. S. (C. C.) 119 Fed. 495. The opinion in the King Case (G. A. 5,290, supra) reads as follows:

"Somerville, General Appraiser. The importations in question were made under Tariff Act Aug. 27, 1894, c. 349, and consist of ginger ale in bottles, which was classified under paragraph 248 of said act (section 1, Schedule H, 28 Stat. 526), which reads as follows: '248. Ginger ale or ginger beer, twenty per centum ad valorem, but no separate or additional duty shall be assessed on the bottles.' Under this paragraph the bottles were not subject to duty, either under the provision for bottles in paragraph 88 of said act, c. 11, § 1, Schedule B, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1632], or under that for coverings in Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924]. U. S. v. Dickson, 73 Fed. 195, 19 C. C. A. 428; In re Ross, G. A. 3,580, T. D. 17,389. In the assessment of the duty of 20 per cent. ad valorem on the ale, however, the collector included as part of its dutiable value certain charges for tin tops, wire, corks, labels, labor, and casks or barrels, this inclusion being an attempted compliance with the requirements of said section 19 of the customs administrative act, which defines the dutiable value of merchandise as including 'the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.'

"The contentions of the importer are twofold, as follows: (1) That the charges for tin tops or caps, the wiring, the corks, and the labeling pertain rather to the bottles than to their contents, and therefore should not be assessed as a part of the value of the contents, but treated as a part of the value of the bottles, and as free of duty accordingly; the bottles being exempted from duty by the terms of said paragraph 248, as above noted. (2) That the other dutiable charges on the invoices, namely, for labor and casks or barrels, pertain both to the bottles and to their contents, and not to the contents alone, and should therefore be distributed between the bottles and the contents according to the value of each, in which case the amount apportioned to the bottles would be exempt from duty.

"The first of these contentions, so far as it relates to corking and wiring, was sustained in board decision In re Keane, G. A. 3,728, T. D. 17,742, in which the following observations were made: 'As to the items of corking and wiring, we are of the opinion that they are inseparable from the value of the ginger ale bottles in the condition in which such merchandise is bought and sold for exportation from Great Britain to the United States and other countries. In all cases where filled bottles are dutiable, the usual corks are always included as parts of the bottles in appraisement proceedings to ascertain the market value of such coverings. The cost of wiring the corks, which is done merely to hold them in place, when customary, should, for a like reason, be included as merely enhancing the value of the coverings. These items can in no sense be considered as parts of the value of the contents. It would be quite as reasonable to differentiate from the coverings the cost of nailing up a box, sewing a sack, or hooping a barrel, where merchandise is imported in such packages.' On appeal by the government (T. D. 17,878, 17,910, and 18,969) the decision of the board was reversed by the Circuit Court for the District of South Carolina (Simonton, J) in U. S. v. Keane (C. C.) 84 Fed. 330, on an ex parte presentation of the case, the importer not being represented at the trial. In deference to this ruling by a higher tribunal, the board in a later case overruled a similar contention. In re West, unpublished. That case was taken on appeal by the importer to the Circuit Court for the Southern District of New York, and that court (Townsend, J.), in West v. U. S. (C. C.) 119 Fed. 495, also reversed the decision of the board, the conclusions of Judge Simonton in the Keane Case not being concurred in. It was observed by Judge Townsend: 'It appears from the opinion of the board that they had formerly decided this question in favor of the importer, but were constrained in this case to overrule their previous decision, and to reach a contrary conclusion by virtue of the decision in U. S. v. Keane

(C. C.) 84 Fed. 330. Since said decision was rendered, however, the same question has been passed upon by the Supreme Court in the case of Schlitz Brewing Company v. U. S., 181 U. S. 584, 21 Sup. Ct. 740, 45 L. Ed. 1013. The reasoning and conclusions in that case are applicable to the question at issue here. The decision of the Board of Appraisers is reversed.' The case of Schlitz Brewing Company, cited by the Circuit Court, related to exported bottled beer. The law under construction provided for the drawback of duties 'where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States.' The Supreme Court held that neither the bottles nor the corks, though imported, were entitled to participate in the drawback allowed on the beer. A similar conclusion was reached by the District Court for the Southern District of New York in Beadleston v. U. S. (D. C.) 104 Fed. 295. Note Wheeler v. U. S. (D. C.) 75 Fed. 654. The decision of the Circuit Court in the West Case has been acquiesced in by the government. Following that decision and the original ruling of the board, we hold, as contended by the importer, that no duty should have been imposed on the value of the tops or caps, the wiring, the corks, and the labeling. The question as to the item of labeling was not considered in the original decision of the board, nor in the Keane Case; but the West Case applied the same rule to that item as to the items for corking, etc.

"As to the second of the importer's contentions, we shall be governed by In re Field, G. A. 3,945, T. D. 18,235, which related to various kinds of bottled goods, the bottles being dutiable at specific rates, and their contents at ad valorem rates. The question to be decided was whether certain 'Ausstattung' (fitting-out) charges should be included in the value of the contents of the bottles, or should be apportioned between the bottles and their contents. These charges were for labels, cappings, ribbons, cartons, etc., which were designed for facilitating the sale of the articles, and rendering them more merchantable. The board held that they should be distributed between the bottles and their contents, as contended by the importers. The reasoning on which this conclusion was based appears from the following extract from the opinion of the board: 'The rule is that charges of this kind ought to be distributed in the mode which would seem to be "most equitable and just," and generally this would be pro rata apportionment according to the value of the goods in reference to which the charges are incurred. We so understand the ruling of the courts, as stated and followed by this board in Re Stern, G. A. 1,672, decided as far back as August 11, 1892, a ruling from which no appeal was ever taken. It is observable that many kinds of bottles are made subject to an ad valorem duty under the provisions of paragraph 88 of the present tariff act (Act July 24, 1897, c. 11, § 1, Schedule B. 30 Stat. 155 [U. S. Comp. St. 1901, p. 1632]). If the merchandise were contained in bottles of this kind, the contention of the importers would necessarily be correct. It is no answer to their contention in this case that the bottles are dutiable at specific rates, and that a small loss would accrue to the government by making the apportionment as claimed. The charges appertain as much to the bottles as to the contents, and the character of the duties is a mere accident of the case. It would not be just or equitable to make the apportionment merely by the inquiry as to which party to the litigation may gain or lose by it. Justice and equity are blind to parties, and are supposed to gauge all things by principle, as established by legislative enactment.' Applying the principle of our ruling in that case, we hold that the amount of the charges for labor and for casks or barrels should be apportioned between the bottles and the ginger ale contained in them, according to the value of each.'

"Reverting to the first of the contentions made in this case, it should be stated that the decision in West v. U. S., supra, operates to overrule the decision in the Field Case (G. A. 3,945, supra) so far as it held that charges for labels should have been apportioned between the bottles and their contents, and possibly so as to cappings and the ribbons. Under the West Case they would seem to have been more properly treated as pertaining wholly to the bottles; the rule followed by Judge Townsend, though none is stated, being apparently to consider as a part of the bottles everything having a fixed physi-

cal connection with them, so as, by a loss of separate identity, to merge in the coverings themselves.

"The protests are sustained, and the decisions of the collector reversed, with instructions to reliquidate the entries in accordance with the foregoing conclusions."

Comstock & Washburn (Albert H. Washburn, of counsel), for the importers.

Charles Duane Baker, Asst. U. S. Atty.

WHEELER, District Judge. The decision is affirmed on the authority of West v. U. S. (C. C.) 119 Fed. 495, and cases therein referred to.

Decision affirmed.

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## FULD & CO. v. UNITED STATES. LEVINSON v. SAME. LEWKOWITZ v. SAME.

(Circuit Court, S. D. New York. February 23, 1905.)

Nos. 3,534–3,536.

CUSTOMS DUTIES—CLASSIFICATION—LITHOGRAPHIC PRINTS OF VARYING THICKNESS—FOLDING PICTURES.

In construing Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672], which provides a duty on lithographic prints, varying according to their thickness, *held*, as to lithographic prints in the form of folding pictures, of which substantial parts are of one thickness, and relatively smaller parts, consisting of little figures of an ornamental and incidental character, of a less thickness, that they should be classified according to the thickness of the substantial portions.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision under review related to importations at the port of New York made by Fuld & Company, A. Levinson, and Gustav Lewkowitz, and overruled the protests of those parties against the assessment of duty by the collector of customs at that port. The opinion of the board, so far as pertinent to the present cases, reads as follows:

FISCHER, General Appraiser. The merchandise consists of articles printed by lithographic process. * * * From the evidence and samples we find * * * (2) that the remainder of the goods are folding pictures made up of pieces of lithographically printed paper of various designs and thicknesses, fastened together in such a manner as to form particular designs. Some of the parts of the articles thus constituted measure less than eight one-thousandths of an inch, while the remaining portions of the article measure between eight one-thousandths and twenty one-thousandths, and over twenty one-thousandths, respectively. All were assessed at 20 cents per pound, the highest rate to which any part of the article was liable by reason of the provisions of paragraph 400, Schedule M, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672], and the importers claim that they are dutiable at various lower specific rates than that assessed. As paragraph 400 does not provide for articles made up of pieces of lithographically printed paper of different thicknesses, it was held in G. A. 5,348, T. D. 24,473, that such goods fell within the general provision for printed matter contained in paragraph 403, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]. This claim is not made in the protests, however, and, following the decision mentioned, we overrule the protests, without affirming the correctness of the collector's classification.

Comstock & Washburn (Albert H. Washburn, of counsel), for the importers.

Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. A portion of these importations appear to have been returned by the appraiser as printed matter dutiable at 25 per cent., and the remainder as litographic prints. In the first finding of the board the parts not lithographic are specified. In the testimony taken in this court this distinction does not appear to be noticed, and is understood to be acquiesced in, and as to that part found not to be lithographic prints the decision is of course affirmed.

As to the rest the testimony shows that some small figures on tissue paper and the like are less than .008 of an inch in thickness, and the rest over .008 and under .020. These appear to have been assessed as printed matter not otherwise provided for, under paragraph 403, Schedule M, § 1, Tariff Act July 1, 1897, c. 11, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], because there is no provision in paragraph 400, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672], for lithographic prints in part below and in part above .008 of an inch in thickness. But they are lithographic prints which are the subject of paragraph 400, and seem to be dutiable at some rate fixed there, either according to the highest rate of any part of a print, or according to the actual thickness of the principal and substantial part of each print. These little figures are not parts of the frames and bodies of the prints, but seem to be rather incidents and ornamentations of them, very small in proportionate surface, and still smaller in proportionate weight. Under these circumstances, it seems as if the thickness of the substantial parts should govern.

Decision reversed as to lithographic prints, and otherwise affirmed.

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## MEYER v. UNITED STATES.

(Circuit Court, S. D. New York. February 15, 1905.)

No. 3,332.

CUSTOMS DUTIES—CLASSIFICATION—UNFINISHED HANDKERCHIEFS.

The provision in paragraph 345, Schedule J, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1663], for "handkerchiefs * * * unfinished," *held* to include cloth cut into pieces which are in the shape of squares and other geometrical figures, and which in that shape are principally used in the manufacture of handkerchiefs.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below, G. A. 5,143, T. D. 23,745, affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by William Meyer & Company.

The opinion of the Board of General Appraisers reads as follows:

DE VRIES, General Appraiser. The merchandise consists of small plain squares and pieces cut from flax cloth of various geometrical figures. Duty

was assessed thereon at the rate of 50 per cent. ad valorem, under the provisions of paragraph 345, Schedule J, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1663], which, in so far as applicable, reads:

"345. Handkerchiefs composed of flax, * * * or of which * * * [it] is the component material of chief value, whether in the piece or otherwise, and whether finished or unfinished. * * * fifty per centum ad valorem."

Among other claims in the protest, the merchandise is alleged to be dutiable at the rate of 35 per cent. ad valorem, under the last clause of paragraph 346 of said act, Schedule J, § 1, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1663], providing for woven fabrics of flax, etc., under 4½ ounces in weight per square yard, and counting over 100 threads per square inch, etc.

The local appraiser made the following return: "The merchandise in question, contained in case 640, consisted of unfinished flax handkerchiefs advanced beyond the condition of cloth by being cut into sizes required for handkerchiefs, and were returned for duty as flax handkerchiefs, whether in the piece or otherwise, finished or unfinished, not hemmed."

At the hearing of the cases testimony was introduced by the importers, who sought to establish that the term "unfinished handkerchiefs" as used in said paragraph 345 referred to an article well known in trade and commerce of a peculiar description, and that that phrase was used in a commercial sense. One of the witnesses introduced for that purpose, a member of the importing firm, testified as follows: "Q. You say there are articles known in trade and commerce as unfinished handkerchiefs? A. There used to be, and may be now, so far as I know. If there is any one who uses them, it would be Achison, Hardin & Company, because they have that class of goods. There were some printed forms coming out in the piece—a piece of linen or cotton usually—with the shape of a handkerchief printed upon it, and when cut apart and hemmed it would be a handkerchief. It was really an unhemmed handkerchief, and there was a corded border unhemmed handkerchief. Q. They were known in the trade and commerce as unfinished handkerchiefs? A. Well, I always knew them as handkerchief cloth by the dozen. An unfinished handkerchief, in the usage of the commercial community, is an unhemmed handkerchief. I don't know of any other term for an unfinished handkerchief. They are handkerchiefs in the first place, but they are finished. These are not handkerchiefs, but can be made into handkerchiefs. Q. More of these are used for handkerchiefs than for tidies and doilies? A. We use more of them." The next witness introduced was a member of the firm referred to in the testimony above, who testified as follows: "Q. Can you give a concise definition of what is understood in trade and commerce as an unfinished handkerchief? A. I would say a handkerchief like that, with the border fringed (referring to one of the exhibits in this case). That is not finished. It is not hemmed. Of course there are a variety, and also woven corner borders; but I would call that (Exhibit A) an unfinished handkerchief. (Exhibit A, here referred to, was one of the squares in question, the subject of these protests.) Q. Are you familiar with pieces of linen cut into squares and circles and rectangular figures, such as these exhibits? A. I am familiar with most forms cut up for a handkerchief; yes. Q. Are they used for any other purpose than to make handkerchiefs—such squares as these? A. There are doilies made out of it, like table doilies. Q. What do you think is the principal use of these as an article, if you know? A. I suppose to be used for a handkerchief."

It is evident from the testimony above offered in rebuttal of the return of the collector that there is no particular article in trade and commerce known as an "unfinished handkerchief"; that is to say, that the term "unfinished handkerchief" is not referable to any particular class of articles known to the trade as such; that the word is descriptive, and not denominative. It appears from the testimony of the importers' witnesses that the articles in question, the subject of this protest, are deemed unfinished handkerchiefs by those members of the trade importing them in large quantities. It is further evident from the testimony that the principal use to which the articles in question are applied is that for subsequent manufacture into handkerchiefs. No other conclusion could be deduced from the testimony, which is uncontradicted upon these points.

We think the rule laid down in the case of Magone v. Wiederer, 159 U. S. 555, 16 Sup. Ct. 122, 40 L. Ed. 258, applicable to the merchandise herein. In that case the Supreme Court of the United States upheld instructions to a jury as follows (the articles in question being glass cut to the shape of faces for clocks): "In determining this question whether or not these articles are parts of clocks, it will not be necessary for you to say they were exclusively used for that purpose. An article may be chiefly used for a certain purpose, and be diverted from its principal use; somebody may put it to a purpose for which it was not originally intended. That cannot, in my judgment, change its tariff nomenclature. The Supreme Court, in a case which I think is somewhat similar to the facts, although relating to different sections of the statute, sustained the charge to the jury 'that the use to which the articles were chiefly adapted and for which they were used determined their character, within the meaning of the statute'; and so I will say to you as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks, that would determine their tariff nomenclature."

We find from the evidence and record in this case that the articles the subject of this protest are chiefly used for subsequent manufacture into handkerchiefs; that part of the process of that manufacture has already been devoted to the articles, so that in their present condition they are partly manufactured handkerchiefs. We conclude that they were properly assessed by the collector.

The protest is overruled, and the decision of the collector affirmed.

W. Wickham Smith, for importers.
Charles D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. Affirmed on the opinion of the board.

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## FABRICANT v. PHILADELPHIA RAPID TRANSIT CO.

(Circuit Court, E. D. Pennsylvania. June 12, 1905.)

NEW TRIAL—GROUNDS.

The fact that neither party is entirely satisfied with the result is no reason why a new trial should be granted after a fair hearing before an impartial jury.

At Law. On motion for new trial.

Joseph H. Brinton, for plaintiff.
Wm. M. Stewart, Jr., and Thomas Leaming, for defendant.

HOLLAND, District Judge. This case was an action for damages for personal injuries caused by the alleged negligence of the defendant, tried in this court April 6, 1905, and resulted in a verdict in favor of plaintiff for $3,600. Motion for a new trial was duly made. The reasons assigned have been considered, but we fail to find any error either in the trial or the charge of the court. The case was fairly submitted to the jury, and the verdict was justified by the evidence in the cause. The fact that neither party is entirely satisfied with the result is no reason why a new trial should be granted after a fair hearing before an impartial jury.

The motion for a new trial is therefore overruled.

## BRAUER v. MACBETH.

(Circuit Court of Appeals, Second Circuit. April 12, 1905.)

No. 166.

1. CONTRACT—TIME FOR PERFORMANCE—SPECIFYING DAY FOR PERFORMANCE.
Where a contract by its terms is to be performed on a day named, both parties have the whole of the business day in which to tender performance.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 957; vol. 45, Cent. Dig. Time, § 53.]

2. SALE—ACTION FOR BREACH OF CONTRACT—QUESTIONS FOR JURY.
Plaintiff entered into a contract with defendant for the purchase of a vessel, title to which was to be transferred at a place and on a day stated, together with her "unexpired insurance fully paid." Plaintiff was at the same time and place to make payment in accordance with the terms of the contract. In an action for breach of the contract, it was shown that plaintiff's agent and defendant met at the designated time and place in the forenoon, when defendant stated that he had obtained assignments of some of the insurance policies, but other underwriters refused to transfer, and he offered to obtain new insurance for the deficiency, or new insurance for the entire amount, for the unexpired term of the old policies. There was evidence on behalf of defendant that after some discussion plaintiff's agent went out, stating that he would return at 2 o'clock; also that defendant could have procured the required insurance, and otherwise complied strictly with the terms of the contract before the close of the day, but no formal tender of full performance was made. *Held*, as determined on a prior hearing, that the insurance offered, if in reliable companies, met all the requirements of the contract, and that defendant had the full day in which to perform or tender performance; also, that plaintiff could not recover if performance was prevented by the action of his agent, which was a question for the jury.

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

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, entered upon verdict of a jury in favor of defendant in error, who was defendant below. The same controversy was before this court sub nomine. Livermore v. Brauer, 128 Fed. 265, 62 C. C. A. 647. It is concerned with the disposition of a fund of some $10,000 deposited by Brauer with Livermore, to be held by the latter until a certain contract of sale should be carried out by the vendors, Macbeth & Gray, when said sum should be paid to them as part of the purchase money; with the further proviso that if the vendors failed to carry out their agreement, the deposit should be returned to the vendee, while, if the vendee defaulted, it should be paid to the vendors as liquidated damages. The contract of sale provided (inter alia) that the vendors, Macbeth & Gray (Gray is since deceased), would on or before February 1, 1901, execute and deliver to Brauer or his nominee the necessary documents to vest in him good title to the steamer Dunmore, "her fixtures, tackle, equipment and the materials and stores on board, and her unexpired insurance fully paid, as she stood on December 15, 1900, free and clear of all incumbrances, together with all the earnings of said vessel from and after Dec. 15, 1900, under the charter party under which she sailed Dec. 16, 1900." The vendee agreed to pay some £7,000, with interest, in cash, to give an order on Livermore for the $10,000, and to execute and deliver a purchase money mortgage for £11,900; all of which payments were to be made in Glasgow, Scotland, on or before February 1, 1901. Reference to other facts will be found in our former opinion.

Ira D. Warren, for plaintiff in error.
J. Parker Kirlin, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The time and place of performance of the contract was Glasgow, February 1, 1901, and each party had the whole of business hours on that date to complete what the contract required him to perform. Concededly, on that day Macbeth had not procured assignments of all the identical insurance policies which were on the vessel December 15, 1900, and he could not have procured them that day, since two underwriters (to the extent of £2,500) had absolutely refused to make any transfer. A large part of the brief for plaintiff is concerned with the proposition, which is abundantly settled by authority, that, when a party to a contract has stipulated that he is to receive a certain specified thing, he cannot be compelled to accept something else which the other party, or even a jury, may think is "equally good." But that question is not presented on this appeal. This court has construed the clause in the contract "and her unexpired insurance fully paid, etc.," as meaning that to the extent to which the ship was covered by insurance on December 15, 1900, Macbeth & Gray were obligated to vest the vendee on February 1st with fully paid policies issued by underwriters as good at least as those which were underwriting her on December 15, 1900. And it was held in that opinion that, "if Macbeth & Gray had made tender of such insurance at the interview in Glasgow, they would have satisfied the condition." That is the law of this case, and its acceptance materially reduces the subjects of discussion presented on this appeal.

The court charged the jury that the defendant had the whole of the business day of the 1st of February in which to perform; a proposition which does not seem to be questioned. Indeed, both sides had the whole of that day, and it is therefore immaterial whether either, at the beginning of that day, was in a position instanter to complete the business, except as the condition of preparedness or unpreparedness might assist the jury in determining the question, which was submitted to them, whether performance was possible, and would have been carried out, had the course of proceedings not been interfered with. And it was held on the former appeal that, if the evidence should show that the plaintiff deprived Macbeth & Gray of an opportunity of tendering performance, he could not insist upon their default. There are widely different stories of just what took place in Macbeth's office in Glasgow on February 1st. Defendant's story is that, after explaining the situation as to the old policies and some discussion thereon, he offered to Mr. Warren, Brauer's representative, to give him new equivalent insurance for the small amount that could not be transferred or, if desired, for the whole amount of insurance that was on the vessel, and that there would have been no difficulty in obtaining such new insurance in Glasgow in straight full-paid Lloyds policies

that same afternoon at a small expense; that, as to the accumulated earnings under the charter party, he was fully prepared to pay them there and then, as soon as some arrangement was come to as to what should be done touching the insurance; indeed, it would seem that the amount of cash due from Macbeth to Brauer for charter earnings was less than the £7,000 due under the contract from Brauer to Macbeth; that the question as to insurance was still under discussion when Warren temporarily withdrew, indicating that he would return certainly by 2 o'clock to renew the negotiations, which would then be carried to a consummation. Plaintiff's story is that, when Warren was informed as to the situation touching the insurance policies, he said that he was not authorized to accept the proposals made by Macbeth, turned around, and walked out of the office. Upon such a conflict of evidence the jury only could decide. According to defendant's story, he was not, as plaintiff argues, concededly in default, unable to comply strictly with the terms of his contract, and negotiating to secure the acceptance of an alternative. Construing the clause as to insurance as this court has construed it, he was not yet in default, and was, as he testified, able to give the kind of insurance called for as soon as the other side should flatly refuse to receive any part in the other kind. By their verdict the jury have found (on evidence sufficient to sustain their finding, if they believed defendant's story) that Brauer's representative had agreed to return at 2 p. m.; that had he done so, and then stated that he would not accept any of the old insurance, part of it not being as yet actually transferred, and most, if not all of it, being in so-called "club policies," which might fairly be considered as not "fully paid," Macbeth could easily have procured, and tendered him long before the close of the business day, Lloyds policies for the full amount which under the former decision he was entitled to give, and could at the same time have tendered in cash the full amount of earnings under the charter party; and that he would have done both these things within the time allowed him for performance had Brauer's representative returned at the time indicated with a definite statement as to whether he would or would not accept any part of the old insurance, some of which had been in fact duly transferred. Under our former decision the court was bound to send those questions to the jury upon such conflict of testimony, and their verdict is conclusive, unless there was reversible error either in admission of testimony or in the charge.

Of the assignments of error which deal with the admission of evidence, some deal with the right of defendant to offer other insurance than such as was on the ship December 15, 1900, and are not separately discussed in the brief. Exception was reserved to a question which asked the witness whether on February 1st he was "prepared" to pay over the amount due upon the charter party. This did not necessarily call for a conclusion; no doubt it was understood by the witness and by the jury as inquiring if in fact at that time he had ready the money needed to pay the sum due. And if it did elicit a conclusion it was harmless, for cross-examina-

tion would have quickly shown just what the witness meant by "prepared."

Exceptions were reserved to testimony about Macbeth's efforts to get consents to the transfers of the old policies. It is not perceived how the testimony was harmful, even if the evidence were irrelevant, which is by no means clear. Other objections to testimony were not followed up by exceptions.

Many exceptions were taken to the charge. Some of them deal with so much of the charge as instructed the jury that the plaintiff must satisfy them that he had offered performance, and that defendant had substantially refused to perform. In view of the fact that there was conflicting evidence as to whether the £7,000 which plaintiff was to pay had even been brought to the place of meeting in a form which defendant was willing to accept as cash, the charge was entirely correct in that respect.

Exception was taken to the court's instructing the jury that they were to disregard defendant's offer to prove that he had sustained damages by reason of the failure of plaintiff to carry out the contract. This is clearly frivolous. Other exceptions are not much better.

Objection was taken to the statement that there was no consideration of equity in the case. The context shows that this statement merely cautioned the jury that the parties had reduced their rights to a written instrument, and that the case should be disposed of under its terms, not under any theory of hardship either way.

It was objected that the court remarked that evidently the vendors were not willing to give in December an option of purchase good till February 1st, thus cutting themselves off from the chance to sell the ship elsewhere, without requiring a deposit. This was manifest on the face of the contract itself.

So, too, it was objected that the court said the contract was drawn rather favorably to the plaintiff; but in the same sentence the court explained that the contract limited defendant's recovery in case of breach to $10,000, but left plaintiff free, in case of breach, to recover any damages he might be able to prove.

It would be a waste of time to go over all these minute criticisms of the charge, which very fully and fairly presented the evidence to the jury. We find no sound exception to any material part of it.

The judgment of the Circuit Court is affirmed.

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## HUGHES v. PFLANZ, Jailer.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1905.)

1. EXTRADITION—CONSTRUCTION OF FEDERAL CONSTITUTION AND STATUTE—PERSONS CHARGED WITH CRIME.

In article 4, § 2, of the Constitution of the United States, providing for the extradition from one state to another of persons charged with crime, and Rev. St. § 5278 [U. S. Comp. St. 1901, p. 3597], enacted for the carrying out of such constitutional provision, the term "charged with crime" is used in its broad sense, and includes all persons accused of crime by

legal proceedings; the charge continuing until such person has been tried and acquitted, or, if convicted, until the sentence imposed has been performed.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Extradition, § 31.]

2. SAME—EVIDENCE TO SUSTAIN PROCEEDINGS.

Where a charge of crime made against a person in affidavits filed before a magistrate or a court has culminated in a conviction, the record of such conviction is sufficient evidence in proceedings for his extradition from another state, and the question as to the sufficiency of the affidavits becomes immaterial.

3. FEDERAL COURTS—FOLLOWING STATE DECISIONS—CONSTITUTIONALITY OF STATUTE.

The decision of the highest court of a state upon the constitutionality of a statute under the state Constitution is binding on the federal courts.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 956, 957.

Following state decisions, see note to Wilson v. Perrin, 11 C. C. A. 71, and Hill v. Hite, 29 C. C. A. 553.]

4. EXTRADITION—FUGITIVE FROM JUSTICE—ESCAPED CONVICT.

A person who, after having been convicted of a crime committed within a state, when sought for, to be subjected to the sentence of the court, is found within another state, is a fugitive from justice, within the meaning of the extradition statute.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Extradition, § 32.

Fugitives from justice under extradition laws, see note to In re Strauss, 63 C. C. A. 104.]

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

The relator, Nelson B. Hughes, stole a gold watch in Putnam county, Ind., August 4, 1898. On the same day, affidavit was made before a justice of the peace of Putnam county, charging relator with the offense of larceny. The justice thereupon issued a warrant for Hughes' arrest, which was duly executed, and the warrant, with its return, filed in the office of the Putnam circuit court. On September 5, 1898, the prosecuting attorney for Putnam county filed another affidavit and a criminal information in the Putnam circuit court. This second affidavit was filed with the criminal information, and made two charges: First, of stealing the watch, and having been previously tried and convicted of petit larceny; and, second, of robbing the owner of the watch by violence. This affidavit was not sworn to before a justice of the peace, but before the clerk of the circuit court of Putnam county.

The information of the prosecuting attorney followed the language of the affidavit, making the charges in two counts. A nolle prosequi was entered as to the second count, charging robbery with violence. On September 6, 1898, a trial was had in the Putnam circuit court, and a jury found relator guilty as charged in the first count of the criminal information, and also found that he was 25 years of age. Judgment was accordingly entered, confining Hughes in the Indiana Reformatory, or at such place as might be designated by the board of managers, for a term of not less than 1 year, nor more than 14 years. Hughes was committed to the institution September 25, 1898. Under the Indiana law, on January 9, 1903, relator entered into what is called a "parole agreement," and was paroled by the board of managers of the Indiana Reformatory "to go outside of the buildings and inclosure of said reformatory, upon the conditions stipulated." The parole agreement required him to "remain in the legal custody and under the control of said board of managers." Appellant violated the conditions of the parole agreement, and on June 3, 1903, was declared delinquent by the board of managers, and his arrest and return to the reformatory ordered. He departed from Indiana in December, 1902, and went to Kentucky, where he remained until arrested in these proceedings. A request for a requisition was on February 28, 1905, made by the reformatory

superintendent to the Governor of Indiana. On February 28, 1905, a requisition for the rendition of Hughes as a fugitive from justice was issued by the Governor of Indiana, addressed to the Governor of Kentucky. The papers with this requisition did not include the original affidavit made before the justice of the peace, nor the original warrant issued by the justice, upon which relator was first arrested, but began with the affidavit made before the clerk of the Putnam circuit court, and the criminal information of the prosecuting attorney of Putnam county. On March 1, 1905, the Governor of Kentucky honored the requisition by issuing his warrant of arrest for Hughes, and he was arrested in Boyd county, and brought to Louisville by the sheriff of that county, and lodged in the Jefferson county jail on March 11, 1905.

Proceedings in the Jefferson circuit court for the identification of Hughes and his delivery to the Indiana agent were postponed, to allow him to apply for a writ of habeas corpus, until March 18th, on which date he filed his petition in the United States Circuit Court for the Western District of Kentucky, at Louisville. The petition for the writ recites the trial, conviction, and parole of Hughes; that he departed from Indiana and came to Kentucky; the requisition of the Governor of Indiana; and the arrest of relator under the warrant of the Governor of Kentucky. It asks the writ of habeas corpus on the ground that breaking his parole is not a crime under the law of Indiana; that he was not charged with a crime of any kind, for which he could be arrested and further punished, but only with a conviction of crime. Copies of the original papers forwarded with the original requisition are filed with the petition. The hearing of the motion for the writ was postponed until the 20th of March, when it was further postponed until the 27th, on which date the writ was granted. Meanwhile a second requisition was made by the Governor of Indiana upon the Governor of Kentucky, accompanied by a new set of papers, in which was included the original affidavit before the justice of the peace, and also the justice's original warrant for Hughes' arrest. A second warrant for the arrest of the relator was issued by the Governor of Kentucky, upon the second requisition, was delivered to the sheriff of Jefferson county, and served upon the jailer of Jefferson county, and left in his possession as his warrant of authority for the detention of relator.

The response of the jailer of Jefferson county was filed March 28th, and it alleged that he held relator in custody under both the warrants which had been issued by the Governor of Kentucky. With the response were filed certified copies of the second requisition and accompanying papers, and also the Governor's second warrant of arrest. The relator moved to strike out all that part of the response of the jailer which set up the second requisition and extradition papers, and also specially moved to strike out the affidavit made before the justice of the peace, which motions were overruled. Relator also demurred and excepted to the response of the jailer, and his demurrer and exception were overruled. On March 29, 1905, the court dismissed the petition and discharged the writ of habeas corpus, and an arrangement was made by which the relator was retained in the custody of the United States marshal for the Western District of Kentucky, in the jail of Jefferson county, to await the disposition of this appeal.

Herman Morris and Walter L. Neible (James A. Williams and Walter J. Kohn, of counsel), for appellant.

George Du Relle and Walter L. Vaughan (Charles W. Miller, C. C. Hadley, and Du Relle & McHenry, of counsel), for appellee.

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

WANTY, District Judge, after making the foregoing statement, delivered the opinion of the court.

If it is held that the indeterminate sentence law of Indiana is constitutional, it is conceded by the relator that he is an escaped convict; but it is contended that he is not a person charged with crime,

within the meaning of the federal Constitution and statute relating to extradition from one state to another; that the term "charged with crime," used in the Constitution and statute, means a charge by indictment or affidavit made before a magistrate, and that the charge must be a pending charge, on which the relator could be tried when returned to the demanding state, and not a judgment of conviction, upon which he would be returned to the administrative authorities; that although the relator has been tried, convicted, and sentenced in the state of Indiana, and the term of sentence has not yet expired, there is no authority under the Constitution and statute for compelling his return.

The Constitution of the United States (article 4, § 2) requires that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." The law of Congress passed in 1789 (now section 5278 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3597]), providing for the carrying out of this provision of the Constitution, says:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the state or territory from whence the person so charged has fled it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of his arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive to be delivered to such agent when he shall appear."

The statute of Kentucky of 1903 (section 1928) provides for the procedure under which extradition is ordered when a requisition is made upon the Governor.

The term "charged with crime," as used in the Constitution and statute, seems to us to have been used in its broad sense, and to include all persons accused of crime. It would be a very narrow and technical construction to hold that after the accusation, and before conviction, a person could be extradited, while after conviction, which establishes the charge conclusively, he could escape extradition. The object of the provisions of the Constitution and statute is to prevent the escape of persons charged with crime, whether convicted or unconvicted, and to secure their return and punishment if guilty. Taking the broad definition of "charged with crime" as including the responsibility for crime, the charge would not cease or be merged in the conviction, but would stand until the judgment is satisfied. It would include every person accused, until he should be acquitted, or until the judgment inflicted should be satisfied. Any other construction would prevent the return of escaped convicts upon the charge under which they had been sentenced, and defeat in many instances the ends of justice.

The relator was convicted of the crime of larceny in Indiana, and sentenced, and the term of sentence has not yet expired. That charge of larceny continues to be a charge against him until the sentence has been performed, and he therefore stands "charged with crime," within the meaning of that term as used in the federal Constitution. The question has not often been raised, but in the only instances called to our attention where it has been the foregoing views have been adopted. In re Hope, 10 N. Y. Supp. 28; Drinkall v. Spielgel, Sheriff, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486.

This view obviates the necessity of discussing the many questions raised concerning the sufficiency of the affidavits upon which the charges of larceny before the justice of the peace and the Putnam circuit court were based, as the charge has culminated in conviction of a crime with which the relator now stands charged.

All of the questions argued relating to the Indiana indeterminate sentence statute being violative of the Indiana Constitution have been decided by the Supreme Court of that state adversely to the contention of the relator (Miller v. State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109), and decisions of the highest court of a state upon the constitutionality of statutes under the state Constitution are binding on the federal courts.

There can be no question that the finding of the Governor that the relator is a fugitive from justice was based on sufficient evidence. A person who, having committed within a state a crime, when sought for, to be subjected to criminal process, is found within the territory of another state, has been held by the Supreme Court to be a fugitive from justice. Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544.

The relator had been convicted of a crime in the state of Indiana, had not served the term for which he had been sentenced on that conviction, and when wanted he was found in the state of Kentucky. This made a prima facie case, which has not been rebutted.

The judgment of the Circuit Court is affirmed.

Note.—The following is the opinion of Evans, District Judge, in the Circuit Court:

EVANS, District Judge. The petitioner in 1898 was convicted in Indiana of the offense of larceny, and sentenced to the State Reformatory for a term of from one to fourteen years. It seems that the imprisonment was to last at least for one year, but afterwards its continuance for the remainder of the term depended upon the action of the State Board of Pardons. The good conduct of the prisoner might obtain for him either an absolute or a conditional release, as might be determined by the board. After something over four years' imprisonment, the petitioner was released by the board on a parole, the conditions of which he violated and fled to Kentucky. His arrest and return to Indiana were demanded by the executive authority of the latter state, and upon the warrant of the Governor of Kentucky he was arrested here and placed in jail. Before he could be returned to the state of Indiana, he filed a petition for a writ of habeas corpus in these proceedings, with the object of testing the legality of his arrest in Kentucky, and of his contemplated surrender to the state of Indiana.

The court has given the subject very careful consideration, and the only question involved, as it seems to the court, is one that arises out of section

5278 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3597], upon which, coupled with section 753, Rev. St. [U. S. Comp. St. 1901, p. 592], and section 2, art. 4, of the Constitution of the United States, must be based the sole right of this court in any wise to interfere, or to release the petitioner from the custody of the state officers. Those portions of the act which appear to be pertinent to the inquiry are in this language: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the Governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured," etc.

It is insisted that the provisions of this section do not embrace a case precisely like this, and that the case of a convicted offender who has escaped from prison was omitted from the legislation, and cannot be supplied by the court. To say nothing of section 2, art. 4, of the federal Constitution, it seems to the court to be clear that such a construction of section 5278, Rev. St., would lead to absurd results, and is therefore inadmissible. Lau Ow Bew v. United States, 144 U. S. 59, 12 Sup. Ct. 517, 36 L. Ed. 340, and United States v. Hogg, 112 Fed. 912, 50 C. C. A. 608—a case decided by the Circuit Court of Appeals for this Circuit. It would be absurd to extradite on a mere accusation of crime, and not after conviction thereof. The word "charging," as used in the statute, cannot fairly, nor within the object, intent, and spirit of the section, be limited to accusations which merely initiate criminal proceedings, to the exclusion of cases where the accusation has been supported and maintained by a conviction and sentence on a trial in open court. In short, the "charging" is not effaced by the judgment of conviction, but is rather emphasized by it. Notwithstanding a conviction, the charge against the prisoner remains and necessarily inheres in the case. The petitioner must therefore be regarded as still being under the charge of larceny, within the meaning of that word as embraced in the statute and constitutional provision referred to.

The court thinks that it admits of no doubt that the petitioner, Hughes, is a fugitive from justice, within the legal and proper sense of that word, and that he has been demanded as such by the executive authority of the state of Indiana. True, the original demand upon the Governor of Kentucky was based upon the production of a copy of an information, accompanied by an affidavit made, not before a "magistrate," but before a clerk of a court; but some days ago, on hearing the petition, it was conceded that the production of a copy of an "information" did not of itself come up to the statutory provision, and it was pointed out by the court that there might be doubt whether it has not the right to interfere where the affidavit has been made, not before a magistrate, but before a clerk. The statute does not seem to contemplate that there shall be copies both of an indictment and of an affidavit made before a magistrate. In the opinion of the court, either of these will suffice where all of the other conditions are met. After the suggestions referred to were made, the case was adjourned from time to time, and meanwhile the executive authority of Indiana secured a copy of an affidavit made in 1898 before a justice of the peace, who doubtless is a magistrate, within the meaning of the statute, and this affidavit charged the petitioner with larceny. Other papers relative to the case, including the judgment of conviction in the court in Indiana, were also secured, and all were presented to the executive authority of Kentucky, and additional requisition papers were issued and placed in the hands of the proper officers of this state. This last-named affidavit was in existence, of course, before the petition was presented to this court. Under these circumstances, the executive authority of Indiana might mend—it did mend—its hold, and after the second requisition was issued, and after it had been placed in the hands of the jailer who had the custody of the petitioner, and after the facts were stated orally in court, the writ of habeas corpus was issued, not that the court supposed the petitioner should be discharged, but because it did not see its way clear to determine the questions involved,

and make up the record satisfactorily, without hearing from the jailer of Jefferson county in response to the writ. That officer made his response, stating the foregoing facts; and the court considers it, especially when viewed in connection with the petition and judgment of conviction, to be sufficient to support the action of the state authorities.

At the final hearing neither side presented any evidence, unless possibly one item which had been taken care of in a bill of exceptions, and the case was submitted on the petition of the prisoner, and the exhibits filed therewith, and upon the response of the jailer of Jefferson county, and the exhibits filed with it. Conceiving, upon the facts stated, that this is a case coming within section 5278, the court is of opinion that the Governor of Indiana had the right to demand the petitioner from the authorities of Kentucky, and the latter had the right to recognize and enforce that demand. This being so, the court is further of opinion that, under the proper construction of the statutory provisions referred to, the petitioner has presented no claim, technical nor substantial, to be released from the custody of which he complains, and the judgment of the court will be that the petition be dismissed, and the writ of habeas corpus discharged.

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JONES v. BURNHAM, WILLIAMS & CO. et al.

(Circuit Court of Appeals, Third Circuit. June 29, 1905.)

No. 27.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—PARTNERSHIP.
   To sustain proceedings in involuntary bankruptcy against a person as a partner in a firm, a partnership in fact must be shown, and the burden of proof on the issue rests upon the petitioners.
   [Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 137.]

2. SAME.
   Evidence considered, and *held* insufficient to establish the existence of a partnership between the defendants, in involuntary proceedings in bankruptcy, as alleged in the petition.

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

For opinion below, see 130 Fed. 475.

James Harold Warner, for appellant.

F. P. Prichard, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This is an appeal by Frank C. Jones from a judgment of the District Court for the Middle District of Pennsylvania adjudging the appellant a bankrupt in an involuntary proceeding in bankruptcy instituted by creditors of C. F. Beckwith & Co. against C. F. Beckwith and Frank C. Jones as alleged partners, trading as C. F. Beckwith & Co. To the creditors' petition Jones put in an answer under oath denying the alleged partnership. Whether, as charged in the creditors' petition, a partnership in fact existed between C. F. Beckwith and Frank C. Jones, trading as C. F. Beckwith & Co., was the fundamental and controlling issue, in the case as respects the appellant. Collier on Bankruptcy (4th Ed.) p. 61. And the burden of proof to show the alleged partnership was on the petitioners.

At the outset we note three important and undisputed facts: First, the alleged partnership was not evidenced by written articles; second, no express oral agreement of partnership was shown; third, there was no participation by Jones in the profits of the firm.

The firm of C. F. Beckwith & Co. was formed and began business in the year 1898. The ostensible partners composing the firm were C. F. Beckwith and A. L. Derry. The business was the buying and selling of mine machinery and supplies. The business was conducted at the city of Scranton, Pa., by C. F. Beckwith, who resided in that city. Jones lived in the city of New York. He was extensively interested in manufacturing industries, and was a man of wealth. There were intimate social relations between the Jones family and the Beckwith family. Mr. Jones formed the personal acquaintance of young C. F. Beckwith, who had then just left college by reason of an accident or ill health, through the latter's mother. Jones testifies, "His mother had spoken about him to me and his father." Thus commended to his friendly regard, Mr. Jones became very much interested in the young man, and soon began to render him financial aid in his business. Mr. Jones' uncontradicted account of how this came about is this:

"She [Beckwith's mother] spoke of his needing capital; that if he had some capital he could pay it off in a short time, and it would enable him to do a lucrative business, as he was well acquainted in Scranton and vicinity, and had many friends. I then either told him or wrote him (I forget which) that I would discount notes for him, which he could pay off gradually from his business. The result was that, as far as I recollect now, the first would be $500 or $1,000, and then it increased to $5,000 or $6,000 of notes from time to time he would send to me as he needed the money for paying for goods he had bought and had not collected from them, and I got them discounted in my banks in New York, and sent him the proceeds; and regularly as each note came due he would send me a new note or check, reducing the note a little, and for the interest on the new note, and I would send him the proceeds of the new note."

The learned judge below in his opinion said, "The relation between the two parties concerned as respondents was in the beginning the outcome of social friendliness." This was certainly the case, and we discover nothing in the proofs to show that the relation between the two was ever other than the "outcome of social friendliness" during the whole time in which Jones was extending financial aid to Beckwith.

Besides his indorsements of C. F. Beckwith & Co.'s notes, Jones guarantied some accounts of the firm for purchases of goods. In every instance, however, his liability was incurred by some special contract—a guaranty or an indorsement—covering the particular transaction. The liabilities he thus incurred were indeed large in the aggregate, but his indorsements extended over several years, and included renewals. Young Mr. Beckwith was constant in his requests for such accommodations, and Jones responded generously. When asked why he thus assisted Beckwith, Jones answered, "Well, I assisted him on account of my friendship for his family," artlessly adding "as I have assisted a number of people in the same way."

The largest transaction with which Jones was connected by indorsement was a purchase of old rails, which Jones thus explained:

"A lot of secondhand rails were sold by the St. Louis & San Francisco Railroad, and Mr. Beckwith told me he had bought some, and had found a customer for most of them in a Mr. Devlin, and from time to time they were sold to Mr. Devlin; and, in order to finance that transaction, Mr. Beckwith asked me for larger indorsements, always holding out the idea that, when he received the full money from the rails, these notes would all be paid off, and also the other notes that I was carrying in New York, through the profits."

The examination of Mr. Jones as a witness was thorough. He denied positively that he was connected with Beckwith as a partner, or had any financial interest in the firm of C. F. Beckwith & Co. But he did not confine himself to a mere denial of partnership relations. His explanation of his dealings with Beckwith and said firm was circumstantial, straightforward, and full. He distinctly testified that all his guaranties and indorsements were entirely gratuitous, and out of friendship to Beckwith and his family. His version of the relation that existed between himself and C. F. Beckwith & Co. is consistent with all the circumstances of the case. For instance, what would be more natural than to furnish from time to time statements of the condition of the firm's business to one whose accommodation indorsements were constantly sought?

The principal witness for the petitioners was C. F. Beckwith. Upon his testimony, which, in so far as unfavorable to Jones, is contradicted by the latter, the case of the petitioners in the main depends. It is indeed said that Jones made an admission to Mr. Dolphin that "he was interested with Beckwith," and "also declared that he was a partner to Col. Sickles, of New York, and to Mr. Coffin." But all this rests exclusively upon the uncorroborated testimony of C. F. Beckwith. Mr. Dolphin did not testify at all; neither did Col. Sickles or Mr. Coffin. It is most significant that Beckwith did not testify to any express agreement of partnership. He did not state the terms of partnership. Upon the crucial question of fact he simply affirmed that Jones was a partner in C. F. Beckwith & Co. from the time that firm began operations. Counsel on behalf of the petitioners asked him, "Who were interested in the firm of C. F. Beckwith & Co. at the time, or who were partners?" to which he answered, "Mr. A. L. Derry, Scranton; Mr. Frank Cazenova Jones, of New York; and myself." The rest of his testimony consists of a recital of circumstances to justify his stated conclusion or inference (for it really amounted to no more) that Jones was a partner. Thus in his examination in chief this occurs:

"Q. Who furnished the backing or the money for the firm of C. F. Beckwith & Co.? A. Frank Cazenova Jones. Q. How was that money raised? A. On notes Mr. Jones indorsed."

Again, in his examination in chief we find the following:

"Q. What, if anything, did Jones say to you as to his backing of the firm, or his financial interest in the firm? A. Mr. Jones said to me any time we needed the money I could get it. Q. When referred to, what did he say as to his connection with the firm of C. F. Beckwith & Co.? A. I heard Mr. Jones say he was interested in me."

Beckwith, indeed, testified that he had introduced Jones as his partner to people, and named several persons, but not one of them was called to corroborate him.

The books of the firm presumably would show that Jones was a partner if such were the case. Yet the books were not produced, although undoubtedly in the hands or under the control of the petitioners. It may well be assumed that the books contain no evidence to corroborate the assertion of Beckwith that Jones was a partner.

The correspondence in evidence, we think, disproves the alleged partnership. The earliest letter was written by C. F. Beckwith to Mr. Jones soon after the firm of C. F. Beckwith & Company was formed and had begun business, and in the same year. As furnishing a key to the whole correspondence which followed, we quote this letter at length, and extracts from the statement inclosed therein.

"Scranton, Pa., November 16th, 1898.

"Mr. Frank C. Jones, President Manhattan Rubber Company, 18 Vesey Str., New York City—My Dear Mr. Jones: Enclosed you will find statement of my business to date (face of Ledger with Mdse. Int. added), and a few explanations below. Really this does not do us credit, since we are working very hard on two or three large orders, any one of which would materially alter the looks of our accounts. I have just closed a nice order for fire apparatus, but have to sell on sixty days.

"Your telegram came this morning. Indeed your prompt reply only emphasizes your goodness and places me farther away from the point where I might be able to thank in suitable terms.

"I am not going to attempt to thank you for the last favor—it is beyond me, but with my kindest regards, I am, Most indebtedly yours,

"[Signed] C. F. Beckwith."

Does this letter indicate any partnership relation between the writer and the person addressed? Does it not rather express the natural sentiments of a beneficiary to his benefactor?

The inclosed statement referred to in and by this letter contains the following explanation:

"I do not know whether I have told you just how Mr. Derry stands. When I first took him in he had absolutely nothing, so I have had to pay some of his bills and advance him some money from time to time. At the same time he assumed half of the debt that I had contracted up to that time (about $400.00). To balance this indebtedness, outside of his expense account—traveling, etc., for me—he is going to give me his note with a first-class endorser."

And the inclosed statement concluded thus:

A. L. Derry.

| | |
|---|---|
| September 1st, one-half net indebtedness | $197 47 |
| September withdrawals, less expenses | 30 45 |
| October withdrawals, less expenses | 63 59 |
| | $291 51 |

C. F. Beckwith.

| | | |
|---|---|---|
| September 1st, one-half indebtedness | $197 48 | |
| September, investment | | $100 00 |
| October, investment | | 60 00 |
| By balance | | 37 48 |
| | $197 48 | $197 48 |

This documentary evidence discredits the verbal statement Beckwith now makes that Jones was a copartner with him and Derry, for his contemporaneous written statement shows that the firm was composed of Beckwith and Derry only, and that they were equal partners. Other proof shows that Beckwith and Derry were the ostensible partners. Thus Beckwith testifies:

"Q. At the time during which Derry was a partner, what was the form of the letter paper? A. 'C. F. Beckwith & Company'—'C. F. Beckwith' one corner, and 'A. L. Derry' in the other corner. Q. Did Mr. Jones' name appear in the paper? A. It did not."

As showing what the true relation between Jones and Beckwith was, we here quote from a letter which the latter wrote to the former:

"Scranton, Pa., April 9th, 1900.

"My Dear Mr. Jones: Yours of the 7th instant, together with the check for $656.96 received. Please accept my thanks. * * * You need never fear that I have failed to place you on the top round of faithful friendship, and I assure you that I will fully appreciate the fact that not one young man in a thousand has the advantage that I have in a good sound adviser back of him.

"I have had a hard pull in a field where competition is terrific and prices necessarily low, but I hope we shall be able to pull out ahead each month now.

"When I am able to cancel the financial indebtedness to you, I shall be the happiest boy in Penna.

"I will send you the $450.00 note for endorsement in a day or two. I meant to find out how much we can afford to reduce it, if any, before getting your endorsement. I would like to pay this note in full and then make another here at the Traders' Bank for enough to take one of or two or three New York notes off your hands.

"Please don't congratulate me for a while yet, for I would not want to have you recall any such communication later on. It is not necessary to praise me, as I know you are the best friend I have and I never forget this fact for one moment.

"With kindest regards and deep appreciation of your many kindnesses, I am yours sincerely and affectionately,

"[Signed] Chas. F. Beckwith."

In a letter from Beckwith to Jones dated May 21, 1900, Beckwith says:

"I saw Mr. Phillips to-night, and he said he would cover my check Wednesday, if I could get an endorser on note for a few days. I asked him if your endorsement would go, he said, sure. Now in order to cover the complete account, I enclose note for ten days for $2,500.00 for your signature. I feel that I can do this in the present emergency, since you have told me to go to you when in trouble. * * * Thanking you again with all my heart for your great kindness, I am, sincerely and devotedly yours."

In the spring of 1901 the correspondence related to the dissolution of the partnership between Beckwith and Derry. In a letter dated May 3, 1901, Jones wrote to Beckwith:

"I have read your letter very carefully, and the more I think the matter over and the more you write me, the more convinced I am that there is nothing left for you to do but to dissolve partnership with Derry, as it would never do for you to have as a partner a man with his record, as it would be sure to injure you in a business way, and would ruin your financial credit. * * * And in the meantime I would have my lines laid to get hold of Carter or some one else to take in with you, but I would not have any name on the paper except C. F. Beckwith & Co."

In a letter dated May 21, 1901, Beckwith wrote to Mr. Jones:

"Scranton, Pa. November 29th, 1901.

"My Dear Mr. Jones: I received yours of the 28th out here at the house last night, and have carefully noted all of your advice. In reply, let me say, my dear Mr. Jones, your advice is just as much appreciated and considered just as valuable by me as your financial help. I fully understand the spirit of your letter and thank you from the bottom of my heart for writing as you have. * * * Before closing this scribble, I want to say again that I can never tell you in adequate terms how much all you have done for me has been appreciated by me. I think I always take your letters in the spirit they are written, and I always keep letters like the one you sent me yesterday separately and re-read them often. Your sound advice I can always take, but some of the great favors you have extended to me have completely floored me, as I did not know there was any such friend as you have proved to be, except in story books of my boyhood days, at which I have turned up my nose for some time."

Notwithstanding an expression or two which read alone might seem to import that Mr. Jones had a pecuniary interest in the firm of C. F. Beckwith & Co., the correspondence as a whole negatives the alleged partnership, and convincingly sustains the testimony of Jones.

It only remains for us to notice the testimony of Mr. Merrill, who, as the representative of Dun's Commercial Agency, interviewed Mr. Jones in the month of June, 1901. Merrill states Jones "told me he was then and always had been a special partner of Mr. Beckwith in the firm of C. F. Beckwith & Co.; that he furnished him capital, and started him when he left college, and was backing him," etc. Jones denies that he told Merrill he was a special partner. Now, no one connected with this litigation pretends that Jones was a special partner. Such proof would defeat the creditors' petition. This proceeding is based on an alleged general partnership, and must be so based. Collier on Bankruptcy (4th Ed.) p. 61. Evidently Mr. Merrill is mistaken in his recollection of Jones' language, or he has given an erroneous interpretation to what Jones said about his furnishing capital to Beckwith and backing him.

Upon a consideration of the whole evidence, we are of opinion that the petitioning creditors failed to make out their case. The proofs, we think, did not warrant a judgment in their favor against Mr. Jones.

The judgment of the District Court adjudging the defendant Frank C. Jones a bankrupt is reversed, and the cause is remanded to that court, with direction to enter judgment in his favor, with costs.

## NORTHERN PAC. RY. CO. v. KEMPTON.

(Circuit Court of Appeals, Ninth Circuit. May 29, 1905.)

No. 1,072.

1. PAROL EVIDENCE—CONSTRUCTION OF CONTRACT—TIME AND MANNER OF PERFORMANCE.

Where a contract for the transportation of live stock was silent as to the time and manner of performance, parol evidence was admissible to show that it was customary to furnish an independent train for the transportation of stock amounting to 10 cars or upwards, when demanded.

2. CARRIAGE OF LIVE STOCK—ACTION FOR DELAY—INSTRUCTIONS.

In an action for damages resulting from delay in transportation of 12 cars of live stock, plaintiff testified that it was customary for the railroad to furnish independent power for the shipment of 10 cars or more, when demanded, and "we always expect it [independent power] when shipping either in or out. We collect a train load, and were entitled to a stock train. If we had ten cars or more, we generally get separate power for them." Another witness, who had been a long time in the cattle business, testified: "If we have a train load, we have power of our own. A train load is from ten cars up." *Held*, that such proof justified an instruction that the jury might consider the evidence relating to the question whether cattle being transported in a number greater than 10 car loads were or were not hauled by regular freight trains, or trains gotten up specially for the purpose of transporting them.

3. RES GESTÆ—STATEMENTS OF SERVANTS.

In an action against a carrier for delay in transporting cattle, a statement by defendant's railroad conductor, made to plaintiff, during the transportation, in response to a question, "Why don't you get over the road?" "I can't get anywhere with this dummy. They should have known better than to send it out this kind of weather"—was admissible as res gestæ.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 308.]

4. CARRIAGE OF LIVE STOCK—ACTION FOR DELAY—INSTRUCTIONS—RES IPSA LOQUITUR.

Where, in an action for injuries to cattle sustained by delay in transportation, the evidence showed that 70 hours were consumed in making a trip which ordinarily could have been covered in 36⅔ hours, it was not error for the court to charge that where defendant undertakes to transport property by means of a train which is under its management, and the accident is such as, in the ordinary course of things, does not happen if those who have the management thereof use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care, though the transportation contract provided that the carrier should not be liable for injuries to the stock unless the same were immediately caused by the misconduct or actual negligence of the carrier, its agents, servants, or employés.

5. SAME—SEPARATE DELAYS.

Where, in an action against a carrier for injuries to cattle by delay in transportation, there was evidence of several separate delays en route, and the court charged that it was plaintiff's duty to show how much of the damage, if any, sustained by the cattle was due to the causes for which defendant might be liable, and that plaintiff was not entitled to recover for damages caused by a blizzard, and could only recover such damages as resulted directly from some act or omission of the defendant which defendant should have done or omitted to do in the exercise of reasonable care, the refusal of an instruction that each of the delays must be considered by itself, and that the fact that, if the first delay had not taken place, the second might have been avoided, would not impose a

liability on defendant for the second delay, as the first would not then be the proximate cause of the second, was not error.

6. UNITED STATES COURTS—ENFORCEMENT OF CONTRACT AGAINST PUBLIC POLICY OF STATE REMOVED FROM.

Where plaintiff, a resident of Montana, contracted in Minnesota with defendant for the transportation of certain cattle from Minnesota, to destination in Montana, and thereafter brought suit in the Montana state courts for damages resulting from delay, which suit defendant removed to the federal Circuit Court sitting in Montana, such court would not enforce a stipulation in the transportation contract providing a 60-day limitation for an action thereon, which was void under the express provisions of Civ. Code Mont. § 2245, though it was not prohibited by the laws of Minnesota, where the contract was made.

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

This is an action for damages alleged to have been sustained by the plaintiff (defendant in error) in consequence of the negligence and delay of the defendant in transporting 12 car loads of the plaintiff's cattle over its line of railroad from Winnipeg Junction, Minn., to Fallon, Mont. It is alleged that the negligent conduct of the defendant consisted in the failure to provide an independent train, with independent power, for the transportation of the plaintiff's cattle, in the negligently slow rate of speed at which the cars containing the cattle were hauled, and the negligent manner of starting and stopping the said cars, by reason whereof many cattle were bruised, crippled, made sick and sore, and otherwise injured, resulting in damages to the plaintiff in the sum of $10,072. The defendant railway company denies any negligence on its part in transporting the cattle, and avers that the plaintiff and his agents overcrowded the cattle in loading them into the cars, and any injury sustained by said cattle was contributed to by the said crowding. It avers that it furnished an independent train, with independent power, as soon as demanded, and alleges, as matter of defense, that the principal delay in hauling the train containing the plaintiff's cattle was caused by the unusually severe snowstorm and blizzard, producing conditions over which the defendant had no control. The defendant further charged that the plaintiff had no right of action upon the contract, as he had not complied with the terms thereof, in that he had not brought the action within 60 days after the alleged damage was said to have occurred, and had not given any written notice of his claim for damages to any officer or agent of the defendant before removing the said stock from the place of destination.

The plaintiff shipped 12 car loads of cattle from Winnipeg Junction, Minn., to Fallon, Mont., over defendant's line of road, under a written contract. The distance from Winnipeg Junction to Fallon is 471 miles. The train hauling the cars containing plaintiff's cattle left Winnipeg Junction May 1, 1899, at 5 p. m. It arrived at Fallon on May 4, 1899, at 3 p. m. The plaintiff testified that the usual running time for stock trains was from 15 to 25 miles an hour. At the rate of 15 miles an hour, the train should have made the distance in 36⅔ hours, including 5 consecutive hours required by section 4386 of the Revised Statutes [U. S. Comp. St. 1901, p. 2995] for rest, water, and feeding, when the transportation of cattle is for a longer period than 28 consecutive hours. The time actually consumed in transporting the cattle to their destination was 70 hours. The 12 cars containing the cattle were attached to a local freight train from Winnipeg Junction to Mandan, a distance of 226 miles, at which point the cattle were unloaded by the plaintiff, cared for, and reloaded into the cars. The plaintiff there demanded a special, independent locomotive for the hauling of the cars, which was furnished, and the train proceeded independently from that point to Richardton, a distance of 86 miles, where a delay of some 11 or 12 hours occurred by reason of a severe snowstorm, and an accident to the switch which prevented the train from leaving a side track. From this point to the point of destination, 159 miles, the train appears to have proceeded without difficulty, and no complaint is made as to this portion of the service. The evidence tended

to show delays at several points between Fargo and Richardton, for which the defendant company was responsible. The evidence also tended to show that plaintiff shipped 582 head of cattle from Winnipeg Junction, all in good condition. When the train arrived at Mandan, the stock was in bad condition. Two had legs broken, and 9 were dragged out of the cars because they could not be got up, on account of bruises they had received on the way, from being thrown down and crippled. The next morning at Mandan 9 of the cattle were dead, and 3 others were dying. Twelve were left at Mandan. The cattle were in very bad condition on arrival at Fallon. Forty-five more were dead, 7 more died on being taken from the cars, and 54 were left at Fallon because they could not walk. Within 10 days 122 were dead, others crippled, and still others were more or less injured.

The case was tried with a jury, resulting in a verdict for the plaintiff in the sum of $3,000, and judgment was entered thereupon. To reverse this judgment a writ of error has been sued out to this court.

Wm. Wallace, Jr., and Charles Donnelly, for plaintiff in error.

Sidney Sanner and T. J. Walsh, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

The defendant in error, as a witness in his own behalf, was asked by his counsel the following question:

"How, in the ordinary shipment of live stock, is it shipped and transported by railroads in this section generally—with single trains, or jointly and promiscuously with other freight?"

An objection to this question was overruled by the court, and the witness answered:

"Ten cars and upwards constitute a stock train. It is customary, when asked, to give power for ten cars or upwards to the capacity of the power, and transport it as a separate train, when demanded."

It is objected to this evidence that the shipment was made under a special contract, which was complete in itself, and was a contract simply to transport stock; that this evidence tended to show a custom making another and a different contract for the transportation of the stock by an independent train, and it is contended that this could not be done. The objection cannot be sustained. The evidence did not tend to establish a new contract, or to change or modify the terms of the written contract. The contract was silent as to time and manner of performance, and the evidence was properly introduced to inform the court and jury as to the custom prevailing with respect to the character of transportation the parties had in view when they made the contract. The contract did not say whether the cars in which the cattle were loaded were to be attached to a through freight train or to a way freight train, or whether the cars were to be hauled as an independent train. Which of these methods was the carrier to furnish? The presumption was that the parties to the contract understood that the cattle were to be transported in the way that similar freight in similar quantities was being transported, and the evidence objected to, as well as other evidence not objected to, relating to the method of transportation, was introduced for the purpose of establishing that fact, and was admissible for that purpose. Robinson v. United States,

13 Wall. 363, 20 L. Ed. 653. A custom or usage known to the shipper, as to the manner or method of transportation, will be binding as a part of the contract when not contrary to its terms. 6 Cyc. 428.

It was also objected that the court instructed the jury that it was entitled to take into consideration the evidence relating to the question whether cattle being transported in a number greater than ten car loads were or were not hauled by regular freight trains, or trains gotten up specially for the purpose of transporting such cattle. It is contended, first, that the plaintiff was only entitled to transportation as an independent train when demanded, and it is claimed that the testimony shows that when such transportation was demanded it was furnished; and, second, that the evidence was insufficient to establish a custom that 10 cars and upwards constituted a stock train. It is true, the plaintiff testified that it was "customary, when asked, to give power for ten cars or upwards to the capacity of the power, and transport it as a separate train, when demanded." This answer, standing alone, is not very clear. But he made his meaning clear in a subsequent statement. He said: "We always expect it when shipping either in or out. We collect a train load, and were entitled to a stock train. If we had ten cars or more, we generally get separate power for them." What the witness evidently meant was that, when transportation was asked for 10 car loads or upwards, it was customary to transport the shipment as a separate train. James E. Farnham, who had been in the cattle business in Montana since 1883, and for the last 12 years had shipped most of the cattle for his company, testified: "If we have a train load, we have power of our own. A train load is from ten cars up." This evidence was sufficient to justify the instructions given by the court. It also disposes of the objection that the court refused to instruct the jury that no sufficient proof had been given to establish a custom under which the plaintiff was entitled to have the cattle transported as an independent train, with independent power; and it disposes of the further objection that the court refused to instruct the jury that the plaintiff, having failed to demand an independent train with independent power from Fargo to Mandan, had waived his right thereto.

The plaintiff testified that the train stopped at Richardton; he did not know why. He asked the conductor: "Why don't you get over the road?" He said: "I can't get anywhere with this dummy. They should have known better than to send it out this kind of weather." The defendant moved to strike out this answer, because, assuming he referred to the engine or power, the conductor's statement was not admissible to bind the defendant. The motion was denied, and the defendant excepted. The question at issue in the case was whether there was any unreasonable delay in moving the train containing the cattle. The defendant was charged with negligence in attaching plaintiff's cars to a train that proceeded at a slow rate of speed and stopped at many stations. The defendant denied that it had been guilty of the negligence charged. The statement of the conductor was made in the midst of the act com-

plained of, reflecting light upon its quality and character, and under the general rule was part of the res gestæ. As said by Mr. Justice Cooley in Sisson v. Cleveland R. Co., 14 Mich. 489, 90 Am. Dec. 252:

"The statements * * * were made while the conductor was engaged in the business of the defendants in respect to the contract in question, and had control of the train, and they related to the delay complained of, which was the res gestæ of the case."

The declaration of a servant while engaged in enforcing the regulations of a steamboat company concerning passengers, with respect to which complaint was made that the regulation was being enforced with unnecessary or cruel severity, was held to constitute a part of the res gestæ. New Jersey Steamboat Co. v. Brackett, 121 U. S. 637, 649, 7 Sup. Ct. 1039, 30 L. Ed. 1049. Where a railroad employé has been injured by the movement of cars about which he was at work, statements of the conductor of the train, made almost immediately, and while the cars were moving or had just stopped, and while the injured man was bleeding from the injury at that moment received, describing his own part in bringing about the motion that effected the injury, were held to be admissible as part of the res gestæ. Peirce v. Van Dusen, 78 Fed. 693, 706, 24 C. C. A. 280 (Circuit Court of Appeals, Sixth Circuit, opinion by Mr. Justice Harlan). A conversation of a conductor with a passenger who expressed fear of a fellow passenger, as to the latter's sanity, being in discharge of the conductor's duty to the passenger, was held admissible as part of the res gestæ in an action against the railroad company for the killing, shortly after such conversation, of another passenger by the person whose sanity was questioned. St. Louis, I. M. & S. Ry. Co. v. Greenthal, 77 Fed. 150, 152, 23 C. C. A. 100 (Circuit Court of Appeals, Eighth Circuit, opinion by Judge Caldwell). These and other similar cases indicate the scope of the rule as established by the courts, under which we think the evidence was properly admitted.

The court instructed the jury that:

"Where the defendant undertakes to transport property by means of a train which is under its management or that of its servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

The defendant took an exception to this instruction, and contends that it is not a correct statement of the law applicable to this case, under the terms of the special contract. The contract provides that:

"The said company shall not be liable for the loss or death of, nor for any injuries received by, any of such stock, unless the same is immediately caused by the misconduct or the actual negligence of the said company or its agents, servants, or employés."

We are unable to discover how this provision of the contract changes any rule of evidence otherwise applicable to the case. The instruction was taken from the case of Scott v. The London & St. Catherine's Dock Co., 3 Hurlstone & Cottman, 596. The plain-

tiff in that case was injured by bags of sugar falling from a crane in which they were lowered to the ground from a warehouse by the defendant. The court said:

"There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

This doctrine was held to be applicable to a common carrier in the transportation of flour in Rintoul v. New York Cent. & H. R. Co. (C. C.) 17 Fed. 905, 907, and is stated to be the law in Shearman & Redfield on Negligence (5th Ed.) § 59. We think the instruction, taken in connection with other instructions given by the court, stated correctly a rule of evidence applicable to the case.

The court refused to give the following instruction requested by the defendant:

"So, too, each of these delays must be considered by itself alone. The fact that if the first delay had not taken place the second one might have been avoided, would not impose a liability on the defendant for the second delay, as the first delay would not be the proximate cause of the second under such circumstances."

The defendant contends that it was entitled to this instruction by reason of an allegation contained in the complaint "that had the said cars been made into an independent train and furnished with sufficient independent power out of the city of Fargo, and, if such train had proceeded with reasonable speed, it would have arrived at the town of Fallon before the snowstorm, or before it had prevailed a sufficient length of time to cause any injury to the cattle," and the evidence of the train dispatcher, drawn out on cross-examination, that, had the train left certain points on time, delays at other points would not have occurred. It is further contended by the defendant that plaintiff's theory was that, though the delay on account of the storm was in and of itself inevitable, the defendant was responsible for its consequences, if it might not have happened but for a previous delay for which defendant was responsible, and that as this theory is in conflict with the law upon this subject as declared by the Supreme Court of the United States in Railroad Company v. Reeves, 10 Wall. 176, 189, 19 L. Ed. 909, and in St. Louis, etc., Ry. v. Commercial Ins. Co., 139 U. S. 223, 236, 11 Sup. Ct. 554, 35 L. Ed. 154, the instruction requested should therefore have been given. It is a sufficient answer to this contention to say that, whatever may have been the theory of the plaintiff as to the liability of the defendant for a delay following a previous delay for which the defendant was responsible, the theory of the court was in accordance with the decisions of the Supreme Court, as appears from the instructions given as requested by the defendant, as follows:

"As to the blizzard and snowstorm, I instruct you that the defendant in this case is exempt from liability on account of injuries caused by freezing or by the elements, and would not be liable for any damage resulting to the cattle on account of the said storm; and you could not and ought not to award

any damages against defendant because of injuries sustained by the live stock in the said storm, or in consequence thereof.

"It is the duty of the plaintiff to show how much of the damage, if any, sustained by his cattle, was due to causes for which the defendant might be liable; and if he fails to prove by any preponderance of the evidence how much of the damage, if any, sustained by his cattle, was due to causes other than the blizzard, he would have failed in his proof in this regard, and you could not render a verdict for him.

"Only those damages resulting directly from some act or omission of the defendant, which the defendant should have done or omitted to do in the exercise of reasonable care, can be recovered. None of the damages consequent upon the blizzard can be recovered. This burden of showing the exact amount of damages due to the causes for which the plaintiff might recover, if any such causes there were, is on the plaintiff, and you can only award a sum such as you can find from a preponderance of the evidence was due to recoverable causes as distinguished from the other causes."

It is assigned as error that upon the conclusion of the evidence the court refused to instruct the jury to find for the defendant. Among the reasons urged why this instruction should have been given is a provision of the contract—

"That no suit or action to recover any damages for loss or injury to any of said stock, or for the recovery of any claim by virtue of this contract, shall be sustained by any court against said company, unless suit or action shall be commenced within sixty (60) days after the damage shall occur, and on any suit or action commenced against said company after the expiration of said sixty (60) days, the lapse of time shall be taken and deemed conclusive evidence against the validity of said claim, any statute to the contrary notwithstanding."

The damages claimed were alleged to have been sustained between May 1, and May 4, 1899. This action was originally commenced in the district court of Montana, in and for the county of Custer, on September 5, 1899, or 122 days after the damages occurred. It is claimed by the plaintiff in error (defendant in the court below) that this limitation is not forbidden by the law of Minnesota, where the contract was made, and should be enforced. The contract was to be executed partly in Minnesota and partly in North Dakota and Montana. In the last two states the limitation is void by statutory prohibition. Rev. Codes N. D., 1899, § 3925; Civ. Code Mont. § 2245. The latter Code provides:

"Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void."

The delivery of the cattle was to be made in Montana. The plaintiff was a citizen of Montana, and the suit was brought in Montana. The breach of the contract occurred in North Dakota and Montana. The limitation in the contract is contrary to the policy of Montana, as expressed in its law, and could not be enforced in that state. This is an exception to the general rule that a contract valid and binding in the state where made will be enforced in another state. Chicago, B. & Q. R. Co. v. Gardiner, 51 Neb. 70, 70 N. W. 508. The rule applicable to this case is: A contract valid elsewhere will not be enforced if it is condemned by positive law, or is inconsistent with the public policy of the country, the aid of

whose tribunals is invoked for the purpose of giving it effect. Union Locomotive Exp. Co. v. Erie Ry. Co., 37 N. J. Law, 23; Thompson v. Taylor (N. J. Sup.) 46 Atl. 567; The Kensington, 183 U. S. 263, 269, 22 Sup. Ct. 102, 46 L. Ed. 190. This suit was brought in the state court of the state of Montana, and by the defendant removed to the United States Circuit Court for the District of Montana. In the state court the plaintiff was entitled to the benefit of the prohibition against the stipulation or condition in the contract limiting the time within which plaintiff might enforce his rights by legal proceedings, and the defendant could not, by removing the case to the federal court on the ground that it was a citizen of another state, deprive the complainant of such a substantive right. Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 358, 19 Sup. Ct. 179, 43 L. Ed. 474. This provision of the contract did not entitle the defendant to an instruction to the jury to find in its favor. The other grounds urged for such an instruction do not appear to have any substantial grounds, and need not be discussed.

Finding no error in the record, the judgment of the Circuit Court is affirmed.

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## PHILADELPHIA CONST. CO. v. CRAMP et al.

(Circuit Court of Appeals, Third Circuit. June 27, 1905.)

No. 12.

CORPORATIONS—BONDS—SALE—UNDERWRITERS' AGREEMENT.

An underwriting syndicate, formed to sell certain bonds for a construction company, agreed that its members should take the bonds in specified proportions, and pay therefor 95 per cent. of their face, with interest, the construction company agreeing to deliver the bonds to the syndicate with certain preferred and common stock of the corporation in consideration of such 95 per cent. of the face value of the bonds. The agreement also provided that the syndicate managers might sell the bonds at not less than their par value and accrued interest, and deduct 10 per cent. of the amount received from actual sales, and pay the same on account of expenses and commissions in the sale, in payment to the construction company of any unpaid portion of the purchase price, and to pay the balance to the members of the syndicate. Thereafter a letter purporting to construe the agreement was written by the syndicate managers reciting that the underwriters were to receive the number of shares of stock set out in the agreement, and in addition 5 per cent. of the par value of the bonds, and that, if the bonds were sold as intended, the underwriters should receive 5 per cent. out of the 10 per cent. reserved from the proceeds of the sale, and, if they should not be sold, that the underwriters should take them at 95 per cent. of the par value. *Held*, that the original agreement should be construed as requiring that 95 per cent. of the full face value of the bonds should, at all events, be paid to the construction company, and that any unpaid portion of the purchase price should be paid out of the 10 per cent. retained, and that such agreement was not modified by the provisions of the letter.

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

See 134 Fed. 690.

F. P. Prichard, for plaintiff in error.

Dwight M. Lowrey, for defendants in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is a writ of error to the Circuit Court of the United States for the Eastern District of Pennsylvania. Suit was brought in the court below upon a statement of claim, of which the following are the material averments:

The Philadelphia Construction Company, plaintiff in error, is a corporation of the state of New Jersey, which, in 1901, under a contract with the Lancaster County Railway & Light Company, for construction of its works, had become possessed of $600,000 of the collateral trust mortgage 50-year, 5 per cent. gold bonds of said last-named company, and of certain shares of preferred and common stock thereof. Being desirous of selling these bonds, the Construction Company entered into an agreement, October 17, 1901, with certain persons, called a "syndicate." The material parts of this agreement, after reciting the foregoing, are as follows:

"1. Each member of the Syndicate for himself only and not for any or either of the other members, hereby agree with the Philadelphia Construction Company and with the other members of the Syndicate to purchase and take and pay for, on April 1, 1903, at ninety-five per cent. of the par value, so much of said $600,000 of said collateral trust mortgage bonds as is set opposite his signature hereto or such proportion thereof as shall not be sold at public or private sale as herein below provided; the Philadelphia Construction Company hereby agreeing to transfer and deliver, as well to or upon the order of each member of the syndicate who shall make payment as herein agreed full paid common stock of the said Lancaster County Railway and Light Company to an amount at par equal to twenty-five per cent. of the par value of said bonds, and also full paid preferred capital stock of said Lancaster County Railway and Light Company to an amount at par equal to twenty per cent. of the par value of said bonds by him agreed to be purchased hereunder.

"2. The members of the syndicate hereby appoint Messrs. Samuel R. Shipley and William B. Given syndicate managers for the purposes and with the powers herein expressed.

"The syndicate managers may at any time on or before April 1, 1903, in their discretion, either personally or through such bank or trust company or banking house as they may elect, offer for sale the said $600,000 of said bonds at not less than their par value and accrued interest, and after deducting from the proceeds of such sale ten per cent. of the amount realized upon the bonds actually sold, which ten per cent. shall be retained by the syndicate managers for the following purposes, to wit:

"(1) For the expenses and commissions paid by the said Syndicate Managers in the sale of said bonds.

"(2) To pay to the Philadelphia Construction Company, or upon its order, any unpaid portion of the purchase price of the bonds subscribed for hereunder by the several members of the syndicate.

"(3) To pay over the balance to the members of the syndicate pro rata in the proportion of their subscription.

"In case the amount of bonds sold as above provided is insufficient to make payment in full of the subscriptions for bonds hereunder made by the members of the syndicate, the same shall be applied on account of such subscriptions and the several members of the syndicate shall and will in such event make payment, to or upon the order of the Philadelphia Construction Company on demand, on April 1, 1903, of the unpaid balance of their subscriptions hereunder, receiving from the Philadelphia Construction Company the unsold bonds by them subscribed for hereunder and as well the common and preferred stock to which they will then be entitled.

"3. The members of the syndicate hereby severally agree that said $600,000 of bonds subscribed for hereunder may, pending the payment of the subscriptions therefor, be pledged by the Philadelphia Construction Company as col-

lateral security for advances to be made; the Philadelphia Construction Company hereby agreeing to repay such advances out of the purchase price of said bonds as and when received from the members of the syndicate or the syndicate managers, or both."

Afterwards, the following letter was issued by Samuel R. Shipley and William B. Given to the underwriters in said syndicate:

"Philadelphia, Pa., November 1, 1901.

"To The Underwriters of the Bonds of the Lancaster County Railway and Light Company.

"In the view that the compensation of the Underwriters is not sufficiently set forth in the underwriting agreement, we desire to say that it is the meaning thereof that the said underwriters shall receive the number of shares of Common and Preferred stock set forth in the agreement, and in addition thereto the sum of Five per cent. (5%) of the par value of the bonds subscribed for in cash at the termination of the underwriting agreement.

"If the bonds shall be sold, as is intended, to other persons than the subscribers to the underwriting, they shall be paid five per cent. (5%) out of the ten per cent. (10%) reserved from the proceeds of the sale; and if they shall not be sold and the underwriters be required to take them at 95, the said five per cent. (5%) of the par value of the bonds shall be paid them in a reduction of the amount paid by them.

"Very truly yours,

Samuel R. Shipley.
"William B. Given.

"Philadelphia Construction Company,
"By John E. Hess, President.

"Attest: Lewis Starr, Secretary."

The syndicate members, some 25 in number, subscribed for the full amount of the bonds. Subsequently, in April, 1902, pursuant to the authorization of the above agreement, the defendant below, the Philadelphia Construction Company, borrowed the sum of $570,000 (being the 95 per cent. of the $600,000 which the syndicate members in the aggregate agreed to pay for the bonds), pledging therefor, as collateral, all the bonds and stock, preferred and common, referred to in said syndicate agreement, and further pledging as collateral the subscriptions contained in the above recited agreement.

By the terms of this agreement, the subscriptions thereto were made payable on or about April 1, 1903. This time was subsequently extended to April 1, 1904. The statement of claim concludes as follows:

"The syndicate managers, in the above-recited syndicate agreement mentioned, did not effect the sale of the said bonds at par to persons other than the syndicate, as contemplated in the said written syndicate agreement; and the plaintiffs and their associates in the syndicate were required to pay, and did pay, on or about the first day of April, 1904, the amount of their several subscriptions, and the plaintiffs particularly paid the sum of $95,000, with interest at five per cent. from January 1, 1904, in conformity with the terms of said syndicate agreement, and released the bonds and stocks aforesaid. The said payment was made by the syndicate to the lenders to an amount in the aggregate of $570,000, that amount being the full subscription price under the syndicate agreement, with interest at five per cent. from January 1, 1904; and the lenders delivered to the syndicate the bonds (with coupons due July 1, 1904, and thereafter attached) and the preferred and common stock above referred to; and the plaintiffs received the bonds and preferred and common stock to which they were entitled upon their subscription, as above recited: but have never received the cash commission of five per cent. upon the par of the bonds to which they are entitled, as hereinbefore recited.

"By reason whereof the plaintiffs aver that the defendant became and is justly indebted to the plaintiffs in the sum of $5,000. with interest from the first day of April, 1904, for which sum demand has been made and refused, wherefore this suit is brought."

The trouble seems to have arisen from the so-called "letter of explanation" of November 1, 1901. The affidavit of defense filed in the case was largely taken up with a statement of reasons why the so-called "supplementary agreement" or "letter of explanation" was in no wise part of the agreement under which the subscription of the syndicate members was made. The court below, in the short opinion preceding its judgment for want of a sufficient affidavit of defense, confined itself to this contention of the affiant.

The argument on the writ of error, however, presents the single question, whether the agreement of October 17, 1901, and the so-called "supplementary agreement" of November 1, 1901, disclosed the existence of any right on the part of the defendants in error and plaintiffs below to receive anything more than the bonds and shares of stock which were delivered. The affidavit of defense may therefore be considered as, in effect, a general demurrer to the statement of claim. The agreement itself seems to us perfectly plain, as to the mutual obligations imposed upon the parties thereto. The syndicate members, in the proportions set down opposite their names, agreed, on or before the 1st of April, 1904, to take the aggregate of $600,000 of the Lancaster County Railway & Light Company bonds, paying therefor 95 per cent. of their face, with interest at 5 per cent. from January 1, 1904. This seems perfectly clear. The construction company agreed to deliver the bonds, with their stock bonus, to the syndicate members, and agreed to take from them 95 per cent. of the face value of said bonds, which, on the other hand, the syndicate members agreed to pay. The form of subscription, below displayed, briefly and with great clearness expresses the true meaning of this contract:

| Name. | Cash Subscribed. | Bonds. | Entitling Preferred Stock. | Subscribed to Common Stock. |
|---|---|---|---|---|
| Cramp, Mitchell & Serrill. | $95,000 | $100,000 | $20,000 | $25,000 |

As above set forth, the agreement then goes on to provide that the syndicate managers may at any time before April 1, 1903 (1904), in their discretion, offer for sale said bonds, at not less than their par value and accrued interest, "and after deducting from the proceeds of such sale ten per cent. of the amount realized from the bonds actually sold, which ten per cent. shall be retained by the syndicate managers for the following purposes, to wit: '(1) For the expenses and commissions paid by the said Syndicate Managers in the sale of said bonds. (2) To pay to the Philadelphia Construction Company, or upon its order, any unpaid portion of the purchase price of the bonds subscribed for hereunder by the several members of the syndicate. (3) To pay over the balance to

the members of the syndicate pro rata in the proportion of their subscription.'"

It does not seem to us that any other meaning can be attached to this provision of the agreement than that the full 95 per cent. of the face value of the bonds was at all events to be paid to the construction company. The "purchase price of the bonds" was undoubtedly 95 per cent. of their par value, and the requirement that "any unpaid portion of the purchase price" should be paid out of the 10 per cent. retained, if the bonds were sold by the syndicate, clearly indicates this meaning. But the bonds were not sold by the underwriters, as contemplated by this provision of the agreement, and it is therefore unnecessary to consider that phase of the matter. The construction company had borrowed $570,000, upon the pledge of these bonds. This fact seems to confirm our opinion as to what was the intention of the parties at the time the agreement was made. It is hardly probable that the construction company, which required that amount to take up these bonds and perfect a delivery, would have been willing to pay $30,000 cash in addition, as is suggested by the defendants in error.

Such being the clearly expressed meaning of the original agreement of October 17, 1901, we turn to the so-called "supplementary agreement" or "explanatory letter." Its first paragraph is plainly in consonance with what we have said was the plain meaning of the agreement; that is, that the underwriters in any event shall, in addition to the bonus of common and preferred stock, receive the sum of 5 per cent. (and no more) of the par value of the bonds subscribed for in cash when the whole business has been concluded. When we come to the second paragraph of this letter, it seems also clear that only 5 per cent. of the par value of the bonds is to be paid to the underwriters; in other words, that the construction company is to receive full 95 per cent. of that value, whether the bonds are sold by the syndicate or are taken by the subscribers thereto. The last clause of that paragraph refers to the situation as it actually occurred. If the bonds were not sold, the underwriters were themselves required to take them at 95, the said 5 per cent. of the par value which was to be paid the underwriters in cash, if the bonds were sold, being now covered by the 5 per cent. reduction from the par value in the price which the syndicate members were obliged to pay for the delivery of the bonds. This letter of November 1st only purports to be an explanation of a preceding agreement, and not to be itself a new agreement. Unfortunately it has served rather to obscure than explain. But, whether the writer was without any clear notion of what its meaning was, or only failed in giving a clear expression of what he intended to say, it seems certain that no meaning can be extracted from its terms sufficiently unequivocal to overthrow the interpretation we have given to the agreement between the parties.

The judgment of the court below must therefore be reversed.

## ELSON v. TOWN OF WATERFORD.

(Circuit Court, D. Connecticut. June 28, 1905.)

No. 559.

1. HIGHWAYS—DEFECTS—INJURIES—PLEADINGS.
A complaint in an action against a town for injuries caused by a defect in a highway was not demurrable for failure to set forth with sufficient clearness that the defect relied on was the same defect as set out in the notice to the town required by Gen. St. Conn. 1902, § 2020, as such fault, if it existed, might be cured by amendment.

2. SAME—NOTICE—LOCATION OF DEFECT.
Where a notice of a defect in a highway alleged to have caused plaintiff's injuries was couched in such terms as were sufficient to enable an ordinarily intelligent person to find the place and understand how and when the accident occurred, it constituted a sufficient compliance with Gen. St. Conn. 1902, § 2020, requiring as a condition precedent to suit that a written notice of the injury, and a general description of the same, the cause thereof, and the time and place of its occurrence, be given within 60 days to a selectman of the town.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 515.]

See 135 Fed. 247.

Shutz & Edwards, for plaintiff.
Brown & Perkins, for defendant.

PLATT, District Judge. This is an action under the Connecticut statute against the town for damages by reason of a defective highway. The defendant demurs on two grounds:

(1) Because the complaint is defective in form, in that it does not set forth with sufficient clearness that the defect relied upon is the same defect set out in the notice.

If such a fault existed, it could be easily removed by amendment, but I do not think that it exists. The objection is frivolous.

(2) Because the notice is insufficient, in that the place where the injury occurred is not described with the requisite certainty.

Gen. St. (Revision of 1902) § 2020, requires, as a condition precedent to the bringing of such a suit as this, that a "written notice of such injury and a general description of the same, and of the cause thereof, and of the time and place of its occurrence," shall be given within 60 days to a selectman of the town. The plain purpose of the statute is to provide that the local authorities shall receive timely information about injuries caused by defective highways, so that an early investigation of the facts can be instituted. If the notice is couched in such terms as to enable an ordinarily intelligent man to find the place and understand how and when the accident happened, it will be sufficiently specific. This notice seems, in the circumstances, to be quite definite, and gave the authorities all the information which they could have reasonably expected. It is not to be supposed that the Great Neck Road, at a point near the Hedden place, could have been so neglected that a large number of limbs of trees should have been permitted to extend out over the highway at a dangerously low height. If the fact were so, and the select-

men were put to confusion in making a selection, the fault ought not to be entirely imposed upon the personal representatives of the man who met his death in the way charged in the notice.

Let the demurrer be overruled, with costs.

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## THE TWILIGHT.

## THE MARY J. WALKER.

(District Court, E. D. Pennsylvania. July 8, 1905.)

No. 27.

ADMIRALTY—RELEASE OF LIBELED VESSEL—AMOUNT OF BOND.

In fixing the amount of the stipulation for the release of a libeled vessel where there is a dispute as to its value, which is less than libelant's claim, the bond will be required for the highest amount, subject to the right of the claimant on final hearing to prove the value to which libelant's recovery will be limited.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, §§ 456, 460.]

In Admiralty. On application for order fixing amount of bond.

Francis C. Adler and John F. Lewis, for libelant.

Henry R. Edmunds, for respondent.

HOLLAND, District Judge. A libel has been filed in this case to recover damages to the steamer Twilight as a result of a collision with a car float in tow of the tug Mary J. Walker. The twilight claims to have sustained damages in the amount of $19,000. The respondent tug has been attached, and the parties are now before this court for the purpose of fixing the amount of the bond to be filed as a stipulation for the release of the tug. Admiralty appraisers were appointed by this court, who valued the tug at $4,000. Counsel for the Mary J. Walker has filed three affidavits by experienced tugmen on the river, who testify that in their judgment the tug is worth from $3,600 to $4,000. Counsel for the Twilight has filed the affidavit of experienced tug builders who say that the tug is worth at least $7,300, and further that this sum was offered for the tug Mary J. Walker in April of this year, and that the owners were then asking $10,000 for it. They have it insured, however, for only $4,000.

It is urged on the part of the libelant that the release of the tug upon a stipulation of $4,000 would operate greatly to the prejudice of the libelant, if it should be proven subsequently that her value exceeded that sum, because in that event the owners of the Twilight would be obliged to look for the recovery of the excess to the personal responsibility and credit of the owners, and that that responsibility is usually fruitless, as the owners are numerous, and their residence at different places, so that the collection is impossible, but that, in case it should turn out at the final hearing that the tug is worth less than the bond or stipulation, the libelant can only recover the amount of the value of the tug. This contention on the

part of the libelant, in my judgment, is correct. In The City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134, the stipulation was $70,000, and upon an application for limitation of liability the libelants were only permitted to recover the value of the vessel. In this case the evidence is conflicting as to the value of the vessel, and as the fixing of the amount of the bond does not fix the value of the tug, under the law, as the court views it, the respondent will be permitted on final hearing to show exactly the value of the tug, which will be the amount of the libelant's recovery, if it had sustained damages to that amount or more.

It is directed that a stipulation in this case be entered in the sum of $7,300.

## MEMORANDUM DECISIONS.

MUNICIPAL TELEGRAPH & STOCK CO. v. WARD, Internal Revenue Collector. (Circuit Court of Appeals, Second Circuit. June 23, 1905.) No. 216. In Error to the Circuit Court of the United States for the Northern District of New York. This cause comes here upon writ of error to review a judgment of the Circuit Court, Northern District of New York, in favor of the defendant in error who was plaintiff below. The cause was tried upon stipulation by the court without a jury, and the facts and conclusions thereon are reported in 133 Fed. 70. John A. Delehanty, for plaintiff in error. Taylor L. Arms, for defendant in error. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. We do not think it necessary to add anything to the opinion of the Circuit Judge. The evidence entirely warrants the finding of facts therein set forth, and upon those facts we fully concur in the conclusion that the dealings between plaintiff and its correspondents were dealings between principals and independent of the correspondents' dealings, each with his own customers. The judgment is affirmed.

VANDERBILT et al. v. EIDMANN. (Circuit Court of Appeals, Second Circuit. April 4, 1905.) No. 67. In Error to the Circuit Court of the United States for the Southern District of New York. For decision below, see (C. C.) 121 Fed. 590. The Circuit Court of Appeals certified certain questions in the case to the Supreme Court, which were answered in Vanderbilt v. Eidman, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563. Anderson & Anderson, for plaintiffs in error. Henry L. Burnett, U. S. Atty., for defendant in error. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Judgment sustaining demurrer reversed, with costs, and with directions to enter judgment for plaintiffs, upon demurrer, for relief demanded in complaint.

WEIMER et al. v. ZEVELY, Indian Inspector, et al. (Circuit Court of Appeals, Eighth Circuit. June 1, 1905.) No. 2,195. Appeal from the United States Court of Appeals in the Indian Territory. Charles B. Stuart and James H. Gordon, for appellants. Charles C. Houpt, for appellees. Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

PER CURIAM. The decree of the United States Court of Appeals in the Indian Territory (82 S. W. 941), reversing the decree of the United States

Court for the Central District of the Indian Territory and dismissing the bill of complaint, is affirmed on the authority of Buster v. Wright (C. C. A.) 135 Fed. 947, and Morris v. Hitchcock, 194 U. S. 384, 24 Sup. Ct. 712, 48 L. Ed. 1030.

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GAFFNEY et ux. v. INTERNATIONAL MERCANTILE MARINE CO. (Circuit Court, E. D. Pennsylvania. July 12, 1905.) No. 22. Overruling Motion for a New Trial. Joseph H. Brinton, for plaintiff. Charles Biddle, for defendant.

HOLLAND, District Judge. In this case 13 reasons for a new trial are filed, and counsel for the defendant has submitted a very elaborate brief in support of these reasons. I have examined the argument and cases cited with considerable care, but I am not convinced that there was any error in the charge of the court when the case was tried. The law applicable to the facts in the case was correctly stated in the charge of the court, and it was fairly submitted to the jury upon evidence which fully warranted the finding. The motion for a new trial is therefore overruled.

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McGUIGAN v. HENNESY. (Circuit Court, S. D. New York. June 9, 1905.) Albert A. Wray, for plaintiff. Frederick E. Fishel, for defendant.

WALLACE, Circuit Judge. I have carefully considered the brief of counsel for the plaintiff, and have reconsidered the correctness of my ruling upon the trial directing a verdict for the defendant. I am satisfied that the direction was correct, and that upon the case presented to the jury the plaintiff was not entitled to recover. Judgment is accordingly ordered for the defendant, pursuant to the verdict of the jury.

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McKINNEY v. ATLANTIC CITY R. CO. (Circuit Court, E. D. Pennsylvania. June 12, 1905.) No. 51. Granting a New Trial. Samuel A. Boyle and Rothermel & Clement, for plaintiff. Gavin W. Hart, for defendant.

HOLLAND, District Judge. The fifth reason for a new trial, among others, is as follows: "The learned court erred in declining to charge as requested by defendant in its first point, to wit: 'There is no evidence that the train that caused the accident was the property of or in control of defendant or its servants, and your verdict must be for the defendant.'" Upon a review of the evidence, I find no proof at all on this point; nor is there any evidence to show that the railroad upon which this accident occurred is under the defendant's management. As defendant's counsel insists that proof of these facts is material in this case, a new trial should be granted; and it is so ordered.

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THOMAS WILSON & CO. v. UNITED STATES. (Circuit Court, S. D. New York. February 23, 1905.) No. 3,720. On Application for Review of a Decision of the Board of United States General Appraisers. W. Wickham Smith, for plaintiffs. Henry A. Wise, Asst. U. S. Atty.

WHEELER, District Judge. Upon the findings of the Board, in view of the protests, decision affirmed.

MOORE v. FIDELITY TRUST CO. et al. (Circuit Court of Appeals, Third Circuit. June 1, 1905.) Dissenting opinion. For majority opinion, see 138 Fed. 1.

ACHESON, Circuit Judge. I dissent from the affirming decree in this case. The complainant is beneficially interested in the estate of Andrew M. Moore, deceased, as legatee and distributee under the will of said decedent. The primary purpose of the bill is to compel an accounting between the defendants the Fidelity Trust Company and Walton Pennewill, as executors and testamentary trustees of the estate of said decedent, and the defendant Joseph F. Sinnott, as surviving partner of the deceased in the firm of Moore & Sinnott, of and concerning the partnership affairs. As incidental to such accounting, the bill seeks to have determined what assets and property belonging to the partnership—including the firm name, good will, and trademarks—are undisposed of and still in the hands of Sinnott, and to have the proceeds from the sale thereof or the value thereof brought into the accounting "for application and distribution according to the respective interests of said estate and the said Sinnott therein." The bill charges, in substance, that Sinnott has wholly failed to account as surviving partner, and that the other defendants have neglected to compel him to account, and that such failure and neglect inure to the detriment and injury of the complainant as a beneficiary under the will of said deceased. The bill shows that the will was proved on February 10, 1898, more than six years before the commencement of this suit. In addition to the specific allegations of the bill recited in the opinion of the majority of the court, the bill charges "that the said Sinnott wrongfully claims that the said estate of Andrew M. Moore never did have any interest in or right to said firm name of Moore & Sinnott, or the good will of said business, or said trade-marks or labels, or the right to do business under the name of Moore & Sinnott as successors to John Gibson's Son & Co." Sinnott is not only the surviving partner of Andrew M. Moore, but he is also coexecutor and trustee of his estate with the other defendants.

It seems very clear that the bill presents a case properly cognizable in a court of equity. In Bowsher v. Watkins, 1 Russ. & Mylne, 277, residuary legatees sustained a bill in equity for an account between the executor and the surviving partner of the testator, though collusion between the executor and the surviving partner was neither charged nor proved. In Holland v. Prior, 1 Myl. & Keen, 237, 244, the Lord Chancellor unreservedly sanctioned the decision in Bowsher v. Watkins. In Newland v. Champion, 1 Ves. Sen. 105, 106, the Lord Chancellor said: "Many bills are brought in this court, not only making the representatives parties, but also any other persons who have possessed the specific assets; and there are many instances where the surviving partner is made party that they may have an account of the personal estate entire." Even were it conceded that a bill by one beneficiary interested in the estate of a deceased partner against his surviving partner and personal representative is not maintainable in the absence of special circumstances (as was intimated in Travis v. Milne, 9 Hare, 141), the special circumstances in the present case are quite sufficient to sustain the bill. Upon its averments we have here the element of demand by the complainant upon the two executors to bring the surviving partner to an account of partnership assets in his hands, and their failure so to do. Now, in Lancaster v. Evors, 4 Beav. 158, a creditor of a testatrix was allowed to maintain a bill against the executors and persons claiming a fund on which the testatrix had an equitable demand for the purpose of obtaining payment thereout; the executors having refused to take proceedings for establishing the demand. Moreover, great and inexcusable laches seems justly imputable to the defendants here. Again (as is charged in the bill), the surviving partner, Sinnott, by the sufferance of his codefendants, has been using partnership assets without any account of profits realized by him, and he wrongfully denies that the estate of the decedent has any interest or right in or to those assets. And, finally, Sinnott is a coexecutor with the other defendants of the estate of the deceased. Therefore he is in a very different situation from that of a mere debtor to the estate. He is liable upon the footing of a trust. As

executor he is amenable (as are his coexecutors) to a court of chancery at the suit of one beneficially interested in the estate who seeks discovery and distribution of assets. Thompson v. Brown, 4 Johns. Ch. 619 (per Chancellor Kent). Undoubtedly, "in the court of chancery executors and administrators are considered as trustees, and that court exercises original jurisdiction over them, in favor of creditors, legatees, and heirs, in reference to the proper execution of their trust." Green v. Creighton, 23 How. 90, 106, 16 L. Ed. 419. This ancient and original jurisdiction of courts of equity is vested by the Constitution and laws of the United States in the Circuit Courts of the United States in controversies arising between citizens of different states (Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. 342, 30 L. Ed. 532); and the jurisdiction thus given to the Circuit Courts is the same that the High Court of Chancery in England possessed (Id.; Payne v. Hook, 7 Wall. 425, 430, 19 L. Ed. 260). Now, it is the well-settled doctrine that this equity jurisdiction so conferred upon the courts of the United States cannot be affected by any state legislation. Union Bank v. Jolly, 18 How. 503, 15 L. Ed. 472; Green v. Creighton, supra; Payne v. Hook, supra; Borer v. Chapman, supra. Reaffirming this doctrine in Lawrence v. Nelson, 143 U. S. 215, 223, 12 Sup. Ct. 440, 443 (36 L. Ed. 130), the Supreme Court, speaking by Mr. Justice Gray, declared that "the general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction, cannot be defeated or impaired by laws of a state undertaking to give exclusive jurisdiction to its own courts." The only qualification in the application of this principle is that the Circuit Court of the United States, in the exercise of its jurisdiction over the parties, cannot seize or control property while in the custody of a court of the state (Borer v. Chapman, supra), or "take possession of property in the hands of an administrator appointed by the state court, and thus dispossess that court of its custody" (Byers v. McAuley, 149 U. S. 608, 618, 13 Sup. Ct. 906, 910, 37 L. Ed. 867). The bill in this case does not contemplate or involve the seizure or control or the taking possession of any property in the custody of the state court. The specific partnership assets which the complainant seeks to reach by an accounting are in the hands of Sinnott as surviving partner. Those assets are neither actually nor constructively in the possession or custody of the state court. Sinnott, as surviving partner, is in lawful possession of those assets, and the legal title thereto is in him. He is bound to account therefor to the estate of the deceased. But he refuses to do so, and his coexecutors practically refuse to compel him to account. In this situation the complainant, under the above-cited authorities, had a right, I think, to invoke the equitable interposition of the Circuit Court for relief.

The dismissal of the complainant's bill, it seems to me, was not at all justified by the decision in Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. In that case the assets of the decedent's estate were actually in the hands of the administrator, and his account showing the balance for distribution had been confirmed by the state court, and the cause was set by the state court for final hearing and decree of distribution. In that situation a bill was filed in the Circuit Court of the United States by citizens of other states claiming interests in the assets. The Supreme Court sustained the jurisdiction of the Circuit Court to entertain the bill for the adjudication of the claims of the complainants therein, but held that the Circuit Court should have gone no further, as the filing of the bill did not authorize the Circuit Court "to take bodily the administration of the estate out of the hands of the state court and transfer it to its own forum." The Supreme Court applied to the case the rule that, where property is in the actual possession of a court of competent jurisdiction, such possession cannot be disturbed by process out of another court; the Supreme Court holding that the possession of the decedent's property by the administrator, who had been appointed by the state court, was the possession of that court. Certainly, a court of equity is the appropriate forum for the settlement of an account between partners. If it be conceded that the orphans' court can grant relief to this complainant by surcharging the executors, still equity affords a much better remedy. Miller's Estate, 136 Pa. 349, 20 Atl. 565. Now, although

the Circuit Court, under this bill, might proceed to distribute any balance found due the estate of the decedent (Thompson v. Brown, 4 Johns. Ch. 619), yet the bill does not specifically pray for distribution by the Circuit Court, and such distribution would not necessarily follow the accounting. The bill rather contemplates, and the Circuit Court might well decree, that the balance found due the estate by the surviving partner upon the accounting be paid over to the executors to go into their executorship account for ultimate distribution by the orphans' court. No reasonable objection lies to the grant of relief to that extent under this bill. To say that the jurisdiction of the orphans' court to settle this partnership account excludes the exercise by the Circuit Court of the United States of its equitable jurisdiction is, I think, to repudiate the principles declared by the decisions of the Supreme Court.

END OF CASES IN VOL. 138.

# INDEX.


## ABANDONMENT.

Of child, see "Parent and Child."
Of patent, see "Patents," § 1.

## ABATEMENT AND REVIVAL.

Judgment as bar to another action, see "Judgment," § 3.

## ACCIDENT.

Accident insurance, see "Insurance," §§ 3, 4.
Cause of death, see "Death," § 1.

## ACCOUNT.

Accounting by assignee in bankruptcy, see "Bankruptcy," § 7.
Accounting by executor or administrator, see "Executors and Administrators," § 2.
Accounting by receiver, see "Receivers," § 2.
Accounting in suits for infringement of patent, see "Patents," § 10.
Accounting in suits for infringement of trademark, see "Trade-Marks and Trade-Names," § 1.
Interlocutory judgment for accounting as bar to another suit, see "Judgment," § 3.

## ACTION.

Bar by former adjudication, see "Judgment," § 3.
Jurisdiction of courts, see "Courts."
Malicious actions, see "Malicious Prosecution."

*Actions between parties in particular relations.*

See "Master and Servant," § 1.

*Actions by or against particular classes of parties.*

See "Carriers," §§ 3, 4; "Municipal Corporations," § 4; "States," § 2.
Board of college regents, see "Colleges and Universities."
Corporate officers, see "Corporations," § 3.
Trustees in bankruptcy, see "Bankruptcy," § 5.

*Particular causes or grounds of action.*

See "Collision," § 5; "Death," § 1; "Indemnity"; "Insurance," § 3; "Malicious Prosecution," §§ 1–3; "Negligence," § 1.
Breach of contract, see "Sales," §§ 3, 4.
Enforcement of liability of corporate officers for debts of corporation, see "Corporations," § 3.
Infringement of patent, see "Patents," §§ 8, 10.
Infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 1.
Injuries caused by delay in transportation of live stock, see "Carriers," § 3.
Injuries to goods shipped by vessel, see "Shipping," § 4.
Personal injuries, see "Carriers," § 4; "Highways," § 1; "Master and Servant," § 1; "Railroads," § 1.
Recovery of price paid for goods, see "Sales," § 4.
Unfair competition in trade, see "Trade-Marks and Trade-Names," § 1.

*Particular forms of special relief.*

See "Injunction"; "Specific Performance."
Enforcement of lien, see "Maritime Liens," § 2.
Trial of tax title, see "Taxation," § 7.

*Particular proceedings in actions.*

See "Continuance"; "Costs"; "Damages"; "Depositions"; "Evidence"; "Judgment"; "Parties"; "Reference"; "Removal of Causes"; "Trial."

*Particular remedies in or incident to actions.*

See "Attachment"; "Discovery"; "Injunction"; "Receivers."

*Proceedings in exercise of special jurisdictions.*

Suits in admiralty, see "Admiralty"; "Collision," § 5.
Suits in equity, see "Equity."

*Review of proceedings.*

See "Appeal and Error"; "Exceptions, Bill of"; "Judgment," § 1; "New Trial."

## ACTS OF BANKRUPTCY.

See "Bankruptcy," § 1.

## ADEQUATE REMEDY AT LAW.

Effect on jurisdiction of equity to cancel mining lease, see "Mines and Minerals," § 2.

## ADJUDICATION.

Operation and effect of former adjudication, see "Judgment," §§ 3, 4.

## ADMINISTRATION.

Of estate of bankrupt, see "Bankruptcy," § 4.
Of estate of decedent, see "Executors and Administrators."
Of property by receiver, see "Receivers," § 1.

## ADMIRALTY.

See "Collision"; "Maritime Liens"; "Salvage"; "Seamen"; "Shipping"; "Towage."
Applicability of rules of admiralty to internal revenue proceedings, see "Internal Revenue."
Authority of consular officers over maritime matters, see "Ambassadors and Consuls."

**§ 1. Jurisdiction.**

A citizen of the United States cannot be deprived by treaty of his constitutional right to invoke the jurisdiction of the national courts of admiralty to determine a cause within the admiralty and maritime jurisdiction, to which he is a party and which is cognizable within the United States.—The Neck (D. C.) 144.

**§ 2. Parties, process, claims, and stipulations or other security.**

On a summary motion on the pleadings to vacate the attachment of a vessel for manifest want of equity on the part of the libelant, filed pursuant to admiralty rule 35 of the District Court of the District of Washington, the truth of the new facts alleged in the answer cannot be assumed, being deemed denied under general admiralty rule 51.—The Celtic Monarch (C. C. A.) 711; The Sea Lion, Id.

*In fixing the amount of the stipulation for the release of a libeled vessel, where there is a dispute as to its value, which is less than libelant's claim, the bond will be required for the highest amount, subject to the right of the claimant on final hearing to prove the value to which libelant's recovery will be limited.—The Twilight (D. C.) 1005; The Mary J. Walker, Id.

## ADMISSIONS.

In pleading, see "Equity," § 4.

## ADVERSE POSSESSION.

**§ 1. Operation and effect.**

Where an unincorporated religious society had claimed and occupied land in controversy for more than 30 years, it would be presumed that the lost deed, under which it claimed title, conveyed the land to trustees for the society's benefit.—Penny v. Central Coal & Coke Co. (C. C. A.) 769.

*A religious society having had uninterrupted possession of land in controversy for 30 years or more, it would be presumed, in the absence of a deed, that its entry was under a purchase and that its grantor had a lawful right to convey.—Penny v. Central Coal & Coke Co. (C. C. A.) 769.

## AFFIDAVITS.

See "Depositions."
In extradition proceedings, see "Extradition," § 1.

## AFFREIGHTMENT.

Contracts, see "Shipping," § 4.

## AFTER-ACQUIRED PROPERTY.

Effect of street railroad mortgage, see "Street Railroads," § 1.

## AGREEMENT.

See "Contracts."

## AGRICULTURE.

Agricultural colleges, see "Colleges and Universities."
Irrigation, see "Waters and Water Courses," § 1.

## ALIENS.

See "Indians."
Removal of suits by or against aliens to United States court, see "Removal of Causes," § 1.
Right of action by, for wrongful death, see "Death," § 1.

**§ 1. Exclusion or expulsion.**

*The marriage of a Chinese slave girl, whose entry into the United States was secured by fraud, to a Chinese laborer resident in this country, *held* no defense to proceedings for her deportation.—United States v. Ah Sou (C. C. A.) 775.

The fact that the deportation of a Chinese slave girl, illegally brought into this country for purposes of prostitution by her master, from whom she subsequently escaped, would result in remanding her to slavery and degradation, affords no ground upon which the courts can refuse to enforce the statute.—United States v. Ah Sou (C. C. A.) 775.

## AMBASSADORS AND CONSULS.

The surety on the bond of a consular officer cannot be held liable for the statutory penalty incurred by the principal, under Rev. St. § 1723 [U. S. Comp. St. 1901, p. 1185], for charging excessive fees, where such fees, including the excess, have been charged against him in his account and paid to the Treasury Department.—United States v. Ballantine (C. C. A.) 312.

Article 13 of the treaty of December 11, 1871, between the German Empire and the United States (17 Stat. 928), which gives consular officers of the respective parties exclusive jurisdiction of differences between captains and crews of their own nation, does not exempt a German ship employing seamen in a port of the United States from the obligation to observe the provisions of Act Dec. 21, 1898, c. 28, § 24, 30 Stat. 763 [U. S. Comp. St. 1901, p. 3079]; nor does it deprive courts of admiralty of the United States of jurisdiction to determine the rights of an American seaman thereon who entered and left the service in this country.—The Neck (D. C.) 144.

## AMENDMENT.

*Of particular legal proceedings.*

Petition in bankruptcy, see "Bankruptcy," § 1.
Pleading in condemnation proceedings, see "Eminent Domain."
Specifications of objections to discharge in bankruptcy, see "Bankruptcy," § 7½.

## AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Courts," § 3.
Jurisdictional amount on appeal in bankruptcy, see "Bankruptcy," § 8.

## AMUSEMENTS.

Negligence in conducting amusement grounds, see "Negligence," § 1.

## ANIMALS.

Adoption by federal court of state laws as rules of decision in action for breach of contract for transportation of, see "Courts," § 5.
Carriage of live stock, see "Carriers," § 3.

## ANSWER.

In pleading, see "Equity," § 2.

## APPEAL AND ERROR.

See "Exceptions, Bill of"; "New Trial."
Affirmance of interlocutory judgment on appeal as bar to another suit, see "Judgment," § 3.
Appellate jurisdiction of particular courts, see "Courts," §§ 6, 7.
Review in special proceedings, see "Bankruptcy," § 8; "Habeas Corpus," § 2.

**§ 1. Nature and form of remedy.**

*An appeal is not the appropriate remedy for reviewing alleged errors committed on the trial of an action at law, and will not be entertained.—Roberts v. Great Northern Ry. Co. (C. C. A.) 711.

**§ 2. Record and proceedings not in record.**

On appeal in an equity case, recourse cannot be had to an opinion filed by the court below to ascertain the facts, where there is no evidence in the record; and, where the case was decided on issues of fact, it cannot be reviewed.—Townsend v. Beatrice Cemetery Ass'n (C. C. A.) 381.

**§ 3. Review.**

Where improper evidence is received, the presumption is that it was prejudicial.—National Biscuit Co. v. Nolan (C. C. A.) 6.

An objection that a verdict is excessive will not be reviewed by the Circuit Court of Appeals.—Cook v. Proskey (C. C. A.) 273.

On appeal from a decree in chancery, it will be presumed that the findings of the trial judge on conflicting evidence are correct, unless an obvious error has intervened.—Big Six Development Co. v. Mitchell (C. C. A.) 279.

Where a bill of exceptions was settled and certified, though not served and filed, as required by Circuit Court rules 23, 26, a motion to strike the same would be denied.—City of Seattle v. Board of Home Missions of Methodist Protestant Church (C. C. A.) 307.

It is not ground for the dismissal of an appeal that decrees in other suits between the parties involving the same issues were entered subsequent to the one appealed from and based upon that decree, from which no appeals were taken.—Copper River Min. Co. v. McClellan (C. C. A.) 333.

A motion for continuance is addressed to the sound discretion of the court, and its action thereon is not reviewable, unless there has been an abuse of discretion.—Copper River Min. Co. v. McClellan (C. C. A.) 333.

In an action to recover the value of timber alleged to have been wrongfully cut from the public domain, defendant *held* not prejudiced by the admission of evidence that certain timber in the vicinity had been sold by the state for $2.10 per thousand.—Lynch v. United States (C. C. A.) 535.

**§ 4. Liabilities on bonds and undertakings.**

An appeal *held* to have been prosecuted to effect within the meaning of the condition of the supersedeas bond.—Crane v. Buckley (C. C. A.) 22.

## APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 1.

## APPORTIONMENT.

Of salvage compensation, see "Salvage," § 1.

## ARBITRATION AND AWARD.

See "Reference."

## ASSESSMENT.

Of damages, see "Damages," § 2.
Of damages for injuries caused by public improvement, see "Municipal Corporations," § 1.
Of tax, see "Taxation," § 3.

## ASSIGNMENTS.

Champertous assignments, see "Champerty and Maintenance."
For benefit of creditors, see "Assignments for Benefit of Creditors."
In bankruptcy, see "Bankruptcy," § 2.

*Transfers of particular species of property, rights, or instruments.*

See "Insurance," § 2; "Patents," § 8.
Corporate shares, see "Corporations," § 1.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy."

**§ 1. Accounting, settlement, and discharge of assignee.**

*An allowance of 5 per cent. to an assignee of an insolvent on the money handled by him was reasonable.—Drey v. Watson (C. C. A.) 792.

## ASSOCIATIONS.

See "Trade Unions."

## ASSUMPTION.

Of risk by employé, see "Master and Servant," § 1.

## ASYLUMS.

The action of a board of trustees of a hospital in postponing the election of a physician on the expiration of the term of the incumbent *held* not to amount to an implied contract of reemployment for another term.—Taber v. Trustees of State Hospital for Insane of Southeastern Dist. of Pennsylvania (C. C. A.) 865.

## ATTACHMENT.

Against municipal corporations, see "Municipal Corporations," § 4.

**§ 1. Liabilities on bonds or undertakings.**

Where a redelivery bond in attachment was executed to the receiver of a corporation, his successors and assigns, a termination of the receivership did not discharge the surety from liability on the bond.—American Surety Co. v. Campbell & Zell Co. (C. C. A.) 531.

Where a redelivery bond in attachment was given to indemnify the receiver of a corporation, his successors and assigns, the corporation, on termination of the receivership, *held* entitled to prosecute an action on the bond.—American Surety Co. v. Campbell & Zell Co. (C. C. A.) 531.

## ATTORNEY AND CLIENT.

Absence of counsel ground for continuance, see "Continuance."

Attorney's fees, in receivership proceedings, see "Receivers," § 2.

## BAILMENT.

See "Carriers," § 2.

## BANKRUPTCY.

See "Assignments for Benefit of Creditors."

Discovery in bankruptcy proceedings, see "Discovery," § 1.

Failure to plead discharge in bankruptcy as ground for opening or vacating judgment, see "Judgment," § 1.

Privilege of witness in bankruptcy proceedings, see "Witnesses," § 2.

**§ 1. Petition, adjudication, warrant, and custody of property.**

Where the validity of the claim of a petitioning creditor in involuntary bankruptcy proceedings is put in issue by the bankrupt's answer, and the issue is heard upon evidence and determined in favor of the creditor, such adjudication is conclusive upon the bankrupt and all other creditors.—Ayres v. Cone (C. C. A.) 778.

Evidence considered, and *held* insufficient to establish the existence of a partnership between the defendants in involuntary proceedings in bankruptcy as alleged in the petition.—Jones v. Burnham, Williams & Co. (C. C. A.) 986.

*To sustain proceedings in involuntary bankruptcy against a person as a partner in a firm, a partnership in fact must be shown, and the burden of proof on the issue rests upon the petitioners.—Jones v. Burnham, Williams & Co. (C. C. A.) 986.

Under Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], an insolvent having made a valid equitable assignment of certain insurance policies while solvent, a subsequent legal assignment thereof after loss, when he was insolvent, did not constitute an act of bankruptcy, within Bankr. Act July 1, 1898, c. 541, § 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422].—Wilder v. Watts (D. C.) 426.

Facts *held* to require denial of leave to amend an involuntary bankruptcy petition, alleging acts of bankruptcy occurring subsequent to those alleged in the original petition.—Wilder v. Watts (D. C.) 426.

Where two petitions in involuntary bankruptcy were filed against a corporation, each alleging the same act of bankruptcy in the appointment of receivers of the corporation, and both petitions were defective, and the petitioning creditors took part in the proceedings in which the receivers were appointed, and there was no evidence that the corporation was insolvent within the bankruptcy act, and the estate was in course of administration, applications to amend petitions should be denied, and the petitions dismissed.—Woolford v. Diamond State Steel Co. (D. C.) 582; Madeira Hill & Co. v. Same, Id.

Where petitions in involuntary bankruptcy against a corporation were defective, and the corporation was in the hands of a receiver, leave to amend should not be granted, though, if the petitions had not been defective, the petitioners would have had a right to support them by evidence, and, if successful, to have the corporation adjudged bankrupt.—Woolford v. Diamond State Steel Co. (D. C.) 582; Madeira Hill & Co. v. Same, Id.

A partnership is not insolvent, within the meaning of Bankr Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], when the property of the partnership, together with

that of the individual members, exceeds in value the indebtedness of the firm and members.—In re Perley & Hays (D. C.) 927.

Consummation of an act of bankruptcy by the bankrupt's failing to dissolve a levy creating a preference, as provided by Bankr. Act 1898, c. 541, § 3, cl. 3, 30 Stat. 546 [U. S. Comp. St. 1901, § 3422], held five days before the day of sale.—In re National Hotel & Cafe Co. (D. C.) 947.

**§ 2. Assignment, administration, and distribution of bankrupt's estate —Assignment, and title, rights, and remedies of trustee in general.**

A trust deed, executed by a corporation to secure debts not due, *held* not an absolute conveyance, but that the grantor retained an interest in the property, which passed to a trustee in bankruptcy.—In re Jersey Island Packing Co. (C. C. A.) 625.

The title to vessels which at the time of bankruptcy were in the bankrupt's shipyard in various stages of construction under contracts requiring payments to be made as the work progressed, which had been made, and providing that title should vest as such payments were made, *held* to be in the several petitioners for whom the vessels were being built.—In re MacDonald (D. C.) 463.

**§ 3. —— Preferences and transfers by bankrupt, and attachments and other liens.**

A bankrupt's trustee *held* entitled to refuse to take possession of mortgaged property, if its value did not exceed the lien, or sell the same for the benefit of general creditors after satisfying such lien.—In re Jersey Island Packing Co. (C. C. A.) 625.

Bankr. Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], *held* to state an exception to the rule that a trustee takes no better title to the bankrupt's property than the bankrupt possessed.—In re Lukens (D. C.) 188.

A mortgagee of land in Pennsylvania, having failed to record his mortgage prior to the mortgagor's bankruptcy, *held* not entitled to payment in full from the proceeds of the mortgaged property against the mortgagor's general creditors.—In re Lukens (D. C.) 188.

Creditors of a bankrupt *held* not entitled to a distribution of funds arising from the sale of certain of the bankrupt's real estate on which the bankrupt had executed deeds of trust according to Code W. Va. 1899, c. 74, § 2.—In re Porterfield (D. C.) 192.

A deed of trust, executed by a bankrupt to his wife more than four months prior to the filing of the bankruptcy petition, *held* sustainable as a valid lien to the extent of the amount secured thereby.—In re Porterfield (D. C.) 192.

A suit under Code W. Va. 1899, c. 74, § 2, brought within four months of the filing of a petition in bankruptcy, *held* void as a proceeding for the institution of a lien, within Bankr. Act July 1, 1898, c. 541, § 67, cl. "f," 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450].—In re Porterfield (D. C.) 192.

The validity of a chattel mortgage as a lien on a bankrupt's assets as to all the parties is a local question, to be determined by the decisions of the state courts.—In re Beede (D. C.) 441.

Where a chattel mortgage was not filed until two days prior to the mortgagor's adjudication in bankruptcy, creditors recovering judgment and execution both prior to and after such adjudication on claims existing during the time the mortgage was unfiled *held* entitled to a prior lien on the mortgaged property as against the mortgagee and his assignee in good faith.—In re Beede (D. C.) 441.

The filing of a bankruptcy petition and a bankruptcy adjudication *held* not to prevent existing creditors from proceeding to reduce their claims to judgment and execution against the holder of an unfiled chattel mortgage executed by the bankrupt.—In re Beede (D. C.) 441.

Transfer of a bankrupt's mortgaged personalty to his trustee by operation of law *held* not to extinguish the right of creditors to attack the invalidity of the mortgage for nonfiling as to the mortgagee and his assignee.—In re Beede (D. C.) 441.

A bankrupt's trustee *held* subrogated to the rights of judgment creditors as against the holder of a chattel mortgage, void for nonfiling within a reasonable time, and therefore entitled to the proceeds of the property for the benefit of the bankrupt's estate.—In re Beede (D. C.) 441.

Bankr. Act July 1, 1898, § 67, subds. "a," "b," c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], *held* to apply to judgments obtained by a creditor of a bankrupt after as well as prior to adjudication.—In re Beede (D. C.) 441.

*Reasonable cause to believe that a preference was intended by a payment by a bankrupt does not require either actual knowledge or actual belief, but only such surrounding circumstances as would lead an ordinarily prudent business man to so believe.—Sundheim v. Ridge Avenue Bank (D. C.) 951.

Evidence *held* insufficient to sustain an adverse claim to property in possession of the bankrupt on the ground that he obtained it by fraud.—In re Hess (D. C.) 954.

**§ 4. —— Administration of estate.**

An order requiring a surplus collected on certain accounts assigned by bankrupts to their trustee, notwithstanding a further assignment of such surplus to another, who took no steps to assert his claim thereto before the referee, *held* proper.—In re Wiesen Bros. (D. C.) 164.

An adjudication in bankruptcy draws to the bankruptcy court jurisdiction to administer all of the property of the bankrupt, even though it may be subject to a valid lien acquired by the levy of an execution thereon more than four months prior to the bankruptcy.—In re Baughman (D. C.) 742.

A referee in bankruptcy, on ruling that certain questions which a witness refused to an-

swer, etc., were improper, *held* not bound, at the request of one of the parties, to certify the witness' alleged contempt to the court for decision. —In re Romine (D. C.) 837.

Under Gen. Bankr. Order 27 (89 Fed. xi, 32 C. C. A. xxvii), a referee, on sustaining objections to questions asked of a witness on the taking of his deposition before him, *held* not bound to certify such rulings to the court for revision.—In re Romine (D. C.) 837.

Under Gen. Bankr. Order 22 (89 Fed. x, 32 C. C. A. xxv), a referee, in taking testimony, must have it taken down, and, on objection, set out the question, the objection, his ruling, and then allow the question to be answered, though his ruling be adverse.—In re Romine (D. C.) 837.

Where a bankrupt constructed an addition to a building on leased ground, whether the building was a fixture as against the landlord could not be determined, in advance of a sale of the bankrupt's assets and an attempt to sever. —In re Gorwood (D. C.) 844.

The president and treasurer of a bankrupt corporation, on his examination before the referee, may properly be required to make known to the trustee the combination of a safe owned by the corporation and alleged to contain assets.—In re Hooks Smelting Co. (D. C.) 954.

**§ 5. —— Actions by or against trustee.**

A court of bankruptcy *held* to have jurisdiction to restrain the threatened sale of all of the assets of a bankrupt corporation on the foreclosure of a trust deed, under Bankr. Act July 1, 1898, c. 541, § 2, cl. 15, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421].—In re Jersey Island Packing Co. (C. C. A.) 625.

A Circuit Court is without jurisdiction of a suit in equity against trustees in bankruptcy to require them to pay over the proceeds of property claimed by complainant, but which was sold by defendant under an order of the bankruptcy court as assets of a bankrupt estate.—Treat v. Wooden (C. C.) 934.

Instructions considered and approved in an action by a trustee in bankruptcy to recover the value of property alleged to have been transferred by the bankrupt with intent to hinder, delay, and defraud his creditors.—Montgomery v. McNicholas (D. C.) 956.

**§ 6. —— Claims against and distribution of estate.**

Creditors of a bankrupt, who desire to contest the claim of another creditor, as parties in interest, under Bankr. Act July 1, 1898, c. 541, § 57d, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], must file objections on their own account, and cannot become parties to the issue by formally adopting objections filed by the bankrupt; nor can they contest the claim on an appeal taken by the trustee in which they do not join.—Ayres v. Cone (C. C. A.) 778.

On presentation of a claim against a bankrupt's estate, pleadings other than the verified claim provided for by Bankr. Act July 1, 1898, c. 541, § 57, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], are unauthorized.—In re Carter (D. C.) 846.

Where a claim against a bankrupt's estate was in proper form and duly verified, except in particulars waived, the burden of proof was shifted to the objectors.—In re Carter (D. C.) 846.

Facts *held* insufficient to sustain a finding that a debt sought to be proved in bankruptcy proceedings was that of the bankrupt's wife, and not that of the bankrupt.—In re Carter (D. C.) 846.

Under Bankr. Act July 1, 1898, c. 541, § 57i, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], where a wife became surety for her husband, who became a bankrupt, she was either entitled to prove the claim in the name of the creditor, in case of its failure so to do, or to pay the debt and be subrogated to the creditor's rights to the husband's estate in bankruptcy.—In re Carter (D. C.) 846.

An arrangement between a claimant against a bankrupt and the corporation organized to continue the bankrupt's business *held* not to operate as a payment of the claim, nor preclude the claimant from proving the same against the bankrupt's estate.—Haas-Baruch & Co. v. Portuondo (D. C.) 949.

In a suit by a bankrupt's trustee to recover an alleged preference, whether defendant had reasonable cause to believe a preference was intended *held* a question for the jury.—Sundheim v. Ridge Avenue Bank (D. C.) 951.

**§ 7. —— Accounting and discharge of trustee.**

A petition of a creditor to review a referee's order of distribution as to commissions allowed the trustee, filed long after the time fixed therefor by rule of court, and after the commissions have been approved at a creditors' meeting and paid, will not be entertained.—In re Scherr (D. C.) 695.

**§ 7½. Rights, remedies, and discharge of bankrupt.**

*An averment, in a petition for revocation of the discharge of a bankrupt, merely that petitioners are "creditors" of the bankrupt, is insufficient to show that they are "parties in interest," entitled to object to the discharge, or to file such petition, under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411].—In re Chandler (C. C. A.) 637.

Where specifications of objection to a bankrupt's discharge filed with a referee were not sufficiently specific, the referee's only duty was to report back to the court that no specifications had been filed sufficient to require the taking of testimony.—In re Hendrick (D. C.) 473.

A bankrupt, though entitled to file papers in resistance of specifications against his discharge, is not bound to do so.—In re Hendrick (D. C.) 473.

Specifications of objections to a bankrupt's discharge *held* amendable to cure a defect in form.—In re Hendrick (D. C.) 473.

***Point annotated. See syllabus.**

Under Bankr. Act July 1, 1898, c. 541, § 7, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], a bankrupt *held* absolutely required to attend the hearing of objections to his application for a discharge before the referee on the demand of the objecting creditors.—In re Shanker (D. C.) 862.

A bankrupt's exemption in horses, wagon, etc., determined under V. S. 1805.—In re Grady (D. C.) 935.

**§ 8. Appeal and revision of proceedings.**

Proceedings on a trial by jury of the issues joined on a petition in involuntary bankruptcy are not subject to review by appeal, but only on writ of error.—Bower v. Holzworth (C. C. A.) 28.

Amounts in controversy *held* insufficient to sustain an appeal by a bankrupt's trustee to the Circuit Court of Appeals from a judgment confirming a referee's finding with reference to claims for services paid by the referee and for unpaid bills against the estate, under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432].—Gray v. Grand Forks Mercantile Co. (C. C. A.) 344.

Where a bankrupt's trustee appealed from a judgment sustaining a referee's order allowing certain payments and claims for expenses and attorney's fees as modified, and rejecting other claims of the trustee, the persons entitled to the proceeds were necessary parties to the appeal, and, not being represented by the trustee, the appeal should be dismissed.—Gray v. Grand Forks Mercantile Co. (C. C. A.) 344.

Where appellant's counsel made no application for an alias citation to bring in necessary parties to an appeal until two full terms had elapsed and the appeal had become inoperative as to them, the defect could not be cured.—Gray v. Grand Forks Mercantile Co. (C. C. A.) 344.

Where it did not appear that original securities were attached to a claim against a bankrupt's estate as required by the bankrupt law, but no objection was taken, it would be presumed that such original securities were present at the trial, or their presence waived.—In re Carter (D. C.) 846.

## BAR.

Of action by former adjudication, see "Judgment," § 3.

## BEQUESTS.

See "Wills."

## BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

## BOARD.

Of college regents, see "Colleges and Universities."

## BONA FIDE PURCHASERS.

Of municipal bonds, see "Municipal Corporations," § 3.
Of public lands, see "Public Lands," § 2.

## BONDS.

Bond of consul, see "Ambassadors and Consuls."
Bonds in legal proceedings, see "Appeal and Error," § 4; "Attachment," § 1.
Liabilities of sureties on bonds under revenue laws, see "Internal Revenue."
Municipal bonds, see "Municipal Corporations," § 3.
Street railroad bonds, see "Street Railroads," § 1.
Validity of bonds of water company, see "Waters and Water Courses," § 1.

## BREACH.

Of condition, see "Insurance," § 4.
Of contract, see "Contracts," § 3; "Sales," § 2.
Of covenant, see "Insurance," § 4.
Of warranty, see "Insurance," §§ 3, 4.

## BRIBERY.

Under Rev. St. U. S. § 2058, and Act Cong. Feb. 28, 1891, 26 Stat. 795, c. 383, § 3 (Supp. Rev. St. U. S. pp. 897, 898), an Indian agent, receiving money to influence his official action on the execution and completion of Indian leases, *held* subject to punishment for bribery, under section 5501, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3709].—Sharp v. United States (C. C. A.) 878.

An indictment against an Indian agent for bribery *held* not defective for failure to set out the matter with reference to which the bribery was charged with greater certainty.—Sharp v. United States (C. C. A.) 878.

## BRIDGES.

Railroad bridge company taxed as railroad, see "Taxation," § 3.

## BROKERS.

Enjoining sale of nontransferable tickets by ticket brokers, see "Injunction," § 2.

## CANCELLATION OF INSTRUMENTS.

Cancellation of mining lease, see "Mines and Minerals," § 2.
Cancellation of street railroad lease, see "Street Railroads," § 1.
Setting aside tax deed, see "Taxation," § 7.

## CARGO.

See "Shipping."

## CARRIERS.

Adoption by federal court of state laws as rules of decision in action for breach of cattle transportation contract, see "Courts," § 5.
Carriage of goods by vessels, see "Shipping," § 4.
Carriage of passengers by vessels, see "Shipping," § 5.
Enjoining sale of nontransferable tickets, see "Injunction," § 2.
Interstate commerce regulations, see "Commerce," § 1.
Parol or extrinsic evidence relating to contract of, see "Evidence," § 3.
Res gestæ in action for delay of shipment, see "Evidence," § 1.

**§ 1. Control and regulation of common carriers.**

*The only authority of the federal court to issue mandamus to prevent unjust discrimination by an interstate carrier is conferred by Act Cong. March 2, 1889, c. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3157], supplementary to the interstate commerce act, and its amendments.—United States v. Norfolk & W. Ry. Co. (C. C.) 849.

A mandamus proceeding to compel an interstate railroad to furnish relator with an equitable distribution of cars, according to a proportionate basis agreed on between the railroad, relator, and other shippers, *held* a proceeding to enforce a contractual obligation, and not to prevent discrimination, under Interstate Commerce Act, as amended by Act Cong. March 2, 1889, c. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3157], and therefore unsustainable.—United States v. Norfolk & W. Ry. Co. (C. C.) 849.

**§ 2. Carriage of goods.**

The general rule is that, the greater the tonnage to be transported, the lower should be the freight charges therefor.—Tift v. Southern Ry. Co. (C. C.) 753.

The reasonableness of a freight rate is a question for judicial investigation.—Tift v. Southern Ry. Co. (C. C.) 753.

Reasonable compensation for the service actually rendered is all that a common carrier can exact.—Tift v. Southern Ry. Co. (C. C.) 753.

Where a vast increase of lumber traffic had resulted in a large increase of net revenue to the carrier, and the service was inexpensive, and the industry afforded a tonnage second in magnitude to any transported by the carrier, an arbitrary increase to points of destination of two cents a hundred is unreasonable and unlawful.—Tift v. Southern Ry. Co. (C. C.) 753.

Railroads have no right to regulate their charges in proportion to the prosperity which attends industries whose products they transport.—Tift v. Southern Ry. Co. (C. C.) 753.

Where an association of railroads arbitrarily and unreasonably increased the rate of transportation of lumber within the territory covered by their agreement, the enforcement will be enjoined, and a reference will be had to ascertain the amount improperly collected from complainants, and a decree rendered therefor.—Tift v. Southern Ry. Co. (C. C.) 753.

**§ 3. Carriage of live stock.**

In an action for damages to cattle by delays in transportation, a requested instruction that each of the delays must be considered by itself, etc., *held* properly refused.—Northern Pac. Ry. Co. v. Kempton (C. C. A.) 992.

In an action for damages to cattle by delay in transportation, an instruction on the doctrine of "res ipsa loquitur" *held* not error.—Northern Pac. Ry. Co. v. Kempton (C. C. A.) 992.

In an action for delay in transporting live stock, evidence *held* to justify an instruction that the jury should consider the question whether cattle transported in more than ten car loads were or were not hauled by regular freight trains or special trains made up for that purpose.—Northern Pac. Ry. Co. v. Kempton (C. C. A.) 992.

**§ 4. Carriage of passengers.**

Injuries to a passenger, by derailment of the car in which he was riding while passing over a switch, created a presumption of negligence on the part of the carrier.—Minahan v. Grand Trunk Western Ry. Co. (C. C. A.) 37.

In an action for injuries to a passenger by derailment of the car in which he was riding as it passed over a switch, conflicting evidence as to the cause of the defective switch *held* to present a question for the jury.—Minahan v. Grand Trunk Western Ry. Co. (C. C. A.) 37.

## CAUSE OF ACTION.

See "Malicious Prosecution," § 1.

## CHAMPERTY AND MAINTENANCE.

Assignments of claims against an insolvent corporation, for the purpose of enabling the assignees to participate in a suit against promoters and execute a bond for costs and expenses in consideration of 30 per cent. of the amount recovered, *held* not champertous.—McEwen v. Harriman Land Co. (C. C. A.) 797.

## CHANCERY.

See "Equity."

## CHARACTER.

Of witness, see "Witnesses," § 3.

## CHARGE.

By carrier, see "Carriers," § 2.
To jury in civil actions, see "Trial," § 2.

## CHARTER PARTIES.

See "Shipping," § 2.

## CHATTEL MORTGAGES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 3.
Priority of tax on proceeds of chattel mortgage sale, see "Taxation," § 4.

**§ 1. Rights and remedies of creditors.**
Where a chattel mortgage, executed and delivered, was not filed within a reasonable time, and possession was not delivered, the mortgage was void as to all creditors of the mortgagor then existing or becoming such while the mortgage remained unfiled.—In re Beede (D. C.) 441.

## CHILD.

See "Parent and Child."

## CHINESE.

Exclusion or expulsion, see "Aliens," § 1.

## CHOCTAWS.

See "Indians."

## CHURCH.

See "Religious Societies."

## CIRCUIT COURTS.

See "Courts," § 7.

## CIRCUIT COURTS OF APPEALS.

See "Courts," § 6.
Review of findings of referee in bankruptcy, see "Bankruptcy," § 8.

## CITIES.

See "Municipal Corporations."

## CITIZENS.

See "Aliens"; "Indians."
Citizenship ground of jurisdiction of United States courts, see "Removal of Causes," § 1.
Equal protection of laws, see "Constitutional Law," § 3.

## CIVIL RIGHTS.

See "Constitutional Law," § 3.

## CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 6.

## COLLATERAL UNDERTAKING.

See "Guaranty."

## COLLECTION.

Of estate of decedent, see "Executors and Administrators," § 1.
Of taxes, see "Taxation," § 6.

## COLLEGES AND UNIVERSITIES.

Under a statute incorporating the Board of Regents of the Kansas Agricultural College, it was subject to suit for breach of contract, though no funds had been appropriated by the Legislature to meet the claim on which the action was based.—Ward v. Board of Regents of Kansas State Agricultural College (C. C. A.) 372.

The board of regents of the Kansas Agricultural College, having statutory authority to remove a professor whenever the interests of the college require, *held* not liable for a breach of a professor's contract by his discharge before termination of the contract period.—Ward v. Board of Regents of Kansas State Agricultural College (C. C. A.) 372.

In the absence of fraud or bad faith, the grounds for the removal of a professor prior to the expiration of his contract period of employment by the Board of Regents of the Kansas Agricultural College *held* not a proper cause for judicial investigation.—Ward v. Board of Regents of Kansas State Agricultural College (C. C. A.) 372.

Under a statute incorporating the board of regents in the Kansas Agricultural College, a contract for the employment of a professor for 2½ years *held* not void as unreasonably long.—Ward v. Board of Regents of Kansas State Agricultural College (C. C. A.) 372.

## COLLISION.

Liability of railroad company for injuries to employé caused by collision between trains, see "Master and Servant," § 1.

**§ 1. Rules and precautions for preventing collisions in general.**
The law makes no exception in favor of passenger steamers running regularly on schedule time on an established route, and for injuries resulting from excessive speed, in violation of the rules prescribed to insure safety to vessels and passengers, they must render compensation to the injured.—The Bellingham (C. C.) 619; The Dode, Id.; The Flyer, Id.

**§ 2. Steam vessels meeting or crossing.**
Two steamboats, one with a tow alongside, both *held* in fault for a collision in the harbor of Seattle while on crossing courses in a fog, one for excessive speed, and the other for not waiting until the first had passed, having knowledge of her approach and her usual course.—The Bellingham (C. C.) 619; The Dode, Id.; The Flyer, Id.

**§ 3. Vessels in tow.**
Two tugs, each with two scows in tow tandem on long hawsers, both *held* in fault for a collision between the tows when meeting in upper New

York Bay.—The Bee (C. C. A.) 303; The Alfred W. Booth, Id.

A steamer *held* in fault for a collision at night with a dredge anchored in the Savannah river and carrying proper lights indicating that vessels should pass to the north of her, where there was 500 feet of deep water.—The City of Birmingham (C. C. A.) 555; Ocean S. S. Co. v. P. Sandford Ross, Id.

A dredge anchoring at night without necessity within 200 feet of the center of the narrow channel of a river, where, owing to bends and the tide, it is of difficult navigation, obstructs the passage of other vessels, in violation of Act March 3, 1899, c. 425, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543] and is chargeable with contributory fault for a collision with a passing vessel.—The City of Birmingham (C. C. A.) 555; Ocean S. S. Co. v. P. Sandford Ross, Id.

A steamship *held* liable for an injury to a small steamer by striking a line which the ship had stretched across a slip and had negligently failed to mark by a light, or to otherwise give warning of its presence.—The Roma (D. C.) 218.

**§ 4. Narrow channels, harbors, rivers, and canals.**

The entire body of water of upper New York Bay, through which two substantially parallel channels have been officially designated, running from the mouths of the rivers to the Narrows, is not to be considered as a single narrow channel, within the meaning of article 25 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2883]).—The Bee (C. C. A.) 303; The Alfred W. Booth, Id.

A transfer tug, with two car floats in tow alongside, *held* solely in fault for a collision between one of such floats and a meeting schooner in tow on a hawser, which took place in East river between the Bronx shore and North Brothers Island, on the ground that the tug was unnecessarily on the wrong side of the channel.—The Transfer No. 10 (D. C.) 221.

A tug *held* in fault for a collision between her tow and a meeting propeller, on the ground that, after making an agreement by signal to pass to the right, she failed to keep her tow to the right side of the channel.—The S. S. Wyckoff (D. C.) 418; The Gertrude, Id.

**§ 5. Suits for damages.**

Damages divided in suit for collision, where both vessels were in fault.—The Bellingham (C. C.) 619; The Dode, Id.; The Flyer, Id.

## COLLUSION.

Equitable relief from judgment obtained by collusion, see "Judgment," § 2.

## COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

## COMBINATIONS.

See "Monopolies," § 1.

## COMITY.

Between courts, see "Courts," § 8.

## COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."
Right of railroad commission to regulate train service, see "Railroads," § 1.
Right to restrain railroad commission from interfering with interstate commerce, see "States," § 2.

**§ 1. Interstate commerce commission.**

The interstate commerce commission is an expert tribunal charged by law with the determination of the reasonable or unreasonable character of the rate charged for transportation in interstate commerce.—Tift v. Southern Ry. Co. (C. C.) 753.

*Explicit law, the settled policy of the government, and the practical principles of justice require that the national courts should not discredit the conclusions of the interstate commerce commission.—Tift v. Southern Ry. Co. (C. C.) 753.

*The findings of fact set forth in the report of the interstate commerce commission are in all judicial proceedings prima facie evidence as to each fact found.—Tift v. Southern Ry. Co. (C. C.) 753.

The act to regulate commerce creates a rule of presumption in favor of the report of the interstate commerce commission, which casts the burden of proof upon the party against whom the report is made.—Tift v. Southern Ry. Co. (C. C.) 753.

## COMMISSION.

Interstate commerce commission, see "Commerce," § 1.
To take proofs in equity, see "Equity," § 3.

## COMMISSIONERS.

Railroad commissioners, see "Railroads," § 1.

## COMMISSIONS.

Of assignee for benefit of creditors, see "Assignments for Benefit of Creditors," § 1.
Of receiver, see "Receivers," § 2.
Of trustee in bankruptcy, see "Bankruptcy," § 7.

## COMMON CARRIERS.

See "Carriers."

## COMMON LAW.

Right of action for wrongful death, see "Death," § 1.

## COMPENSATION.

Of assignee for benefit of creditors, see "Assignments for Benefit of Creditors," § 1.
Of receiver, see "Receivers," § 2.

## COMPETENCY.

Of experts as witnesses, see "Evidence," § 4.
Of witnesses in general, see "Witnesses," § 1.

## COMPETITION.

Unfair competition, see "Trade-Marks and Trade-Names," § 1.

## COMPUTATION.

Of interest, see "Interest," § 1.

## CONDEMNATION.

Taking property for public use, see "Eminent Domain."

## CONDITIONS.

In insurance policies, see "Insurance," § 4.

## CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 1.

## CONFLICT OF LAWS.

Conflicting jurisdiction of courts, see "Courts," § 8.

## CONSPIRACY.

Combinations to monopolize trade, see "Monopolies," § 1.

## CONSTITUTIONAL LAW.

*Provisions relating to particular subjects.*

See "Eminent Domain," § 1; "Extradition," § 1; "Habeas Corpus," § 1; "Licenses," § 1; "Officers," § 1; "Slaves"; "Taxation," §§ 1, 3.
Suits against state, see "States," § 2.

**§ 1. Construction, operation, and enforcement of constitutional provisions.**

The Legislature, subject only to the limitations of evidence set forth in the Constitution, has control over the rules of evidence.—Tift v. Southern Ry. Co. (C. C.) 753.

**§ 2. Obligation of contracts.**

A Michigan railroad company *held* exempt from the ad valorem taxation of its property, under Act No. 173, p. 236, Acts Mich. 1901, by Act No. 140, p. 305, of 1855, providing for a specific tax in lieu of all other taxes, which created an irrepealable contract between the state and the company.—Detroit, G. H. & M. Ry. Co. v. Powers (C. C.) 264.

**§ 3. Equal protection of laws.**

Chicago City Ordinance March 27, 1903, § 10, prohibiting the emission of dense smoke from chimneys for more than three or six minutes in any hour of the day, *held* not unconstitutional for inequality.—Glucose Refining Co. v. City of Chicago (C. C.) 209.

The provisions of the fourteenth constitutional amendment do not prevent a state from classifying property for the purposes of taxation, and imposing different rates on different classes, if there is no discrimination in favor of one as against another of the same class, and the method of assessment and collection of the tax is not inconsistent with natural justice.—Michigan Railroad Tax Cases (C. C.) 223.

Article 14 of the Constitution of Michigan, as amended in 1900 and Act No. 173, p. 236, Pub. Acts 1901, enacted pursuant thereto, and providing for the assessment and taxation of property of railroad corporations, construed, and *held* not in violation of the fourteenth constitutional amendment, as depriving the companies of their property without due process of law or denying them the equal protection of the laws.—Michigan Railroad Tax Cases (C. C.) 223.

A statute providing a special method of taxing the property of railroad corporations is not unconstitutional, as denying such corporations the equal protection of the laws, because it taxes their property, including credits, as a unit at its cash value, while other statutes providing for the taxation of individuals permitted the deduction of indebtedness from credits.—Michigan Railroad Tax Cases (C. C.) 223.

A state statute is not in violation of the fourteenth constitutional amendment, as denying the equal protection of the laws, because it provides a method of taxing the property of railroad corporations different from that applied to the property of other corporations or individuals, although the latter may incidentally own or operate railroads.—Michigan Railroad Tax Cases (C. C.) 223.

**§ 4. Due process of law.**

Rev. St. Idaho 1887, § 5210, as amended by Act March 3, 1903 (Laws 7th Sess. p. 203), and Act March 15, 1899 (Laws 5th Sess. p. 442), authorizing the condemnation of a right of way for a mining tunnel through claims of others, *held* not in violation of the fourteenth amendment of the federal Constitution, on the ground that the use was private, and not public.—Baillie v. Larson (C. C.) 177.

The provisions of the fourteenth constitutional amendment do not prevent a state from classifying property for the purpose of taxation, and imposing different rates on different classes, if there is no discrimination in favor of one as against another of the same class, and the method of assessment and collection of the tax is not inconsistent with natural justice.—Michigan Railroad Tax Cases (C. C.) 223.

Article 14 of the Constitution of Michigan, as amended in 1900, and Act No. 173, p. 236, Pub. Acts 1901, enacted pursuant thereto, and providing for the assessment and taxation of property of railroad corporations, construed,

and *held* not in violation of the fourteenth constitutional amendment, as depriving the companies of their property without due process of law. — Michigan Railroad Tax Cases (C. C.) 223.

## CONSULS.

See "Ambassadors and Consuls."

## CONTEMPT.

By witness testifying before trustee in bankruptcy, see "Bankruptcy," § 4.
Violation of injunction against infringement of patents, see "Patents," § 10.

## CONTINUANCE.

Effect of denial of continuance on reference proceedings, see "Reference," § 1.
Review of discretionary rulings, see "Appeal and Error," § 3.

The denial of a motion for continuance on the ground of absence of counsel and witnesses was not an abuse of discretion, where no satisfactory showing of diligence was made. —Copper River Min. Co. v. McClellan (C. C. A.) 333.

## CONTRACTS.

Adoption by federal courts of state laws as rules of decision in action for breach, see "Courts," § 5.
Damages for breach, see "Damages," § 1.
Impairing obligation, see "Constitutional Law," § 2.
Operation and effect of champerty, see "Champerty and Maintenance."
Operation and effect of usury laws, see "Usury," § 1.
Parol or extrinsic evidence, see "Evidence," § 3.
Specific performance, see "Specific Performance."

*Contracts of particular classes of parties.*

See "Colleges and Universities"; "Corporations," § 4; "Trade Unions."
Seamen, see "Seamen."

*Contracts relating to particular subjects.*

See "Interest"; "Mines and Minerals," § 2.

*Particular classes of express contracts.*

See "Guaranty"; "Indemnity"; "Insurance"; "Sales."
Affreightment, see "Shipping," § 4.
Charter parties, see "Shipping," § 2.
Employment of college professor, see "Colleges and Universities."
Sales of realty, see "Vendor and Purchaser."

**§ 1. Requisites and validity.**

The question whether plaintiff had proved a contract, made through defendant's agent, in an action for its breach, *held* one for the jury, under the evidence showing the customs of the trade and the previous course of dealing between the parties.—Monarch Electric & Wire Co. v. National Conduit & Cable Co. (C. C. A.) 18.

Defendants *held* not entitled to defend an action for breach of a waterworks contract on the ground that they were induced to enter into it by fraud.—Smith & Benham v. Curran & Hussey (C. C.) 150.

**§ 2. Construction and operation.**

*Where a contract by its terms is to be performed on a day named, both parties have the whole of the business day in which to tender performance.—Brauer v. Macbeth (C. C. A.) 977.

**§ 3. Performance or breach.**

Where defendants contracted to pay plaintiff $20,000 in consideration of a loan of their credit to raise funds to construct a railway, but no funds could be secured on such credit, so that the whole project was abandoned, plaintiffs were not entitled to recover the balance of the consideration unpaid.—Weed v. Centre & C. St. Ry. Co. (C. C.) 474.

## CONTRIBUTORY NEGLIGENCE.

Of person injured by operation of railroad, see "Railroads," § 1.
Of servant, see "Master and Servant," § 1.

## CONVERSION.

Testator's distributees *held* to have acquired title to trust realty, as to which trustee's discretionary power of sale was not exercised, as remaindermen, which title vested as of the death of the testator.—In re L'Hommedieu (D. C.) 606.

*A power of sale *held* discretionary, and therefore insufficient to create an equitable conversion.—In re L'Hommedieu (D. C.) 606.

## CONVEYANCES.

See "Assignments for Benefit of Creditors"; "Chattel Mortgages."
Affecting liability to taxation, see "Taxation," § 2.

## CORPORATIONS.

Denial of due process of law in taxation of, see "Constitutional Law," § 4.
Denial of equal protection of law in taxation of, see "Constitutional Law," § 3.
Exercise of right of eminent domain, see "Eminent Domain," § 2.
Infringement of patent by, see "Patents," § 10.
Loan or sale to bankrupt corporation, see "Sales," § 1.
Privilege of officer of corporation as witness, see "Witnesses," § 2.
Receivers in general, see "Receivers," § 1.
Taxation of corporations and corporate property, see "Taxation," §§ 1, 3, 4.

*Particular classes of corporations.*

See "Colleges and Universities"; "Municipal Corporations"; "Railroads"; "Religious Societies"; "Street Railroads."
Water companies, see "Waters and Water Courses," § 1.

**§ 1. Capital, stock, and dividends.**
An agent for the owners of stock of a corporation *held* not to have rendered himself liable for an assessment thereon by causing it to be transferred on the books to the name of a third person, who held it for the actual owners, where there was no fraud, and the agent had no interest in the stock.—American Alkali Co. v. Kurtz (C. C. A.) 392.

**§ 2. Members and stockholders.**
A minority stockholder in a corporation *held* entitled to an injunction to restrain the holding of an election until the right to vote the majority stock, which was in controversy between two trustees in another court, had been determined.—Villamil v. Hirsch (C. C.) 690.

**§ 3. Officers and agents.**
Under V. S. 3724, making directors of corporations assenting to an indebtedness in excess of two-thirds of the capital paid in personally liable for the excess, the liability is joint and several, and directly to the creditor, who may enforce the same by an action at law directly against one or more of the assenting directors.—Hilliard v. Lyman (C. C.) 469.

**§ 4. Corporate powers and liabilities.**
The question whether plaintiff had proved a contract, made through defendant's agent, in an action for its breach, *held* one for the jury, under the evidence showing the customs of the trade and the previous course of dealing between the parties.—Monarch Electric & Wire Co. v. National Conduit & Cable Co. (C. C. A.) 18.

An underwriter's contract for the sale of corporate bonds construed, and *held* to require payment to the owner of the bonds of a sum equal to 95 per cent. of their par value, and that any unpaid portion of the price should be paid from a 10 per cent. deduction from the proceeds of actual sales, which agreement was not modified by a subsequent letter of the managers of the syndicate.—Philadelphia Const. Co. v. Cramp (C. C. A.) 999.

**§ 5. Insolvency and receivers.**
Creditors of an insolvent corporation, not having participated in the furnishing of security for costs in suits brought by the receiver against promoters to recover secret profits under an order of the court, *held* not entitled to participate in such fund.—McEwen v. Harriman Land Co. (C. C. A.) 797.

Transfer of indebtedness against an insolvent corporation by its creditors to a new corporation in exchange for stock in the latter *held* not to constitute payment of the indebtedness, but to vest the new corporation with all the creditors' rights against the old corporation and its assets.—McEwen v. Harriman Land Co. (C. C. A.) 797.

## COSTS.

In action to set aside tax deeds, see "Taxation," § 7.

**§ 1. Nature, grounds, and extent of right in general.**
*A federal court has no authority to award costs on dismissal of an action, on the ground that the state court from which it was removed was without jurisdiction.—Parks Co. v. City of Decatur (C. C. A.) 550.

A charterer is not relieved from the payment of interest or costs in a suit against him to recover charter hire by an offer to pay less than the sum due, renewed after suit brought, but without paying the money into court or including in the offer interest or costs up to the time it was made.—Donaldson v. Severn River Glass Sand Co. (D. C.) 691; Severn River Glass Sand Co. v. Donaldson, Id., 694.

## COURTS.

Removal of action from state court to United States court, see "Removal of Causes."
Review of decisions, see "Appeal and Error."
Rules of admiralty applicable to internal revenue proceedings, see "Internal Revenue."

*Jurisdiction of particular actions, proceedings, or subjects.*

See "Habeas Corpus," § 2.
Action by or against trustee in bankruptcy, see "Bankruptcy," § 5.
Action for limitation of liability of vessel, see "Shipping," § 4.
Attachment against municipal corporations, see "Municipal Corporations," § 4.
Proceedings for accounting by executor or administrator, see "Executors and Administrators," § 2.

**§ 1. United States courts—Jurisdiction and powers in general.**
Where the jurisdiction of a federal court has been properly invoked for relief against assessments as discriminating against complainant and depriving it of the equal protection of the laws in violation of the fourteenth constitutional amendment, although such federal question is determined against complainant, the bill may be retained for the decision of other questions arising on the record.—Michigan Railroad Tax Cases (C. C.) 223.

The Arkansas statute (Sand. & H. Dig., § 3778), authorizing an injunction against all unauthorized taxes or assessments by counties, cities, or other local tribunals, boards, or officers, does not merely affect the remedy, but gives a substantive right, which may be enforced on the equity side of a federal court.—Humes v. City of Little Rock (C. C.) 929.

**§ 2. —— Jurisdiction dependent on nature of subject-matter.**
Federal jurisdiction, in a suit to enjoin enforcement of city ordinances, cannot be predicated on an allegation that in passing the ordinances the city exceeded its charter powers.—Glucose Refining Co. v. City of Chicago (C. C.) 209.

A federal court has jurisdiction of a suit to restrain the collection of taxes levied under provisions of the Constitution and statutes of a state which the bill in good faith alleges are repugnant to the Constitution of the United States, and where it is also alleged that the defendant as a state officer by his acts under said state Constitution and statutes is about to

deprive complainants of their property without due process of law.—Michigan Railroad Tax Cases (C. C.) 223.

A statement of claim which seeks to recover damages for acts of defendant done in his capacity as judge of a state court does not raise a federal question, and where there is no diversity of citizenship a Circuit Court of the United States is without jurisdiction, and it is its duty on motion therefor to dismiss the suit.—Kinney v. Mitchell (C. C.) 270.

**§ 3. —— Jurisdiction dependent on amount or value in controversy.**

Where a bill in a federal court alleged that the amount in controversy exceeded $5,000, such allegation would be presumed correct until defendant had sustained the burden of proving of record that the case did not involve the jurisdictional amount.—Pennsylvania Co. v. Bay (C. C.) 203.

Allegations of a bill of a foreign corporation to restrain enforcement of a municipal smoke ordinance *held* to sufficiently show federal jurisdiction.—Glucose Refining Co. v. City of Chicago (C. C.) 209.

In a suit to enjoin the enforcement of an ordinance imposing a license tax on complainant's business, alleged to be prohibitory, the amount in controversy, for the purpose of determining the jurisdiction of a federal court, is the value of such business.—Humes v. City of Little Rock (C. C.) 929.

**§ 4. —— Procedure, and adoption of practice of state courts.**

Rev. St. U. S. § 721 [U. S. Comp. St. 1901, p. 581], *held* inapplicable to an objection to the competency of a physician to testify in an action on a policy, under a disqualifying statute of a foreign state where the policy was executed.—Doll v. Equitable Life Assur. Soc. (C. C. A.) 705.

**§ 5. —— State laws as rules of decision.**

*The decision of the highest court of a state upon the constitutionality of a statute under the state Constitution is binding on the federal courts.—Hughes v. Pflanz (C. C. A.) 980.

In an action for breach of a cattle transportation contract made in Minnesota for completion in Montana, brought in the state courts of Montana and removed by the defendant to the federal courts, the latter would not enforce a contract limitation of 60 days, which was void under the express provisions of Civ. Code Mont. § 2245.—Northern Pac. Ry. Co. v. Kempton (C. C. A.) 992.

**§ 6. —— Circuit courts of appeals.**

Rule 11 of the Circuit Court of Appeals (31 C. C. A. cxlvi, 90 Fed. cxlvi), which requires a plaintiff in error or appellant to file with the court below his petition and assignment of errors, and provides that no writ of error or appeal shall be allowed until such assignment of errors shall have been filed, is sufficiently complied with when the order allowing an appeal and the petition and assignment of errors are filed in the court below at the same time.—Copper River Min. Co. v. McClellan (C. C. A.) 333.

A member of the Circuit Court of Appeals for the Ninth Circuit has power to allow an appeal from the District Court of Alaska.—Copper River Min. Co. v. McClellan (C. C. A.) 333.

*The Circuit Court of Appeals is without jurisdiction of proceedings in error which involve only the question of the jurisdiction of the Circuit Court in the cause.—Halpin v. Amerman (C. C. A.) 548.

**§ 7. —— Circuit courts.**

Under Judiciary Act March 3, 1875, c. 137, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511] it is the duty of the Circuit Court to dismiss an appeal, either on objection or on its own motion, whenever and however it appears that jurisdiction is lacking.—Pennsylvania Co. v. Bay (C. C.) 203.

**§ 8. Concurrent and conflicting jurisdiction, and comity.**

Mississippi railroad commission *held* not a court, within Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], prohibiting the issuance of an injunction by a federal court to stay proceedings in any court of the state.—Illinois Cent. R. Co. v. Mississippi Railroad Commission (C. C. A.) 327.

Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], does not limit the power of a federal court to restrain parties from instituting proceedings in any court.—Glucose Refining Co. v. City of Chicago (C. C.) 209.

*A federal court *held* without authority to interfere with state proceedings for the execution of the criminal's sentence, except to prevent any of the privileges or immunities of the accused under the federal constitution from being infringed.—Ex parte Rogers (D. C.) 961.

## COVENANTS.

In insurance policies, see "Insurance," § 4.

## CREDIBILITY.

Of witness, see "Witnesses," § 3.

## CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

Rights as to chattel mortgage by debtor, see "Chattel Mortgages," § 1.

## CRIMINAL LAW.

Conflicting jurisdiction, see "Courts," § 8.

Extradition of persons accused, see "Extradition."

Grand jury, see "Grand Jury."

*Particular offenses.*

See "Bribery"; "Homicide."

Violations of food regulations, see "Food."

## CROSS-EXAMINATION.

Of witnesses on taking proofs in equity, see "Equity," § 3.

## CUSTOMS AND USAGES.

Parol evidence of custom affecting written contract, see "Evidence," § 3.

## CUSTOMS DUTIES.

**§ 1. Goods subject to duty, rate, and amount.**

Surgical needles are not within the provision for "hand sewing" needles in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 620, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685].—A. J. Woodruff & Co. v. United States (C. C.) 946.

In including the cost of coverings in the dutiable value of imported merchandise, under Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924], such cost should, where the merchandise consists of filled bottles, be distributed between the bottles and their contents, according to the value of each.—Francis H. Leggett & Co. v. United States (C. C.) 970.

In assessing the ad valorem duty provided in paragraph 99, Schedule B, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], on filled bottles, the cost of fittings (corks, caps, labels, etc.) of the bottles should be included in the value of the bottles.—Francis H. Leggett & Co. v. United States (C. C.) 970.

Lithographic prints in the form of folding pictures, of which the substantial parts are of one thickness and smaller incidental parts of a less thickness, are dutiable under the subdivision of paragraph 400, Schedule M, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672], relating to prints of the thickness of the substantial portions.—Fuld & Co. v. United States (C. C.) 973; Levinson v. Same, Id.; Lewkowitz, Id.

Pieces of cloth cut in the shape of squares and other geometrical figures, and used principally in the manufacture of handkerchiefs, are dutiable as "unfinished * * * handkerchiefs," under paragraph 345, Schedule J, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1663].—Meyer v. United States (C. C.) 974.

## DAMAGES.

*Damages for particular injuries.*

See "Collision," § 5; "Death," § 1.
Breach by buyer of contract for sale of goods, see "Sales," § 3.
Breach by seller of contract for sale of goods, see "Sales," § 4.
Breach of contract by charterer, see "Shipping," § 4.
Infringement of patent, see "Patents," § 10.
Injuries caused by public improvements, see "Municipal Corporations," § 1.

**§ 1. Grounds and subjects of compensatory damages.**

*In action for wrongful death, where recovery is based on compensation for pecuniary loss, conjecture cannot supply the absence of evidence.—Swift & Co. v. Johnson (C. C. A.) 867.

In an action for breach of a contract to construct a water pipe line, profits which plaintiffs would have made if the contract had been carried out *held* too speculative and doubtful for allowance.—Smith & Benham v. Curran & Hussey (C. C.) 150.

Where defendants broke their contract with plaintiffs to construct a water pipe line, plaintiffs, though not entitled to recover previous expenses in furthering the scheme, were entitled to recover subsequent expenses necessarily incurred in carrying out their part of the contract before breach.—Smith & Benham v. Curran & Hussey (C. C.) 150.

**§ 2. Pleading, evidence, and assessment.**

In an action for personal injuries, plaintiff cannot testify that she depended upon herself for support.—National Biscuit Co. v. Nolan (C. C. A.) 6.

The charge of the court as to the measure of damages recoverable in an action for a personal injury considered and approved.—Northern Commercial Co. v. Nestor (C. C. A.) 383.

## DEATH.

Caused by negligence in general, see "Negligence," § 1.
Grounds for compensatory damages, see "Appeal and Error."

**§ 1. Actions for causing death.**

In action for wrongful death of son, where father willfully abandoned his family, evidence *held* insufficient to show reasonable expectation of pecuniary benefit from continuance of son's health.—Swift & Co. v. Johnson (C. C. A.) 867.

Where deceased left his father surviving, an action for his wrongful death, under Gen. St. Minn. 1894, § 5913, was for the father's sole benefit, and hence it was error to admit evidence of the mother's expectancy.—Swift & Co. v. Johnson (C. C. A.) 867.

*By common law no action lies for an injury resulting in death.—Swift & Co. v. Johnson (C. C. A.) 867.

*Under Gen. St. Minn. 1894, § 5913, the action for wrongful death is for the exclusive benefit, first, of creditors having demands for support of deceased between his injury and death; second, creditors for funeral expenses; and, third, for the benefit of the widow and next of kin.—Swift & Co. v. Johnson (C. C. A.) 867.

*In action by father for wrongful death of son, whom he abandoned, evidence *held* to limit recovery to nominal damages.—Swift & Co. v. Johnson (C. C. A.) 867.

In an action for wrongful death, a verdict of $3,500 *held* excessive, and should be reduced to

$2,500.—Hirschkovitz v. Pennsylvania R. Co. (C. C.) 438.

Under a statute authorizing a recovery for wrongful death, a recovery *held* limited to the pecuniary assistance the jury believes the next of kin would have received from deceased had he lived.—Hirschkovitz v. Pennsylvania R. Co. (C. C.) 438.

In an action for wrongful death under a statute providing that the recovery shall be for the benefit of deceased's widow and next of kin, it was no defense that all of his next of kin were nonresident aliens.—Hirschkovitz v. Pennsylvania R. Co. (C. C.) 438.

*Under Bates' Ann. St. Ohio, §§ 6133–6135, a Kentucky administrator of a decedent killed in Ohio *held* entitled to sue a foreign corporation in Kentucky for such wrongful death under the Ohio statutes.—Williams v. Camden Interstate Ry. Co. (C. C.) 571.

## DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

## DECEDENTS.

Estates, see "Executors and Administrators."

## DEEDS.

Tax deeds, see "Taxation," § 7.

## DELIVERY.

Of goods sold, see "Sales," § 2.

## DEMURRAGE.

See "Shipping," § 6.

## DEMURRER.

In pleading, see "Equity," § 2.

## DEPOSITIONS.

See "Witnesses."
In equity, see "Equity," § 3.

*The general rule is that witnesses whose depositions are being taken under Rev. St. § 863 [U. S. Comp. St. 1901, p. 661], should be required to answer all questions which may possibly be material, subject to their right to be protected in their constitutional privileges.—Perry v. Rubber Tire Wheel Co. (C. C.) 836.

## DESCENT AND DISTRIBUTION.

See "Executors and Administrators"; "Wills."

## DEVISES.

See "Wills."

## DIRECTING VERDICT.

In civil actions, see "Trial," § 1.

## DISABILITIES.

Of slaves, see "Slaves."

## DISCHARGE.

From indebtedness, see "Bankruptcy," § 7½.

## DISCOVERY.

**§ 1. Under statutory provisions.**

*A creditor of a bankrupt, objecting to his discharge for acts which the creditor asserted on knowledge, *held* not entitled to discovery prior to the giving of his own testimony.—In re Romine (D. C.) 837.

## DISCRETION OF COURT.

Allowance of appeal in habeas corpus proceedings, see "Habeas Corpus," § 2.
Review in civil actions, see "Appeal and Error," § 3.
Rulings on motion for continuance, see "Continuance."

## DISCRIMINATION.

By carrier, see "Carriers," §§ 1, 2.

## DISMISSAL AND NONSUIT.

Dismissal of appeal by circuit court, see "Courts," § 7.
Dismissal of appeal or writ of error, see "Appeal and Error," § 3.

## DISTRIBUTION.

Of estate of bankrupt, see "Bankruptcy," § 6.

## DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Removal of Causes," § 1.

## DOCKS.

See "Wharves."

## DUE PROCESS OF LAW.

See "Constitutional Law," § 4.

## DURESS.

Compelling election between trial and reference as constituting duress, see "Reference," § 1.

## DUTIES.

Customs duties, see "Customs Duties."
Excise duties, see "Internal Revenue."

## EASEMENTS.

See "Highways."

## ELECTION OF REMEDIES.

Necessity of election of remedies on breach of contract of sale, see "Sales," § 2.

## ELECTIONS.

Of corporate officers, see "Corporations," § 2.

## EMANCIPATION.

Of child, see "Parent and Child."

## EMBEZZLEMENT.

Privilege of witness under indictment for, see "Witnesses," § 2.

## EMINENT DOMAIN.

Denial of due process of law in condemnation proceedings, see "Constitutional Law," § 4.
Public improvements by municipalities, see "Municipal Corporations," § 1.

**§ 1. Nature, extent, and delegation of power.**

Under Rev. St. U. S. § 2338 [U. S. Comp. St. 1901, p. 1436], the state of Idaho was authorized to pass Act March 15, 1899 (Laws 5th Sess. p. 442), granting the owner of ground on which a mining tunnel was located tunnel rights through other claims, on payment of the actual damages sustained.—Baillie v. Larson (C. C.) 177.

**§ 2. Proceedings to take property and assess compensation.**

Under Civ. Code Alaska, 31 Stat. 321–494, c. 22, §§ 204, 210, 225, a corporation organized in California and having complied with the laws of Alaska *held* entitled to condemn land in Alaska for a public pipe line to convey water for mining.—Miocene Ditch Co. v. Lyng (C. C. A.) 544.

A complaint to condemn a right of way for a water pipe line *held* demurrable for failure to show a public need for right of way over the land sought to be taken.—Miocene Ditch Co. v. Lyng (C. C. A.) 544.

*Where a complaint to condemn land for a right of way for a pipe line was demurrable for failure to allege a public use, it might be corrected by amendment.—Miocene Ditch Co. v. Lyng (C. C. A.) 544.

## EMPLOYES.

See "Master and Servant."

## EQUITY.

Effect of laches on right to review suit for infringement of patent, see "Patents," § 10.
Effect of laches on suit for unlawful competition, see "Trade-Marks and Trade-Names," § 1.
Enforcement in equity of option contract for purchase of realty, see "Vendor and Purchaser," § 2.
Equitable conversion, see "Conversion."
Jurisdiction of federal courts, see "Courts," § 1.
Relief against judgment, see "Judgment," § 2.

*Particular subjects of equitable jurisdiction and equitable remedies.*

See "Injunction"; "Receivers"; "Specific Performance."
Cancellation of mining lease, see "Mines and Minerals," § 2.
Suits for infringement of patents, see "Patents," § 10.

**§ 1. Jurisdiction, principles, and maxims.**

A bill by a lessor to restrain waste and cancel a lease *held* not objectionable on the ground that its purpose was to enforce a forfeiture.—Big Six Development Co. v. Mitchell (C. C. A.) 279.

A bill being maintainable in equity to enjoin waste by a lessee, the court was entitled to retain it to remove the lease as a cloud on title, quiet the title, and determine the right of possession.—Big Six Development Co. v. Mitchell (C. C. A.) 279.

**§ 2. Pleading.**

A demurrer to a plea or answer in equity is improper.—Pennsylvania Co. v. Bay (C. C.) 203.

Exceptions to an answer to a bill in equity only raise the questions of sufficient discovery, whether the averments have been fully answered, and whether the allegations excepted to are scandalous and impertinent.—Pennsylvania Co. v. Bay (C. C.) 203.

**§ 3. Taking and filing proofs.**

Where complainants' notice for taking testimony signifies a desire that the testimony be taken orally, defendants would be permitted to cross-examine complainants' foreign witness orally.—Edison Electric Co. v. Westinghouse, Church, Kerr & Co. (C. C.) 460.

Where defendants elect to cross-examine complainants' foreign witness orally, complainants would be given leave to withdraw direct interrogatories filed by them and examine the witness orally.—Edison Electric Co. v. Westinghouse, Church, Kerr & Co. (C. C.) 460.

Where a commission is applied for under Rev. St. § 866 [U. S. Comp. St. 1901, p. 663], to take the testimony of foreign witnesses, the court is authorized by equity rule 67 to permit the adverse party to cross-examine such witnesses orally.—Encyclopædia Britannica Co. v. Werner Co. (C. C.) 461.

**§ 4. Hearing, submission of issues to jury, and rehearing.**

When, upon pleas filed to a bill in equity, the complainant sets the cause down for hearing,

he admits the facts, but not the conclusions pleaded. Likewise the defendant admits to be true the facts alleged in the bill which are not denied by the plea.—General Electric Co. v. Bullock Electric Mfg. Co. (C. C.) 412.

## ERROR, WRIT OF.

See "Appeal and Error."

## ESTABLISHMENT.

Of railroads, see "Street Railroads," § 1.

## ESTATES.

Decedents' estates, see "Executors and Administrators"; "Wills."

## ESTOPPEL.

By judgment, see "Judgment," §§ 3, 4.
Of assignee to assert narrow construction of patent as against assignor, see "Patents," § 8.
Of infringer of trade-marks, see "Trade-Marks and Trade-Names," § 1.
To avoid or forfeit insurance policy, see "Insurance," § 5.
To claim maritime lien, see "Maritime Liens," § 1.

## EVIDENCE.

See "Depositions"; "Discovery"; "Witnesses."
Harmless error in rulings on, see "Appeal and Error," § 3.
Newly discovered evidence ground for writ of review of suit for infringement of patent, see "Patents," § 10.
Questions of fact for jury, see "Trial," § 1.
Review on appeal or writ of error, see "Appeal and Error," § 3.

*As to particular facts or issues.*

See "Damages," § 2.
Construction and operation of constitutional provisions, see "Constitutional Law," § 1.
Findings of interstate commerce commission, see "Commerce," § 1.
Good faith of purchaser of public lands, see "Public Lands," § 2.
Invention, see "Patents," § 1.
Mineral or nonmineral character of lands, see "Public Lands," § 1.
Partnership of bankrupts, see "Bankruptcy," § 1.
Payment of taxes, see "Taxation," § 5.
Right to patent as between employer and employé, see "Patents," § 2.

*In actions by or against particular classes of parties.*

See "Carriers," § 4; "Municipal Corporations," § 1; "Religious Societies."

*In particular civil actions or proceedings.*

See "Malicious Prosecution," §§ 1, 3.
For enforcement of lien, see "Maritime Liens," § 2.
For injuries to goods shipped by vessel, see "Shipping," § 4.
For limitation of liability, see "Shipping," § 4.
For personal injuries, see "Carriers," § 4.
On insurance policy, see "Insurance," § 3.

*In criminal prosecutions.*

See "Extradition," § 1.

**§ 1. Relevancy, materiality, and competency in general.**

In a proceeding for assessment of damages by a change of street grade, the use to which property is devoted or for which it is suitable is a proper element to be considered in ascertaining its market value.—City of Seattle v. Board of Home Missions of Methodist Protestant Church (C. C. A.) 307.

*In an action to recover the value of timber wrongfully cut from the public domain, a witness as to the value, having testified that he knew the appraised value fixed by state officers, under Pol. Code Mont. § 3560, was also entitled to testify that some of the timber had been sold at a price higher than such appraised value.—Lynch v. United States (C. C. A.) 535.

*In an action for delay in transporting cattle, a statement by defendant's engineer as to the cause of the delay, made while the transportation was in progress, *held* admissible as res gestæ.—Northern Pac. Ry. Co. v. Kempton (C. C. A.) 992.

**§ 2. Hearsay.**

The testimony of a witness as to an indebtedness, based upon his examination of charges made in books of account which were not made by him and are in no manner authenticated, is hearsay, and inadmissible.—Rosenthal v. McGraw (C. C. A.) 721.

**§ 3. Parol or extrinsic evidence affecting writings.**

In an action for delay in transporting cattle, evidence of a custom to transport ten cars or upwards as an independent train, when demanded, *held* admissible.—Northern Pac. Ry. Co. v. Kempton (C. C. A.) 992.

**§ 4. Opinion evidence.**

Where the issue was actionable negligence in failing to provide a reasonably safe place in which to work about machinery, it was not competent for the machinist to testify that in his opinion machinery should have been safeguarded.—National Biscuit Co. v. Nolan (C. C. A.) 6.

The opinions of experts are not receivable, if all the facts can be ascertained and made intelligible to the jury.—National Biscuit Co. v. Nolan (C. C. A.) 6.

*Whether land from which timber was alleged to have been wrongfully cut was mineral land *held* not a subject of expert opinion.—Lynch v. United States (C. C. A.) 535.

On an issue as to the character of land from which timber was alleged to have been wrongfully cut, an alleged expert *held* not entitled to testify that ground along the bed of a creek nearest the place where the timber cutting was

done contained gold in quantities sufficient to pay to extract.—Lynch v. United States (C. C. A.) 535.

**§ 5. Weight and sufficiency.**
Prima facie evidence of a fact is such as, in judgment of law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for that purpose.—Tift v. Southern Ry. Co. (C. C.) 753.

## EXAMINATION.

Of witnesses in general, see "Witnesses," § 2.

## EXCEPTIONS.

To pleadings, see "Equity," § 2.
To pleadings in suit for injunction, see "Injunction," § 2.

## EXCEPTIONS, BILL OF.

**§ 1. Nature, form, and contents in general.**
In an action for wrongful removal of coal from beneath the grounds of a religious society, a recital in the bill of exceptions *held* an admission that the coal was removed directly beneath the land in controversy.—Penny v. Central Coal & Coke Co. (C. C. A.) 769.

**§ 2. Settlement, signing, and filing.**
A bill of exceptions in a case tried in a federal court may be settled at any time, during the term or thereafter, until the end of the term during which judgment is rendered.—Minahan v. Grand Trunk Western Ry. Co. (C. C. A.) 37.

An order extending the time for settlement of a bill of exceptions until a date later than the term at which the action was tried operated to prolong the control of the court over the cause and justified the settlement of the bill at a later date.—Minahan v. Grand Trunk Western Ry. Co. (C. C. A.) 37.

## EXCESSIVE DAMAGES.

For wrongful death, see "Death," § 1.

## EXCISE.

Duties, see "Internal Revenue."

## EXECUTION.

See "Attachment."

## EXECUTORS AND ADMINISTRATORS.

See "Wills."

**§ 1. Collection and management of estate.**
A legatee and a judgment creditor of residuary devisees named in the will *held* not entitled to object to the validity of a mortgage executed by the executors without express authority on land belonging to the estate.—Thomas v. Provident Life & Trust Co. (C. C. A.) 348; Wickham v. Same, Id.

Where the proceeds of a mortgage executed by executors was used to pay debts of the estate, the latter was bound in equity to repay the loan, with interest, though the executors were not authorized by the will to execute such mortgage.—Thomas v. Provident Life & Trust Co. (C. C. A.) 348; Wickham v. Same, Id.

**§ 2. Accounting and settlement.**
A suit by a distributee of an estate in process of settlement in the probate court of the state to compel a surviving partner of the firm of which the deceased was a member to account to the surviving partner's coexecutors *held* not maintainable in the federal court.—Moore v. Fidelity Trust Co. (C. C. A.) 1, 1008.

## EXEMPTIONS.

From liability for injury to cargo of vessel, see "Shipping," § 4.
Of bankrupt, see "Bankruptcy," § 7½.
Of Indians from taxation, see "Indians."

## EXPERT TESTIMONY.

In civil actions, see "Evidence," § 4.

## EXTORTION.

As ground for liability for peonage, see "Slaves."

## EXTRADITION.

**§ 1. Interstate.**
*The term "charged with crime," in article 4, § 2, of the federal Constitution, relating to extradition of persons so charged from one state to another, and in Rev. St. § 5278 [U. S. Comp. St. 1901, p. 3597], is used in its broad sense, and includes all persons legally accused of crime, after as well as before conviction, until the sentence imposed has been performed.—Hughes v. Pflanz (C. C. A.) 980.

*A person who, after having been convicted of a crime committed within a state, when sought for to be subjected to the sentence of the court, is found within another state, is a fugitive from justice within the meaning of the extradition statute.—Hughes v. Pflanz (C. C. A.) 980.

Where a charge of crime, made against a person in affidavits filed before a magistrate or a court, has culminated in a conviction, the record of such conviction is sufficient evidence in proceedings for his extradition from another state, and the question as to the sufficiency of the affidavits becomes immaterial.—Hughes v. Pflanz (C. C. A.) 980.

## FALSE IMPRISONMENT.

See "Malicious Prosecution."

## FEDERAL COURTS.

See "Courts," § 1.
Authority to issue mandamus to prevent discrimination by carrier, see "Carriers," § 1.

## FEDERAL QUESTIONS.

Grounds for jurisdiction, see "Courts," § 2.

## FELLOW SERVANTS.

See "Master and Servant," § 1.

## FILING.

Bill of exceptions, see "Exceptions, Bill of," § 2.
Chattel mortgage, see "Chattel Mortgages," § 1.

## FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 3.

## FLATHEAD NATION.

See "Indians."

## FOOD.

Failure of a wholesale dealer in oleomargarine to pay the tax under Act Cong. Aug. 2, 1886, c. 840, § 4, 30 Stat. 209 [U. S. Comp. St. 1901, p. 2229], is an offense punishable by information or indictment.—United States v. Joyce (D. C.) 455.

An indictment in the words of Act Cong. Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], charging defendant with carrying on the business of a wholesale dealer in oleomargarine without paying the tax required, *held* not objectionable for indefiniteness.—United States v. Joyce (D. C.) 455.

It was no objection to an indictment for the wrongful sale of oleomargarine that defendants were charged in the first count with carrying on the business of a wholesale, and in the other of a retail, dealer in oleomargarine, without in either instance having paid the tax required by Act Cong. Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228].—United States v. Joyce (D. C.) 457.

An indictment for wrongful sale of oleomargarine, in violation of Act Cong. Aug. 2, 1886, c. 840, § 6, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2230], failing to charge whether the sale was at wholesale or at retail, in what respect the packages were not in the prescribed form, and what required stamps or brands were omitted, *held* insufficient.—United States v. Joyce (D. C.) 457.

Under Act Cong. Aug. 2, 1886, c. 840, §§ 6, 7, 10, 15, 24 Stat. 210, 211, 212 [U. S. Comp. St. 1901, pp. 2230, 2231, 2233], an indictment for removing marks, stamps, and brands from an oleomargarine package, failing to charge that the stamps were such as were required by statute, *held* insufficient.—United States v. Joyce (D. C.) 457.

## FORCIBLE ENTRY AND DETAINER.

Availability of action of forcible entry and detainer as affecting bill to cancel mining lease, see "Mines and Minerals," § 2.

## FORFEITURES.

Jurisdiction of equity, see "Equity," § 1.
Of insurance, see "Insurance," § 4.
Of mining leases, see "Mines and Minerals," § 2.

## FORMER ADJUDICATION.

See "Judgment," §§ 3, 4.

## FRANCHISES.

Taxation of, see "Taxation," § 4.

## FRAUD.

*In particular classes of conveyances, contracts, or transactions.*

See "Contracts," § 1; "Insurance," § 3; "Public Lands," § 2.

## FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 3.

## FREIGHT.

See "Carriers," § 2.

## FUGITIVES.

Extradition, see "Extradition," § 1.

## GARNISHMENT.

See "Attachment."

## GOOD FAITH.

Of purchaser of municipal bonds, see "Municipal Corporations," § 3.
Of purchaser of public lands, see "Public Lands," § 2.

## GRAND JURY.

A grand jury drawn from lists returned *held* illegal, where the clerk, in sending to the judges of election the number of jurors, failed to accompany it with the form of oath in accordance with St. 1893, § 3098 (6), and did not properly apportion the jurors to all the precincts in the county.—Sharp v. United States (C. C. A.) 878.

Under a statute declaring that the names first drawn from the jury box shall constitute the grand jury for the term, a grand jury from which two members were erroneously excused, and their places filled by persons subsequently drawn, *held* illegal.—Sharp v. United States (C. C. A.) 878.

## GRANTS.

Of public lands, see "Public Lands."

## GUARANTY.

See "Indemnity."

**§ 1. Construction and operation.**

Plaintiff bought an account from defendants, taking a written guaranty that the debtor would pay the same in machinery; otherwise, the amount paid for the account was to be refunded. The debtor delivered machinery for part of the account, but as to the remainder insisted on paying in other property, as entitled to do under the contract with defendants. *Held*, that plaintiff was entitled to recover on the guaranty the amount paid for such part.—Bassford v. Fitzgerald (C. C.) 958.

## HABEAS CORPUS.

**§ 1. Nature and grounds of remedy.**

Const. U. S. art. 1, § 9, prohibiting the suspension of the writ of habeas corpus, etc., *held* not a grant of power to federal courts, but a prohibition against suspension of the writ by Congress or the executive.—Ex parte Caldwell (C. C.) 487.

**§ 2. Jurisdiction, proceedings, and relief.**

Under Rev. St. U. S. §§ 716, 751–753 [U. S. Comp. St. 1901, pp. 580, 592], the power of federal courts to issue habeas corpus is coextensive with the common law, except that it cannot be used for a deliverance of a prisoner in jail, except in cases specified.—Ex parte Caldwell (C. C.) 487.

A writ of habeas corpus may be issued out of the federal courts to inquire into the cause of a commitment under a civil, as well as a criminal, process.—Ex parte Caldwell (C. C.) 487.

Act Cong. March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], authorizing appeals to the Supreme Court of the United States in cases involving the construction of the federal Constitution, etc., *held* applicable to appeals in habeas corpus proceedings.—In re Marmo (D. C.) 201.

Where a petition to a federal court for habeas corpus alleged that petitioner's imprisonment was in violation of the federal Constitution, the court, on denying the writ, had no discretion to refuse to allow an appeal.—In re Marmo (D. C.) 201.

## HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 3.

## HEALTH.

See "Food."

## HEARING.

In equity, see "Equity," § 4.

## HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 2.

## HIGHWAYS.

Accidents at railroad crossings, see "Railroads," § 1.

**§ 1. Regulation and use for travel.**

*A notice of a defect in a highway alleged to have caused plaintiff's injuries, sufficient to enable an ordinarily intelligent person to find the place and understand how and when the accident occurred, *held* a sufficient compliance with Gen. St. Conn. 1902, § 2020.—Elson v. Town of Waterford (C. C.) 1004.

In an action against a town for injuries caused by defect in a highway, complaint *held* not defective for failure to show that the defect relied on was the same as set out in the notice required by Gen. St. Conn. 1902, § 2020. —Elson v. Town of Waterford (C. C.) 1004.

## HOMICIDE.

**§ 1. Sentence and punishment.**

Under V. S. §§ 1997–1999, 2007, 4886, and Const. c. 2, § 11, the keeping of petitioner in solitary confinement after the time fixed for her execution for murder during the time of successive reprieves without a new sentence *held* a violation of a right to be freed therefrom without due process of law.—Ex parte Rogers (D. C.) 961.

## HOSPITALS.

See "Asylums."

## IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 2.

## IMPEACHMENT.

Of officer, see "Officers," § 1.
Of witness, see "Witnesses," § 3.

## IMPORTS.

Duties, see "Customs Duties."

## IMPRISONMENT.

Habeas corpus, see "Habeas Corpus."

## IMPROVEMENTS.

Public improvements, see "Municipal Corporations," § 1.
Recovery of improvements from intruder in Indian territory, see "Indians."

## INDEMNITY.

See "Guaranty."

Plaintiffs, in an action for breach of a contract to construct a water pipe line, *held* not entitled to recover damages for breach of a bond given to a city, in advance of their being compelled by the city to perform their liability on the bond.—Smith & Benham v. Curran & Hussey (C. C.) 150.

## INDIANS.

Bribery of Indian agent, see "Bribery."

Act Oct. 30, 1888, of the Choctaw Nation (Laws 1894, p. 248), directing sheriffs to sell improvements owned by noncitizens to the highest Choctaw citizen bidder for cash, confers no power to make a sale on credit, and such a sale is void, and conveys no right or title to the purchaser.—Walker v. McLoud (C. C. A.) 394.

That a defendant is an intruder and in possession of improvements in the Indian Territory, in violation of the law of an Indian nation, affords no ground for the recovery of such improvements by a plaintiff who shows no title thereto.—Walker v. McLoud (C. C. A.) 394.

A half-blood Indian, who has continued to reside on a reservation as a tribal Indian, may lawfully be adopted by the tribe as a member, and such adoption entitles him to all the rights of other members of the tribe, including the exemption from state taxation of his property held on the reservation while he maintains his tribal relations.—United States v. Heyfron (C. C.) 964.

A quarter-blood Indian, adopted into the Flathead Nation on his marriage to a member thereof, and who has continued to reside on the reservation, and has been treated by the tribe and the government as a member of the tribe, is entitled to all the rights of one, including the exemption of his property from state taxation.—United States v. Heyfron (C. C.) 968.

## INDICTMENT AND INFORMATION.

See "Grand Jury."
For bribery, see "Bribery."
For failure to pay tax on oleomargarine, see "Food."

## INFANTS.

See "Parent and Child."

## INFRINGEMENT.

Of patent, see "Patents," §§ 8–10.
Of trade-mark, see "Trade-Marks and Trade-Names," § 1.

## INJUNCTION.

Federal courts restraining proceedings in state courts, see "Courts," § 8.
Interlocutory judgment awarding injunction as bar to another suit, see "Judgment," § 3.
Jurisdiction of equity, see "Equity," § 1.
Jurisdiction of federal court to restrain enforcement of ordinances, see "Courts," § 2.
Jurisdiction of federal courts to restrain unlawful state taxes, see "Courts," §§ 1, 2.

*Restraining particular acts or proceedings.*

Election of corporate officers, see "Corporations," § 2.
Enforcement of judgment, see "Judgment," § 2.
Infringement of patent, see "Patents," § 10.
Mining ore on leased premises, see "Mines and Minerals," § 2.
Order of railroad commission affecting commerce, see "States," § 2.
Sale of assets of bankrupt corporation, see "Bankruptcy," § 5.
Unfair competition, see "Trade-Marks and Trade-Names," § 1.
Unreasonable charges by carrier, see "Carriers," § 2.
Wrongful enforcement of tax, see "Taxation," § 6.

**§ 1. Nature and grounds in general.**

A bill to restrain enforcement of a municipal smoke ordinance *held* to present a cause for equitable relief.—Glucose Refining Co. v. City of Chicago (C. C.) 209.

**§ 2. Actions for injunctions.**

In a suit by a railroad company to restrain ticket brokers from buying and selling nontransferable tickets, allegations in the answer pleading the invalidity of such nontransferable conditions and waiver thereof and laches *held* not subject to exceptions.—Pennsylvania Co. v. Bay (C. C.) 203.

In a suit to restrain ticket brokers from buying and selling nontransferable railroad tickets, an allegation in the answer that such nontransferable provisions were the result of an illegal combination in violation of the interstate commerce and Sherman acts *held* subject to exception.—Pennsylvania Co. v. Bay (C. C.) 203.

**§ 3. Preliminary and interlocutory injunctions.**

Where, in a suit to restrain the enforcement of a city ordinance for want of power of the city council to pass the same, the federal court was not satisfied that it had jurisdiction of the subject-matter, a motion for a preliminary injunction would be denied.—Farson v. City of Chicago (C. C.) 184.

The pleadings and proof on motions for a preliminary injunction and the appointment of a

receiver *held* not to warrant the granting of such relief.—Napier v. Westerhoff (C. C.) 420.

## INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."
Of corporation, see "Corporations," § 5.
Priority of tax on sale of property of insolvent corporation, see "Taxation," § 4.
Rights and duties of receiver in operating insolvent's property, see "Receivers," § 1.

## INSTRUCTIONS.

In civil actions, see "Trial," § 2.

## INSURANCE.

Adoption of practice of state courts as to competency of witnesses in action on policy, see "Courts," § 4.
Assignment of policies by insolvent as act of bankruptcy, see "Bankruptcy," § 1.
Breach of contract for transfer of insurance, see "Sales," § 4.
Competency of witness in suit on insurance contract, see "Witnesses," § 1.

**§ 1. The contract in general.**

*Stipulations in written policies, to preserve the policy from change by parol, *held* valid.—Atlas Reduction Co. v. New Zealand Ins. Co. (C. C. A.) 497.

A policy of insurance is a contract by the terms of which the rights of the parties are to be measured.—Atlas Reduction Co. v. New Zealand Ins. Co. (C. C. A.) 497.

An indorsement on a policy of insurance must be considered in the light of the purpose actuating the parties in stipulating that the policy could be modified only in writing.—Atlas Reduction Co. v. New Zealand Ins. Co. (C. C. A.) 497.

**§ 2. Assignment or other transfer of policy.**

The words "as their interest may appear" refer to an interest, not in the property insured, but in the payment of the loss.—Atlas Reduction Co. v. New Zealand Ins. Co. (C. C. A.) 497.

An indorsement of a policy, "Loss, if any, payable to [another] as his interest may appear," does not give the assignee a right to the loss absolutely, but to the extent of any interest he may have at the time of the loss.—Atlas Reduction Co. v. New Zealand Ins. Co. (C. C. A.) 497.

An indorsement of a policy to another, "Loss payable as his interest may appear," *held* not to create a new contract with the payee, or abrogate any condition of the policy.—Atlas Reduction Co. v. New Zealand Ins. Co. (C. C. A.) 497.

An agreement by a borrower before insolvency to assign certain insurance policies to the lender as collateral security for loans *held* a valid equitable assignment of the insurance when issued, though the policies were not actually delivered or assigned until after loss, when the insured was insolvent.—Wilder v. Watts (D. C.) 426.

**§ 3. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.**

The term "occupation," as used in an accident policy, implies simply that which, at the time of the accident, constitutes assured's principal business.—Ætna Life Ins. Co. v. Dunn (C. C. A.) 629.

Party obtaining an accident policy, specifying his occupation to be that of druggist *held* to be occupied as supervising farmer, and not druggist, within the policy.—Ætna Life Ins. Co. v. Dunn (C. C. A.) 629.

*Statements by insured in his application, with reference to his family history as to consumption, and whether he had had any serious illness within two years, were warranties.—Doll v. Equitable Life Assur. Soc. (C. C. A.) 705.

*In an action on a policy, evidence *held* to establish a breach of warranty that insured had no family history of consumption, and that he had had no serious illness within two years prior to the date of the application.—Doll v. Equitable Life Assur. Soc. (C. C. A.) 705.

Evidence *held* to show that assured in accident policy did not continue his occupation as a druggist, but that while improving his homestead he was a supervising farmer.—Ætna Life Ins. Co. v. Dunn (C. C.) 629.

**§ 4. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.**

Where a policy of insurance covering personal property contained a stipulation avoiding the policy if it be incumbered without consent, the giving of a chattel mortgage without consent terminates the insurance.—Atlas Reduction Co. v. New Zealand Ins. Co. (C. C. A.) 497.

The test as to whether one insured in an accident policy had abandoned the occupation stated in the policy is whether at the time of the injury he was in fact engaged in another occupation as a business of a more hazardous classification.—Ætna Life Ins. Co. v. Dunn (C. C. A.) 629.

**§ 5. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.**

Where by the terms of a policy the agents of insurer had no power to waive any of its provisions, except by writing indorsed thereon, and the agents by indorsement made the policy payable to a third person as his interest might appear, parol evidence was inadmissible to show that at the time of the indorsement the agents knew that the insured personal property was incumbered by chattel mortgage to the indorsee.—Atlas Reduction Co. v. New Zealand Ins. Co. (C. C. A.) 497.

An indorsement of an insurance policy to a third person as his interest may appear *held* not a consent to the incumbering of the insured personal property by a chattel mortgage.—Atlas Reduction Co. v. New Zealand Ins. Co. (C. C. A.) 497.

**§ 6. Mutual benefit insurance.**

A delay of three years by a member of a mutual benefit insurance society before electing to rescind his contract, after the right to rescind arose, during which time the society lost a large number of members, who would have been assessable to pay his claim to recover his assessments paid, and took in others who were ignorant of such claim, *held* to estop him to recover.—Clymer v. Supreme Council A. L. H. (C. C.) 470.

## INTEREST.

See "Usury."

**§ 1. Time and computation.**

*A charterer is not relieved from the payment of interest or costs in a suit against him to recover charter hire by an offer to pay less than the sum due, renewed after suit brought, but without paying the money into court or including in the offer interest or costs up to the time it was made.—Donaldson v. Severn River Glass Sand Co. (D. C.) 691; Severn River Glass Sand Co. v. Donaldson, Id. 694.

## INTERLOCUTORY INJUNCTION.

See "Injunction," § 3.

## INTERNAL REVENUE.

Under the rule of the court that the arrangement of rules under distinct heads is not to prevent their covering every mode of procedure to which they may be applicable, *held*, that the rule, under the head of "Admiralty," that service upon the proctor of a party in admiralty stipulations binds the surety, is applicable in internal revenue proceedings.—United States v. 59,650 Cigars (D. C.) 166.

## INTERNATIONAL LAW.

See "Aliens"; "Ambassadors and Consuls"; "Treaties."

## INTERROGATORIES.

To witnesses, see "Depositions."

## INTERSTATE COMMERCE.

Regulation, see "Carriers," § 1; "Commerce."

## INTERSTATE EXTRADITION.

See "Extradition," § 1.

## INVENTION.

See "Patents."

## IRRIGATION.

See "Waters and Water Courses," § 1.

## JUDGES.

See "Courts."

## JUDGMENT.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 3.
Evidence of, as ground for impeachment of witness, see "Witnesses," § 3.
Review, see "Appeal and Error."

**§ 1. Opening or vacating.**

Where a bankrupt was not ruled to plead until three months after his discharge, and failed to set up such discharge as a defense, he was not entitled to have the judgment set aside in order that he might thereafter raise such defense.—Mack Mfg. Co. v. VanDuerson (C. C.) 953.

**§ 2. Equitable relief.**

The exploitation of a collusive decree adjudging the validity of a void patent does not entitle one not a party to have the same set aside after a number of terms have passed, nor to injunctive relief.—Union Waxed & Parchment Paper Co. v. Sevigne Bread Wrapper Co. (C. C.) 415.

**§ 3. Merger and bar of causes of action and defenses.**

A decree sustaining the validity of a patent, awarding an injunction against infringement, and referring the case for an accounting, is interlocutory only, and, although affirmed on appeal, is not conclusive as to the validity of the patent in a subsequent suit between the same parties prior to the rendition of final decree.—Australian Knitting Co. v. Gormly (C. C.) 92.

**§ 4. Conclusiveness of adjudication.**

A manufacturer of an alleged infringing device, who assisted a purchaser from him and user in the defense of a suit for infringement, but who was not a party to the record, *held* not directly interested in the case, so as to be concluded by a decree for complainant, nor estopped from setting up new defenses against the validity of the patent in a subsequent suit thereon against him.—Australian Knitting Co. v. Gormly (C. C.) 92.

The judgment in an action of replevin brought under Rev. St. § 4965 [U. S. Comp. St. 1901, p. 3414], in which plaintiff recovered a number of infringing sheets of a copyrighted picture, is not evidence that they were found in defendant's possession, in a subsequent suit under the same section to recover the pecuniary penalty of $10 for each copy so found.—Werckmeister v. American Tobacco Co. (C. C.) 162.

**§ 5. Lien.**

The vested remainder to which one of testator's children was entitled under the will *held* charged with the lien of a judgment recovered against such child, which lien, in case of a sale of the property by the executor, attached to the proceeds thereof.—In re L'Hommedieu (D. C.) 606.

## JURISDICTION.

Amount in controversy, see "Courts," § 3.

*Jurisdiction of particular actions or proceedings.*

See "Habeas Corpus," § 2.
Actions for causing death, see "Death," § 1.
By or against trustee in bankruptcy, see "Bankruptcy," § 5.
For limitation of liability, see "Shipping," § 4.

*Special jurisdictions.*

See "Admiralty," § 1; "Equity," § 1.
Particular courts, see "Courts."

## JURY.

See "Grand Jury."
Grounds for reference instead of trial by jury, see "Reference," § 1.
Instructions in civil actions, see "Trial," § 2.
Questions for jury in civil actions, see "Trial," § 1.
Taking case or question from jury at trial, see "Trial," § 1.

## LACHES.

Affecting right to review suit for infringement of patent, see "Patents," § 10.
In suing for injunction, see "Injunction," § 2.
In suing for unlawful competition, see "Trade-Marks and Trade-Names," § 1.

## LANDLORD AND TENANT.

Liability of lessor of railroad for negligence of lessee, see "Railroads," § 1.
Mining leases, see "Mines and Minerals," § 2.
Street railroad lease, see "Street Railroads," § 1.

## LANDS.

See "Public Lands."

## LEGACIES.

See "Wills."

## LETTERS PATENT.

For inventions, see "Patents."
For public lands, see "Public Lands," § 2.

## LICENSES.

For making, sale, and use of patented article, see "Patents," § 10.
Jurisdictional amount in controversy in suit to restrain enforcement, see "Courts," § 3.

**§ 1. For occupations and privileges.**

Sand. & H. Dig. Ark. § 5132, authorizing cities to tax, license, and suppress certain occupations, including "gift enterprises," does not confer power on a city to impose a license tax on the occupation of selling trading stamps to merchants, to be given by them to cash customers as a premium, and redeemed by the seller in merchandise at their face value, in whatever sums presented; there being no element of chance in such business to constitute it a gift enterprise.—Humes v. City of Little Rock (C. C.) 929.

A city ordinance imposing a license tax of $50 per week on the occupation of selling trading stamps to merchants *held* void as unreasonable and an infringement upon the constitutional rights of a citizen.—Humes v. City of Little Rock (C. C.) 929.

## LIENS.

See "Maritime Liens."
Conflicting liens for usurious debt, see "Usury," § 1.
Effect of proceedings in bankruptcy, see "Bankruptcy," § 3.
For taxes, see "Taxation," § 4.
Of judgment, see "Judgment," § 5.
Of pilots for wages, see "Seamen."

## LIFE INSURANCE.

See "Insurance," § 3.

## LIMITATION OF ACTIONS.

See "Adverse Possession."

## LIMITATION OF LIABILITY.

Of owner of vessel, see "Shipping," § 4.

## LIVE STOCK.

Adoption by federal courts of state laws as rules of decision in action for breach of contract for transportation of, see "Courts," § 5.
Carriage of, see "Carriers," § 3.

## LOANS.

Loan or sale, see "Sales," § 1.

## LOGS AND LOGGING.

Evidence of similar facts and transactions in action for wrongfully cutting timber, see "Evidence," § 1.
Right to cut timber on government land, see "Public Lands," § 1.

## LOST INSTRUMENTS.

Opinion evidence as to whether land from which timber was cut was mineral land, see "Evidence," § 4.

## MACHINERY.

Liability of employer for defects, see "Master and Servant," § 1.
Opinion evidence as to negligence in use of, see "Evidence," § 4.

## MAINTENANCE.

See "Champerty and Maintenance."

## MALICE.

See "Malicious Prosecution," § 2.

## MALICIOUS PROSECUTION.

**§ 1. Want of probable cause.**

Proof that defendant instituted criminal proceedings against plaintiff on the advice of a police magistrate, not shown to be an attorney, *held* insufficient to rebut the inference of malice arising from want of probable cause.—Cook v. Proskey (C. C. A.) 273.

**§ 2. Malice.**

In an action for malicious prosecution, the jury *held* entitled to infer that the prosecution was malicious, if without probable cause.—Cook v. Proskey (C. C. A.) 273.

**§ 3. Actions.**

In an action for malicious prosecution, the admission of a superseded indictment in evidence *held* not error.—Cook v. Proskey (C. C. A.) 273.

In an action for malicious prosecution, evidence *held* to warrant a finding that defendant prosecuted plaintiff for an offense defined by Pen. Code N. Y. § 550, under which plaintiff was arrested and indicted, and that the indictment was subsequently dismissed.—Cook v. Proskey (C. C. A.) 273.

## MANDAMUS.

To prevent discrimination by carrier, see "Carriers," § 1.

## MARITIME LIENS.

**§ 1. Creation, operation, and effect.**

Respondents, who equipped libelant's yacht with an engine, lost the right to a common-law lien on the vessel for the price by surrendering possession to libelant without payment, and such right was not revived by a subsequent delivery of the vessel to respondents for repairs, although they were entitled to such lien for the value of the repairs then made.—Downey v. Lozier Motor Co. (D. C.) 173.

*The repairer of a vessel is not estopped from claiming a lien by the fact that he first brought suit against the owner in personam to recover for such repairs.—The Grand Republic (D. C.) 615.

**§ 2. Enforcement.**

The fact that the cost of repairs to a vessel was charged to the owner, and a bill therefor presented to the owner, will not defeat the right of the repairer to a lien, where an agreement for one is shown.—The Grand Republic (D. C.) 615.

## MARRIAGE.

Of Chinese slave girl to resident as affecting right to remain in country, see "Aliens," § 1.

## MASTER AND SERVANT.

See "Seamen."

Liability of vessel for tort by master or crew, see "Shipping," § 3.

Peonage, see "Slaves."

Right to patent as between employers and workmen, see "Patents," § 2.

Trade unions, see "Trade Unions."

**§ 1. Master's liability for injuries to servant.**

An employé *held* guilty of contributory negligence, barring recovery for injuries received.—National Biscuit Co. v. Nolan (C. C. A.) 6.

Where the place assigned an employé of full age, intelligence, and experience is not necessarily dangerous, the master is not required to warn the servant of danger.—National Biscuit Co. v. Nolan (C. C. A.) 6.

The master is only bound to ordinary and reasonable care in furnishing a reasonably safe place and machinery.—National Biscuit Co. v. Nolan (C. C. A.) 6.

A railroad company *held* not liable for failure to provide plaintiff's decedent with a safe place to work; he having been killed by a rock falling down the side of a mountain into a cut while he was assisting in the removal of a landslide from the track, which obstructed traffic.—Florence & C. C. R. Co. v. Whipps (C. C. A.) 13.

Decedent's foreman and defendant's roadmaster, engaged in removing débris from defendant's railroad track in a cut, *held* decedent's fellow servants, for whose negligence in inspecting the mountain for further loose material defendant was not liable.—Florence & C. C. R. Co. v. Whipps (C. C. A.) 13.

A railroad employé, engaged in removing débris obstructing traffic in a cut caused by a landslide, *held* not entitled to rely on defendant's inspection of the place, but to have assumed the risk of dangers incident thereto.—Florence & C. C. R. Co. v. Whipps (C. C. A.) 13.

The questions whether an employé, who was killed by being thrown from a scaffolding by the action of a defective tool with which he was working, had assumed the risk or was guilty of contributory negligence, *held* properly submitted to the jury.—Hayward v. Key (C. C. A.) 34.

Under the New York employers' liability act of 1902, which establishes the rule for the federal courts sitting within the state in actions for personal injuries to employés, an employer is liable for the negligence of a foreman whose principal duty is that of superintendence to the same extent that he would be liable at common law for his own personal negligence.—Hayward v. Key (C. C. A.) 34.

The care which the law requires of a railroad company respecting the safety of the place where work is to be performed by its employés is ordinary care, such as prudent, intelligent, experienced men usually use under like circumstances to guard against dangers reasonably to be an-

ticipated.—Southern Pac. Co. v. Gloyd (C. C. A.) 388.

An instruction as to the measure of care required of a railroad company in constructing its culverts *held* erroneous, in an action for injury to a brakeman.—Southern Pac. Co. v. Gloyd (C. C. A.) 388.

A railroad company *held* not chargeable with negligence, which rendered it liable for an injury to a brakeman, because it maintained open culverts on its line remote from stations, through one of which the brakemen fall.—Southern Pac. Co. v. Gloyd (C. C. A.) 388.

*A switchyard conductor, who was injured by a collision with an engine while pushing a dining car over a track in the nighttime with the engine behind it, *held* to have assumed the additional risk from such manner of placing the engine, where he had knowledge of the greater danger, although he so placed it by direction of the yardmaster, who was his superior.—Southern Ry. Co. v. Logan (C. C. A.) 725.

## MEASURE OF DAMAGES.

For breach of contract for shipment of goods, see "Shipping," § 4.

## MEETINGS.

Of stockholders, see "Corporations," § 2.

## MERGER.

Of cause of action in judgment, see "Judgment," § 3.

## MINES AND MINERALS.

Bill of exceptions in action for removal of coal, see "Exceptions, Bill of," § 1.
Denial of due process of law in condemnation of property for mining tunnel, see "Constitutional Law," § 4.
Effect of payment of taxes on, see "Taxation," § 5.
Exercise of power of eminent domain by mine owner, see "Eminent Domain," §§ 1, 2.
Opinion evidence as to mineral character of land, see "Evidence," § 4.
Taxation of, see "Taxation," § 2.

**§ 1. Public mineral lands.**

A ruling by the Interior Department that the classification of lands in Montana and Idaho as mineral, under Act Cong. Feb. 26, 1895, c. 131, 28 Stat. 683, was not conclusive on the United States, *held* not error.—Lynch v. United States (C. C. A.) 535.

**§ 2. Title, conveyances, and contracts.**

A bill to cancel a mining lease as a cloud on plaintiff's title, to establish his right of possession, and to enjoin the lessee from mining ore on the leased premises, *held* maintainable as a bill to restrain a continued trespass, tending to alter the character of the property and occasion irreparable damage.—Big Six Development Co. v. Mitchell (C. C. A.) 279.

A bill to cancel a mining lease as a cloud on plaintiff's title, to establish his right of possession in the premises, and to enjoin the lessee from mining ore on the leased premises, *held* not demurrable on the ground that plaintiff had a complete remedy at law by an action for forcible entry and detainer.—Big Six Development Co. v. Mitchell (C. C. A.) 279.

That a landlord received rent or royalties due under a mining lease, after notice of forfeiture because of a continuing breach of the lease by the tenant, or after suit brought to recover the property, *held* not a waiver of the forfeiture.—Big Six Development Co. v. Mitchell (C. C. A.) 279.

In trespass for the removal of coal from beneath plaintiffs' property, plaintiffs *held* entitled to an order for the survey of defendant's mining operations.—Penny v. Central Coal & Coke Co. (C. C. A.) 769.

## MISREPRESENTATION.

By insured, see "Insurance," § 3.

## MONEY RECEIVED.

Recovery of price paid for goods, see "Sales," § 4.

## MONOPOLIES.

**§ 1. Trusts and other combinations in restraint of trade.**

Where a number of railroads, acting by concert of agreement and action, advanced the rates on shipments of a particular class throughout all the territory to which their organization and influence with similar organizations extended, *held*, that it was immaterial that they had a stipulation in such articles that each member could at will and at any time withdraw from the agreement, so that it was not a combination in restraint of trade.—Tift v. Southern Ry. Co. (C. C.) 753.

## MORTGAGES.

By or to executor or administrator, see "Executors and Administrators," § 1.
Effect of proceedings in bankruptcy, see "Bankruptcy," § 3.
Of personal property, see "Chattel Mortgages."
Street railroad, mortgage, see "Street Railroads," § 1.

## MOTIONS.

Continuance in civil actions, see "Continuance."
Direction of verdict in civil actions, see "Trial," § 1.

## MUNICIPAL CORPORATIONS.

Enjoining enforcement of ordinance, see "Injunction," §§ 1, 3.
Jurisdiction of federal court to restrain enforcement of ordinances, see "Courts," § 2.
Ordinances prohibiting emission of smoke from chimneys as denying equal protection of law, see "Constitutional Law," § 3.
Power to impose license tax on mercantile business, see "Licenses," § 1.
Relevancy of evidence in proceedings for assessment of damages caused by change in street grade, see "Evidence," § 1.
Street railroads, see "Street Railroads."

**§ 1. Public improvements.**

Mere impairment of the use of property for a particular purpose by a change of street grade will not necessarily entitle the owner to damages.—City of Seattle v. Board of Home Missions of Methodist Protestant Church (C. C. A.) 307.

Where a change of street grade will result in damage, it is proper to consider the cost of adjusting the property and buildings to the new grade, together with damages to trees, etc.—City of Seattle v. Board of Home Missions of Methodist Protestant Church (C. C. A.) 307.

Under Laws Wash. 1893, p. 194, c. 84, § 15, on an ascertainment of damages to property not taken by a change of grade, any local or special benefits that the property would derive from the improvement should be deducted from any damages sustained thereby.—City of Seattle v. Board of Home Missions of Methodist Protestant Church (C. C. A.) 307.

In a proceeding to assess damages for a change of street grade, under Laws Wash. 1893, p. 194, c. 84, § 15, evidence that the market value of the lot and buildings would be greater after the regrade than before *held* admissible.—City of Seattle v. Board of Home Missions of Methodist Protestant Church (C. C. A.) 307.

In a proceeding for assessment of damages resulting from a change of street grade, under Laws Wash. 1893, p. 194, c. 84, § 15, evidence as to benefits of the lot apart from the buildings thereon *held* inadmissible.—City of Seattle v. Board of Home Missions of Methodist Protestant Church (C. C. A.) 307.

**§ 2. Police power and regulations.**

Rev. St. Ill. art. 5, c. 24, par. 75 (Hurd's Rev. St. 1903, p. 294), *held* to authorize the Chicago city council to pass ordinance March 23, 1903, § 10, declaring the emission of dense smoke, with certain exceptions, to be a nuisance, etc.—Glucose Refining Co. v. City of Chicago (C. C.) 209.

**§ 3. Fiscal management, public debt, securities, and taxation.**

Bona fide purchasers of municipal bonds take with notice of the law under which the bonds were issued.—Wright v. East Riverside Irr. Dist. (C. C. A.) 313.

**§ 4. Actions.**

*A municipal corporation is not suable by attachment in the courts of another state.—Parks Co. v. City of Decatur (C. C. A.) 550.

## MUTUAL BENEFIT INSURANCE.

See "Insurance," § 6.

## NAMES.

See "Trade-Marks and Trade-Names."

## NAVIGABLE WATERS.

See "Waters and Water Courses"; "Wharves."

## NAVIGATION.

Rules for preventing collisions, see "Collision," § 1.

## NEGLIGENCE.

Causing death, see "Death," § 1.
Injuries to seamen, see "Seamen."
In obtaining evidence as affecting right to review suit for infringement of patent, see "Patents," § 10.
Liability of vessel for negligence of passenger, see "Shipping," § 5.
Opinion evidence as to, see "Evidence," § 4.

*By particular classes of parties.*

See "Carriers," § 4.
Employer, see "Master and Servant," § 1.
Owner of wharf, see "Wharves."
Railroad companies, see "Railroads," § 1.
Tugs, see "Towage."

*Condition or use of particular species of property, works, or machinery.*

See "Highways," § 1; "Railroads," § 1.
Vessels, see "Shipping," §§ 3–5.

*Contributory negligence.*

Of person injured by operation of railroad, see "Railroads," § 1.
Of servant, see "Master and Servant," § 1.

**§ 1. Actions.**

In an action for death of a spectator, having paid an admission fee to certain amusement grounds, by being struck by a dead limb from a tree, defendant's negligence in failing to discover and remove the limb *held* for the jury.—Williams v. Camden Interstate Ry. Co. (C. C.) 571.

## NEWLY-DISCOVERED EVIDENCE.

Grounds for review of suit for infringement of patent, see "Patents," § 10.

## NEW TRIAL.

Opening or vacating judgment, see "Judgment," § 1.
Reopening suits for infringement of patent, see "Patents," § 10.

**§ 1. Grounds.**

The fact that neither party is entirely satisfied with the result is no reason why a new

trial should be granted after a fair hearing before an impartial jury.—Fabricant v. Philadelphia Rapid Transit Co. (C. C.) 976.

## NOTICE.

*Of particular facts, acts, or proceedings.*

Defect in highway, see "Highways," § 1.
Increase of assessment of railroad property, see "Taxation," § 3.
Rights of bondholders under street railroad trust mortgage, see "Street Railroads," § 1.
Taking proofs in equity, see "Equity," § 3.

*To particular classes of parties.*

Purchaser of municipal bonds, see "Municipal Corporations," § 3.
Purchaser of patent, see "Patents," §§ 9, 10.

## NUISANCE.

Smoke nuisance in cities, see "Municipal Corporations," § 2.

## OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 2.

## OFFICERS.

Bribery, see "Bribery."

*Particular classes of officers.*

See "Ambassadors and Consuls"; "Receivers."
Corporate officers, see "Corporations," §§ 3, 4.
State officers, see "States," § 1.

**§ 1. Appointment, qualification, and tenure.**

Under Const. W. Va. art. 5, and article 4, § 9, West Virginia House of Delegates *held* without jurisdiction to appoint a committee to sit during vacation to investigate alleged misconduct of the Governor, for the purpose of vindicating charges made.—Ex parte Caldwell (C. C.) 487.

## OLEOMARGARINE.

See "Food."

## OPENING.

Judgment, see "Judgment," § 1.

## OPINION EVIDENCE.

In civil actions, see "Evidence," § 4.

## OPTIONS.

See "Vendor and Purchaser," § 2.
Specific performance of option contract, see "Specific Performance," § 1.

## ORDERS.

Review of appealable orders, see "Appeal and Error."

## ORDINANCES.

Denying due process of law, see "Constitutional Law," § 3.
Jurisdiction of federal court to restrain enforcement, see "Courts," § 2.
Municipal ordinances, see "Municipal Corporations," § 2.
Restraining enforcement, see "Injunction," §§ 1, 3.

## OVERCHARGE.

By carrier, see "Carriers," § 2.

## PARENT AND CHILD.

Damages recoverable by father for wrongful death of child, see "Death," § 1.

Abandonment of deceased by his father *held* to constitute his emancipation, by which the father forfeited his right to deceased's services and earnings.—Swift & Co. v. Johnson (C. C. A.) 867.

## PAROL EVIDENCE.

In civil actions, see "Evidence," § 8.

## PARTIES.

Joinder of parties as affecting removal of causes, see "Removal of Causes," § 1.
Persons concluded by judgment, see "Judgment," § 4.
In action against labor union, see "Trade Unions."
In action for infringement of patent, see "Patents," § 10.
On appeal in bankruptcy, see "Bankruptcy," § 8.

**§ 1. Plaintiffs.**

*Trustees of a religious society *held* entitled to sue for an injury to the freehold of the society's land without joining the members of the congregation, under Sand. & H. Dig. Ark. § 5632.—Penny v. Central Coal & Coke Co. (C. C. A.) 769.

## PARTNERSHIP.

Accounting by executor or administrator of deceased partner, see "Executors and Administrators," § 2.
Bankruptcy of, see "Bankruptcy," § 1.
Receiver of partnership, see "Receivers," § 1.

## PASSENGERS.

See "Carriers," § 4; "Shipping," § 5.

## PATENTS.

Conclusiveness of judgment in suit for infringement, see "Judgment," § 4.
Equitable relief from judgment in patent case, see "Judgment," § 2.

For public lands, see "Public Lands," § 2.
Interlocutory judgment in patent suit as bar to another suit, see "Judgment," § 3.

**§ 1. Patentability.**

The word "Chamotte" defined, as used in a patent to designate a material entering into the patented composition.—Panzl v. Battle Island Paper Co. (C. C. A.) 48.

A conception alone, although first in time, is not patentable, but must be accompanied by mechanical embodiment, which, to make the invention patentable, must itself be unanticipated. —Voightmann v. Perkinson (C. C. A.) 56.

One who selects and combines elements from the inventions of others into a new structure adapted to accomplish the old result is entitled to a patent only for his own particular form of adaptation.—Loew Supply & Mfg. Co. v. Fred Miller Brewing Co. (C. C. A.) 886.

The failure of an applicant for a patent to further prosecute his application after it has been rejected by the examiner for anticipation does not operate as an abandonment of the invention nor an acquiescence in the ruling, where it was caused by his lack of funds.—Shepherd v. Deitsch (C. C.) 83.

The commercial success and success in actual use of a patented article is evidence of invention.—Revere Rubber Co. v. Consolidated Hoof Pad Co. (C. C.) 899.

If an inventor passes his invention into the hands of different persons to test the usefulness of the device before patent, their use of it must be confined to experimental use; and, if they use it publicly as a nonpatented article, it will constitute a public use.—Bradley v. Eccles (C. C.) 911.

Under Rev. St. § 4886 [U. S. Comp. St. 1901, p. 3382], the public use of an invention for more than two years before the application for a patent therefor, although in but a single instance, will defeat the right to a patent.—Bradley v. Eccles (C. C.) 911.

The fact that an application for a patent has been rejected does not characterize the alleged invention as an abandoned experiment; and, if it has in fact been perfected into an operative device, it cannot thereafter be appropriated and patented by another.—Miller & England v. Walker Patent Pivoted Bin Co. (C. C.) 919.

**§ 2. Persons entitled to patents.**

*Where a patent was applied for by an employé after the termination of his employment, the burden was on the employer, claiming a right to an assignment thereof under a contract, to show by the weight of the proof that the invention was made by the employé during his employment.—Mississippi Glass Co. v. Franzen (C. C.) 924.

**§ 3. Applications, and proceedings thereon.**

Where a patentee has pointed out such features as he claims are his invention with sufficient clearness to enable them to be understood by those skilled in the art, the law affords him protection.—Shepherd v. Deitsch (C. C.) 83.

**§ 4. Requisites and validity of letters patent.**

A patent for a chemical composition must not only give the names of the ingredients used in making the composition, but also the proportion of each, so that the invention may be practiced by those skilled in the art without further experimentation.—Panzl v. Battle Island Paper Co. (C. C. A.) 48.

When a patent contains a sufficient disclosure of the claimed invention, it will not be invalidated either by the failure of the patentee to state the causes which produce the result or by a mistaken statement thereof.—Hemolin Co. v. Harway Dyewood & Extract Mfg. Co. (C. C. A.) 54.

**§ 5. Term.**

Under Rev. St. § 4887, before its amendment in 1897, a domestic patent is limited by the term of a foreign patent to the same inventor only where the inventions covered by the two patents are identical.—Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co. (C. C. A.) 823.

**§ 6. Reissues.**

The presumption that new matter found in the specification of a reissue patent was omitted from the original through inadvertence or mistake, arising from the fact of the granting of the reissue, is prima facie only, and merely places the burden of proof upon a defendant contesting the validity of the reissue.—S. Franklin & Co. v. Illinois Moulding Co. (C. C. A.) 58.

**§ 7. Construction and operation of letters patent.**

The Marconi reissue patent, No. 11,913 (original No. 586,193), covering a system of wireless telegraphing apparatus, *held* valid and infringed as to claims 3 and 5, not infringed as to claims 8, 10, and 24, and void as to claim 1.—Marconi Wireless Telegraph Co. v. De Forest Wireless Telegraph Co. (C. C.) 657.

**§ 8. Title, conveyances, and contracts.**

*In a suit for infringement by an assignee of a patent against the patentee, the defendant is estopped to insist upon a narrow construction of the patent, which would render it valueless.—Hurwood Mfg. Co. v. Wood (C. C.) 835.

**§ 9. Infringement.**

Infringement of a patent for a combination is not avoided by omitting one element of the combination, where such element is essential to the successful operation of the alleged infringing device, and it is intended that it or its equivalent shall be supplied by users.—James Heekin Co. v. Baker (C. C. A.) 63.

In determining the question of infringement of a patent covering a new combination of elements, the form of the several parts has but little weight; the correct rule being that parts which perform substantially the same function in substantially the same way and produce the same results are mechanical equivalents.—In-

ternational Mfg. Co. v. H. F. Brammer Mfg. Co. (C. C. A.) 396.

The Jenkins patent, No. 620,036, for a multiplying camera, *held* not infringed.—Mahoney v. Jenkins (C. C. A.) 404.

Where the real invention covered by a patent lies in one element of a combination, the others being old and material only in putting into use that which is new, one who appropriates such novel feature cannot avoid infringement by substituting a different form of one of the nonessential parts.—Cazier v. Mackie-Lovejoy Mfg. Co. (C. C. A.) 654.

The rule stated for determining whether the replacement of an element of a patented combination by a purchaser constitutes a repairing or an unlawful reconstruction.—Morrin v. Robert White Engineering Works (C. C.) 68.

The replacing of the vital element in the combination of a patented structure *held* a reconstruction, which constituted an infringement. —Morrin v. Robert White Engineering Works (C. C.) 68.

A notice conspicuously placed on a patented machine that it is sold subject to a license restriction that it shall be used only with supplies furnished by the licensor is binding on a purchaser and user of the machine.—Cortelyou v. Charles Eneu Johnson & Co. (C. C.) 110; Brodrick Copygraph Co. v. Same, Id.

It is competent for the owner of a patent to sell the patented machine, subject to a license restriction that it shall be used only with supplies made and sold by the licensor, and a violation of such restriction will constitute an infringement of the patent.—Cortelyou v. Charles Eneu Johnson & Co. (C. C.) 110; Brodrick Copygraph Co. v. Same, Id.

A defendant who, with knowledge that a patented machine is sold subject to a license restriction that it is to be used only with supplies made and sold by the licensor, induces such licensees to violate such restriction and infringe the patent by buying and using with the machine supplies made by himself, is chargeable with contributory infringement.—Cortelyou v. Charles Eneu Johnson & Co. (C. C.) 110; Brodrick Copygraph Co. v. Same, Id.

**§ 10. —— Suits in equity.**

An application to reopen the case after final hearing in a suit for infringement to permit the taking of additional testimony on an issue of fact is properly denied, where the evidence could have been produced on the hearing by the exercise of due diligence.—Panzl v. Battle Island Paper Co. (C. C. A.) 48.

On an accounting for damages or profits for infringement of a claim of a patent covering an improvement on an existing device, it is incumbent on complainant to show how much of the profit made by defendant on the entire article was due to the patented improvement, or, in case of damages, how much of complainant's loss was due to such improvement.—Baker v. Crane Co. (C. C. A.) 60; Crane Co. v. Baker, Id.

The owner of a patent *held* entitled to recover as profits the amount saved by defendant by the substitution of infringing devices for others previously used through the fact that the patented devices were less subject to breakage due to carelessness or miscalculation on the part of employés or others using them.—Doten v. City of Boston (C. C. A.) 406.

*Infringement by a corporation gives no right of action against one of its officers individually, unless he has acted beyond the ordinary scope of his office.—Cazier v. Mackie-Lovejoy Mfg. Co. (C. C. A.) 654.

A defendant, in failing to present the facts relating to a claim that a patent in suit had expired by reason of the expiration of a prior foreign patent on a hearing in the appellate court, *held* chargeable with laches, which justified the court in denying leave to file a supplemental bill in the nature of a bill of review to enable him to present the question.—Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co. (C. C. A.) 823.

A defendant *held* in contempt on the evidence for violation of a permanent injunction against infringement of a patent.—Kahn v. Starrells (C. C.) 67.

The fact that a patent has not been adjudicated is not sufficient ground for refusing a preliminary injunction against its infringement, where that is clear, unless there is a substantial question as to its validity.—Lambert Snyder Vibrator Co. v. Marvel Vibrator Co. (C. C.) 82.

A personal license granted by a grantee to manufacture and vend the patented article, which reserves the right to license one other and also binds the patentee to prosecute infringers, does not operate as an assignment, and the licensee is not a necessary party complainant to a suit for infringement.—Shepherd v. Deitsch (C. C.) 83.

A plea to a bill for infringement of patents *held* not to state a sufficient defense against the awarding of an injunction, where it in effect admitted the infringement, but alleged that it had ceased before the bill was filed, and that defendant had leased its plant and had no intention of further infringing.—General Electric Co. v. Bullock Electric Mfg. Co. (C. C.) 412.

In a suit for infringement of a patented belt fastener, newly discovered evidence of the manufacture and use of a fastener, an exact counterpart of that patented some four years prior to the application for the patent, *held* sufficiently material to sustain a bill of review.—Diamond Drill & Machine Co. v. Kelley Bros. & Spielman (C. C.) 833.

In a suit for infringement of a patent, defendants *held* not guilty of such negligence in obtaining alleged newly discovered evidence as precluded them from obtaining a writ of review.—Diamond Drill & Machine Co. v. Kelley Bros. & Spielman (C. C.) 833.

**§ 11. Decisions on the validity, construction, and infringement of particular patents.**

The Panzl patent, No. 644,367, for a composition of material for lining vessels used for storing or boiling corrosive liquids, *held* not

anticipated, valid, and infringed as to claim 3. Claims 1 and 2 *held* void for insufficiency of description.—Panzl v. Battle Island Paper Co. (C. C. A.) 48.

The Austen patent, No. 491,972, for an improvement in the art of making coloring matter from logwood, construed, and *held* not anticipated, valid, and infringed.—Hemolin Co. v. Harway Dyewood & Extract Mfg. Co. (C. C. A.) 54.

The Voightmann patent, No. 600,186, for a fireproof window, *held* void for lack of invention.—Voightmann v. Perkinson (C. C. A.) 56.

The Adams second reissue patent No. 11,980 (original No. 642,059), for a machine for mounting ornamental composition directly upon circular picture frames, claims 11 to 18, are void, as covering matters not included in the original.—S. Franklin & Co. v. Illinois Moulding Co. (C. C. A.) 58.

The Lattimore patent, No. 415,720, for a lantern holder, claim 1, *held* not infringed.—Jones v. Davis (C. C. A.) 62.

The Lewis patent, No. 650,129, for a drip coffee pot, construed, and *held* valid and infringed by the device of the Baker patents, Nos. 710,132 and 710,133.—James Heekin Co. v. Baker (C. C. A.) 63.

The Plagman patent, No. 608,220, for a mechanical movement, construed, and *held* infringed by the device of the Martin patent, No. 736,285.—International Mfg. Co. v. H. F. Brammer Mfg. Co. (C. C. A.) 396.

The Moore patent, No. 379,973, for an overflow for wash basins, etc., *held* not infringed, if conceded validity.—Moore v. Meyer-Sniffen Co. (C. C. A.) 402.

The Coup patent, No. 401,775, for a car coupler, construed, and *held* not infringed.—Coup v. McConway & Torley Co. (C. C. A.) 411.

The Oehrle patent, No. 599,191, for an improvement in ornamental ropes or cords, construed, and *held* not infringed.—Oehrle v. William H. Horstman Co. (C. C. A.) 561.

The Murray patent, No. 442,531, for a store service ladder, *held* not anticipated, valid, and infringed.—Murray v. Orr & Lockett Hardware Co. (C. C. A.) 564.

The Cazier patent, No. 696,940, for a trousers hanger, *held* valid and infringed as to claim 5.—Cazier v. Mackie-Lovejoy Mfg. Co. (C. C. A.) 654.

The Bevington patent, No. 474,718, for a railway torpedo, *held* void for lack of invention.—Lafferty Mfg. Co. v. Acme Ry. Signal & Mfg. Co. (C. C. A.) 729.

The Crooker process patent, No. 11,144, for a process for finishing the sole and heel edges of boots and shoes, claim 1, *held* void for lack of patentable novelty.—Electric Boot & Shoe Finishing Co. v. Little (C. C. A.) 732.

The Glover patent, No. 559,522, for a sewage apparatus, construed, and *held* not infringed.—American Sewage Disposal Co. v. City of Pawtucket (C. C. A.) 811.

The terms of the Tesla patents, Nos. 511,559 and 511,560, for an improved method and means of operating electric motors, *held* not limited by prior British patents to the same inventor, which do not cover or claim the same inventions.—Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co. (C. C. A.) 823.

The Green & Gent patent, No. 676,606, for a fire arch for furnaces, is void for lack of patentable invention.—McKenzie Furnace Co. v. Green Engineering Co. (C. C. A.) 830.

The Cobb patent, No. 690,563, for a bottle washing machine, construed, and *held* not infringed by the machine of the Volz patent, No. 736,037.—Loew Supply & Mfg. Co. v. Fred Miller Brewing Co. (C. C. A.) 886.

The Morrin patent, No. 463,307, for a steam generator, *held* infringed by defendant by replacing the vital element of the combination in generators sold under the patent.—Morrin v. Robert White Engineering Works (C. C.) 68.

The Snyder patent, No. 773,234, for a vibratile apparatus, *held* valid and infringed as to claim 1, on a motion for preliminary injunction.—Lambert Snyder Vibrator Co. v. Marvel Vibrator Co. (C. C.) 82.

The Shepherd patent, No. 601,405, for a brush having a reticulated back, *held* not anticipated, valid, and infringed.—Shepherd v. Deitsch (C. C.) 83.

The Mygatt design patent, No. 32,685, for a design for a lamp shade, *held* valid and infringed.—Mygatt v. Zalinski (C. C.) 88.

The Kline design patent, No. 26,623, for a design for a chair, *held* valid, but not infringed.—Kline Chair Co. v. Theo. A. Kochs & Son (C. C.) 90.

The Kinsey patent, No. 424,314, for a burr wheel for knitting machines, is void for prior public use of the alleged invention by others.—Australian Knitting Co. v. Gormly (C. C.) 92.

The Gathright patents, No. 436,619, claims 4 and 5, and No. 452,268, claims 6 and 8, each covering mechanism for making column stops on a typewriting machine, construed, and *held* not infringed.—American Writing Mach. Co. v. Wagner Typewriter Co. (C. C.) 108; Wagner Typewriter Co. v. Wyckoff, Seamans & Benedict, Id.

The Schulte patent, No. 450,592, for mechanism for making column stops on a typewriter machine, claim 9, construed, and *held* not infringed.—American Writing Mach. Co. v. Wagner Typewriter Co. (C. C.) 108; Wagner Typewriter Co. v. Wyckoff, Seamans & Benedict, Id.

The Haigh patent, No. 607,433, for a milk can, *held* valid, and infringed.—Ironclad Mfg. Co. v. Dairymen's Mfg. Co. (C. C.) 123; Same v. Orange County Milk Ass'n, Id.

The Pine patent, No. 645,871, for a folding machine, *held* not anticipated, valid, and in-

fringed.—United Shirt & Collar Co. v. Beattie (C. C.) 136.

The Robinson patent, No. 452.320, for a swivel hook, *held* not anticipated, valid, and infringed on motion for preliminary injunction. —Robinson v. S. & B. Lederer Co. (C. C.) 140.

The Hershey patent, No. 532,554, for a machine for cutting candy, *held* void for lack of patentable invention.—American Caramel Co. v. Thomas Mills & Bro. (C. C.) 142; Same v. Quaker City Chocolate & Confectionery Co., Id.

The Capewell patent, No. 630,972, for a stick pin retainer, *held* void for lack of a patentable invention.—Capewell v. Goldsmith (C. C.) 682.

The Patterson patent, No. 659,315, for a shade fixture, claims 1, 2, and 3, construed, and, as limited by the prior art, *held* not infringed. —Curtain Supply Co. v. North Jersey St. Ry. Co. (C. C.) 734.

The Forsyth patent, No. 559,446, for a shade-holding device, *held* valid, but not infringed by the device of the Hoyt patent, No. 676.557.— Curtain Supply Co. v. North Jersey St. Ry. Co. (C. C.) 734.

The Wood patent, No. 671,039, for a screw driver, *held* infringed, on a motion for a preliminary injunction.—Hurwood Mfg. Co. v. Wood (C. C.) 835.

The Donchian patent, No. 541,320, for a carpet fastener, construed, and *held* not infringed.—Donchian v. Kingston (C. C.) 890.

The Virgil patents, Nos. 344,462, 344,464, 391,439, and 479,339, relating to an instrument for teaching the playing of the piano, and improvements thereon, *held* valid and infringed. —Virgil Practice Clavier Co. v. Virgil (C. C.) 897.

The Kent patent, No. 646,148, for a hoof pad, *held* valid and infringed as to claims 1, 2, 5, and 6.—Revere Rubber Co. v. Consolidated Hoof Pad Co. (C. C.) 899.

The Brachhausen & Riessner patent, No. 500,371, for a music box, *held* void for lack of patentable invention, in view of the prior art.—Regina Co. v. New Century Music Box Co. (C. C.) 903.

The Storm patent, No. 344,793, for a rail bender, construed, and claim 1 *held* void, as too broad, in view of the prior art, and claim 6 not infringed.—Pettibone, Mulliken & Co. v. Verona Tool Works (C. C.) 909.

The Hannan reissued patent, No. 11,260 (original No. 456,117), for an improvement on thill couplings, is void for prior public use of the invention.—Bradley v. Eccles (C. C.) 911.

The Bradley patent, No. 485,956, for a thill coupling, *held* not anticipated and infringed.— Bradley v. Eccles (C. C.) 916.

The Bacon patent, No. 447,532, for a tilting bin, *held* void, because the patentee was not the real inventor.—Miller & England v. Walker Patent Pivoted Bin Co. (C. C.) 919.

**§ 12. Patents enumerated.**

ENGLISH.

1867.

2,450. Brush, cited .....84. 88

1887.

18,007. Sockets on rods, cited..... 685

1890.

17,911. Hoof-pad, cited .....901, 902

1891.

20,347. Hoof-pad, cited .....901, 902

1895.

5,948. Brush, cited ..... 84

1896.

7,467. Brush, cited ..... 84

UNITED STATES.

DESIGN.

26,623. Chair, held valid, but not infringed ..... 90

32,685. Lamp shade, held valid and infringed ..... 88

ORIGINAL.

4,959. Composition for lining pulp digesters, cited ..... 49

18,631 Carpet fastener, cited..... 893

-8,473. Hoof-pad, cited ..... 901

39,659. Swivel hook, cited..... 142

55,563. Swivel hook, cited..... 142

64,038. Machine for making book covers, cited ..... 137

100,454. Milk can, cited..... 124

107,521. Milk can, cited..... 124

155,843. Swivel hook, cited ..... 142

199,615. Folding machine, cited..... 137

208,838. Shuttle-race, cited ..... 74

229,629. Shuttle-driver, cited .....73, 74

231,531. Milk can, cited.....124, 131

240,008. Knitting machine, cited..... 107

257,906. Soap tray, cited..... 403

258,744. Sewage apparatus, cited..817, 821, 822

263,014. Plaiting machine, cited..... 137

267,482. Music box, cited..... 905

268,120. Sewage apparatus, cited..... 814

274,359. Shuttle-race, cited ..... 74

286,739. Swivel hook, cited..... 142

296,169. Mail bag fastener, cited..... 685

298,643. Hat rounding machine, cited..... 138

299,336. Swivel hook, cited..... 141

305,539. Thill coupling, cited..... 918

307,806. Cord or strap fastener, cited..... 685

308,308. Gangway, held infringed..... 406

318,749. Brush, cited ..... 84

321,713. Thill-coupling, cited ..... 914

322,438. Swivel hook, cited ..... 142

328,726. Thill coupling, cited..... 918

331,088. Gripping clamp for lines or reins, cited ..... 685

337,908. Swivel hook, cited..... 141

341,235. Thill-coupling, cited ..... 913

344,462. Clavier, held valid and infringed.. 897, 898

344,464. Clavier, held valid and infringed.. 897, 898, 899

710,133. Drip-coffee pot, held to infringe patent No. 650,129.....63, 64

716,000. Wireless telegraphic apparatus, cited .....666, 667, 680

344,793. Rail bender, held void as to claim 1, and not infringed as to claim 6 ..... 909
348,811. Swivel hook, cited..... 141
350,299. Mode of electric communication without wires, cited..... 667
359,615. Clasp and buckle, cited..... 893
374,127. Music box, cited..... 907
374,380. Milk can, cited.....124, 128, 131
376,606. Thill-coupling, cited ..... 913
379,973. Overflow device for wash basins, held limited by the prior art and not infringed ..... 402
388,144. Thill-coupling, cited ..... 913
391,039. Milk can, cited..... 127
391,439. Clavier, held valid and infringed.. 897
396,788. Ear jewel, cited..... 685
399,161. Clasp and buckle, cited..... 893
401,775. Car coupler, held limited by the prior art and not infringed.... 411
404,117. Milk can, cited..... 130
415,720. Lantern holder, held not infringed 62
424,314. Burr-wheel for knitting machine, held void .....92, 95
425,935. Music box, cited..... 908
434,177. Clasp, cited ..... 894
434,691. Line puller, cited..... 685
436,619. Stop mechanism for typewriting machines, held not infringed as to claims 4 and 5..... 108
437,103. Clasp, cited ..... 894
442,056. Glove fastener, cited..... 893
442,531. Store ladder, held not anticipated, valid, and infringed..... 564
447,532. Tilting bin, held void for prior public use ..... 920
450,094. Sewage apparatus, cited..... 821
450,592. Stop mechanism for typewriting machines, held not infringed as to claim 9.....108, 109
452,268. Stop mechanism for typewriting machines, held not infringed as to claims 6 and 8.....108, 109
452,320. Swivel hook, held not anticipated, valid, and infringed..... 140
456,117. Thill-coupling, held void for prior public use ..... 911
457,007. Brush, cited ..... 84
458,332. Broom holder, cited..... 685
463,307. Steam generator, held infringed as to claim 2 ..... 69
465,971. Wireless telegraphic apparatus, cited ..... 668
474,718. Railway torpedo, held void..... 729
478,435. Hoof-pad, cited ..... 901
479,339. Clavier, held valid and infringed.. 897, 898, 899
480,934. Composition for lining pulp digesters, cited ..... 49
485,856. Thill-coupling, held not anticipated and infringed as to claims 1 and 2 ..... 916
489,644. Milk can, cited..... 124
489,896. Hoof-pad, cited ..... 901
491,972. Process of making logwood extract, held not anticipated and infringed ..... 54
500,371. Music box, held void..... 903
506,402. Machine for making book covers, cited .....138, 139
511,559. Electric motors, held not limited by prior British patents..... 823
511,560. Electric motors, held not limited by prior British patents ..... 823
515,817. Tool or implement holder, cited.. 685
516,255. Milk can, cited.....124, 132
532,554. Machine for cutting candy, held void ..... 142
535,465. Mechanical movement for use in washing machines, cited...399, 401
541,320. Carpet fastener, held not infringed 890
550,510. Wireless telegraphic apparatus, cited ..... 668
557,844. Brush, cited ..... 84
559,446. Shade-holding device, held limited and not infringed..... 734
559,522. Sewage apparatus, held limited and not infringed .....811, 812
566,144. Brush, cited ..... 86
582,509. Brush, cited ..... 86
584,147. Guide and fastener for hat pins, cited ..... 685
586,030. Hoof-pad, cited ..... 901
586,193. Wireless telegraphic apparatus, cited ..... 657
599,191. Ornamental ropes, held not infringed ..... 561
600,186. Fire-proof window, held void.... 56
601,405. Brush, held not anticipated and infringed ..... 83
607,433. Milk can, held valid and infringed 123, 124
608,220. Mechanical movement for use in washing machines, cited ...396, 401
620,036. Multiplying camera, held not infringed ..... 404
625,806. Device for operating dynamo-electric machine, cited ..... 413
627,650. Wireless telegraphic apparatus, cited ..... 676
630,972. Stick pin retainer, held void..... 682
642,059. Machine for ornamenting picture frames, held void as to claims 11 to 18 ..... 58
644,367. Composition for lining pulp digesters, held void as to claims 1 and 2, and valid and infringed as to claim 3 .....48, 49
645,871. Folding machine, held valid and infringed ..... 136
646,148. Hoof-pad, held not invalid as to prior public use, and infringed, as to claims 1, 2, 5, and 6..... 899
650,129. Drip-coffee pot, held valid and infringed ..... 63
659,315. Shade fixture, held limited by the prior art and not infringed as to claims 1, 2, and 3.....734, 741
661,049. Device for operating dynamo-electric machines, cited..... 413
669,011. Process of making flat-caps, held infringed ..... 67
671,039. Screw-driver, held infringed..... 835
671,287. Device for operating dynamo-electric machines, cited ..... 413
676,557. Shade-holding device, held not to infringe patent No. 559,446.... 734
676,606. Fire-arch for furnaces, held void.. 830
690,563. Bottle-washing machine, held limited and not infringed..... 886
696,940. Trousers-hanger, held valid and infringed as to claim 9..... 654
710,132. Drip-coffee pot, held to infringe patent No. 650,129.....63, 64

716,203. Wireless telegraphic apparatus, cited .....665, 666
716,334. Wireless telegraphic apparatus, cited ..... 666
723,573. Screw-driver, cited ..... 835
736,037. Bottle-washing machine, held not to infringe patent No. 690,563.. 886
736,285. Mechanical movement for use in washing machines, held to infringe patent No. 608,220.... 396, 397, 401
741,125. Wire glass, cited..... 924
773,234. Vibratile apparatus, held valid and infringed ..... 82

REISSUED.

4,718. Electric lamp, cited..... 915
5,850. Milk can, cited.....124, 131
11,144. Process for finishing boot and shoe soles, held void..... 732
11,260. Thill-coupling, held void for prior public use ..... 911
11,282. Pulp digester, cited..... 52
11,913. Wireless telegraphic apparatus, held void as to claim 1, and held infringed as to claims 3, 5, 8, 10, and 24 ..... 657
11,980. Machine for ornamenting picture frames, held void as to claims 11 to 18 ..... 58
26,098. Milk can, cited..... 127

## PAYMENT.

Of taxes, see "Taxation," § 5.

## PEONAGE.

See "Slaves."

## PERSONAL INJURIES.

See "Damages," § 2; "Negligence."
To employé, see "Master and Servant," § 1.
To passenger, see "Carriers," § 4.
To seamen, see "Seamen."
To traveler on highway, see "Highways," § 1.
To traveler on highway crossing railroad, see "Railroads," § 1.

## PETITION.

For revocation of discharge in bankruptcy, see "Bankruptcy," § 7½.
In bankruptcy, see "Bankruptcy," § 1.

## PHYSICIANS AND SURGEONS.

Adoption of practice of state courts as to testimony of physicians, see "Courts," § 4.
Employment by hospital, see "Asylums."
Privileged communication, see "Witnesses," § 1.

## PIERS.

See "Wharves."

## PILOTS.

Lien of pilots for wages, see "Seamen."

## PLEA.

In suits in equity, see "Equity," §§ 2, 4.

## PLEADING.

*Allegations as to particular facts, acts, or transactions.*
Jurisdictional amount in controversy, see "Courts," § 3.

*In particular actions or proceedings.*
See "Bankruptcy," § 1; "Equity," § 2; "Injunction," § 2.
Condemnation proceedings, see "Eminent Domain," § 2.
For cancellation of mining lease, see "Mines and Minerals," § 2.
For infringement of patent, see "Patents," § 10.
For limitation of liability, see "Shipping," § 4.
For personal injuries, see "Highways," § 1.
On disputed claim against bankrupt, see "Bankruptcy," § 6.
Petition for revocation of discharge in bankruptcy, see "Bankruptcy," § 7½.
Removal of causes, see "Removal of Causes," § 2.

## PLEDGES.

Pledge of stock by mortgagor of street railroad, see "Street Railroads," § 1.

## POLICE POWER.

Of municipality, see "Municipal Corporations," § 2.

## POLICY.

Of insurance, see "Insurance."

## POSSESSION.

See "Adverse Possession."

## POWERS.

Creation by will, see "Wills," § 1.
Effecting equitable conversion, see "Conversion."

## PRACTICE.

Adoption by United States courts of practice of state courts, see "Courts," § 4.

*In particular civil actions or proceedings.*
See "Habeas Corpus," § 2.
Condemnation proceedings, see "Eminent Domain," § 2.

*Particular proceedings in actions.*
See "Continuance"; "Costs"; "Damages," § 2; "Depositions"; "Evidence"; "Judgment"; "Parties"; "Reference"; "Removal of Causes"; "Trial."

*Particular remedies in or incident to actions.*
See "Attachment"; "Discovery"; "Injunction"; "Receivers."

*Procedure in criminal prosecutions.*

See "Extradition."

*Procedure in exercise of special jurisdictions.*

In admiralty, see "Admiralty"; "Collision," § 5.
In bankruptcy, see "Bankruptcy," § 1.
In equity, see "Equity."
Particular courts, see "Courts."

*Procedure on review.*

See "Appeal and Error"; "Exceptions, Bill of"; "New Trial."

## PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," §§ 1, 3.

## PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 3.

## PRELIMINARY INJUNCTION.

See "Injunction," § 3.

## PRINCIPAL AND AGENT.

Corporate agents, see "Corporations," § 4.
Liability of agent for assessments on corporate stock transferred by him in name of another, see "Corporations," § 1.

## PRINCIPAL AND SURETY.

See "Guaranty"; "Indemnity."
Liabilities of sureties on bonds in legal proceedings, see "Appeal and Error," § 4; "Attachment," § 1.
Liabilities of sureties on bonds of ambassadors or consuls, see "Ambassadors and Consuls."
Liabilities of sureties on bonds under revenue laws, see "Internal Revenue."

## PRIORITIES.

Of taxes, see "Taxation," § 4.

## PRIVILEGE.

Of witness as to testimony, see "Witnesses," § 2.

## PRIVILEGED COMMUNICATIONS.

Disclosure by witness, see "Witnesses," § 1.

## PROBABLE CAUSE.

For prosecution, see "Malicious Prosecution," § 1.

## PROCESS.

See "Injunction."
In suits in admiralty, see "Admiralty," § 2.
Power of legislative committee to enforce process, see "States," § 1.

## PROFITS.

Accounting of, on suit for infringement of trade-mark, see "Trade-Marks and Trade-Names," § 1.
As damages in suits for infringement of patent, see "Patents," § 10.

## PROOF.

Taking and filing proof in equity, see "Equity," § 3.

## PROPERTY.

See "Mines and Minerals"; "Shipping"; "Trade-Marks and Trade-Names."
Adverse possession, see "Adverse Possession."
Constitutional guaranties of rights of property, see "Constitutional Law," § 4.
Taking for public use, see "Eminent Domain."

## PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 1.

## PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 1.

## PUBLIC LANDS.

Evidence of similar facts and transactions in action for value of timber cut from, see "Evidence," § 1.
Harmless error in action for value of timber cut from public domain, see "Appeal and Error," § 3.
Mineral lands, see "Mines and Minerals," § 1.

**§ 1. Government ownership.**

Where defendant's right to cut timber in controversy depended on the land being mineral and not subject to entry, except under Act Cong. June 3, 1878, c. 150, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528] evidence that a witness cultivated a portion of land near where the timber was cut, and that such ground was suitable for agriculture, was admissible.—Lynch v. United States (C. C. A.) 535.

On an issue as to the character of land from which timber was alleged to have been wrongfully cut, the government *held* entitled to prove, in rebuttal, that certain of the land in the township in question, though classified as mineral, under Act Cong. Feb. 26, 1895, c. 131, 28 Stat. 683, had been patented as nonmineral.—Lynch v. United States (C. C. A.) 535.

**§ 2. Survey and disposal of lands of United States.**

The United States *held* not entitled to repudiate a fraudulent entry of public land after the issuance of the patent confirming the same, as against a subsequent innocent purchaser for value.—United States v. Clark (C. C. A.) 294.

Evidence *held* to establish that defendant was a bona fide purchaser of public land, alleged to have been fraudulently entered after patent issued, and was therefore not chargeable with the fraud of the entrymen.—United States v. Clark (C. C. A.) 294.

## PUBLIC USE.

Taking property for public use, see "Eminent Domain."

## PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 1.

## PUNISHMENT.

For homicide, see "Homicide," § 1.

## QUESTIONS FOR JURY.

In civil actions, see "Trial," § 1.

## QUIETING TITLE.

Jurisdiction of equity, see "Equity," § 1.
Removal of cloud on title to mineral land, see "Mines and Minerals," § 2.

## RAILROADS.

See "Street Railroads."
As employers, see "Master and Servant."
Carriage of goods and passengers, see "Carriers."
Combination of railroads to monopolize trade, see "Monopolies," § 1.
Constitutional prohibition of suits against state as affecting suits against railroad commission, see "States," § 2.
Interstate commerce regulations, see "Commerce," § 1.
Railroad bridge company taxed as railroad, see "Taxation," § 3.
Railroad commission as a court, within laws relating to federal courts restraining proceedings in state courts, see "Courts," § 8.
Railroad tax laws denying due process of law, see "Constitutional Law," § 4.
Railroad tax laws denying equal protection of law, see "Constitutional Law," § 3.
Restraining sale of nontransferable tickets, see "Injunction," § 2.
Taxation of railroad corporations, see "Taxation," §§ 1, 3, 6.

### § 1. Operation.

The question whether a plaintiff, injured at a railroad crossing, was chargeable with contributory negligence, *held* one of fact for the jury under the evidence.—Farrell v. Erie R. Co. (C. C. A.) 28.

A person approaching a railroad crossing in a city is not bound to anticipate that an approaching train will proceed at an unlawful or an unusual rate of speed.—Farrell v. Erie R. Co. (C. C. A.) 28.

Mississippi railroad commission *held* without power to compel an interstate railroad to stop two of its fast interstate trains at a county seat, already provided with three trains in the same direction, under Code Miss. 1892, §§ 3350, 4302.—Illinois Cent. R. Co. v. Mississippi Railroad Commission (C. C. A.) 327.

*Where, in an action for injuries to a traveler at a railroad crossing, the evidence as to whether the railroad company gave statutory signals at the crossing was conflicting, such question was for the jury.—Southern Ry. Co. v. Carroll (C. C. A.) 638.

*A traveler at a railroad crossing *held* bound to give way to a train in sight or hearing and moving so rapidly as to make it doubtful whether he can cross in safety.—Southern Ry. Co. v. Carroll (C. C. A.) 638.

*A person injured in collision with a railroad train at a crossing *held* guilty of willful contributory negligence, precluding a recovery under a state statute rendering the railroad liable for failure to give statutory signals, unless the person injured is guilty of "willful" negligence.—Southern Ry. Co. v. Carroll (C. C. A.) 638.

Rev. St. Ohio 1892, § 3305, *held* not to make a lessor of a railroad liable for injury to an employé of the lessee, injured through the lessee's negligence.—Axline v. Toledo, W. V. & O. R. Co. (C. C.) 169.

## RECEIVERS.

Appointment in suit for injunction, see "Injunction," § 3.
Bonds to receiver in attachment proceedings, see "Attachment," § 1.
Duties of receiver on cancellation of lease of street railroad, see "Street Railroads," § 1.
Of corporations, see "Corporations," § 5.
Priority of tax on proceeds of receivers' chattel mortgage sale, see "Taxation," § 4.

### § 1. Management and disposition of property.

*A receiver of a partnership which had sold an interest in oil properties which it was operating, under an agreement that the purchaser should receive his share of the profits without charge for services in operating the same, is not entitled to charge for the services incidentally rendered by him to the purchaser in operating the properties after his appointment.—Rosenthal v. McGraw (C. C. A.) 721.

*Where a receiver operates properties of an insolvent in which a third person owns an interest, and is entitled to a fixed share of the earnings, it is his duty to pay over such share as it is received, and his failure to do so, or to pay the money into court and ask its direction, renders him liable for interest.—Rosenthal v. McGraw (C. C. A.) 721.

Nonparticipating creditors of an insolvent corporation *held* not entitled to collaterally attack a sale of certain of the corporation's realty to a reorganization committee at the upset price fixed in the decree of sale, which sale was sub-

sequently confirmed.—McEwen v. Harriman Land Co. (C. C. A.) 797.

**§ 2. Accounting and compensation.**

On exceptions to a receiver's report, allowances made to attorneys for the receiver and the insolvent's assignee reviewed, and *held* excessive.—Drey v. Watson (C. C. A.) 792.

An allowance to a receiver of $2,422.84, exclusive of $15 a day for 125 days for expenses, *held* excessive, and should be reduced to $1,500. —Drey v. Watson (C. C. A.) 792.

## RECORDS.

Transcript on appeal or writ of error, see "Appeal and Error," § 2.

## REFEREES.

In bankruptcy, see "Bankruptcy," § 4.

## REFERENCE.

**§ 1. Nature, grounds, and order of reference.**

Where a motion for continuance made by complainant was overruled for insufficiency, it was not error for the court to give complainant its election to proceed to trial or consent to a reference, and a consent to a reference so given cannot be said to have been made under duress. —Copper River Min. Co. v. McClellan (C. C. A.) 333.

Under the Code of Alaska, an order of reference need not require that the witnesses who testify before the referee shall read over and subscribe their testimony.—Copper River Min. Co. v. McClellan (C. C. A.) 333.

**§ 2. Referees and proceedings.**

If an order of reference to take the testimony in a cause does not give a party sufficient time, he should apply for an extension before the time given has expired; and, where no such application is made, it is not error for the court to refuse to receive further testimony offered on the hearing.—Copper River Min. Co. v. McClellan (C. C. A.) 333.

An objection to the form in which testimony is taken before a referee or commissioner is waived, unless the testimony is objected to when offered in evidence.—Copper River Min. Co. v. McClellan (C. C. A.) 333.

## REFORMATORIES.

See "Asylums."

## REGENTS.

Of college, see "Colleges and Universities."

## REHEARING.

See "New Trial."

Reopening suits for infringement of patent, see "Patents," § 10.

## REISSUE.

Of patent, see "Patents," § 6.

## RELEVANCY.

Of evidence in civil actions, see "Evidence," § 1.

## RELIGIOUS SOCIETIES.

Adverse possession by, see "Adverse Possession," § 1.

Bill of exceptions in action for removal of coal from lands of, see "Exceptions, Bill of," § 1.

Trustees of religious society as parties plaintiff, see "Parties," § 1.

Evidence *held* to warrant finding that the title to certain land in controversy in an action of trespass for an injury to the freehold was in a church, for the benefit of which plaintiffs sued as trustees.—Penny v. Central Coal & Coke Co. (C. C. A.) 769.

## REMAINDERS.

Effect of judgment as lien on remainders, see "Judgment," § 5.

## REMEDY AT LAW.

Effect on jurisdiction of equity to cancel mining lease, see "Mines and Minerals," § 2.

## REMOVAL.

From office in general, see "Officers," § 1.

Of college professor, see "Colleges and Universities."

## REMOVAL OF CAUSES.

Costs on dismissal of action removed to federal court on ground of lack of jurisdiction of state court, see "Costs," § 1.

**§ 1. Citizenship or alienage of parties.**

On the question of diversity of citizenship of the parties, for purpose of removal of the cause, *held*, one improperly joined as defendant is to be disregarded.—Axline v. Toledo, W. V. & O. R. Co. (C. C.) 169.

**§ 2. Proceedings to procure and effect of removal.**

*A petition for the removal of a cause from a court of common pleas of Philadelphia county, Pa., must be filed within four days after service of statement on defendant, which is the time given him by rule of the court within which to file a dilatory plea.—First Nat. Bank v. A. E. Appleyard & Co. (C. C.) 939.

## REPLEVIN.

Conclusiveness of judgment, see "Judgment," § 4.

## REPORTS.

Of interstate commerce commission, see "Commerce," § 1.

## REQUESTS.

For instructions in civil actions, see "Trial," § 2.

## RESCISSION.

Of contract of insurance, see "Insurance," § 6.

## RES GESTÆ.

In civil actions, see "Evidence," § 1.

## RES JUDICATA.

See "Judgment," §§ 3, 4.

## RESTRAINT OF TRADE.

Trusts and other combinations, see "Monopolies," § 1.

## REVENUE.

See "Customs Duties"; "Internal Revenue"; "Taxation."

## REVIEW.

See "Appeal and Error."
In suits for infringement of patent, see "Patents," § 10.

## REVOCATION.

Of discharge in bankruptcy, see "Bankruptcy," § 7½.

## RISKS.

Assumed by employé, see "Master and Servant," § 1.

## ROADS.

See "Highways."

## ROYALTIES.

Under mining leases, see "Mines and Minerals," § 2.

## RULES OF NAVIGATION.

See "Collision," § 1.

## SALES.

Lien of judgment on proceeds of sales, see "Judgment," § 5.
Of realty, see "Vendor and Purchaser."
Power of sale under will, see "Wills," § 1.
Receiver's sales, see "Receivers," § 1.
Specific performance of option contract of sale, see "Specific Performance," § 1.
Title on sale of engine to vessel, see "Shipping," § 1.

**§ 1. Requisites and validity of contract.**

Contracts for the sale and purchase of steel axles and springs to be manufactured, which definitely specify the quantity and the price of each, are not rendered so uncertain that an action will not lie by the seller for their breach by a provision requiring the purchaser to specify the sizes and styles wanted.—George Delker Co. v. Hess Spring & Axle Co. (C. C. A.) 647.

Facts *held* to constitute a loan to a bankrupt corporation, and not a purchase of the corporation's stock.—In re McLean-Bowman Co. (D. C.) 181.

**§ 2. Performance of contract.**

A provision of contracts for the manufacture and sale of springs and axles according to specifications to be furnished by the buyer *held* not to require the seller to make an election of remedies, on the refusal of the buyer to specify, but merely to dispense with the necessity of a tender.—George Delker Co. v. Hess Spring & Axle Co. (C. C. A.) 647.

**§ 3. Remedies of seller.**

A contract for the sale of springs and axles construed, and *held* to be a manufacturing contract, for the breach of which the seller was entitled to recover as damages the difference between the contract price and the cost of manufacture and delivery.—George Delker Co. v. Hess Spring & Axle Co. (C. C. A.) 647.

**§ 4. Remedies of buyer.**

One who contracted, in the building of a yacht, to use material the best procurable of its kind, does not fulfill the implied warranty by using reasonable efforts to procure the best; and it is no defense to an action to recover back the purchase price on the ground of its breach that he ordered the best materials and used them in good faith, in the belief that they were such.—George Lawley & Son Corp. v. Park (C. C. A.) 31.

An issue as to whether materials used in the construction of a yacht were of the quality required by the contract *held* one for the jury under the evidence.—George Lawley & Son Corp. v. Park (C. C. A.) 31.

An action for breach of a contract for the sale of a ship and the transfer of her insurance *held* properly submitted to the jury on questions of fact.—Brauer v. Macbeth (C. C. A.) 977.

## SALVAGE.

**§ 1. Amount and apportionment.**

A tug *held* entitled to an award of $500 against the United States under Tucker Act March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], for salvage services rendered to a burning ammunition ship.—Hartford & N. Y. Transp. Co. v. United States (C. C.) 618.

A steam propeller *held* entitled to an award of $1,000 for a salvage service in rescuing a car float moored in a slip adjoining a burning pier at Hoboken.—The Car Float No. 19 (D. C.) 435.

## SEAMEN.

A citizen of the United States, who signed as a seaman on a German vessel in New York for a voyage to Japan, and who was paid a month's wages in advance, in violation of Act Dec. 21, 1898, c. 28, § 24, 30 Stat. 763 [U. S. Comp. St. 1901, p. 3079], *held* not bound by the contract, and entitled to leave the service at another American port and to recover wages for the full time served in a court of admiralty.—The Neck (D. C.) 144.

Where it appears that persons are employed on vessels as pilots, and are not performing the duties of masters, but are engaged solely in the navigation of the vessel, they are entitled to liens for their wages.—The Pauline (D. C.) 271; The Young America, Id.

*A tug is not liable for an injury to a fireman, received accidentally while tightening nuts on the machinery, which was in general good repair, the work being such as he was familiar with and not in itself dangerous, but is liable for the expense of his cure and his maintenance in the meantime while he is disabled.—The Mars (D. C.) 941.

## SET-OFF AND COUNTERCLAIM.

Set-off on cancellation of lease of street railroad, see "Street Railroads," § 1.

## SETTLEMENT.

By assignee for benefit of creditors, see "Assignments for Benefit of Creditors," § 1.
By executor or administrator, see "Executors and Administrators," § 2.
Of bill of exceptions, see "Exceptions, Bill of," § 2.

## SHIPPING.

See "Admiralty"; "Collision"; "Maritime Liens"; "Salvage"; "Seamen"; "Towage"; "Wharves."
Breach of contract of sale of vessel, see "Sales," § 4.
Breach of warranty in sale of yacht, see "Sales," § 4.
Costs in action to recover charter hire, see "Costs," § 1.
Recovery of interest on charter hire, see "Interest," § 1.

**§ 1. Title.**

The owner of a yacht, who had a gas engine installed therein to be tried for 30 days, and then either accepted and paid for or returned, and who, although not accepting the engine or paying anything for it, retained and used it for a year, is not entitled to recover possession of it from the builder, to whom it was returned for repairs, without paying the purchase price.—Downey v. Lozier Motor Co. (D. C.) 173.

**§ 2. Charters.**

A charter party construed as to a provision requiring the vessel to sail 48 hours after orders were given.—Rosasco v. Pitch Pine Lumber Co. (C. C. A.) 25.

The failure of a vessel to sail for the port of loading within the time fixed by the charter *held* not to authorize the charterer to cancel the charter, in view of its other provisions.—Rosasco v. Pitch Pine Lumber Co. (C. C. A.) 25.

Under a charter of the whole of a barge, requiring the charterer to provide her with a cargo of "not less than 700 tons of sand," to be paid for at the rate of 90 cents per ton when delivered, she is entitled to recover the amount so stipulated for on delivery of the cargo as shipped by the charterer, although, without her fault, less than 700 tons was loaded.—Donaldson v. Severn River Glass Sand Co. (D. C.) 691; Severn River Glass Sand Co. v. Donaldson, Id. 694.

**§ 3. Liabilities of vessels and owners in general.**

A vessel is liable for a tortious act of her master or a member of her crew on board in her service, by which another vessel is injured, although committed without the authority or knowledge of the owners.—The Bulley (D. C.) 170.

*A steamer *held* liable for an injury to scows in tow, caused by her swell while she was passing the tow in New York Harbor, on the ground that she was not navigated with proper care.—The Asbury Park (D. C.) 617.

It is not a defense to a suit to recover for an injury to a vessel, caused by the swell of a passing steamer, that other vessels were not injured, or that the one injured might have prevented the injury by taking unusual precautions.—The Asbury Park (D. C.) 925.

*A steamer *held* liable for the injury of a vessel lying at a dock, caused by her swell, on the ground of her negligent navigation.—The Asbury Park (D. C.) 925.

**§ 4. Carriage of goods.**

A barge *held* liable, under section 1 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), for damage to the cargo from leakage of the vessel while she was being discharged in the usual manner, on the ground that it was due to unseaworthiness or improper loading.—Donaldson v. J. W. Perry Co. (C. C. A.) 643.

In an action to recover for damages to cargo from leakage of the vessel, evidence that directions as to the manner of loading were given the agents of the vessel by libelant, which directions were not followed, was competent.—Donaldson v. J. W. Perry Co. (C. C. A.) 643.

The failure of a barge to take the quantity of lumber which it had contracted by charter to carry on a voyage subjects it only to such damages as were contemplated by the parties when the charter was made, and the damages cannot be measured by the loss sustained by the shipper by reason of his failure to deliver the lumber under a contract of sale which was not

known to the owners of the barge.—The A. Denicke (C. C. A.) 645.

*A ship cannot exempt herself from liability for damage to cargo from sea water as a peril of the seas, where such water entered because of the obstruction of a valve due to the failure to exercise due diligence in the equipment of the ship at the beginning of the voyage.—The Brilliant (D. C.) 743.

Evidence considered, and *held* to show that a ship was not liable for an injury to sugar cargo from sea water on the ground that certain valves were defective and rendered her unseaworthy at the beginning of the voyage, but that they were properly constructed and in good condition at that time.—The Brilliant (D. C.) 743.

The absence of a rose or screen on the bottom of a pipe extending into a compartment of a ship in which sugar cargo was stowed, by reason of which a stick was drawn from the compartment into the pipe when the pumps were worked, which obstructed a valve and permitted seawater to enter and damage the cargo, *held* a failure to use due diligence in equipment at the beginning of the voyage to make the ship seaworthy, which rendered her liable for the damage, under section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]).—The Brilliant (D. C.) 743.

A ship is relieved from liability for a shortage in weight of a shipment of vegetable fiber in bales under a bill of lading containing the clause, "Not responsible for weight, nor quality, nor for loose bales," where it shows that all the bales shipped were delivered.—La Kroma (D. C.) 936.

*A ship has the burden of explaining the cause of damage to cargo shown to have been received in good condition, to relieve itself from liability for such damage.—La Kroma (D. C.) 936.

A petition for limitation of liability *held* sufficient to give the court jurisdiction as against a special plea.—In re Eastern Dredging Co. (D. C.) 942; The Scow No. 34, Id.

A scow, employed in carrying cargoes of mud in navigable waters of the United States, is a vessel within the maritime law, and her owner may maintain proceedings for limitation of liability, under Rev. St. §§ 4282, 4289, as amended by Act June 19, 1886, c. 421, § 4, 24 Stat. 80 [U. S. Comp. St. 1901, pp. 2943, 2945].—In re Eastern Dredging Co. (D. C.) 942; The Scow No. 34, Id.

**§ 5. Carriage of passengers.**

Where the officers of a ship allowed passengers to discharge firearms on board in a reckless manner, the owners are liable to a passenger injured thereby without his fault.—Northern Commercial Co. v. Nestor (C. C. A.) 383.

A passenger on a vessel, injured while on a voyage, without his fault, through the negligence of the officers, is entitled to no less care from the ship than a seaman, and its duty is not fulfilled by giving him such care as an ordinary unskilled person could afford him.—Northern Commercial Co. v. Nestor (C. C. A.) 383.

**§ 6. Demurrage.**

A charterer of a barge *held* not liable for demurrage because of delay in discharging a quantity of coal brought to the place of loading by the master under a contract with a third party.—Donaldson v. Severn River Glass Sand Co. (D. C.) 691; Severn River Glass Sand Co. v. Donaldson, Id. 694.

## SLAVES.

Deportation of Chinese slave girl, see "Aliens," § 1.

Peonage is a condition of compulsory service, based on indebtedness of the peon to the master.—In re Peonage Charge (C. C.) 686.

If a master procured a servant to be arrested and incarcerated for the purpose of extorting from him a promise to return and work out a debt, the master would be liable for peonage, denounced by Rev. St. U. S. § 5526. [U. S. Comp. St. 1901, p. 3715].—In re Peonage Charge (C. C.) 686.

Const. U. S. Amend. 13, *held* to forbid involuntary servitude within the federal jurisdiction, whether created by contract, criminal individual force, municipal ordinance, state law, or otherwise.—In re Peonage Charge (C. C.) 686.

## SMOKE.

Smoke nuisance in cities, see "Municipal Corporations," § 2.
Validity of police regulations, see "Constitutional Law," § 3.

## SPECIFIC PERFORMANCE.

Enforcement of option contract for purchase of realty, see "Vendor and Purchaser," §§ 2, 3.

**§ 1. Contracts enforceable.**

An option contract for the purchase of real estate, if complete and certain as to its terms and based on a valuable consideration paid, is converted into a contract of sale, which may be specifically enforced in equity by an acceptance by the vendee in accordance with the terms and within the time limited therein.—Couch v. McCoy (C. C.) 696.

## STATES.

Courts, see "Courts."
Interstate extradition, see "Extradition," § 1.

**§ 1. Government and officers.**

A legislative committee, improperly appointed, *held* without jurisdiction to incarcerate a witness for his refusal to appear in obedience to a subpœna.—Ex parte Caldwell (C. C.) 487.

**§ 2. Actions.**

Const. U. S. Amend. 11, prohibiting a suit against a state by a citizen of another state, *held* not to prohibit an action by a railroad

company to restrain a state railroad commission from carrying out an order injuriously affecting interstate commerce.—Illinois Cent. R. Co. v. Mississippi Railroad Commission (C. C. A.) 327.

## STATUTES.

Adoption by United States courts of state laws as rules of decision, see "Courts," § 5.
Laws impairing obligation of contracts, see "Constitutional Law," § 2.

*Provisions relating to particular subjects.*

See "Bankruptcy," § 1; "Bribery"; "Carriers," § 1; "Customs Duties"; "Depositions"; "Discovery," § 1; "Eminent Domain," §§ 1, 2; "Extradition," § 1; "Food"; "Grand Jury"; "Habeas Corpus," § 2; "Indians"; "Licenses," § 1; "Railroads," § 1; "Taxation," § 1.
Actions for wrongful death, see "Death," § 1.
Competency of witnesses, see "Witnesses," § 1.
Liability of corporate officers for corporate indebtedness, see "Corporations," § 3.
Smoke in cities, see "Municipal Corporations," § 2.

## STATUTES CONSTRUED.

### UNITED STATES.

CONSTITUTION.

Amend. 11 ..... 327
Amend. 13 ..... 686
Amend. 14 ..... 223
Art. 1, § 9 ..... 487

STATUTES AT LARGE.

1875, March 3, ch. 137, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511] ..... 203
1878, June 3, ch. 150, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528] ..... 535
1886, June 19, ch. 421, § 4, 24 Stat. 80 [U. S. Comp. St. 1901, pp. 2943–2945] ..... 942
1886, Aug. 2, ch. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228] ..... 455
1886, Aug. 2, ch. 840, § 4, 30 Stat. 209 [U. S. Comp. St. 1901, p. 2229] ..... 455
1886, Aug. 2, ch. 840, §§ 6, 7, 10, 15, 24 Stat. 210, 211, 212 [U. S. Comp. St. 1901, pp. 2230, 2231, 2233] ..... 457
1887, March 3, ch. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752] ..... 618
1889, March 2, ch. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3157] ..... 849
1890, June 10, ch. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924] ..... 970
1891, Feb. 28, ch. 383, § 3, 26 Stat. 795 .. 878
1891, March 3, ch. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549] ..... 201
1893, Feb. 13, ch. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946] .....643, 743
1895, ch. 131, 28 Stat. 683 ..... 535
1897, June 7, ch. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2883] ..... 303
1897, July 24, ch. 11, § 1, Schedule B, par. 99, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633] ..... 970
1897, July 24, ch. 11, § 1, Schedule J, par. 345 [U. S. Comp. St. 1901, p. 1663] ..... 974
1897, July 24, ch. 11, § 1, Schedule M, par. 400, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672] ..... 973
1897, July 24, ch. 11, § 2, Free List, par. 620, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685] ..... 946
1898, July 1, ch. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418] ..... 927
1898, July 1, ch. 541, § 2, cl. 15, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421] .... 625
1898, July 1, ch. 541, § 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422] .....426, 947
1898, July 1, ch. 541, § 7, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424] ..... 862
1898, ch. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]. Amended by Act 1903, Feb. 5, ch. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411] .... 637
1898, July 1, ch. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432] ..... 344
1898, July 1, ch. 541, § 57 [U. S. Comp. St. 1901, p. 3443] ..... 846
1898, July 1, ch. 541, § 57d, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443] ..... 778
1898, July 1, ch. 541, § 57e, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443] ..... 846
1898, July 1, ch. 541, § 67, subds. a, b, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449] 441
1898, July 1, ch. 541, § 67a, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449] ..... 188
1898, July 1, ch. 541, § 67d, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449] ..... 426
1898, July 1, ch. 541, § 67f, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450] ..... 192
1898, Dec. 21, ch. 28, § 24, 30 Stat. 763 [U. S. Comp. St. 1901, p. 3079] ..... 144
1899, March 3, ch. 425, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543] ..... 555
1900, June 6, ch. 786, 31 Stat. 321, 494 ... 544
1903, Feb. 5, ch. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411] ..... 637

TREATIES.

German Empire, Dec. 11, 1871, 17 Stat. 928 ..... 144

REVISED STATUTES.

§ 716 [U. S. Comp. St. 1901, pp. 580, 592] 487
§ 720 [U. S. Comp. St. 1901, p. 581] ..209, 327
§ 721 [U. S. Comp. St. 1901, p. 581] ..... 705
§§ 751, 752 [U. S. Comp. St. 1901, pp. 580, 592] ..... 487
§ 863 [U. S. Comp. St. 1901, p. 661] ..... 836
§ 866 [U. S. Comp. St. 1901, p. 663] ..... 461
§ 1723 [U. S. Comp. St. 1901, p. 1185] .... 312
§ 2058 ..... 878
§ 2338 [U. S. Comp. St. 1901, p. 1436] .... 177
§§ 4282, 4289. Amended by Act 1886, June 19, ch. 421, § 4, 24 Stat. 80 [U. S. Comp. St. 1901, pp. 2943–2945] ..... 942
§ 4886 [U. S. Comp. St. 1901, p. 3382] .... 911
§ 4887 ..... 823
§ 4965 [U. S. Comp. St. 1901, p. 3414] .... 162
§ 5278 [U. S. Comp. St. 1901, p. 3597] .... 980
§ 5501 [U. S. Comp. St. 1901, p. 3709] .... 878
§ 5526 [U. S. Comp. St. 1901, p. 3715] .... 686

COMPILED STATUTES 1901.

Page 511 ..... 203
Page 549 ..... 201
Page 580 ..... 487

Page 581 .....209, 327, 705
Page 592 ..... 487
Page 661 ..... 836
Page 663 ..... 461
Page 752 ..... 618
Page 1185 ..... 312
Page 1436 ..... 177
Page 1528 ..... 535
Page 1633 ..... 970
Page 1663 ..... 974
Page 1672 ..... 973
Page 1685 ..... 946
Page 1924 ..... 970
Pages 2228, 2229..... 455
Pages 2230, 2231, 2233..... 457
Page 2883 ..... 303
Pages 2943–2945 ..... 942
Page 2946 .....643, 743
Page 3079 ..... 144
Page 3157 ..... 849
Page 3382 ..... 911
Page 3414 ..... 162
Page 3418 ..... 927
Page 3421 ..... 625
Page 3422 .....426, 947
Page 3424 ..... 862
Page 3427 ..... 637
Page 3432 ..... 344
Page 3443 .....778, 846
Page 3449 .....188, 426, 441
Page 3450 ..... 192
Page 3543 ..... 555
Page 3597 ..... 980
Page 3709 ..... 878
Page 3715 ..... 686

COMPILED STATUTES (SUPP.) 1903.
Page 411 ..... 637

**ALASKA.**

CIVIL CODE.
Chs. 22, 23, §§ 204, 210, 225..... 544

**ARKANSAS.**

SANDEL'S & HILL'S DIGEST.
§§ 3778, 5132 ..... 929
§ 5632 ..... 769

**CALIFORNIA.**

LAWS.
1887, p. 35, ch. 34, § 15..... 313

**CHOCTAW NATION.**

LAWS.
1894, p. 248 ..... 394

**CONNECTICUT.**

GENERAL STATUTES 1902.
§ 2020 .....1004

**IDAHO.**

REVISED STATUTES 1887.
§ 5210. Amended by Laws 1903, p. 203.. 177

LAWS.
1899, p. 442..... 177
1903, p. 203..... 177

**ILLINOIS.**

REVISED STATUTES.
Art. 5, ch. 24, par. 75..... 209

HURD'S REVISED STATUTES 1903.
Page 294 ..... 209

**MASSACHUSETTS.**

LAWS.
1903, pp. 450–452, ch. 437, §§ 75, 78, 83... 600

**MICHIGAN.**

CONSTITUTION.
Art. 14, § 14..... 223

LAWS.
1855, p. 305, No. 140..... 264
1901, p. 236, No. 173.....223, 262, 264
1901, p. 241, No. 173, § 8..... 257

**MINNESOTA.**

GENERAL STATUTES 1894.
§ 5913 ..... 867

**MISSISSIPPI.**

CODE 1892.
§§ 3550, 4302 ..... 327

**MONTANA.**

CIVIL CODE.
§ 2245 ..... 992

POLITICAL CODE.
§ 3560 ..... 535

**NEW YORK.**

PENAL CODE.
§ 550 ..... 273

LAWS.
1896, p. 571, ch. 547, § 76, subd. 3..... 606

**OHIO.**

BATES' ANNOTATED STATUTES.
§§ 6133–6135 ..... 571

REVISED STATUTES 1892.
§ 3305 ..... 169

**OKLAHOMA.**

STATUTES 1893.
§ 3098 (6) ..... 878

**VERMONT.**

CONSTITUTION.

Ch. 2, § 11 ..... 961

STATUTES.

§§ 1997, 1998, 1999, 2007 ..... 961
§ 3724 ..... 469
§ 4886 ..... 961

**WASHINGTON.**

LAWS.

1893, p. 194, ch. 84, § 15 ..... 307

**WEST VIRGINIA.**

CONSTITUTION.

Art. 4, § 9 ..... 487
Art. 5 ..... 487

CODE 1899.

Ch. 29, §§ 25, 37 ..... 476
Ch. 31, § 25 ..... 476
Ch. 74, § 2 ..... 192

LAWS.

1905, p. 303, ch. 35, § 49 ..... 476

## STIPULATIONS.

In insurance policies, see "Insurance," § 1.
Security in suits in admiralty, see "Admiralty," § 2.

## STOCK.

Corporate stock, see "Corporations," § 1.

## STOCKHOLDERS.

Of corporations, see "Corporations," § 2.

## STREET RAILROADS.

**§ 1. Establishment, construction, and maintenance.**

A street railroad mortgage covering after-acquired property *held* to cover leasehold interests in other roads, the stock of another company organized to hold the title to a railroad purchased by the mortgagor, and an additional railroad subsequently constructed by the mortgagor and operated as an adjunct to its system.—Guaranty Trust Co. of New York v. Atlantic Coast Electric R. Co. (C. C. A.) 517.

A trustee under a street railway trust mortgage *held* charged with notice of the rights of the bondholders as to stock of a new corporation, whose assets were purchased by the bonds, so that it could not acquire a superior lien by a pledge of such stock by the mortgagor.—Guaranty Trust Co. of New York v. Atlantic Coast Electric R. Co. (C. C. A.) 517.

Where a resolution authorizing the execution of street railway bonds and mortgage required the bonds and mortgage to be antedated, the mortgage would be construed as a conveyance of the property on the day of such date.—Guaranty Trust Co. of New York v. Atlantic Coast Electric R. Co. (C. C. A.) 517.

On cancellation of a street railroad lease, the lessee's receivers *held* bound to return equipment to each subordinate company forming a part of the lessor company equal in value and efficiency to that which was received by the lessor.—Johnson v. Lehigh Valley Traction Co. (C. C.) 601.

On cancellation of a lease of the property of certain street railway companies, an excess in value of equipment returned to one of such companies could not be set off against a deficiency returned to another.—Johnson v. Lehigh Valley Traction Co. (C. C.) 601.

A claim for specific equipment under a street railroad lease by the lessors *held* an equitable claim enforceable against property in the hands of the lessee's receivers; but a claim for a share of other equipment under a betterment clause *held* a legal claim, enforceable only against the proceeds of a sale of all the lessee's property.—Johnson v. Lehigh Valley Traction Co. (C. C.) 601.

## STREETS.

See "Highways"; "Municipal Corporations," § 1.

## SUBMISSION OF CONTROVERSY.

Effect of request for instructions as, see "Trial," § 1.

## SUPERSEDEAS.

Bond on appeal or writ of error, see "Appeal and Error," § 4.

## TARIFF.

See "Customs Duties."

## TAXATION.

See "Customs Duties"; "Internal Revenue"; "Licenses," § 1.
Jurisdictional amount in controversy in suit to enjoin enforcement, see "Courts," § 3.
Jurisdiction of federal court of injunction against unlawful state taxes, see "Courts," §§ 1, 2.
Laws affecting exemptions as impairing obligation of contract, see "Constitutional Law," § 2.
Of dealers in oleomargarine, see "Food."
Of Indians, see "Indians."
Tax laws denying due process of law, see "Constitutional Law," § 4.
Tax laws denying equal protection of law, see "Constitutional Law," § 3.

**§ 1. Constitutional requirements and restrictions.**

Act No. 173, p. 236, Pub. Acts Mich. 1901, providing for the taxation of the property of railroad corporations, is not in violation of ar-

ticle 14, § 14, of the state Constitution, as failing to state the object to which the tax is to be applied; nor is it unconstitutional because it does not provide for a hearing with respect to the rate of taxation, such rate being fixed by the state Constitution, and the board of assessment having no discretion to change it.—Michigan Railroad Tax Cases (C. C.) 223.

A statute providing a method of taxation of a particular class of property different from that applied to other classes is not invalid, as in violation of the rule of uniformity of taxation imposed by the state Constitution, because it does not provide for equalizing the valuation of such class with other classes, where all the statutes require assessments to be made at actual value and thus provide for uniformity, if faithfully administered. — Michigan Railroad Tax Cases (C. C.) 223.

**§ 2. Liability of persons and property.**

Under Code W. Va. 1899, c. 29, §§ 25, 37, and Acts 1905, p. 303, c. 35, § 49, a conveyance of an undivided one-sixteenth interest in all oil, gas, and other mineral substances in and under the certain land *held* not a conveyance of a separate title to such substances, subject to separate assessment for taxes.—Barnes v. Bee (C. C.) 476.

**§ 3. Levy and assessment.**

Act No. 173, p. 236, Pub. Acts Mich. 1901, providing for the taxation of the property of railroad corporations, is not unconstitutional because it does not provide for a hearing with respect to the rate of taxation; such rate being fixed by the state Constitution, and the board of assessment having no discretion to change it. —Michigan Railroad Tax Cases (C. C.) 223.

Under Pub. Acts Mich. 1901, p. 241, No. 173, § 8, providing for the assessment of the property of railroad corporations by a state board of assessment, an assessment of a company is not invalidated by the failure of the board to give it notice of its action in increasing such assessment, after a hearing on an application to reduce the same while sitting as a board of review; there being no provision of the act requiring such notice, nor for a rehearing.—Lake Shore & M. S. Ry. Co. v. Powers (C. C.) 257; Duluth, S. S. & A. Ry. Co. v. Same, Id.

A bridge company, organized under the railroad act and owning a bridge used for railroad purposes only, *held* a railroad company for the purposes of taxation, under Act No. 173, p. 236, Pub. Acts Mich. 1901.—Sault Ste. Marie Bridge Co. v. Powers (C. C.) 262; St. Clair Tunnel Co. v. Same, Id.

**§ 4. Lien and priority.**

The commonwealth *held* not entitled to priority of payment of a franchise tax assessed against a corporation, under St. Mass. 1903, pp. 450–452, c. 437, §§ 75, 78, 83, out of the proceeds of mortgaged personalty of an insolvent corporation sold by a receiver appointed on behalf of the subsequent mortgagee.—Loring v. American Transp. Co. (C. C.) 600.

**§ 5. Payment and refunding or recovery of tax paid.**

Facts *held* to establish an intention to assess full taxes on the full valuation of certain real estate to the grantor of an undivided mineral interest; and, she having paid the taxes so assessed, a further assessment on a portion of the mineral interest so conveyed was void.—Barnes v. Bee (C. C.) 476.

Evidence *held* to justify a finding that a bankrupt, who was a deputy sheriff and ex officio tax collector, had paid his own taxes to the sheriff.—In re Porterfield (D. C.) 192.

**§ 6. Collection and enforcement against persons or personal property.**

The collection of a tax levied against the property of railroad companies on an assessment at its actual value cannot be enjoined on the ground that other property in the state was assessed at less than its actual value, in violation of the statute, unless it is shown that such undervaluation was fraudulent, intentional, and systematic.—Michigan Railroad Tax Cases (C. C.) 223.

**§ 7. Tax titles.**

Where a tax deed is set aside as absolutely void, the owner is not required to repay the holder his outlay, under Code 1899, c. 31, § 25, in obtaining the same.—Barnes v. Bee (C. C.) 476.

In a suit to set aside a tax deed, costs would not be awarded to either party, where it was determined that the deed was void, because the property was not subject to assessment.—Barnes v. Bee (C. C.) 476.

## TENDER.

Affecting right to interest, see "Interest," § 1.
Necessity of tender of goods sold, see "Sales," § 2.

## TERMS.

Of patents, see "Patents," § 5.

## TESTAMENT.

See "Wills."

## TESTAMENTARY POWERS.

Creation, see "Wills," § 1.

## THEATERS AND SHOWS.

Negligence in conducting amusement grounds, see "Negligence," § 1.

## TIME.

For payment of interest, see "Interest," § 1.
For performance of contract, see "Contracts," § 2.
For petition for removal of cause to federal court, see "Removal of Causes," § 2.
For settlement of bill of exceptions, see "Exceptions, Bill of," § 2.
For taking testimony on reference, see "Reference," § 2.

## TITLE.

Affecting liability to taxation, see "Taxation," § 2.
Color of title, see "Adverse Possession."
Tax title, see "Taxation," § 7.

*Particular matters affecting title.*

See "Adverse Possession," § 1; "Bankruptcy," § 2.

*Particular species of property or rights.*

See "Mines and Minerals," § 2; "Patents," § 8; "Shipping," § 1.

## TOOLS.

Liability of employer for defects, see "Master and Servant," § 1.

## TORTS.

Causing death, see "Death," § 1.
Liability of vessel for tortious act of master or crew, see "Shipping," § 3.

*Particular torts.*

See "Malicious Prosecution"; "Negligence."
Maritime torts, see "Collision."

## TOWAGE.

Collision with vessels in tow, see "Collision," § 3.
Compensation for salvage service by tug, see "Salvage," § 1.
Injuries to tow by passing vessel, see "Shipping," § 3.
Liability of tug for injuries to seamen, see "Seamen."

A tug *held* liable for the loss of a tow, which formed one of a flotilla, by being overridden by a boat in the tier behind while they were lying to during a high wind; there being no evidence to show that the tug made any effort to prevent such an accident, which should have been anticipated because of the change of tide.—The Gennessee (C. C. A.) 549.

A tug *held* not liable for an injury to her tow by striking a floating log in the early morning, for want of a lookout; it appearing that he probably could not have seen the log, had he been on watch.—The Knickerbocker (D. C.) 148.

A tug, on starting to tow a barge in a shallow stream, is entitled to rely on the statement of the master of the barge as to her draught, and is not bound to examine or to rely upon her draught marks, where such statement is made.—The Royal (D. C.) 416.

A tug *held* not liable for the grounding of her tow in Newtown creek, on evidence showing that the master of the barge represented her draught to be seven feet, and that the depth of water at the place of grounding was over nine feet.—The Royal (D. C.) 416.

## TOWNS.

See "Municipal Corporations."

## TRADE-MARKS AND TRADE-NAMES.

**§ 1. Infringement and unfair competition.**

On an accounting of profits for the infringement of trade-marks and labels on Hunyadi water, traveling expenses and salaries of defendant's salesmen *held* chargeable to general expenses, rather than to defendant's Hunyadi department alone.—Saxlehner v. Eisner & Mendelson Co. (C. C. A.) 22.

On an accounting for the fraudulent use of complainant's trade-marks and labels, complainant *held* not bound to show what proportion of defendant's goods would have been sold, had it used honest marks and labels.—Saxlehner v. Eisner & Mendelson Co. (C. C. A.) 22.

Defendant, having fraudulently appropriated complainant's trade-marks and labels in the sale of mineral water, *held* estopped to claim that it would have been equally successful, had it used honest trade-marks and labels.—Saxlehner v. Eisner & Mendelson Co. (C. C. A.) 22.

In a suit to restrain the use of the term "Healing," or "Healing Springs," on mineral water put up and sold by R., facts *held* to show that R.'s labels so clearly distinguished his waters from those marketed by complainant that he was not guilty of unlawful competition.—Virginia Hot Springs Co. v. Hegeman & Co. (C. C.) 855.

A purchaser of a portion of lands, on which were springs known as "Healing Springs," *held* not entitled to the exclusive use of such name as against a purchaser of the balance of the land and springs.—Virginia Hot Springs Co. v. Hegeman & Co. (C. C.) 855.

*In a suit for unlawful competition in the use of trade-names, etc., complainant *held* not entitled to relief by reason of laches.—Virginia Hot Springs Co. v. Hegeman & Co. (C. C.) 855

## TRADE UNIONS.

A suit for breach of contract by an unincorporated local labor union *held* improperly brought against four of its members, individually and for themselves and others as officers and members of the union.—Ehrlich v. Willenski (C. C.) 425.

## TRADING STAMPS.

Power of city to impose license tax on, see "Licenses," § 1.

## TREATIES.

Affecting authority of consular officers, see "Ambassadors and Consuls."
Affecting right to invoke admiralty jurisdiction, see "Admiralty," § 1.

A treaty between nations should be given a reasonable, rather than a liberal, construction,

and there is no authority for reading into it, under the guise of construction, extraordinary provisions not necessary to give full effect to the intention expressed.—The Neck (D. C.) 144.

## TRESPASS.

On church property, see "Religious Societies."
On mineral lands, see "Mines and Minerals," § 2.
Parties, see "Parties," § 1.

## TRIAL.

See "New Trial"; "Reference"; "Witnesses."
Existence of contract as question for jury, see "Contracts," § 1.

*Proceedings incident to trials.*

See "Continuance."

*Trial of particular civil actions or proceedings.*

See "Malicious Prosecution," § 2; "Negligence," § 1.
Actions for causing death, see "Death," § 1.
For breach of contract of sales, see "Sales," § 4.
For breach of warranty, see "Sales," § 4.
For injuries caused by delay in transportation of live stock, see "Carriers," § 3.
For personal injuries, see "Carriers," § 4; "Master and Servant," § 1; "Railroads," § 1.
On disputed claim against bankrupt, see "Bankruptcy," § 6.
Suits in equity, see "Equity," § 4.
Suits to try tax titles, see "Taxation," § 7.

**§ 1. Taking case or question from jury.**

A trial judge in a federal court is not entitled, on his own view of the evidence, to direct a verdict, where there is a positive conflict in the evidence on an issue material to the controversy.—Minahan v. Grand Trunk Western Ry. Co. (C. C. A.) 37.

A peremptory instruction for plaintiff, filed with other requests to charge while the court was ruling on a motion for a directed verdict, *held* not to amount to a submission of controverted issues to the court, precluding plaintiff from objecting to the court's adverse finding thereon.—Minahan v. Grand Trunk Western Ry. Co. (C. C. A.) 37.

**§ 2. Instructions to jury.**

Requests to charge may be properly refused, where they are substantially covered by instructions given.—Lynch v. United States (C. C. A.) 535.

## TRUSTS.

Combinations to monopolize trade, see "Monopolies," § 1.
Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."
Creation by will, see "Wills," § 1.
Trust deeds, see "Chattel Mortgages."
Trust mortgage of street railroad, see "Street Railroads," § 1.



## TUGS.

See "Towage."

## UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 1.

## UNIONS.

See "Trade Unions."

## UNITED STATES.

See "Customs Duties"; "Public Lands," § 1; "Treaties."
Amount of award for salvage service against the United States, see "Salvage," § 1.
Courts, see "Courts," §§ 1, 8; "Removal of Causes."
Indians, see "Indians."
Public lands, see "Public Lands," § 2.
Public mineral lands, see "Mines and Minerals," § 1.

## UNIVERSITIES.

See "Colleges and Universities."

## USURY.

**§ 1. Usurious contracts and transactions.**

Where the holder of a senior lien for an alleged usurious debt was brought in to a proceeding to determine the priority of liens as a defendant, and he did not file pleadings, such lien could not be vacated without paying the lienholder the amount received by the debtor.—In re L'Hommedieu (D. C.) 606.

## VACATION.

Of judgment, see "Judgment," § 1.

## VALUE.

Jurisdictional amount in controversy on appeal in bankruptcy, see "Bankruptcy," § 8.
Limits of jurisdiction, see "Courts," § 3.
Relevancy of evidence, see "Evidence," § 1.

## VENDOR AND PURCHASER.

See "Sales."
Conflicting rights of purchasers of land to trade-name, see "Trade-Marks and Trade-Names," § 1.
Fraudulent entry of public lands as affecting purchaser, see "Public Lands," § 2.
Specific performance of contract, see "Specific Performance."

**§§ 1, 2. Requisites and validity of contract.**

An offer to give an option to purchase real estate, where a written contract embodying the terms of the option is clearly contemplated by both parties or by the party giving it, does not constitute a contract binding upon either party

until such writing has been duly executed.—Couch v. McCoy (C. C.) 696.

Correspondence between complainant and defendant *held* not to create an option contract for the purchase of real estate, enforceable in equity.—Couch v. McCoy (C. C.) 696.

**§ 3. Construction and operation of contract.**

An offer of an option to purchase real estate, until it has become a completed option contract by acceptance in accordance with its terms and the payment of a consideration, is subject to the same rules as an offer to sell, and may be withdrawn at any time.—Couch v. McCoy (C. C.) 696.

An option contract for the purchase of real estate, if complete and certain as to its terms and based on a valuable consideration paid, is converted into a contract of sale, which may be specifically enforced in equity by an acceptance by the vendee in accordance with the terms and within the time limited therein.—Couch v. McCoy (C. C.) 696.

## VENUE.

Of actions for causing death, see "Death," § 1.

## VERDICT.

Directing verdict in civil actions, see "Trial," § 1.

## VICE PRINCIPALS.

See "Master and Servant," § 1.

## VILLAGES.

See "Municipal Corporations."

## WAGES.

Of seamen, see "Seamen."

## WAIVER.

Of forfeiture of mining lease, see "Mines and Minerals," § 2.
Of rights as to insurance policy, see "Insurance," § 5.

## WARRANTY.

By insured, see "Insurance," §§ 3, 4.

## WASTE.

Jurisdiction of equity, see "Equity," § 1.

## WATERS AND WATER COURSES.

**§ 1. Public water supply.**

Where irrigation bonds issued under Wright Act (St. Cal. 1887, p. 35, c. 34) § 15, were dated December 30, 1890, and the coupons were signed by the then secretary of the irrigation district, but the bonds were not delivered until 18 months thereafter, when, without changing the date, they were signed by the secretary then in office, and the signature on the coupons was not changed, the bonds were void.—Wright v. East Riverside Irr. Dist. (C. C. A.) 313.

## WAYS.

Public ways, see "Highways."

## WHARVES.

A decree affirmed, holding a dock owner solely in fault and liable for removing libelant's schooner from the dock after loading and anchoring her in the river, where there was floating ice by which she was injured.—New York, S. & W. R. Co. v. Roney (C. C. A.) 47.

## WILLS.

See "Executors and Administrators."
Effect of judgment as lien on remainder under will, see "Judgment," § 5.
Equitable conversion, see "Conversion."

**§ 1. Construction.**

Will construed, and *held* to create an express trust under Real Property Law N. Y. (Laws 1896, p. 571, c. 547) § 76, subd. 3.—In re L'Hommedieu (D. C.) 606.

A power of sale contained in a will as a part of the creation of the trust *held* not to enlarge the trustee's estate, but merely to authorize the trustee to sell by virtue of the power, and not as trustee.—In re L'Hommedieu (D. C.) 606.

Will construed, and *held*, that the beneficiaries of the trust were the testator's wife, unmarried daughters, and minor children, who were entitled to the proceeds until the death of such children or the arrival of two of them at the age of 21.—In re L'Hommedieu (D. C.) 606.

## WITNESSES.

See "Depositions"; "Evidence."
Absence of, ground for continuance, see "Continuance."
Adoption of practice of state courts as to competency, see "Courts," § 4.
Examination before referee in bankruptcy, see "Bankruptcy," § 4.
Examination on taking proofs in equity, see "Equity," § 3.
Experts, see "Evidence," § 4.
Incarceration of witness by legislative committee, see "States," § 1.
Opinions, see "Evidence," § 4.

**§ 1. Competency.**

A foreign statute of a state in which an insurance contract was made, disqualifying a physician from testifying as to necessary information acquired while treating a patient, *held* to apply to the remedy only, and was not applicable in an action on the policy in a fed-

eral court sitting in another state.—Doll v. Equitable Life Assur. Soc. (C. C. A.) 705.

**§ 2. Examination.**

In an action to recover goods alleged to have been fraudulently purchased, one of the officers of the ultimate buyer *held* not entitled to refuse to answer certain questions, on the ground that they were irrelevant and required a disclosure of trade secrets.—In re Park (C. C.) 421.

*An officer of a bankrupt corporation, under indictment for embezzlement of its funds, cannot be compelled to state on his examination before the referee, over his claim of privilege, whether or not he appropriated certain money of the bankrupt to his own use; but he may be required to state whether he has in his possession or under his control any property of the bankrupt estate.—In re Hooks Smelting Co. (D. C.) 954.

**§ 3. Credibility, impeachment, contradiction, and corroboration.**

*In an action for salary, defendant *held* entitled to prove by plaintiff, on cross-examination to impeach his testimony, that he had previously recovered a judgment against defendant by default, which had been set aside for fraud and collusion.—Masters v. Seeley (C. C. A.) 719.

## WRITS.

*Particular writs.*

See "Habeas Corpus"; "Injunction."
Writ of error, see "Appeal and Error."

## WRONGFUL SEIZURE.

See "Taxation," § 6.

***Point annotated. See syllabus.**

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