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CASES ARGUED AND DETERMINED

IN THE

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

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JUDGES

OF THE

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

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Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
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Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
Hon. MOSES HALLETT, District Judge, Colorado.[1].....Denver, Colo.
Hon. ROBERT E. LEWIS, District Judge, Colorado.[2].....Denver, Colo.
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Hon. EDWARD WHITSON, District Judge, E. D. Washington.....Spokane, Wash.
Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington.....Seattle, Wash.

[1]Resigned April 7, 1906.

[2]Appointed April 10, 1906.

CASES REPORTED.

CASES

ARGUED AND DETERMINED

IN THE

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

STURGISS v. CORBIN et al.

(Circuit Court of Appeals, Fourth Circuit. November 2, 1905.)

No. 603.

1. BANKRUPTCY—SALES OF PROPERTY—POWERS OF COURT.

A court of bankruptcy has power to order the sale of any property of a bankrupt clear of incumbrances, and also, in its discretion, to appoint commissioners to make the sale; there being no requirement that such sales shall be made by the trustee.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 358.]

2. SAME—SETTING ASIDE SALE—GROUNDS.

A sale of property of a bankrupt, made at a public auction, under an order of the court in which there was neither fraud nor mistake, should not be set aside merely on an offer by an unsuccessful bidder of an advanced price, amounting to no more than 4 per cent. above the sale price; but the purchaser in such case is entitled to a confirmation.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 378.]

3. SAME—REVIEW OF ORDER.

An order of a district court in bankruptcy, setting aside a sale of property and directing a resale, is not reviewable on petition to superintend and revise until after the resale has been made and confirmed.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

Petition for Revision of the Proceedings of the District Court of the United States for the Northern District of West Virginia, at Clarksburg, in Bankruptcy.

B. M. Ambler and A. Leo Weil, for petitioner.

Hector M. Hitchings and Reese Blizzard, for respondents.

Before GOFF, Circuit Judge, and MORRIS and WADDILL, District Judges.

GOFF, Circuit Judge. In April, 1904, the Morgantown Tin Plate Company was duly adjudged a bankrupt. Application for an order of sale of the property of the bankrupt was made before the referee

in bankruptcy, and was by him refused. A second application was made to him for such order, which was again refused. Thereupon, by proper proceedings, this action of the referee was reviewed by the District Court for the Northern District of West Virginia. That court, reversing the action of the referee, directed a sale of the bankrupt's property, consisting of a tin plate plant at Morgantown, W. Va., clear of all liens, incumbrances, and claims. To make such sale the court appointed two commissioners, and gave them specific instructions for their government relating to the sale of said property. This action of the court in directing said sale, and in not directing the trustee in bankruptcy to make it if ordered, is complained of here as error.

By virtue of the decree of the court below, the commissioners proceeded to sell said property, offering it at public auction on March 16, 1905, continuing the sale until the following day, when they "knocked it down" to one John G. Frazer at the price of $154,000. When this sale came before the District Court for confirmation, the petitioner, George C. Sturgiss, submitted to the court an offer of $160,000 for the property, together with a statement of the circumstances attending the public sale which had caused him to cease bidding, and to mistakenly allow the property to be knocked down to Frazer. Upon considering the petition of Sturgiss and his objections to the confirmation of the sale to Frazer, as also his offer of $160,000, the court, Frazer not objecting, sustained the objections to the sale of March 16th, and, as all the parties who had bid on the property were present in court, in person or by attorney, and did not object, the court directed a resale to take place then and there at the bar of the court, the bidding to be started with the offer made by Sturgiss. Accordingly the property was again offered, and was sold in the presence of the court to Sturgiss for $200,200. The commissioners afterwards, on April 4, 1905, when the matter of the confirmation of this sale to Sturgiss was before the court, reported that since said sale they had received from M. G. Palliser, for whom one of the commissioners was counsel, a bid of $208,000 for the property, and at that time the said bidder and his counsel asked the court not to confirm the sale of March 30th, but to offer the property again at an upset bid of $208,000. This application for a resale was opposed by Sturgiss, who then offered to comply fully with the terms of his purchase, but the court overruled his objection, and directed a resale. The objection of Sturgiss to the decree of resale was noted in the order of the court, and due notice was then given by him of an appeal and petition for review by this court. The resale so directed was at once made, the bidding commencing at the offer of $208,000 made by Palliser, and being knocked down to the said John G. Frazer at the price of $220,000, after Sturgiss had bid as much as $219,900 for the same. This sale was subsequently, by a decree of the court below, duly confirmed, over the protest, objections, and exceptions of said Sturgiss. This action of the court in setting aside the sale of said property to Sturgiss, in directing a resale of it, and in afterwards confirming the sale to Frazer, is alleged in the petition for review to be error.

The order of the court below directing a sale of the property clear of all liens, claims, and incumbrances was, under the circumstances, a wise exercise of judicial discretion, being such action as the bankrupt act contemplates and provides for in those instances where the nature and location of the property makes it desirable, in the interest of the creditors, that the same be sold as soon as practicable. The act does not require that such sales shall be made by the trustee in bankruptcy, and while ordinarily it will likely be best and more convenient that such official conduct such sales, still there are doubtless many cases in bankruptcy where it is entirely proper for the court to exercise its undoubted right to designate the officer it wishes to conduct the sale it is authorizing; such designation being other than the trustee. There is nothing in the record before us indicating that the court below, in appointing its commissioners of sale, exercised its discretion improvidently, thereby militating against the interests of either the bankrupt or the creditors. This contention is without merit.

We come now to the consideration of the insistence that there was error in the decree directing that the sale to Sturgiss be set aside, and that the property be again offered at auction to the highest bidder. The sale to Sturgiss had been made under the provisions of the order of court directing the same, had been conducted in the presence of the court, and had been consummated after due notice to the bidders and the amount offered had been given to all concerned, and therefore, unless good cause was shown, the same should have been confirmed. The advance offer of $7,800 was, of itself under the circumstances attending the purchase by Sturgiss, not sufficient to warrant the setting aside of the sale. A sale made under a judicial decree will not, when no misunderstanding existed among the bidders, and when no fraud is shown, be set aside for mere inadequacy of price, unless such inadequacy is so gross as fairly to raise a presumption of fraud. The practice of opening biddings and of setting aside sales made during the progress of judicial proceedings should not be encouraged, as it is not conducive to the interests of litigants, and it tends to shake public confidence in the validity and finality of judicial sales, and to unduly prolong litigation. A purchaser at a judicial sale, who has complied with the terms thereof, or who shows his willingness and ability so to do, is not only entitled to the protection of the court, but as a party to the proceeding, made such by his purchase, is so situated as to be entitled to the court's decree of confirmation, in the absence of the inadequacy, fraud, or mistake before alluded to.

The Supreme Court of the United States, speaking through Mr. Justice Bradley, in Graffam v. Burgess, 117 U. S. 180, 191, 6 Sup. Ct. 686, 692, 29 L. Ed. 839, said:

"In this country Lord Eldon's views were adopted at an early day by the courts, and the rule has become almost universal that a sale will not be set aside for inadequacy of price, unless the inadequacy be so great as to shock the conscience or unless there be additional circumstances against its fairness; being very much the rule that has always prevailed in England as to setting aside sales after the master's report had been confirmed."

Mr. Justice Brewer, speaking for the same court in Pewabic Mining Company v. Mason, 145 U. S. 349, 356, 12 Sup. Ct. 887, 888, 36 L. Ed. 732, said:

"The question in this case is whether the master's sale shall stand. It may be stated generally that there is a measure of discretion in a court of equity, both as to the manner and conditions of such a sale, as well as to ordering or refusing a resale: The chancellor will always make such provisions for notice and other conditions as will in his judgment best protect the rights of all interested, and make the sale most profitable to all; and after a sale has once been made, he will, certainly before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted. Yet the purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto."

The property so sold to Sturgiss had previously been offered for sale, at which time the highest bid secured was $154,200. The bid by Sturgiss, at which it was, in the presence of the court, knocked down to him, was $200,200. The offer of an additional and higher bid, on which the court below acted when it refused to confirm the sale to Sturgiss, was for $208,000. The advance in the bid, it thus appears, was less than 4 per cent. on the sum at which it had been sold to Sturgiss. The acceptance of this belated bid was, we think, under the circumstances attending said sale, a mistake. This offer was made by a party interested in the proceeds of the sale, one who was thoroughly familiar with all the incidents connected with it, who was well advised as to the value of the property, and who had himself been an unsuccessful bidder during one of the times at which the property had been offered for sale. There is an entire absence of fraud; in fact no intimation of its existence is made. It is not shown that any mistake or misunderstanding existed among the bidders concerning the property itself, or the terms under which the sale was made. The additional offer was not of such a character as would demonstrate inadequacy of price, or justify a refusal to confirm. If a judicial sale has been fairly conducted, as was the sale we now consider, the rights of the purchaser should be protected, not only because it is his due, but also for the purpose of protecting such sales from the evil and chilling influences of instability and doubt.

The petitioner has followed the practice as established by the Supreme Court of Appeals of West Virginia relating to questions of this character. Under that practice, he was not entitled to an appeal to this court until after the resale ordered by the court below had been made and confirmed. With this practice we are in accord. Kable v. Mitchell et al., 9 W. Va. 492; Childs v. Hurd et al., 25 W. Va. 530; National Bank of Kingwood v. Jarvis et al., 26 W. Va. 785.

We conclude that the court below erred in refusing to confirm the sale of March 30, 1905, to George C. Sturgiss for the sum of $200,200, and we hold that the order of resale made April 4, 1905, and all proceedings had thereunder, should be vacated and set aside. This cause is remanded, with directions that such further proceedings be had as will carry out the views herein expressed, and as will confirm the sale so made, as aforesaid, to said petitioner.

Ex parte DICK.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1905.)

No. 1,236.

INDIANS—INTRODUCING LIQUOR INTO INDIAN COUNTRY—POLICE POWER OF UNITED STATES.

The police power of the United States can only be exercised where the legislative authority of Congress excludes territorially all state legislation, and where the United States has conveyed under its land laws lands within a state ceded to it by an Indian tribe, and such lands have passed into the ownership of individuals and a municipality of the state which has been formed thereon, they are no longer subject to the provisions of Rev. St. § 2139, as amended by Act Jan. 30, 1897, c. 109, 29 Stat. 506, making it an offense to introduce liquor into the Indian country; nor can that law be retained in force over such lands by agreement with the Indians in the contract or treaty of cession, the police power of the state to regulate the sale of liquor thereon being exclusive.

On Application for Writ of Habeas Corpus.

George W. Tannahill and F. E. Fogg, for petitioner.
N. M. Ruick, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The petitioner was convicted in the United States District Court for the Northern Division of Idaho at the May term, 1905, upon an indictment charging him with the crime of introducing intoxicating liquors into the Indian country, to wit, into and upon the Nez Perce reservation, in the county of Nez Perce, in the state of Idaho, in violation of section 2139 of the Revised Statutes of the United States, as amended by the act of January 30, 1897, c. 109, 29 Stat. 506. The petition for the writ of habeas corpus and certiorari was presented to this court during its recent session in Seattle, and after consideration a writ of certiorari was directed to issue returnable at Portland, to bring up a transcript of the record and proceedings in the case.

The petitioner challenges the jurisdiction of the trial court on the ground that the act of the petitioner, which is made the basis of the charge, namely, that he introduced intoxicating liquors into the Indian country, was not committed in the Indian country, but in the village of Cul de Sac, a municipal corporation organized under the laws of the state of Idaho. The petitioner is a Umatilla Indian, who has received an allotment of land in severalty.

The act of January 30, 1897, provides as follows:

"That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the government, or to any Indian a ward of the government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including

beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever, into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: Provided, however, that the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country, that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department." 29 Stat. 506.

Act Feb. 8, 1887, c. 119, 24 Stat. 388, authorized the President to allot lands in severalty to Indians on the various reservations, whenever in his opinion any reservation or any part thereof would be advantageous for agricultural and grazing purposes. Section 6 of the act provided as follows:

"That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, and every Indian in Indian Territory, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." 24 Stat. 390.

Pursuant to this act, the President authorized negotiations with the Nez Perce Indians in Idaho for the cession to the United States of certain of their lands in that state, and thereupon an agreement was entered into between commissioners of the United States appointed for that purpose and the principal men and other male adults of the tribe for such cession. This agreement was dated May 1, 1893. It provides in article 1 for the cession, relinquishment, and conveyance to the United States by the Nez Perce Indians of all their claim, right, title, and interest in and to all the unallotted lands within the limits of the Nez Perce Reservation, saving and excepting certain described tracts of land which are retained by the Indians. It is provided in article 9 as follows:

"It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians, shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians." Act Aug. 15, 1894, c. 290, 28 Stat. 330.

It is under the terms of this agreement contained in article 9 that the petitioner is charged with having introduced intoxicating liquors into the Indian country. The village of Cul de Sac is located upon the land ceded by the Indians to the United States, about seven or eight miles from the exterior boundary of the Indian school reservation, and no reservation or any part of a reservation used for government purposes or for Indian purposes is within the boundaries of such village. Prior to the transaction involved in this case the title to the lands upon which the village of Cul de Sac is located had passed from the United States by patent under the townsite laws to the probate judge of Nez Perce county, Idaho, in trust for the inhabitants of the village.

There is no question as to the plenary authority of Congress over the tribal relations of the Indians. Such authority has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Lone Wolf v. Hitchcock, 187 U. S. 565, 23 Sup. Ct. 216, 47 L. Ed. 299. But the question involved in the present case does not relate to the tribal affairs of the Nez Perce Indians. The question is whether Congress can break up the tribal relations of these Indians, allot lands to the individual Indians in severalty, give them the benefit of and make them subject to the laws, both civil and criminal, of the state of Idaho, make them citizens of the United States and declare them entitled to the rights, privileges, and immunities of such citizens, open the lands which they have ceded to the United States to settlement under the land laws of the United States, provide for the conveyance of such lands to individuals and municipal corporations, and still retain over such lands the police power prescribed in article 9 of the agreement of May 1, 1893, with the Nez Perce Indians, providing that for a period of 25 years all the laws of the United States prohibiting the introduction of intoxicating liquors into the Indian country shall be applicable to such lands? We do not think that Congress can reserve or exercise such police power within the territorial limits of a state. The police power of the United States can only be exercised where the legislative authority of Congress excludes territorially all state legislation. United States v. De Witt, 9 Wall. 41, 45, 19 L. Ed. 593; Slaughter House Cases, 16 Wall. 36, 64, 21 L. Ed. 394.

The late case entitled Matter of Heff, 197 U. S. 505, 25 Sup. Ct. 506, 49 L. Ed. 848, was a petition to the Supreme Court of the United States for a writ of habeas corpus. The petitioner had been convicted of selling liquor to an Indian, a member of the Kickapoo Tribe, who had received an allotment of a patent of land under the provisions of the act of February 8, 1887. It was claimed in that case, as in this, that this was in violation of the act of January 30, 1897. The Supreme Court, speaking of the limitation of the police power of the general government in such a case, said:

"In this Republic there is a dual system of government—national and state. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other. The general police power is reserved to the states, subject, however, to the

limitation that in its exercise the state may not trespass upon the rights and powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And, so far as it is an exercise of the police power, it is within the domain of state jurisdiction."

The court says further:

"We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from federal control thus created cannot be set aside at the instance of the government without the consent of the individual Indian and the state; and that this emancipation from federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and incumbrance, or the further fact that it guaranties to him an interest in tribal or other property."

This was said with respect to a sale of liquor to an Indian, over whom it was said the general government had parted with its guardianship, and it was held that the court had no jurisdiction of the offense charged. In the present case the sale of liquor was made in a municipal territory clearly within the jurisdiction of the state, and outside the jurisdiction of the United States. With respect to such a case, the court, in the Case of Heff, supra, said:

"It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial limits of that state would be an invasion of the state's jurisdiction, and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the state or the nation, and not divided between the two."

This statement of the law by the Supreme Court we think disposes of the present case.

It is urged on behalf of the United States that the protection of the Indians afforded by the agreement of May 1, 1893, is necessary to protect them from the deplorable consequences resulting from the liquor traffic, that the state does not assume to regulate such traffic in that territory, and that, in default of a law prohibiting the sale of intoxicating liquors to these Indians, their degradation and ruin will soon be complete. It is undoubtedly the duty of the white man to protect the Indian from this consuming vice, and there can be no question as to the necessity for prohibitory legislation in this regard. But the courts cannot supply such legislation, or enforce agreements beyond their jurisdiction. This argument should be addressed to the Legislature of the state, which will undoubtedly perform its duty in this respect.

It follows that the District Court of Idaho did not have jurisdiction of the offense charged in the indictment, and therefore the petitioner is entitled to his discharge from imprisonment; and it is so ordered.

H. HACKFELD & CO., Limited, v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1905.)

No. 1,004.

1. WRIT OF ERROR—DESIGNATION OF PARTIES.
That a writ of error designates the parties as plaintiff and defendant, following the title of the cause in the court below, is not a fatal error, but merely a clerical mistake, which does not affect the right to prosecute the proceedings for review.

2. ALIENS—DUTIES AND LIABILITIES OF SHIPOWNERS—ESCAPE OF IMMIGRANTS FROM INSPECTION OFFICERS.
The duty imposed on the owners, masters, and agents of ships bringing alien immigrants to a port of the United States by Act March 3, 1891, c. 551, §§ 8, 10, 26 Stat. 1085, 1086 [U. S. Comp. St. 1901, pp. 1298, 1299], to "adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers," and to detain such immigrants as may be rejected on board until they are returned, does not make a shipowner, master, or agent an insurer of the safe-keeping of alien immigrants while detained for inspection in the custody of inspection officers at a place on land designated by such officers, and they cannot be convicted of a violation of such provisions, because of the escape of immigrants while so held without their fault or negligence.

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

J. E. Foulds and Kinney, McClanahan & Bigelow, for plaintiff in error.

Robert W. Breckens, U. S. Atty. (Edward E. Cushman, Sp. Asst. Atty. Gen., of counsel), for the United States.

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

HAWLEY, District Judge. The writ of error in this case is taken from judgments of convictions in 12 separate criminal informations, filed by the United States district attorney in the United States District Court for the District of Hawaii, which were all consolidated for the purpose of trial.

Each information contained two counts—the first alleging, in proper form, that on the 21st day of December, 1902, the defendant (plaintiff in error in this court), as agent of the steamship Coptic, did negligently permit to be landed a certain named alien Japanese immigrant, contrary to the provisions of section 8 of the Act of Congress of March 3, 1891, entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor" (26 Stat. 1085, c. 551 [U. S. Comp. St. 1901, p. 1298]); and the second count alleging that defendant, on the same date, did neglect to detain on said vessel the same named alien immigrant, contrary to the provisions of section 10 of the same act. Verdicts of guilty were rendered by the jury upon both counts in each information, and in each case judgment was rendered by the court against defendant for $100 on the first count and $300 on the second count.

The defendant in error moves the court to dismiss the writ of error because the parties in the writ are described as the "United States of America, plaintiff, and H. Hackfeld Co., Ltd., a corporation, defendant, and neither of them designated as plaintiff in error or defendant." The names of the parties were given under the title of the court below, and the failure to designate them as the title appears in this court is not a fatal error; at most, it would be a mere clerical mistake. The point made is too technical to merit serious consideration.

A motion to strike out certain portions of the testimony is subject to the same suggestion. If the motion to strike out were granted, it would not affect the result, because the bill of exceptions contains the essential points necessary to determine whether certain rulings made by the court were correct or not. The record is a very lengthy one, and it is wholly unnecessary to give more than a brief synopsis of the facts.

Section 8 of the act under consideration provides:

"That upon the arrival by water at any place within the United States of any alien immigrants it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came to report the name, nationality, last residence, and destination of every such alien, before any of them are landed, to the proper inspection officers, who shall thereupon go or send competent assistants on board such vessel and there inspect all such aliens, or the inspection officers may order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made. But such removal shall not be considered a landing during the pendency of such examination. * * * During such inspection after temporary removal the superintendent shall cause such aliens to be properly housed, fed, and cared for, and also, in his discretion, such as are delayed in proceeding to their destination after inspection. * * * It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers, and any such officer or agent or person in charge of such vessel who shall either knowingly or negligently land or permit to land any alien immigrant at any place or time other than that designated by the inspection officers shall be deemed guilty of a misdemeanor."

The plaintiff in error was the agent of the steamship Coptic. The immigrants in question arrived upon said steamship at Honolulu from the Orient December 18, 1902. The record shows that they were conveyed from the steamship to Quarantine Island for inspection by surgeons of the marine hospital service, acting under orders from the immigration department. It also appears that subsequent to the medical examination and the finding of a report adverse to the immigrants, but prior to the examination and order of deportation made by the immigration inspectors, the immigrants escaped from Quarantine Island. Two days after the escapes were made, the immigration inspector issued his order, refusing the immigrants in question, with about 40 others who had not escaped, a landing.

The following letter was admitted in evidence:

"Immigration Service, Port of Honolulu, T. H., January 14th, 1902.

"Dr. L. E. Cofer, Chief Quarantine Office, Honolulu, T. H.—Sir: In view of the number of Asiatic immigrants, arriving at this port, on every ship from the Orient, we find it utterly impossible with the limited force of this office, to make proper inspection of such immigrants, as is required by the immigration laws, during the time these ships usually remain in port, and

that the most convenient and practicable plan of handling them is to simply check off all arriving steerage passengers, and send them, for subsequent examination, to some place of detention. As is well known to you, and I believe by the Treasury Department also, the steamship companies bringing these people here have no place of detention at all suited for such large numbers; their only provision being for the detention of such as may be held after inspection, seldom exceeding five or six at a time. I am obliged, therefore, to ask that we be permitted to continue sending such immigrants to Quarantine Island, where they can be properly detained until the inspection is completed.

"Respectfully, Joshua K. Brown, Immigration Inspector."

* * * * * * *

"Q. After this the inspection of immigrants continued at Quarantine Island?

"A. Continued as before; never ceased in fact."

The record shows that the immigrants who were taken to the island for inspection were placed under guards selected and controlled by the officers of the government. The wages of the guards, and the cost of their maintenance and of the immigrants, were paid by the steamship company, as is required by section 10. It will be noticed that the escape occurred while the immigrants were in the custody of the inspection officers, after the removal from the steamship at a point and place that was designated by the inspection officer for the purpose of examination, and were there detained by the inspection officers, and were under their control at the time of the escape.

It was not shown that the plaintiff in error did not "adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers." The steamship company could not be held guilty, unless it be the law, as the court below virtually held, that it was an insurer of the safety of the immigrants while detained in the custody of the inspection officers of the government. We do not think that section 8 of the act is susceptible of any such construction.

At the close of the testimony the court instructed the jury as follows:

"In relation to the first count of these informations, I instruct you that from the time of the entrance of the steamer Coptic into the harbor of Honolulu, upon the date mentioned in the said informations, until the final completion of the examination of these alien immigrants by the proper inspection officers, the custody of such immigrants remained in the ship, notwithstanding that they may have been removed from the ship for the purposes of such inspection. In the language of the statute, this 'temporary removal shall not be considered a landing pending such examination.' It is done, as was shown in these cases, for the convenience of the shipping people, and to prevent any delay in the completion of the voyage of such vessel at its terminal point in California. For the purposes of the act itself, these immigrants are treated as being still on board the vessel, and, until they are declared to be lawfully entitled to enter the United States, the responsibility for their safekeeping was and is with the ship or its agent, under the provisions of the law. They cannot be relieved from this responsibility by claiming or proving that any officer or any employé of the United States may have assumed to look after them. * * * I instruct you further that you cannot consider any attempt on the part of the defendant to prove due care on its part or the fact that due care was exercised to prevent the escape of any of these immigrants. Under the provisions of the act of Congress upon which these informations are based, this is no excuse. The steamship company and its agent took the risk, when these Japanese immigrants were brought here, that they might be among the prohibited classes

and that they might escape and enter the country unlawfully. Nothing will excuse the steamship company or its agent, the defendant in this case, but what is known in the law as vis major (overwhelming force) or inevitable accident, and neither of these things has been shown in these cases."

The same general principles were again emphasized in the instructions given with reference to the second count of the indictment under section 10, closing:

"I therefore instruct you that, if the defendant in these cases has not proven to your satisfaction that these immigrants were returned to the port whence they came, although notified of their rejection by the proper inspection officers, then your verdict should be guilty under the second count of these informations."

The theory of the court in giving the instructions, as well as its rulings during the trial, as shown by the bill of exceptions, was based upon the principles announced by Judge Webb in Warren v. United States, 58 Fed. 559, 7 C. C. A. 368, which case has been expressly overruled by the recent decision of the Supreme Court in H. Hackfeld & Company v. United States, 197 U. S. 442, 451, 25 Sup. Ct. 456, 459, 49 L. Ed. 826. In construing the provisions of the act under consideration, the court said:

"This statute imports a duty, and, in the absence of a requirement that it shall be performed at all hazards, we think no more ought to be required than a faithful and careful effort to carry out the duty imposed."

That decision shows clearly that the court erred in following the Warren Case, and in charging the jury as above stated.

Upon the authority of Hackfeld v. United States, supra, the judgment of the District Court is reversed, and the court below instructed to discharge the plaintiff in error.

HENRY COWELL LIME & CEMENT CO. v. GLOBE NAVIGATION CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1905.)

No. 1,170.

SHIPPING—CONTRACT OF AFFREIGHTMENT.

A contract between the consignee of a shipment of lime and the carrier construed, and *held* to be one for the payment of a bonus above the freight, and not to have been discharged by the payment of the freight at the usual rate by the consignor and its acceptance by the carrier.

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

The appellee was the libelant in the court below, and in its libel alleged that on or about May 1, 1903, it entered into an agreement with the appellant at San Francisco, whereby it agreed to transport to the port of San Francisco from Roche Harbor, in Puget Sound, 15,000 barrels of lime, in consideration of which the appellant agreed to pay, in addition to the freight rate which theretofore prevailed between the parties, a bonus of 5 cents per barrel. The libel proceeded to allege performance of the contract by the appellee by means of its steamship Tampico. The answer of the appellant denied that the contract was made with reference to the steamship Tampico, but alleged that it was made with reference to a particular vessel only, to wit, the

steamship Eureka, and upon the condition that the loading of the lime should commence between the 7th and 10th days of May, and that the lime was not transported by said steamship, nor was said steamship at Roche Harbor ready for loading between the 7th and 10th days of May. For a second defense, the appellant alleged that on or about the 14th day of May, 1903, the appellee made a contract with the Tacoma & Roche Harbor Lime Company, the consignor of the lime, at Roche Harbor, for the transportation of the lime by the Tampico at a freight rate of 30 cents per barrel and no more, and that said corporation paid the appellee said agreed freight rate. On these issues testimony was taken, and thereupon the District Court found for the appellee for the full amount sued for.

Olney & Olney, for appellant.

Charles Page, Samuel Knight, and W. S. Burnett, for appellee.

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

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

For some time prior to the transactions out of which the suit arose, the appellant, a corporation of the state of California, had business dealings with the Tacoma & Roche Harbor Lime Company, a corporation of the state of Washington, from which it purchased lime, with an understanding that, if the freight exceeded 30 cents per barrel from Roche Harbor to San Francisco, the excess was to be charged back to the consignor. The appellee was a corporation having its principal office at Seattle and an agent at San Francisco. It owned and operated three steamers, the Eureka, the Meteor, and the Tampico, all of the same general type, speed, and carrying capacity. It had transported a number of shipments of lime for the appellant. In April, 1903, through its agent in San Francisco, Mr. Rochester, negotiations with the appellant were opened for the transportation of 15,000 barrels of lime. The carrying capacity of the steamers was considerably greater than 15,000 barrels of lime, and to complete a cargo it was necessary to carry other merchandise. About May 1st Mr. Rochester secured a booking of a quantity of coal, to be loaded on the Meteor at Tacoma. He arranged with Mr. George, manager of the appellant, for the transportation of the lime in conjunction with the coal cargo. The contract is shown by a letter written to the appellant on May 4, 1903, by Mr. Rochester on behalf of the appellee, which contained the following:

"Gentlemen: As per our conversation with Mr. George on the first instant. we wired our Seattle office as follows: 'Cowell will pay 5 cents per barrel bonus on lime. This must be kept secret from McMillin. Cowell requests answer by telegram.' To this we receive a reply on the 2d: 'Will accept your offer Cowell, providing this is clearly understood. Barring contingencies loading commencing between May 7th and May 10th. Lime following as soon as possible after other cargo is loaded.' After consulting with your Mr. George, over the long distance line from Santa Cruz this morning, we have telegraphed Seattle as follows: 'Cowell's manager George telephones from Santa Cruz confirming proposition as per your telegram of 2d, requests you notify McMillin immediately, also requests making loading earliest date possible.'"

On May 7, 1903, the lime company telegraphed to the appellee at San Francisco as follows:

"Eureka will be here today. Avoid discussion rate there. That question settled here."

To which the appellant answered on May 8th:

"We beg to advise you that we have already closed at 35-cent freight rate. On the 11th of April you wired us that her rate was 30 cents, but to make the best rate possible. We had the matter up with Mr. Rochester, and in order to get him to send her at all we had to make a 35-cent rate; otherwise, he would not send her."

On May 7th, the lime company wrote the appellant:

"We have definitely engaged the Meteor to take the cargo of 15,000 barrels of lime to you, and they promised she would be here today. * * * We trust that you have not considered the question of rate with Mr. Rochester, as we are handling that question here with the owners of the vessel."

To this the appellant answered on May 11th:

"We note that it is definitely arranged for the Meteor to take 15,000 barrels, and we trust that you will wire us when she sails, which we hope will be soon. We did make the rate here with Mr. Rochester as already advised you, but he simply would not agree to take the cargo unless at that rate; and after ten days' delay, while he tried to secure other cargo, we concluded that it was better to pay that much extra, get the lime here, dispose of it, and be ready for another lot."

This correspondence effectually disposes of the contention of the appellant that the contract to pay the bonus of 5 cents per barrel applied only to the Eureka. Mr. Rochester in his testimony denied that the contract was made with reference to any particular steamer, and testified that about the 20th of April the Eureka had been taken off the line to be sent to Alaska. The correspondence above quoted shows that the appellant's agent understood that the contract to pay the bonus was not affected by the fact that the shipment was to be made on the Meteor, instead of the Eureka.

The principal question in the case is whether or not the contract so made to pay a bonus of 5 cents per barrel was canceled by the arrangement which was made between the lime company and the appellee in regard to the freight rate and the prepayment of the freight by the former. There was no further discussion between Mr. George and Mr. Rochester, the respective agents of the appellee and the appellant, in regard to the freight rate or the bonus, until after the ship arrived at San Francisco with her cargo. The Meteor had been found to be in a disabled condition, and the Tampico had been substituted in her place. The Tampico began her coaling at Tacoma on May 13th, and began loading the lime at Roche Harbor on the 15th. She completed loading her cargo there on the 17th, and on the following day sailed for San Francisco. In the meantime, on the morning of the 12th, Mr. Rochester telephoned to Mr. George that he had received notice that the Tampico had been substituted for the Meteor, and would sail from Tacoma on the 13th. In answer to this Mr. George made no objection, nor was anything said in regard to the bonus. On the 23d the Tampico arrived at San Francisco, and the appellee's agent presented to the appellant a bill for the bonus of 5 cents per barrel. Payment was refused on the ground that the freight had been paid at Roche Harbor. The correspondence which followed between the lime company and the appellant shows the

circumstances and the understanding under which the freight was paid at Roche Harbor. The lime company wrote to the appellant on June 2d:

"As we have written to you a number of times, the agreed rate of freight with the Globe Navigation Company was 30 cents per barrel. That was prepaid, and we have our receipt for same. This freight matter we handled exclusively with that company direct, and there can be no possible misunderstanding about it. They informed us, however, as we wrote you, that you had offered a special inducement of 5 cents per barrel to Mr. Rochester as a private matter between you and him on that cargo. We simply declined to discuss that question, referring it to you entirely, as we knew nothing about it."

It is clear from the correspondence that the lime company, in prepaying the usual freight rate of the lime, did so to protect itself. Under its arrangement with the appellant, if the freight rate exceeded 30 cents per barrel, the excess was to be charged back to the lime company. The lime company had received the information that a special rate had been agreed upon in San Francisco. It was evidently apprehensive that that arrangement might result in a charge against it. It was unwilling to assume any liability in regard to the bonus which it was informed had been exacted by Mr. Rochester. It left the parties to that agreement to adjust the liability thereunder, if any there were. The contract involved in this suit had nothing to do with the freight rate. Nothing was said in it about the freight rate. It was purely and simply a contract for a bonus in addition to the freight rate. It was the freight rate alone that was paid by the lime company at Seattle. How can it be said that the prepayment of the usual freight, and its receipt by the appellee, canceled or affected the original contract for a bonus of 5 cents per barrel or discharged the appellant of its liability therefor. It is true that as early as May 7th, the lime company wired the appellant to avoid discussion of the freight rate, and said that that question would be settled at Roche Harbor. But nothing was done in pursuance of that notice. No readjustment of the bonus contract was made at San Francisco, nor was there any repudiation of the agreement to pay the bonus. On the contrary, the appellant answered, informing the lime company that it had already closed the contract at 35-cent freight rate, and that in order to get the cargo sent at all it had to make that rate. It is true that in its communication the extra 5 cents was added to the freight rate, and was not referred to as a bonus; but the reason for this would seem to have been that at that time the appellant expected the lime company to assume liability for the extra 5 cents as part of the freight rate.

Nor is the appellant relieved of its liability under the contract by the fact that the loading of the lime did not begin between May 7th and May 10th. The proviso in the contract was that:

"Barring contingencies, loading commencing between May 7th and May 10th, Lime following as soon as possible after other cargo is loaded."

This means that the loading of the other cargo was to begin between May 7th and May 10th, and the loading of the lime as soon as possible thereafter, all subject, however, to contingencies that might cause delay. Such contingencies arose. The Meteor was found to be unseaworthy, and was by the inspectors ordered upon the dry dock, so that

the loading of the cargo began on May 13th and the loading of the lime began on May 15th. But on the 12th the appellant received notice that the loading of the coal would not begin until the 13th and made no objection to the delay. When the appellant was asked for payment of the 5 cents per barrel bonus, liability was denied, not on the ground that the shipment had not been made upon the Eureka, nor upon the ground of the delay in beginning loading, but upon the ground only that the freight had been prepaid at Roche Harbor.

We find no error in the decree of the District Court, and it is accordingly affirmed.

CONNERS et al. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. July 6, 1905.)

No. 547.

CONTRACTS—CHANGE IN SPECIFICATIONS OF BUILDING CONTRACT—MODE OF FIXING COMPENSATION.

A contract for the construction of a foundry at a navy yard contained a provision that, if during the progress of the work it should "be deemed necessary or desirable" by the United States to make any changes or modifications in the plans or specifications affecting the cost of the work in a sum exceeding $300, the increased or diminished compensation to be paid for the work should be assessed by a board of naval officers appointed for the purpose, and should be based upon the actual cost. During the progress of the work, it was found that the wood called for by the contract, and required to be fireproofed, would not be improved by such treatment, and it was decided to omit such fireproofing, and a board was appointed, who assessed the decreased cost by reason of such omission. *Held*, that the change was within such provision of the contract, and that the assessment made thereunder was conclusive on the parties, and excluded the jurisdiction of the courts over a controversy between them as to the amount to be deducted from the contract price.

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

For opinion below, see 130 Fed. 609.

Hiram P. Harriman, for plaintiffs in error.

William H. Garland and Guy A. Ham, Asst. U. S. Attys.

Before COLT and LOWELL, Circuit Judges, and ALDRICH, District Judge.

LOWELL, Circuit Judge. This was a petition filed under the provisions of the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752]. The allegation that the United States made a contract with the petitioners was in substance as follows: The said Conners thereupon in writing offered and bid to do the work for the sum of $39,920, and if the railroad was omitted, to deduct the sum of $700, and if the fireproofing of the lumber was omitted, to deduct the sum of $900; all said options being parts of the one and only bid of your petitioners, and the said United States accepted said offer and bid, and omitted said railroad and fireproofing. The United States pleaded the general issue, and the case was heard in the Circuit Court upon agreed facts.

The bill of exceptions, indeed, sets out that there was "other evidence introduced before the court," but from the last paragraph of the "agreed facts" and from the arguments of counsel we assume that this other evidence referred to a matter not now before us. The learned judge made certain findings of fact and rulings of law, and ordered judgment for the United States on the ground of a variance between pleadings and proofs. Having seasonably excepted to the rulings, the petitioners assigned error: (1) That the Circuit Court erred in ordering judgment for the United States. (4) That the court should have ruled that the acts of the United States were an acceptance of the proposal of the petitioners to complete the building, omitting railroad and fireproofing, for $38,220. (5) That the court should have ruled that the acts of the United States were an acceptance of the proposal of the petitioners to deduct only $900 if fireproofing was omitted.

The learned judge found as a fact that the contract alleged in the petition was never made. His finding has the effect of the verdict of a jury, and can be disregarded only if there was no competent evidence to support it. U. S. v. Clark, 96 U. S. 37, 24 L. Ed. 696. Here the finding was abundantly sustained by the evidence set out in the agreeed statement of facts. The United States advertised for proposals to be made according to certain items, one of which was for foundry, railroad, and fireproofing, a second for foundry and fireproofing without railroad, and still a third for foundry without railroad or fireproofing. The petitioners made bids like those set out in their petition, and the United States accepted the bid for the building without railroad, but with fireproofing. A written contract, in which all previous offers, bids, and negotiations were embodied and merged, was thereafter executed. That the fireproofing was subsequently omitted, under a clause of the written contract providing for changes, or by reason of an agreement outside the contract, affords no evidence of the acceptance by the United States of the petitioner's original third bid. It follows that there was a variance between the petition and the proof.

The petitioners, however, now contend that, as the case was heard upon an agreed statement of facts, the pleadings may be disregarded, and an award made to the petitioners, if, upon the facts stated, they are entitled to recover in any proceeding within the jurisdiction of the Circuit Court. This contention was not made in the court below, and has been argued to this court only upon supplemental briefs.

In a submission upon an agreed statement of facts, the parties may insert in the submission or agreement that judgment shall be entered without regard to the pleadings, as the plaintiff or defendant is entitled to prevail in any form of pleadings. See Second Religious Society v. Harriman, 125 Mass. 321. And the same result may be reached by statute. See Day v. Day, 100 Ind. 460. In the absence of statute and of express agreement, a general submission upon agreed facts, without more, has been held to require a judgment for the party who would prevail upon the merits, had the plaintiff's and defendant's rights, as shown by the agreed facts, been presented to the court by appropriate pleadings. West Roxbury v. Minot, 114 Mass. 546; Cushing v. Kenfield, 5 Allen, 307; Merrill v. Bullock, 105 Mass. 486; Folger v. Columbian Ins.

Co., 99 Mass. 267, 277, 96 Am. Dec. 747; Rogers v. Daniell, 8 Allen, 343, 349; Cleaveland v. Five Cents Savings Bank, 129 Mass. 27, 32; Ellsworth v. Brewer, 11 Pick. 316; McCue v. Whitwell, 156 Mass. 205, 30 N. E. 1134; Snow v. Miles, 3 Cliff. 608, 610, Fed. Cas. No. 13,146. In these cases the facts were agreed and stated in various forms, but the court treated the precise form of submission or agreement as immaterial, and, under a general submission upon agreed facts without special stipulation, gave judgment upon the merits of the case as shown by the agreed facts, quite irrespective of the pleadings. The practice is not according to the ordinary course of the common law, which requires the court to determine issues raised by pleadings, but it is established in Massachusetts, and nothing in the laws of the United States or in the rules of the federal courts is shown to contravene its application in this district to the trial of actions at law.

The case at bar is not an action at law. The proceedings are had under the Tucker act, above mentioned. Section 5 of that act provides that the "petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or other thing claimed or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and law." The material parts of this section are similar to those ordinary provisions of practice acts or rules of court which regulate the plaintiff's pleadings in law or equity. Mass. Rev. Laws, c. 173, § 6; Mass. Sup. Ct. Eq. Rules, 20–23. We see no reason to suppose that Congress intended to attach to the requirement of a petition filed under the Tucker act substantially greater importance than belongs to the pleadings in other legal proceedings. It is to be noticed that the Tucker act contains many expressions, assimilating proceedings thereunder to proceedings at law, in equity, and in admiralty, respectively. See sections 4, 7, 9, and elsewhere passim. Moreover, counsel for the petitioners, on the one hand, contend that they are entitled to recover upon the merits of the case, and without regard to the variance, while counsel for the United States, on the other hand, contend that, irrespective of the pleadings, and upon the agreed facts, the petitioners are not entitled to recover anything. Under these circumstances, we think that we are justified by the evident wish of both parties to reach a decision of this case upon the merits, to treat it in this respect as if it were an ordinary trial at common law in the courts of Massachusetts. See District of Columbia v. Barnes, 197 U. S. 146, 154, 25 Sup. Ct. 401, 49 L. Ed. 699. We do not decide that this disposition of the case would be permissible against the objection of the United States.

The variance between pleadings and proofs having been thus disposed of, we come to the merits of the case as disclosed by the agreed facts. The written contract upon which these proceedings are based is not found in the record—a serious omission—as a court should ordinarily have before it the whole instrument which it is called upon to construe. The contract contained the following paragraphs:

"Third. The party of the first part further agrees that if during the progress of the work it shall be deemed, by the party of the second part, necessary or desirable to make any changes or modifications in the said

plans and specifications affecting the cost of the work to be done hereunder, said changes or modifications, and the amount of the increased or diminished compensation to be paid the party of the first part in consequence thereof, shall be stipulated and agreed to in writing by the parties to the contract before the work contemplated by such changes or modifications is begun; and such increased or diminished compensation shall, when exceeding $300, be assessed by a board of naval officers appointed for the purpose, and shall be based upon the actual cost."

"14. Changes. Should it be to the interests of the government to make any changes in the plans or specifications exceeding $300 in value, the increased or decreased compensation to which the contractor may be entitled is to be determined by a board of three naval officers, and the contractor shall be bound by its decision, if the decision of the board is approved by the Chief of Bureau of Yards and Docks, and no further payments shall be made until its decision, so approved, shall be accepted by the contractor in writing. Changes in plans or specifications not exceeding $300 in value may be made by mutual agreement, in writing, between the contractor and the Chief of Bureau of Yards and Docks."

Two companies engaged in the business of fireproofing wood reported to the petitioners that the wood called for by the contract was not fit for fireproofing, and that its value for the contract purposes would not be increased by that treatment. The Chief of Bureau of Yards and Docks thereupon decided not to require fireproofing, and a board of three naval officers was appointed by the commandant of the Portsmouth Navy Yard to consider the changes in the contract for the construction of the foundry, and to report upon the decreased cost by reason of omitting the fireproofing. The board reported, recommending that the fireproofing be omitted, and computing the decreased compensation on that account at $3,605. This decision was approved by the Chief of Bureau of Yards and Docks. The United States requested the petitioners to sign a supplemental agreement for this deduction, but the petitioners refused to agree to any deduction except $900. The United States thereupon ordered the petitioners to complete the building under the contract, and this the petitioners did, without fireproofing, and they were paid the contract price, less $3,605.

The learned judge found as a fact that the omission of fireproofing was not within the fourteenth paragraph, but was a necessity arising from mutual mistake; that therefore the ascertainment of decreased compensation by the board of naval officers was ineffectual, and not appropriate to the existing conditions, and that the amount by which the compensation stipulated should be decreased was ascertainable by the rules of common law, independently of any special provision of the contract. Section 7 of the Tucker act requires the trial judge to file written findings of the facts in the case. These findings of fact have the weight of the verdict of a jury, and cannot ordinarily be revised by the appellate court. But the Supreme Court has decided that, where the record contains all the testimony upon which the judge's findings of fact are based, the appellate court may examine if there is competent evidence to support the findings, and, if there be no evidence, may disregard the findings, and reverse the judgment. United States v. Clark, 96 U. S. 37, 24 L. Ed. 696. See Collier v. United States, 173 U. S. 79, 81, 19 Sup. Ct. 330, 43 L. Ed. 621. Here the appellate court has before it, unchanged in form, all the evidence presented to the trial judge. We

think, therefore, that we may determine whether the agreed facts contained evidence sufficient to support his findings. While the third and fourteenth paragraphs, above quoted, differ somewhat in language, they seem to us to be in substantial agreement, each slightly supplementing the other, and applicable to substantially the same facts. We think that the change in question was made because deemed by the United States in its interest to be necessary and desirable, and we are unable to see that the assessment of diminished compensation was not made in accordance with the written contract.

We agree with the learned judge that an agreement like that above quoted is not ineffectual as depriving the court of jurisdiction over a controversy, and we are therefore of opinion that the contention of the United States is sustained, and that the petitioners are, upon the merits of the controversy, entitled to recover nothing.

The judgment of the Circuit Court is affirmed.

FOWLER v. OSGOOD.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1905.)

No. 2,088.

1. RECEIVER—SUIT—IN A FOREIGN JURISDICTION.

A receiver in chancery of an insolvent corporation, appointed by the United States Circuit Court for the Southern District of Iowa, being authorized thereto by the court appointing him, brought suit in equity in the United States Circuit Court for the District of Colorado for the recovery of a fund, from a resident of the latter state, alleged to be held in trust for the benefit of creditors of the estate. *Held*, that such receiver had no legal status to maintain such suit in a jurisdiction foreign to that appointing him, even though leave to institute such suit was granted by the Colorado court, and although the bill alleged that there were no creditors of the insolvent corporation in the state of Colorado.

[Ed. Note.—Actions by and against receivers of federal courts, see note to J. I. Case Plow Co. v. Finks, 26 C. C. A. 49.]

2. EQUITY—DEMURRER TO BILL—JUDGMENT.

Where a demurrer to the bill is general, and special for the want of jurisdiction, the judgment sustaining the demurrer solely on the ground of want of jurisdiction should be limited accordingly, as a decree of dismissal of the bill concludes the defendant on the merits.

(Syllabus by the Court.)

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

N. T. Guernsey and J. C. Helm (John R. Dixon, on the brief), for appellant.

Cass E. Herrington and D. C. Beaman, for appellee.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

PHILIPS, District Judge. On January 23, 1900, the Atlantic Trust Company, a New York corporation, recovered judgment in the Circuit

Court of the United States for the Northern District of Illinois against the Iowa & Illinois Coal Company, an Iowa corporation, in the sum of $341,838.22. On the 10th day of February, 1900, said trust company recovered judgment against said coal company for a like sum in the Circuit Court of the United States for the Southern District of Iowa. Executions were issued on said judgments, and returns of nulla bona were made prior to the 4th day of August, 1900, on which latter date the said trust company filed a creditors' bill in the Circuit Court of the United States for the Southern District of Iowa against said coal company, alleging the rendition of said judgments and the issuance and return of said executions, the insolvency of said coal company, and that it had assets not subject to levy and sale on execution, consisting of choses in action, claims of an equitable character, which in equity should be sequestered by the court to enforce the satisfaction of said judgments. The complainant asked that the business affairs of the coal company be administered and wound up; that its assets, when collected, be applied upon said judgments; and for the appointment of a receiver to take possession and custody of its books and records, and to collect its assets. In this suit, on the 24th day of January, 1901, the said Circuit Court for the Southern District of Iowa appointed the complainant, Isaac W. Fowler, receiver of said coal company, investing him with the usual powers of a receiver in chancery. On the 14th day of January, 1902, the said Iowa Circuit Court made an order authorizing the receiver to institute and prosecute, outside of the Southern District of Iowa in other courts of competent jurisdiction, such action or actions at law or suit or suits in equity as in the judgment of said receiver might be necessary or expedient to institute and prosecute in order to collect and reduce to his possession all such rights, debts, equitable interests, property, and assets of said corporation, so that the proceeds of the same might be applied to the payment of the debts of said corporation. Thereafter said receiver, upon leave granted by the local court, instituted the present suit in equity in the United States Circuit Court for the District of Colorado, whereby he sought to recover from the defendant, Osgood, a large sum of money alleged to be in his hands in trust for the benefit of said corporation, and which in equity is liable to sequestration at the suit of the said receiver. To this suit the defendant appeared and demurred, on the ground, among others, that it appears on the face of the bill that the complainant is a foreign receiver, and as such has no power to sue in the jurisdiction of said Colorado court. The demurrer was sustained, and the bill dismissed. To reverse this decree, the complainant prosecutes this appeal.

The question to be decided is, could the receiver appointed by the court of the state of Iowa maintain this suit in a court of the state of Colorado? This question was presented to the Supreme Court of the United States in 1854, in Booth v. Clark, 17 How. 322, 15 L. Ed. 164. After thorough discussion, it was ruled that a receiver in chancery appointed by a court of one jurisdiction has no authority to sue in a jurisdiction foreign to that appointing him for the recovery of property or assets of the debtor. This for the reason that such receiver is the

mere right arm of the court appointing him, to obey its orders in matters of administration within its jurisdiction, and as such is entirely subject to its control. He executes bond for the faithful performance of his duties, to account alone to the court appointing him; and the funds coming to his hands as such receiver are in custodia legis, held by him for distribution and application by the court whose commission he holds.

Adverting to the exception where, under statutes of the state of the domicile of the corporation, on its insolvency or dissolution the assignee in law becomes vested with the title to the property, with all the powers conferred by the charter or statute, becomes, pro hæc, the corporation, and can therefore recover its property wherever situate, the learned justice said that none of these alter the relation of a mere receiver in chancery to the court appointing him, empowering him to sue in his own name officially in another jurisdiction for the property or choses in action of a judgment debtor.

"Indeed, whatever may be the receiver's rights under a creditors' bill, to the possession of the property of the debtor in the state of New York (the jurisdiction where the receiver was appointed), or the permissions which may be given to him to sue for such property, we understand the decision of that state as confining his action to the state of New York."

The doctrine of this case has been uniformly followed and steadfastly adhered to by the Supreme Court. In Quincy M. & P. R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632, where the powers of such receiver were under consideration, the court quoted with approval the following language:

"The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court, and by special authority may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned."

In Hale v. Allinson, 188 U. S. 56–64, 23 Sup. Ct. 244, 47 L. Ed. 380, Mr. Justice Peckham, speaking for the court, said:

"We do not think anything has been said or decided in this court which destroys or limits the controlling authority of that case."

And quoted with approval the following:

"He [the receiver] has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."

Because of the suggestion made in the discussion by Mr. Justice Swayne, in Booth v. Clark, that to permit a foreign receiver to recover the assets of the debtor situate in another jurisdiction would contravene the rule of comity, which forbids that the assets of the debtor having a situs in the forum should thus be withdrawn from its more convenient access by the local creditors, the courts of many of the states have conceived that if leave be first obtained from the local court to institute suit by the foreign receiver, and especially where it

is averred, as in the bill here under review, that there are no local creditors, the reason of the rule denying the right of action by the foreign receiver should not apply. But the discussion in full by Mr. Justice Swayne clearly enough indicates that such was not the view of the Supreme Court. Arguendo he said:

"We think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver."

This question has recently undergone a thorough re-examination and discussion by the Supreme Court in Great Western Min. & Mfg. Co. v. Harris et al. (decided May 29, 1905) 198 U. S. 561, reported in 25 Sup. Ct. 770, 49 L. Ed. 1163, Mr. Justice Day, in discussing the rule in Booth v. Clark, said that it never had been departed from by that court, and was rigidly adhered to. He said:

"The decision rests upon the principle that the receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction, in which it is sought, by means of a receiver, to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court, or its approval as to the officer who shall act in the holding and distribution of the property recovered."

He adverted to the conflicting decisions of the state courts upon the right of a receiver, upon principles of comity, to sue in a foreign jurisdiction, and said:

"In this court, since the case of Booth v. Clark, we deem the practice to be settled, and to limit a receiver who derives his authority from his appointment as such to actions, either in his own name or that of an insolvent corporation, such as may be authorized within the jurisdiction wherein he was appointed."

While it is true that it does not appear that there was present in that case the allegation that the receiver obtained the consent of the court in which the suit was brought to sue, or the allegation that there were no creditors in the jurisdiction of the forum, had such fact affected the rule, presumably it would have been so stated by the court, as the divergency of decisions of some of the state courts, to which he adverted,

rested upon such facts. On the contrary, it is quite manifest from the opinion that, in so far as the federal courts are concerned, the only method for reaching the property or assets of an insolvent corporation in a jurisdiction foreign to that where the receiver in chancery is appointed is by resort to an ancillary receivership where the property or asset sought to be recovered has its situs or where the debtor resides. The leave granted by the court in Colorado to sue in that jurisdiction determined nothing as to the power of the foreign receiver to maintain the suit when brought. It did not have the effect to control any fund by that court the receiver might recover in the suit. The receiver was under no bond of accountability to that court. The permission to sue, therefore, was in legal effect, meaningless. Whatever may be the view of any individual as to the correctness or advisability of the rule established by the Supreme Court, it is sufficient for us to say that it is conclusive on this court.

The demurrer for the reasons above stated was properly sustained. But the demurrer challenged the bill on nine other grounds, some of which went to the merits of the cause of action, and the decree is a general dismissal of the bill without any statement of the reason for it. A general judgment or decree of dismissal, without more, renders all the issues in the case res adjudicata and constitutes a bar to any subsequent suit for the same cause of action. Hence, when a court dismisses a suit upon some ground which does not go to the merits of the cause of action, but leaves them open to consideration in another court, or at another time, or in another way, the decree of dismissal must expressly adjudge that it is rendered for the specific reason upon which it is based, or must expressly provide that it is made without prejudice. Indian Land & Trust Co. v. Shoenfelt, 135 Fed. 484, 487, 68 C. C. A. 196; U. S. v. Pine River Logging & Improvement Co., 78 Fed. 319, 325, 24 C. C. A. 101, 107; Speer v. Board of Commissioners, 88 Fed. 749, 752, 32 C. C. A. 101, 105; Mitchell v. Dowell, 105 U. S. 430, 26 L. Ed. 1142; Cecil National Bank v. Thurber, 59 Fed. 913, 914, 8 C. C. A. 365, 367; Russell v. Clark, 7 Cranch, 69, 90, 3 L. Ed. 271; Hooven, Owens & Rentschler Co. v. John Featherstone's Sons, 49 C. C. A. 229, 233, 111 Fed. 81, 85; House v. Mullen, 22 Wall. 42, 46, 22 L. Ed. 838. The general decree of dismissal was therefore erroneous.

It is reversed, with costs against the appellant, and the case is remanded, with directions to the court below to enter a decree of dismissal of the suit, which shall adjudge, in the decree, that it is dismissed on the sole ground that the complainant is a foreign receiver and hence without power to sue in the court below, and that it is dismissed without prejudice to other suits and proceedings which do not involve this objection.

BEAR v. CHICAGO GREAT WESTERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1905.)

No. 2,134.

1. RAILROADS—LIABILITY FOR KILLING STOCK—MINNESOTA STATUTE.
Gen. St. Minn. 1894, § 2693, provides that railroad companies shall be liable for domestic animals killed or injured by their negligence, and that a failure to build and maintain cattle guards and fences, as required by the preceding section shall be deemed an act of negligence. Section 2695, as amended by Laws 1897, p. 612, c. 346, provides that any railroad company which has failed or neglected to build and maintain fences, crossings, and cattle guards shall "be liable for all damages sustained by any person in consequence of such failure or neglect," and that its provisions shall not repeal or change in any way the provisions of section 2693. *Held*, that the two sections relate to different subjects. Section 2693, being specific, governs entirely with respect to the killing or injury of domestic animals, while section 2695, although general in its terms, applies only to other cases of damages not covered by section 2693.

2. SAME—FAILURE TO FENCE—STOCK KILLED ON ADJOINING RAILROAD.
Under Gen. St. Minn. 1894, § 2693, which provides that "all railroad companies shall be liable for domestic animals killed or injured by the negligence of such companies, and a failure to build and maintain cattle guards and fences as above provided shall be deemed an act of negligence on the part of such companies," to justify a recovery it must appear that an animal was killed or injured on the right of way of the railroad company which is sued, from which danger it was the purpose of the statute to protect domestic animals; and no recovery can be had for an animal injured or killed on the adjoining right of way of another railroad company, although its access thereto was through defective fences of defendant.

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

This was an action by Bear against the Chicago Great Western Railway Company to recover the value of a horse alleged to have been killed because of the failure of the defendant to maintain fences and cattle guards inclosing its right of way as required by the Minnesota statutes. For some distance in the vicinity of St. Charles, Minn., the railroad of the defendant and that of the Chicago and Northwestern Railway Company are parallel and their rights of way adjoin. Each right of way is 100 feet in width. That of the defendant is north of that of the Northwestern Company. Along the north line of the right of way of the defendant runs a public highway. With the exception of an opening, to which attention will presently be directed, the defendant maintained a fence along its north line; and the Northwestern Company maintained a fence along its south line, with the exception of an opening corresponding to the one on the north. There had been a fence dividing the two rights of way, but it had become dilapidated and had fallen into disuse, and for the purposes of this case it may be assumed that no partition fence existed, and that the rights of way were inclosed together by the fence of the defendant upon the north and the fence of the Northwestern Company upon the south. The openings in these fences were opposite each other and were so left to admit of a private crossing over the tracks and rights of way, which, however, was not protected by either company by cattle guards or lateral fences. The plaintiff owned a horse alleged to be of the value of more than $2,000. The horse, being in the public highway, on the north entered the opening in the defendant's fence, went across its right of way and track, and upon the right of way and track of the Northwestern Company, where it was killed by a passing train owned and operated by the latter company. Hence plain-

tiff's action. Upon the conclusion of the plaintiff's evidence, which tended to prove the facts above recited, the Circuit Court directed the jury to return a verdict in favor of the defendant. This proceeding in error is prosecuted to review the judgment rendered upon the verdict so returned.

Henry M. Lamberton (Fred C. Campbell, on the brief), for plaintiff in error.

John L. Erdall (A. G. Briggs, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

Whatever duty rested upon the defendant to inclose its right of way must be found in legislative enactment. None existed at the common law. The plaintiff points to sections 2692–2695, Gen. St. Minn. 1894, and the amendment of the latter section by chapter 346, p. 612, of the Laws of 1897. So far as need be set forth, they are as follows:

Section 2692 required every railroad company in the state to build within a limited time substantial fences on each side of its road and sufficient cattle guards at all wagon crossings.

"Sec. 2693. All railroad companies shall be liable for domestic animals killed or injured by the negligence of such companies; and a failure to build and maintain cattle guards and fences as above provided, shall be deemed an act of negligence on the part of such companies."

Section 2694, which also relates exclusively to domestic animals, provides for the recovery of increased costs.

"Sec. 2695. Any company or corporation operating a line of railroad in this state, and which company or corporation has failed or neglected to fence said road, and to erect crossings and cattle guards, and maintain such fences, crossings, and cattle guards, shall hereafter be liable for all damages sustained by any person in consequence of such failure or neglect."

It is provided in the act of 1897, amending section 2695, that there shall be no repeal or change in any way of sections 2693 and 2694, but the same shall remain in full force and effect, and the liability of any railroad companies for damages to stock therein and thereby imposed shall in no way be changed, rescinded, or modified.

It will be observed from the statement preceding this opinion that, while plaintiff's horse entered the opening in defendant's fence, it was not killed upon defendant's right of way or by one of its trains. There are two phases of the plaintiff's contention: (1) That the provisions of the statutes above quoted, and especially those of section 2695, are broad enough to cover the case at bar, and that in their application it is immaterial that the horse met its death upon the adjoining right of way of another company; (2) that the failure of the defendant to build and maintain lawful fences and cattle guards was, in the language of section 2693, "an act of negligence," and further that such negligence was the proximate cause of the killing of the horse.

Since this cause was submitted the Supreme Court of Minnesota has decided that section 2693 deals exclusively with the liability of railroad companies in respect of domestic animals killed or injured through their neglect to fence their roads; that to justify a recovery under that section it must appear that a domestic animal was injured or

killed upon the right of way of the railroad company which is sued; that no recovery can be had if the animal was injured or killed upon an adjoining right of way of another railroad company, although its access thereto was through defective fences of the defendant; and, finally, that the history of the Minnesota legislation upon the subject shows that amended section 2695 was intended to apply, not to domestic animals, but to other cases. Frisch v. Chicago Great Western Ry. Co. (Minn.) 104 N. W. 229.

It was said in substance by that court that the conclusions announced were the logical and necessary outcome of its prior decisions construing the same state statutes. In such case the doctrine so established by the highest judicial tribunal of the state would be more than persuasive to our judgment; it would be binding upon us. But, assuming that the question is a new one, unaffected by the decisions of the state court, we reach the same result. Section 2693 is complete in itself, and it relates specially to those damages which arise from the presence of domestic animals upon railroad rights of way. The subsequent legislation, as now exhibited in amended section 2695, does not purport to change in any respect the duty as to domestic animals or the penalty for its violation. Not only was there no change in these particulars, but there was in the amendment an express affirmation that there was none. It was provided that the liability for damages in the case of domestic animals imposed by section 2693 should be in no way changed, rescinded, or modified. So then, for that subject we are not to look to amended section 2695. It is true that its terms are broad and comprehensive and perhaps sufficiently so to cover the ground of the earlier section, but it is clear that it was not so intended. This conclusion is also reached in another way. The particular feature of the amendment of 1897, already adverted to, emphasizes the propriety of applying the familiar rule of construction that, where there are specific provisions in a statute relating to a particular subject, they will govern in respect of that subject, as against general provisions in the same or other statutes which might otherwise be broad enough to include it, unless a contrary intent is manifest. Gowen v. Harley, 56 Fed. 973, 6 C. C. A. 190; Board of Com'rs v. Insurance Co., 90 Fed. 222, 32 C. C. A. 585; Board of Com'rs v. Society for Savings, 90 Fed. 233, 32 C. C. A. 596; Stapylton v. Thaggard, 91 Fed. 93, 33 C. C. A. 353, 360.

As to the construction of section 2693: By its terms it relates alone to domestic animals killed or injured through the failure of a railroad company to inclose its right of way; such failure being termed an act of negligence. Does it include a case, such as this, where the animal was not killed on the right of way of the defendant? The enactment of the statute was in view of the obvious and especial dangers incident to a railroad right of way and the moral duty of the owner to adopt reasonable precautions to guard against them. This moral duty was made a statutory duty, and the means prescribed as being best suited to attain the object were the erection and maintenance of fences and cattle guards. The defendant's duty was in relation to the dangers upon its own possessions. The duty to exclude stock from an ad-

joining or a distant right of way was upon the company that owned it. That there was upon the south of defendant another right of way was as to it a mere incident; there might as well have been a field or a pasture with uncovered wells or other dangerous features. Each railroad company was required to exclude domestic animals from its own right of way, not from the right of way of other companies or from adjacent property. Although the neglect to erect and maintain fences and cattle guards is denominated an act of negligence, the Supreme Court of Minnesota held many years ago that under sections 2692 and 2693 a railroad company was not liable where cattle went from an unfenced right of way and committed damage upon adjoining lands. Gowan v. Railway Company, 25 Minn. 328.

The failure of defendant to properly fence its right of way was not the proximate cause of the death of the horse. Frisch v. Railway Company, supra. True, had the defendant maintained a proper barrier, the horse could not have strayed upon the right of way of the other company. But the duty of the defendant was in respect of its own right of way—to prevent domestic animals from coming there where they might be killed or injured. It owed no duty to keep them from the adjoining right of way, and it was not responsible for what might happen there. That was the duty and the responsibility of the other company. The other company maintained no fence upon its north line. The colliding train belonged to it, and the horse was killed upon its tracks. The omission and commission of that company constituted an intervening, independent, and efficient cause of the damage done. While the statute denominates the failure of defendant to maintain sufficient fences and cattle guards as negligence, it was negligence merely in an abstract sense, if it did not result in damage within the contemplation of the statute. The omission of defendant was not negligence at the common law. It was only such by reason of the statute and entailed a liability only for a damage done upon its own right of way. As there was no damage inflicted there, the statute cannot be used to create a liability for a damage done elsewhere.

The judgment of the Circuit Court is affirmed.

WESTERN EXPRESS CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1905.)

No. 2,204.

1. WRIT OF ERROR—REVIEW—REQUEST OF BOTH PARTIES FOR PEREMPTORY INSTRUCTIONS.

Where, at the close of the evidence both parties request peremptory instructions, the giving of one is a conclusive finding in favor of such party on every disputed issue of fact, and the only questions for determination by a reviewing court are whether there was any substantial evidence to sustain such findings and whether there was error in the declaration or application of the law.

2. INTERNAL REVENUE—ACTION TO RECOVER SPECIAL TAXES—EVIDENCE.
In the assessment of special taxes the officers of the internal revenue act in a quasi judicial capacity, and in an action to recover such taxes the introduction in evidence of the assessment list, regular in form, makes a prima facie case for the government.

3. SAME—DEALERS IN MALT LIQUORS.
To render one who "sells or offers for sale" malt liquors subject to special tax as a dealer in malt liquors, under Rev. St. § 3244 [U. S. Comp. St. 1901, p. 2098], his ownership of such liquors is not essential.

4. SAME—EXPRESS COMPANIES.
The local agents of an express company in a prohibition state took orders from persons desiring beer and forwarded the same to breweries in another state. The breweries delivered the beer to the company for shipment to the agent who sent the order charging the price to the company, and having no knowledge of the local customer. On its receipt the agent stored the beer in the company's warehouse until it was called for, and then delivered it to the customer, collecting the price and the express charges, and accounting to the company for the same. He sometimes also sent orders which had not been requested, and delivered the beer to persons who thereafter applied for it. No receipts were taken from persons to whom beer was delivered, and their names did not appear on the company's books. When beer was not called for it was returned to the breweries, and the company given credit therefor. The company received nothing except the usual charges for transportation. *Held*, that the company was not merely a carrier nor a commercial broker in the transaction, but was, in effect, a commission merchant, and as such was subject to special tax under Rev. St. § 3244 [U. S. Comp. St. 1901, p. 2098], as a dealer in malt liquors at each of the agencies where such business was carried on.

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

Alfred H. Bright (Ball, Watson & Maclay, on the brief), for plaintiff in error.

B. D. Townsend, Asst. U. S. Atty., and Patrick H. Rourke, U. S. Atty.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

PHILIPS, District Judge. This is an action by the defendant in error, the United States, against the plaintiff in error, the Western Express Company, to recover special taxes assessed against the defendant as a wholesale and retail dealer in liquors. There are a large number of counts in the petition for assessments made against the express company for selling malt liquors at each of 26 stations on the line of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company in North Dakota. North Dakota is a prohibition state. On a trial to a jury, at the conclusion of the evidence, the respective counsel requested a peremptory instruction to the jury. Thereupon, on consideration, the court directed a verdict in favor of the plaintiff. By this action both parties conceded that there was in fact no case for the decision of the jury; and in legal effect submitted the whole case to the decision of the court. "When, pursuant to such requests, the court accepts these waivers, and by its peremptory instruction determines the questions of fact and of law in favor of one of the parties, both

parties are estopped from assailing or reviewing its finding upon disputed issues of fact, and are limited in the appellate court to a review of the two questions, was there any substantial evidence to sustain the court's finding of facts; and was there any error in its declaration or application of the law?" United States v. Bishop, 125 Fed. 183, 60 C. C. A. 125.

The controlling question, therefore, for decision is whether or not there was any evidence in the case to support the finding. If there was, the verdict must stand. The action being based upon assessments made by the proper revenue officers of the government, the law presumes that these officers proceeded regularly; that on due inquiry they ascertained the existence of the essential facts subjecting the defendant to such tax. In this respect such officers act in a quasi judicial capacity, and their action stands as prima facie correct until this presumption, by countervailing proof, is met and overthrown by the party assessed. The government was not required in the first instance to go further in the proofs than to submit the assessment list. 18 Int. Rev. Dec. 164 (Circuit Court, N. D., New York); Delaware Railway Company v. Prettyman et al., Fed. Cas. No. 3,767 (Circuit Court, D. Delaware); United States v. Rindskopf, 105 U. S. 418–422, 26 L. Ed. 1131. When, therefore, the government presented the assessment list, which is conceded to have been regular in form, and rested, it had made out a prima facie case. Without more, it was entitled to a verdict. It then devolved upon the defendant below to rebut the case made by a preponderance of evidence. There was not only some evidence in the case to support the verdict, but when all the evidence which supervened is examined, it discloses many cumulative facts and circumstances, which, within the range of reasonable inference, tended to support the verdict.

The essential question on trial was whether or not, within the purview of section 3244, Rev. St. [U. S. Comp. St. 1901, p. 2098], the express company was engaged in the business of a dealer in liquors, as a retail or wholesale dealer. The fifth paragraph of said section declares that:

"Every person who sells or offers for sale malt liquors in quantities of five gallons or less at one time, but who does not deal in spirituous liquors, shall be regarded as a retail dealer in malt liquors. Every person who sells or offers for sale malt liquors in larger quantities than five gallons at one time, but who does not deal in spirituous liquors, shall be regarded as a wholesale dealer in malt liquors."

Much of the unusually forceful discussion by counsel touching the relation between consignor and common carrier, when the relation of vendor and vendee begins and ends, and where, in such relation, the real title to the property remains and when it passes, is more or less academic. The actual ownership of the property is not essential to fix upon the trafficker the quality of a dealer in liquors under this statute. The statute attaches to him the office of a dealer when he "sells or offers for sale malt liquors." The clerk of the owner of a saloon selling liquor for his employer who has no license, the "bootlegger" who covertly in the brush or alleyway purveys and sells liquor

for the owner, are just as amenable to indictment, or for the revenue tax, as the owner of the liquor.

It may be conceded that the express company as a public carrier, in the usual course of business, had a right, without liability to the government for this tax, to carry beer for breweries at St. Paul and Minneapolis to their consignees within the state of North Dakota. In such a legitimate transaction the mere manner and time of delivery to the consignee, and the payment therefor would not alter the office and liability of a carrier. But the evidence discloses a most unusual and extraordinary method and relation between the consignors and the carrier. The evidence was directed more particularly to such transactions had at one of the stations in North Dakota. But the case was tried on the practical concession that a like method of procedure obtained at all the other stations. The practice was after the following fashion: Persons in North Dakota desiring to obtain beer would go to the local agent of the express company and say they wanted so much beer of a given brew, when the agent would send in the order, generally in the name of a fictitious consignee, and sometimes in the name of a mere number—say 7 or 9. The agent, in instances, would send in the order, not only to cover the quantity thus requested, but for an additional consignment. Sometimes he would send in an order without any such request from any known patron. The beer would be shipped to the agent, the price thereof charged by the shipper to the express company. The shipper knew not the local customer, and dealt not with him; but charged the sale price to and received payment from the express company. The beer, consisting of boxes and kegs, would be shipped in bulk, and when received by the agent would be stored in the company's warehouse. And while a preference would be given to those who had made to the agent a special request for a shipment, the excess would be delivered by the agent to any customer who applied to him for beer in such quantities as the buyer might desire. Thus would beer be sold by the agent to customers who had placed no previous orders with him. The agent would collect from the customer the sale price, plus the transportation charge, and in his returns to the express company would account for this money to it. The evidence further shows that the agent had with the consignor an understanding that as to any beer left over after the customers were supplied, the same could be returned to it, and the money advanced therefor would be refunded. It is a noticeable fact, in this connection, that it does not appear that the consignor made any recompense to the express company for the cost of such carriage to and fro. Another remarkable fact is that, contrary to the ordinary method of dealing between express companies and consignees of articles carried, the agent took no receipts from parties to whom the beer was delivered, and kept no books showing such names. And as further evidence of the fact that such agent in this traffic was plying the office of a dealer, like any other provident business man, he was thoughtful to be prepared to meet an expected large demand for supplies of beer from possible customers. For instance, on the 2d day of July, just two days before the Fourth of July, he

sent in orders and received an unusually large consignment from the breweries, without special requests for all of it from known purchasers.

While the evidence does not show that the express company received any commissions as such on these shipments, it does show that it received each month a very large income thereon for the carriage charges. It enjoyed a monopoly of this business. Although there does not appear to have been any occasion or exigency for "hurry-up" orders for shipment of these regular, frequent consignments, no shipments were made on ordinary freight trains, although the cost of the latter method of transportation was much less than the express charges. Certainly the express company was not performing the office in these transactions of a mere commercial broker, who is exempt under the Internal Revenue Laws from the payment of such tax. "The difference between a factor or commission merchant and a broker is stated by all the books to be this: a factor may buy and sell in his own name, and he has the goods in his possession; while a broker, as such, cannot ordinarily buy or sell in his own name, and has no possession of the goods sold." Slack v. Tucker & Company, 23 Wall. 321–330, 23 L. Ed. 143. The express agent had possession of the beer. He sold to customers who applied to him. He sold some of the beer on credit. If not paid for by the vendee, the loss would presumably fall on the express company. The company got its compensation for its pains and risk in the augmented income to its business as a carrier. In this respect the situation was little, if any, different from that of a commission merchant—an intermediary—who sells on commission, accounting to the manufacturer for the purchase money. Such a person is liable to the government for the revenue tax as a dealer under the statute. Slack v. Tucker & Company, supra; Quinn v. Dimond, 72 Fed. 993, 19 C. C. A. 336. If this express company would shield itself from liability for such tax as a dealer in liquor, which the law extends to the carrier engaged in the useful business of interstate commerce, it is only needful that it conduct the transportation of liquor from without into a prohibition state just as it should any other commodity, without making its agencies and storehouse in the prohibition state a covert for violators of the internal policy of the state.

It results that the judgment of the circuit court should be affirmed.

WM. CAMERON & CO., Inc., v. CAMPBELL et al.

(Circuit Court of Appeals, Eighth Circuit. September 27, 1905.)

No. 2,208.

1. MECHANICS' LIENS—SUBCONTRACTOR—FAILURE TO COMPLY WITH STATUTE.
Mansf. Dig. Ark. §§ 4402–4421, in force in Indian Territory, require a subcontractor, in order to be entitled to a mechanic's lien, to give notice to the owner, before or at the time he furnishes labor or materials, and, after his contract has been completed, to obtain a written settlement, signed by the contractor, which shall be filed, and a copy given to the owner, unless the contractor shall refuse to sign such settlement, when he may substitute a statement of account made by himself. They further provide that

in case he shall fail to give the preliminary notice, but shall furnish the owner the statement required after the contract is completed, "and in all other respects shall comply with the provisions of this act," he shall have the benefit thereof, but only to the extent that the owner can safely, with his engagements and liabilities on account of the building, withhold any amount by him owing to the contractor for the benefit of the subcontractor. *Held* that, under the rule that such statutes must be followed with reasonable strictness and substantially complied with, a subcontractor who did not give the notice to the owner, nor make any attempt to obtain the required settlement with the contractor, did not secure a lien merely by filing and furnishing to the owner a statement of his account.

2. SAME—SUIT FOR ENFORCEMENT—ADMISSION BY TENDER.
Where, in a suit to enforce a mechanic's lien, the owner of the property tenders a sum less than that claimed, such tender is an admission of the validity of the lien to that extent, and the court should decree its enforcement for the amount tendered, even though it is adjudged that the lien is invalid.

Appeal from the United States Court of Appeals in the Indian Territory.

For opinion below, see 82 S. W. 762.

In the summer and fall of the year 1902, one J. M. Ellis, under a contract with the appellees, was constructing for them a business building upon their lot in the town of Minco in the Indian Territory. Between July 29 and November 13, 1902, one J. B. Pope sold and furnished to Ellis building material used in such construction to the amount of $952.30, and was paid thereon $368.40, leaving unpaid a balance of $583.90.

For the purpose of securing a subcontractor's lien upon said building and lot for the said balance owing from said Ellis for the building material so furnished, the said Pope, about December 1, 1902, made a just and true statement in writing of the building material so furnished by him to said Ellis, giving all credits and describing the lot upon which said building was constructed, and naming the appellees as the owners of said lot and building, and sent such statement by mail to the appellees, who received the same in due course of mail. Said statement set forth the items of the material, their values, and the dates of furnishing, and the several credits and dates thereof, and the balance due and unpaid of $583.90; and said Pope thereafter on December 29, 1902, filed a copy of the same statement duly verified by his affidavit, with the clerk of the proper court, who then duly recorded the same in his office. Thereafter, and before suit, the said Pope for a valuable consideration sold, transferred, and assigned the said indebtedness and lien or claim for lien to the appellant, William Cameron & Co., who began this suit in June, 1903, in the United States Court within and for the Southern District of the Indian Territory, at Chickasha, against said J. M. Ellis and said appellees, to recover the said balance owing for said material, to foreclose such lien, and for such other relief as might seem equitable and just. The defendant Ellis did not answer. Campbell & Williams answered, admitting that in the summer and fall of 1902 J. M. Ellis constructed for them the said building upon contract, and that Pope furnished to Ellis lumber and materials which were used in constructing said building, but denied that the same amounted to $952.30, and denied that said Pope had given the notice or done any of the acts alleged in the petition to secure a lien on said building and lot, and denied that he had any such lien, and averred that said building was completed in November, 1902, and that said Campbell & Williams, without knowledge of Pope's claim, had paid Ellis in full, except the sum of $147.47, which they averred they had tendered to the plaintiff, and to Pope, and which in their answer they again tender and offer to bring into court.

Testimony in the cause was taken and by agreement of the parties was submitted to the master in chancery, his conclusions to be reported to the court as on a reference.

The master made his report, to which exceptions were filed and overruled; and upon it decree was entered in favor of the plaintiff, William Cameron & Co., against the defendant Ellis by default for $583.90, and adjudging that the plaintiff has a valid mechanic's lien upon said building and lot, and foreclosing such lien by directing the sale of the property to satisfy the debt so adjudged to be owing by said Ellis, and costs.

Appeal was taken by defendants Campbell & Williams to the United States Court of Appeals in the Indian Territory. Defendant Ellis did not appeal. In that court the cause was determined upon Campbell & Williams' second assignment of error:

"Second. That the court erred in entering any decree against them in excess of $147.47, because of the fact that Pope, plaintiffs' assignor, failed to perform the duties required of him by the statute to avail himself of the lien on defendants' building and lot."

And it was by said Court of Appeals considered that there is error in the decree of the court for the Southern District of the Indian Territory in decreeing a lien upon the premises of Campbell & Williams, and in entering a judgment against them for any sum whatever, and it was ordered and decreed that the decree of the lower court be reversed and set aside, with costs, and the cause remanded to that court, with directions to dismiss the complaint as to Campbell & Williams, and for further proceedings not inconsistent with the opinion.

From this decree the present appeal is taken.

Wallace Hendricks, for appellant.

Bond & Melton, for appellees.

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

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

The principal question presented by this appeal is whether the United States Court of Appeals in the Indian Territory correctly held that J. B. Pope failed to take the necessary steps to secure and perfect his right, as a subcontractor furnishing building material, to a lien upon and against the building of Campbell & Williams, for the construction of which he furnished such material to the contractor, Ellis, and also upon their lot upon which the building was constructed.

There was no right to a mechanic's lien at common law, and therefore such right is based wholly upon statutes providing for such liens, to secure which the procedure prescribed by the statute must be followed with reasonable strictness and substantial compliance. Jones on Liens, §§ 1389, 1390.

The statutes of Arkansas, in force in the Indian Territory, upon this subject, are contained in Mansfield's Digest, which provides:

"Sec. 4402. Every mechanic, builder, artisan, workman, laborer or other person who shall do or perform any work or labor upon or furnish any materials, machinery or fixtures for any building, erection or other improvement upon land, including contractors, subcontractors, material furnishers, mechanics and laborers, under or by virtue of any contract, express or implied, with the owner or proprietor thereof, or his agent, trustee, contractor or subcontractor, upon complying with the provisions of this act, shall have for his work or labor done, or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement and upon the land belonging to such owner or proprietor on which the same is situated, to secure the payment of such work or labor done, or materials, machinery or fixtures furnished."

By section 4422, all persons so furnishing things, or doing work, except under contracts directly with the owner, are to be considered subcontractors. The statute further provides:

"Sec. 4403. Every subcontractor wishing to avail himself of the benefits of this act shall give notice to the owner or proprietor, or his agent or trustee, before or at the time he furnishes any of the things aforesaid, or performs any of the labor, of his intention to furnish or perform the same, and the probable value thereof; and, if afterward the things are furnished or labor done, the subcontractor shall settle with the contractor therefor, and having made the settlement in writing, the same, signed by the contractor and certified by him to be just, shall be presented to the owner or proprietor, or his agent or trustee, and left with him, and within sixty days from the time the things shall have been furnished, or the labor performed, the subcontractor shall file with the clerk of the circuit court of the county in which the building, erection or other improvement is situated a copy of the settlement between him and the contractor, which shall be a lien on the building, erection or other improvement for which the things were furnished, or the labor performed, and shall at the time file a correct description of the property to be charged with the lien, the correctness of all which shall be verified by affidavit.

"Sec. 4404. In case the contractor shall for any reason fail or refuse to make and sign such settlement in writing with the subcontractor when the same is demanded, then the subcontractor shall make a just and true statement of work and labor done or things furnished by him, giving all credits, which he shall present to the owner or proprietor, his agent or trustee, and shall also file a copy of the same, verified by affidavit, with the circuit clerk, as provided in section 4403."

"Sec. 4421. In case any subcontractor shall not have notified the owner, proprietor, his agent or trustee, before furnishing the things aforesaid, or doing work and labor, as provided for in section 4403, but shall furnish to him the account as provided in said section, or the statement provided for in section 4404, and in all other respects shall comply with the provisions of this act, he shall have the benefit hereof the same as if he had given notice as required herein, to the extent, and only to the extent, that such owner or proprietor can safely, with his engagements and liabilities on account of such building, erection or other improvement, withhold any amount by him owing to his contractor for such subcontractor."

The act provided that any such lien should be transferable and assignable. But Pope never complied with the essential provisions of said statute, and therefore never acquired any lien. He did not, in compliance with section 4403, give any notice to the owner before furnishing the material of his intention to furnish the same, and made no settlement in writing with the contractor therefor, nor have any such settlement signed by the contractor and presented to the owner. He never demanded or asked for such settlement of the contractor, who therefore never refused to make, sign, or certify such settlement, and hence said Pope was not entitled to make or furnish to the owner or file with the clerk of the court the statement provided for by section 4404.

It is apparent that the written statement made by Pope about December 1, 1902, of the material furnished by him, which was mailed to the owners, and a verified copy of which was on December 29, 1902, filed with the clerk of the court, did not comply fully with any of the provisions of the statute, and was of itself ineffective to secure or preserve his lien. Even had the proceeding taken by Pope amounted to a substantial compliance with that contemplated by section 4421, it would

preserve the lien only to the extent which the owner of the building could safely, with his engagements and liabilities on account of the building, withhold from what was owing to the contractor. The object of these provisions for the service upon the owner of the notices and statements by the subcontractor is to enable the owner to reserve for the subcontractor moneys which, without such notice, he would ordinarily pay over to the contractor. The courts of Arkansas have held this same statute to be highly remedial, demanding liberal construction for the advancement of the remedy, and that an exact and technical compliance is not indispensable where no injustice can result from overlooking the omission. Anderson v. Seamans, 49 Ark. 475, 5 S. W. 799; Buckley v. Taylor, 51 Ark. 302, 11 S. W. 281.

In this case the defendants admit by their answer that they still have in their hands $147.47, owing by them to the contractor on the contract, and aver that they have tendered that sum to the plaintiff, and again tender and offer to pay the same into court. The record does not show that it was in fact paid into court, so as to affect the right to costs.

"A tender, when made, is an admission of an amount due equal to the sum tendered, and while a verdict may be rendered for more than the amount tendered, it cannot be rendered for less. And this, too, although the tender be defective, or even be offered in a case where it cannot be legally made or pleaded, and for such reasons be held unavailable to save costs." Denver, etc., R. R. Co. v. Harp, 6 Colo. 420, 424, citing many cases. See, also, Eaton v. Wells, 82 N. Y. 576; Noble v. Fagnant, 162 Mass. 275, 38 N. E. 507; 28 Am. & Eng. Encyc. of Law (2d Ed.) 15.

As the plaintiff claimed no personal indebtedness as owing to it by the defendants Campbell & Williams, but only such liability as arose from plaintiff's lien upon these defendants' building and lot, for material furnished to defendants' contractor Ellis, this tender by defendants of $147.47 as moneys owing by defendants to that contractor, on the contract price for constructing that building, is necessarily an admission by defendants that plaintiff has a valid lien on that building and lot to the extent of the amount so tendered, as their right to pay to the plaintiff such balance of money stated to be owing to Ellis could rest alone on the validity of plaintiff's lien to at least that amount.

It follows that the part of the decree of the trial court adjudging and establishing the lien of plaintiff upon the building and lot of these defendants was right, but only to the extent of $147.47 and the costs.

Furthermore, it appears by the record that the decree of the trial court was not questioned to that extent in the appeal taken to the United States Court of Appeals in the Indian Territory. The assignments of error on which that appeal was taken are recited in the opinion of the court. The only one bearing on this matter is the following:

"Second, that the court erred in entering any decree against them in excess of $147.47 admitted by defendants in their answer to be due and unpaid."

The only part of that decree which was against the defendants was that which established the plaintiff's lien, and directed its foreclosure. That by the defendants' assignment of error was admitted to be proper and valid to the extent of $147.47, and the United States Court of Appeals in the Indian Territory should have modified the decree so as to establish the lien for the amount only of $147.47, instead of reversing the decree and remanding the case, with directions to dismiss the complaint as to the defendants then appealing.

The decree of the United States Court of Appeals in the Indian Territory, except as to costs in that court, is reversed, with costs, and the cause remanded to the United States Court for the Southern District of the Indian Territory at Chickasha, with directions that the decree be modified so that the amount recovered by the plaintiffs shall be a lien upon the building and lot of the defendants described in the decree to the extent only of $147.47, and for further proceedings not inconsistent with this opinion.

As the outcome of these defendants' appeal to the United States Court of Appeals in the Indian Territory has been a large reduction of the amount for which a lien upon their property had been adjudged, it is considered that they should, in the final adjustment, be allowed the costs of that court.

DAVIDSON-WESSON IMPLEMENT CO., Ltd., v. PARLIN & ORENDORFF CO.

(Circuit Court of Appeals, Fifth Circuit, December 5, 1905.)

No. 1,447.

CREDITORS' SUIT—JURISDICTION OF FEDERAL COURTS—STATE STATUTE ENLARGING REMEDY.

A simple contract creditor, who has not reduced his demand to judgment and exhausted his remedy at law, has no standing in a court of equity to have his claim adjudicated and to subject equities; nor can a state statute authorizing such suits in the courts of the state confer jurisdiction thereof upon a federal court, in which the defendant has the constitutional right to a trial by jury to determine the fact and amount of his indebtedness.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 905; vol. 14, Cent. Dig. Creditors' Suit, § 46.

Right to trial by jury in federal courts, see note to O'Connell v. Reed, 5 C. C. A. 603; Vany v. Peirce, 26 C. C. A. 528.]

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

Counsel agree on appellants' statement of the case as follows: This case is an appeal from a decree of the United States Circuit Court for the Western District of Louisiana refusing to vacate an order appointing a receiver for the Davidson-Wesson Implement Company, Limited, and dissolve the writ of injunction restraining the officers of said corporation from managing or controlling its affairs, which decree continued the receiver appointed by said court in control of the property and assets of the appellant. The bill filed by complainant is quite extensive, also the motion to vacate and dissolve, which, for simplicity, we will endeavor to condense in this statement by eliminating the portions which we consider immaterial.

Bill.

Appellee alleges that it is a corporation organized under the laws of the state of Illinois, and a citizen of said state, and that the Davidson-Wesson Implement Company, Limited, H. Albert Davidson, H. Edward Wesson, and Louis T. Mathews are residents and citizens of the parish of Calcasieu and state of Louisiana. The bill also made the Welsh National Bank a party defendant, which did not join in the motion to vacate and dissolve. Therefore the allegations as to it are not before this court for consideration. Appellee alleges that appellants Davidson, Wesson, and Mathews, during the month of December, 1901, entered into a fraudulent conspiracy to establish a store in the town of Welsh, La., by means of which they could purchase goods, sell same, and appropriate the proceeds of such sales to their individual uses, without incurring personal liability therefor; that with that purpose in view they organized a corporation on December 9, 1901, adopting the name of "Davidson-Wesson Implement Company, Limited"; the charter for same being signed, acknowledged, and recorded in the recorder's office of Calcasieu parish, La. After stating a number of the provisions of said charter, the bill charges upon information and belief: That said corporation was not formed in good faith for the purpose of carrying on a legitimate mercantile enterprise, but for the purpose of buying goods without any intention of ever paying for them. That nothing further was done towards forming a corporation. No stock was subscribed or certificates therefor issued, no election of officers or meeting of the directors ever held. That the appellant Davidson deeded, on December 9, 1901, lot No. 2, block 25, of the town of Welsh, with a building thereon, which appellee alleges, upon information and belief, was worth about $1,500, for the consideration of $4,100, which deed was not filed for record until January 1, 1903. That, if any contributions were made on stock subscriptions, they were made to pay freight on goods purchased by the said corporation. That the appellants had since the organization of said corporation purchased from various parties goods amounting to $40,000, paying only such debts as they found prudent and politic to pay in order to enable them to continue in business and delay the action of creditors, while the organization appropriated its moneys to their individual uses, charging that each of them had received the sum of $5,000 from said corporation. That the Davidson-Wesson Implement Company, Limited, owned a stock of goods of the probable value of $5,000, which it was selling for less than cost, as appellee is informed. That it owns notes and accounts of the probable value of $5,000, and mules, etc., of the probable value of $500. That it had contracted debts which are unsatisfied and owing to various creditors, "to the extent, as your orator charges and believes, of $25,000." That defendants were indebted to complainant in the sum of $19,323.70. But the bill does not assert any interest in defendant's property or any privilege upon same; nor does said bill allege that such indebtedness is past due. It alleges that the defendants refuse to pay complainant any sum, but continued to collect the notes and accounts owing to the corporation and appropriate the same to their own use. It states, upon information and belief, that Davidson, Mathews, and Wesson are each insolvent, that the Davidson-Wesson Implement Company, Limited, is insolvent, that all its property does not exceed the value of $10,000, and its indebtedness is at least $25,000. The bill closes with an appropriate prayer for the appointment of a receiver to take charge of the property of the Davidson-Wesson Implement Company, Limited, and for a writ of injunction restraining the defendants from selling or disposing of any goods, chattels, property, or effects belonging to the Davidson-Wesson Implement Company, Limited, etc.; that defendants be ordered and directed to pay orator the sums to be due to it by the notes and accounts described in the bill and that orator have judgment for said sums; and that defendants be required to answer said bill, but not under oath, which was specially waived.

Motion to Vacate and Dissolve.

Appellants, after denying all of that portion of complainant's bill charging them with entering into a fraudulent conspiracy for the purpose of acquiring goods without intention of paying for same, or to appropriate same to their individual uses, allege that complainant knew same to be false and untrue at the time they were made. They allege that the Davidson-Wesson Implement Company, Limited, was organized in good faith, and they were advised, encouraged, and counseled to do so by the agents and representatives of complainant, who were fully cognizant of all facts connected therewith, and of the value of the property conveyed to it by Davidson, also their manner and method of doing business. They allege that 51 shares of stock of $100 each were subscribed and paid for in a valuable consideration, and that complainant had full knowledge thereof long prior to the filing of its bill; that the certificates representing said 51 shares of stock were issued; that all the formalities required by the laws of Louisiana were complied with; and that the corporate existence was complete in every respect; that the lot in Welsh and building thereon was purchased by the corporation from Davidson for $4,100, which was considered by each of the appellants and also by the agents and representatives of complainant, who were fully conversant with said transaction at the time it occurred, to be a reasonable valuation for same—pleading an estoppel as to the complainant urging any defect in the corporate organization or to the value of the property purchased from Davidson. Appellants further deny that they have ever appropriated to their several or individual uses the money received from the sale of goods, or that they have applied the cash to the payment of debts in order to delay the action of creditors, that they have appropriated to the uses of each the sum of $5,000, or any other sum, stating that the complainant knew said allegations to be false and untrue when made. Appellants allege that they applied all money received from the sale of goods to the payment of actual running expenses and to the payment of debts and obligations contracted in due course of business; that Davidson and Mathews have never received one cent from the corporation; and Wesson, who gave his time to its management, had received a salary of only $100 per month, and no further sum for his own benefit. Appellants deny that they had sold any goods for less than cost; aver that complainant knew this charge to be false and untrue at the time it was made; deny that it had on hand only $5,000 worth of goods, but allege that same was worth $8,886.67, which fact was well known by both complainant and its solicitor at time of filing the bill; allege that its notes and accounts receivable exceed $12,000, and the allegation in the complainant's bill that same was only $5,000 is false and untrue and was known to be so by both the complainant and its solicitor when made; deny that the Davidson-Wesson Implement Company, Limited, owes $25,000; and state that its total indebtedness does not exceed $11,500. They also deny an indebtedness of $19,323.70 to complainant. They also deny an indebtedness to the Welsh National Bank in the sum of $800, or any other sum. Appellants deny having refused to pay complainant any sum of money, and allege to have paid it large sums at various and different times; deny selling the goods of the implement company and appropriating same to their separate use, or of collecting the debts due it and applying same to their individual accounts; deny Davidson, Wesson, or Mathews, or either of them, are insolvent, or that the Davidson-Wesson Implement Company, Limited, is hopelessly insolvent, or that its property is worth only $10,000 and its debts amount to $25,000, but allege that its assets far exceed its indebtedness; allege that the officers of the Davidson-Wesson Implement Company, Limited, are entitled to remain in control of its corporate affairs and conduct its business; pray that the order appointing a receiver be vacated and the writ of injunction dissolved, and that its officers be reinstated in the custody and control of its assets. The answer is verified by the oath of H. A. Davidson, H. E. Wesson, and Louis T. Mathews.

Charlez A. McCoy and Leland H. Moss, for appellants.
U. F. Short, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge (after stating the facts). The foregoing statement shows that the Parlin & Orendorff Company, claiming to be a contract creditor of the Davidson-Wesson Implement Company, Limited, but asserting no lien, seeks relief in the Circuit Court of the United States for the Western District of Louisiana of both a legal and an equitable nature of the most drastic character—a judgment for the amount of the alleged debt, and an injunction, a receiver, and a liquidation of the defendant corporation. The bill must have been framed in view of the laws of Louisiana (see Acts La. 1898, p. 312, No. 159), for it is inadmissible under the rules and principles of equity as administered in the courts of the United States. Counsel calls his bill "a creditors' bill"; but it is settled since the beginning that a simple contract creditor has no standing in a court of equity to enforce payment or subject equities until after he has reduced his demand to judgment and has exhausted his remedy at law.

Assuming that the complainant below is seeking to avail himself in the United States courts of rights given creditors under the laws of Louisiana, the cases of Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 378, 14 Sup. Ct. 127, 37 L. Ed. 1113, dispose of this appeal adversely to his pretensions. And see Atlanta & F. R. Co. v. Western Railway Co. of Alabama, 50 Fed. 790, 1 C. C. A. 676. We quote from Cates v. Allen, supra:

"Complainants were simple contract creditors, who had not reduced their claims to judgment, and therefore had no standing in the United States Circuit Court, sitting as a court of equity, upon a bill to set aside and vacate a fraudulent conveyance. The suit was originally brought in the state court under sections 1843 and 1845 of the Code of Mississippi of 1880, which provided that the chancery courts of that state should have jurisdiction of bills exhibited by creditors who had not obtained judgments at law, or, having judgments, had not had executions returned unsatisfied, to set aside fraudulent conveyances of property or other devices resorted to for the purpose of hindering, delaying, or defrauding creditors, and might subject the property to the satisfaction of the demands of such creditors as if the complainants had had judgment and execution thereon returned no property found; and that 'the creditor in such case shall have a lien upon the property described therein from the filing of his bill, except as against bona fide purchasers before the service of process upon the defendant in such bill.' These sections were considered in Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, and it was therein determined that the Circuit Courts of the United States in Mississippi could not under their operation take jurisdiction of a bill in equity to subject the property of the defendants to the payment of a simple contract debt in advance of any proceeding at law, either to establish the validity or amount of the debt, or to enforce its collection. It was there shown that the Constitution of the United States, in creating and defining the judicial power of the general government, had established the distinction between law and equity, and that equitable relief in aid of demands cognizable in the courts of the United States only on their law side could not be sought in the same action, although allowable in the state courts by virtue of state legislation (Bennett v. Butterworth, 11 How. 669, 13 L. Ed. 859; Thompson v. Railroad Companies, 6 Wall. 134, 18 L. Ed. 765; Scott v. Armstrong, 146 U. S. 499, 512, 13 Sup. Ct. 148, 36 L. Ed. 1059), and that the Code of Mississippi in giving to a

simple contract creditor a right to seek in equity, in advance of any judgment or legal proceedings upon his contract, the removal of obstacles to the recovery of his claim caused by fraudulent conveyances of property whereby the whole suit involving the determination of the validity of the contract and the amount due thereon is treated as one in equity to be heard and disposed of without a trial by jury, could not be enforced in the courts of the United States because in conflict with the constitutional provision by which the right to a trial by jury is secured. The principle that a general creditor cannot assail as fraudulent against creditors an assignment or transfer of property made by his debtor until the creditor has first established his debt by the judgment of a court of competent jurisdiction, and has either acquired a lien upon the property, or is in a situation to perfect a lien thereon and subject it to the payment of his judgment, upon the removal of the obstacle presented by the fraudulent assignment or transfer, is elementary. Waite on Fraud. Con. § 73, and cases cited. The existence of judgment, or of judgment and execution, is necessary, first, as adjudicating and definitely establishing the legal demand; and, second, as exhausting the legal remedy."

The decree of the Circuit Court granting an injunction and appointing a receiver is reversed, and the cause is remanded, with instructions to discharge the receiver and dismiss the bill, with all costs.

TWINING v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. December 11, 1905.)

No. 13.

BANKS AND BANKING—NATIONAL BANKS—MAKING FALSE ENTRIES IN BOOKS.

Entries in the books of a national bank which correctly record actual transactions of the bank, although such transactions may have been unauthorized, or even fraudulent, are not false entries, within the meaning of Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], and will not sustain an indictment thereunder for the making of false entries.

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

Herbert C. Smyth and John G. Johnson, for plaintiff in error.
Edmund Wilson, for the United States.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The indictment which this writ of error brings before us is under section 5209 of the Revised Statutes [U. S. Comp. St. 1901, p. 3497], and contains six counts, which charge the defendant (the plaintiff in error) with making false entries in the reports and in the books of the First National Bank of Asbury Park, of which the defendant was a director. The first three counts charge that the defendant made false entries in three reports which were made by the bank to the Comptroller of the Currency, dated, respectively, the 15th of July, 1901, the 25th of February, 1902, and the 23d of September, 1902. Each of these reports is made the subject of a separate count; the false entry charged consisting in overstating the amount that was due to the bank from loans and discounts by the sum of $1,000, in that

there was included in the sum so stated to be due the bank a promissory note, dated at Asbury Park the 13th of September, 1899, made by one Benjamin Albertson and indorsed by him in blank, which it is alleged was worthless and void because of the fact that it had been paid and satisfied. The fourth count charges that the defendant made certain false entries on the 23d of January, 1903, in the bank's journal balance book No. 7; the same being an entry showing a credit of $400 to the bills discounted account, and including a credit of $250 to that account by reason of a supposed payment of $250 upon a note made by Alonzo W. Parsons dated February 14, 1902, payable to his own order for $1,000, four months after its date, and another alleged false entry showing a credit to the profit and loss account of $300 on account of the transactions of January 23, 1903, which included a supposed loss on the Parsons note, whereas the credit to the profit and loss account should have been not less than $550, instead of $300, because no loss had been sustained by the bank on account of said promissory note. The fifth count charges that on the 23d of January, 1903, the defendant made a false entry in the bank's journal book No. 7, showing a credit to the profit and loss account of $300 on account of that day's transactions, which included a supposed loss of $950 on account of a note made by John E. Davis for $1,700, dated November 18, 1902, and payable to the order of Davis three months after its date, when, as is alleged, there should have been a credit of not less than $1,250 to the profit and loss account, because no loss had been sustained by the bank on account of said note. The sixth count charges that on the 3d day of March, 1902, the defendant made a false entry in the bank's Journal Balance Book No. 6, showing a charge to the profit and loss account of $700 on account of a promissory note dated March 20, 1896, of Jesse B. Twining, for the sum of $1,700, payable to the order of Hannah B. Twining, when in fact no loss had been sustained by the bank on account of said note.

The jury rendered a general verdict of guilty. Judge Kirkpatrick, before whom the case was tried, died subsequent to the verdict. Thereafter a motion for a new trial was made before Judge Lanning, who after argument set aside the conviction upon the first three counts of the indictment, but refused to disturb the verdict on the last three counts. The defendant was then sentenced on each of the last three counts of the indictment to six years' imprisonment in the state prison; the terms of sentence to be concurrent. After sentence the defendant sued out this writ of error. The primary question we are called on to consider is whether there was evidence to sustain the verdict upon the fourth, fifth, and sixth counts of the indictment, or either of those counts.

Under the proofs it cannot be pretended—indeed, it was not claimed by the government—that the defendant, Twining (the plaintiff in error), personally made any of the alleged false entries complained of in those counts. In fact, those entries were made by J. Edward Davis, who was assistant cashier of the bank. The position of the government was that they were made pursuant to directions of the defendant, Twining. Davis, who was a witness for the government, testified

that about the 1st of January, 1903, Twining came into the bank and handed to him (Davis) the first sheet of the government Exhibit No. 7, and told Davis that he wanted him "to take care of it." Davis states that he looked it over and told Twining that he did not understand it, to which Twining replied that he would fix it up in a certain way and took it away with him. This Exhibit No. 7 came back into Davis' possession the latter part of January, and then consisted of two sheets, on which are written in the handwriting of Twining certain memoranda relating to divers affairs of the bank—a series of items of credits and charges to various accounts. The witness (Davis) was not at all sure that Exhibit No. 7 in its present shape was handed to him by Twining. But, be this as it may, there was no evidence that Twining gave to Davis any verbal directions respecting the items contained in the paper. The evidence shows that for some time prior to the making of the government Exhibit No. 7 George W. Kroehl, the president of the bank and also a director, and Twining, a director, were openly acting for the bank in fixing up its affairs with a view to the proposed reorganization of the bank, and it is clear, we think, that the several matters contained in the government Exhibit No. 7 appertained to a readjustment of the affairs of the bank. Among the items therein contained this Exhibit shows a credit of $950 to be given to the Davis note and a credit of $250 to be given to the Parsons note. Davis testified that in the previous December, Kroehl, the president of the bank, and Twining, the defendant, while they "were fixing up the affairs of the bank," informed him (Davis) that his note was reduced to $750. When the government Exhibit No. 7 came into the hands of Davis, he made no entries in the books of the bank by virtue of anything contained in that paper; but he took the paper to Martin H. Scott, the cashier of the bank, and left it with him. After keeping the paper for several days Scott handed it back to Davis, who then made the entries complained of in the fourth and fifth counts of the indictment. Undoubtedly those entries were made by Davis with the concurrence of Scott, the cashier.

It appears from the government's evidence that the entry of the charge of $700 to the profit and loss account on the Jesse B. Twining note, which is the subject of complaint in the sixth count of the indictment, was made by Davis by authority of Scott, the cashier, who issued to Davis a "charge slip to profit and loss," dated March 3, 1902, which reads thus:

"Charge profit and loss on note J. B. Twining, No. 8,614, $700."

It is shown by testimony on the part of the government that while the government Exhibit No. 7 was still in the hands of Scott, the cashier, and prior to the making of the alleged false entries complained of in the fourth count of the indictment, Scott entered upon the back of the Parsons note a credit of $250, which credit Scott testified he so entered under and by virtue of instructions given to him by George F. Kroehl, the president of the bank.

The Davis note for $1,700 was given for the price of 10 shares of the bank's stock, and the note was secured by the stock, which was

worth when the original note was given $170 a share, or in all $1,700. Prior to the entry complained of in the fifth count of the indictment, Davis executed a new note to the bank's order for $750, which was the actual value of the collateral at that time, and this note for $750 was accepted and discounted by the bank in lieu of the old note for $1,700. The bank held as security for the Jesse B. Twining note for $1,700 10 shares of stock of the bank, which had been pledged as collateral by Mrs. Hannah B. Twining, the indorser of the note. As part of the plan for the reorganization of the bank, it was arranged that Alonzo R. Parsons should become a director, and that he should purchase from the bank these 10 shares of stock in order to qualify him. Accordingly he gave his note to the bank for $1,000 in payment of this stock. His note was then substituted for the Twining note, and the difference between the two notes, namely, $700, was charged to profit and loss. Scott, the cashier, who, as we have seen, authorized Davis to make this charge to the profit and loss account, testified that this was done by virtue of instructions given to him by George F. Kroehl, the president of the bank. Scott, however, also testified that he had been told by the defendant that he (Scott) was to substitute the Parsons note for the Jesse B. Twining note, and that the difference between the notes was to be charged to profit and loss. There was evidence that the bank was under an obligation to protect Mrs. Twining from any loss on the 10 shares of stock by the sale thereof at a price below its market value, which was $170 a share, at the time it was pledged by her to the bank.

Now it seems to us clear, upon the uncontradicted evidence, that the entries complained of in the fourth, fifth, and sixth counts of the indictment were not false entries within the meaning of section 5209 of the Revised Statutes. These entries were in fact true. Each entry resulted from a transaction actually consummated between officers of the bank and a third party. Assuming that the credits or reductions which the officers gave to these third parties were not justifiable, nevertheless the credits or reductions were actually given and allowed, and the entries in question were simply in accordance with the facts. Moreover, while it is true that the board of bank directors did not by formal resolution empower Kroehl, the president, and the defendant to allow the above-mentioned credits or reductions, there is evidence that these officers were openly acting for the bank in effecting its reorganization and readjusting its affairs, and it would seem that what they did in respect to the Parsons, Davis, and Twining notes was within the scope of their apparent authority. But even were this otherwise, the absence of authority to allow the credits or reductions does not and cannot alter the fact that these allowances were made, and hence cannot make entries false which simply conform to and disclose the actual transactions.

In Coffin v. United States, 156 U. S. 432, 463, 15 Sup. Ct. 394, 406, 39 L. Ed. 481, the court held that a correct entry of a misapplication of the bank's funds, although the transaction was fraudulent, was not a false entry under the statute. The court there said:

"Whilst we consider the charges asked were in some respects unsound, yet the exception reserved to the charge actually given by the court was well taken, because therein the question of misapplication and of false entries are interblended in such a way that it is difficult to understand exactly what was intended. We think the language used must have tended to confuse the jury and leave upon their minds the impression that, if the transaction represented by the entry actually occurred, but amounted to a misapplication, then its entry exactly as it occurred constituted 'a false entry'; in other words, that an entry would be false, though it faithfully described an actual occurrence, unless the transaction which it presented involved full and fair value for the bank. The thought thus conveyed implied that the truthful entry of a fraudulent transaction constitutes a false entry within the meaning of the statute. We think it is clear that the making of a false entry is a concrete offense which is not committed when the transaction entered actually took place and is entered exactly as it occurred."

Furthermore, we have great difficulty in discovering in this record sufficient evidence to justify a finding that the defendant, Twining, made or directed to be made the entries which are the subject of the last three counts. But assuming this to have been shown, we are clearly of opinion, for the reasons above stated, that these entries were not false, and we are further of opinion that upon this ground the court should have instructed the jury to acquit the defendant.

Notwithstanding the absence of a request for binding instructions, it becomes our duty, under the authority of Wiborg v. United States, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 41 L. Ed. 289, and Clyatt v. United States, 197 U. S. 207, 221, 222, 25 Sup. Ct. 429, 49 L. Ed. 726, to determine from the record whether there is any evidence to sustain this conviction, and, finding none, to reverse the sentence.

We ought to add that the record discloses serious errors against the defendant, duly excepted to and before us by assignments in the admission of evidence and in the instructions to the jury, which we do not deem it necessary to discuss, in view of our conclusion upon the main question, which conclusion is fatal to the case of the government.

The judgment against the defendant is reversed, and the cause is remanded to the District Court, with instructions to grant a new trial.

AMERICAN LINSEED CO. v. HEINS.

(Circuit Court of Appeals, Eighth Circuit. October 17, 1905.)

No. 2,059.

1. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE. Defendant maintained in its mill a drum used to operate a cable which passed around it, and which was required by the statutes of the state to be boxed or guarded for the protection of workmen; but it was not so guarded. Plaintiff had worked in the immediate presence of the drum and cable for four years, and knew its location and condition. In passing from one part of the mill to another, instead of passing over a platform which was comparatively safe, he undertook to jump over the drum, when his leg was caught by the cable and crushed against the drum. *Held* that, in view of the fact that the dangerous character of the machinery was so generally recognized as to be made a subject of legislation

and was obvious and well known to plaintiff, he was guilty of contributory negligence in unnecessarily subjecting himself to the danger, and was precluded thereby, as well as by his assumption of the risk by remaining in the employment, from recovering damages for the injury because of defendant's negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 706–709.]

2. SAME.

A servant who unnecessarily exposed himself to a known and great danger, and was injured, cannot escape the charge of contributory negligence because the unknown negligence of the master made the danger greater than he supposed it to be.

3. SAME—CUSTOM OF NEGLIGENCE.

A servant, who contributes to his own injury by unnecessarily subjecting himself to a known danger, is not relieved from the charge of contributory negligence, nor from its effect, by the fact that it was a custom of other employés to take the same risk.

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

This action was brought to recover damages for personal injuries, and resulted in a verdict in favor of the plaintiff. The facts out of which it arose may be briefly stated as follows: Plaintiff in error, the American Linseed Company, is a corporation owning and operating a mill for the manufacture of linseed oil at St. Paul, Minn. Side tracks are located adjacent to the mill, upon which cars containing grain are switched. In order, however, to place these cars at the precise point where the grain can be conveniently removed by the spouts and elevators of the mill, it is necessary to change their location from time to time. For this purpose a cable is extended from a drum in the mill about pulleys at the entrance of the mill adjoining the tracks, equipped with a hook so as to grapple with the cars. When it is desired to move a car, this hook is connected with the car coupling, and the drum is set in motion by the power used in operating the plant. The drum was about 3½ feet long and 1 foot in diameter, and was so placed that its upper surface was about 2 feet above the floor. Immediately over its center a lever hung down, so that it would hit the head of a person stepping over the drum. The cable in use at the time of the accident was made of wire. It was about three-quarters of an inch in diameter and from 350 to 400 feet long. The wires of which is was composed were a little larger than a pin, and were woven together in strands. Each strand was covered with tarred hemp, and the strands were then twisted so as to form a cable. One of the witnesses, in describing the purpose for which the tarred hemp was used, said: "Having the strands wound with tarred hemp allows friction, prevents the wires from coming together and cutting, and makes a more pliable rope of it. It prevents and secures the cable from injury, and has a tendency to keep the strands consolidated." The cable was purchased of Roebling & Son Company, manufacturers of established reputation, and had been in use at the time of the accident a little more than two months. Previous to the purchase of this cable an ordinary hemp cable had been used. Neither the cable nor the drum had ever been covered by any framework or other protection. The plaintiff had worked for the defendant about four years, and during nearly all that time had been in charge of the cable and drum, and was thus engaged at the time the hemp cable was replaced by the wire cable which was in use at the time of the accident. About three weeks before his injuries occurred his employment had been changed, and consisted at that time in caring for the seed, weighing it, and attending to the cleaners and separators. A Mr. Capen, who had charge of the drum and cable when the accident happened, testified that on two or three occasions, while having hold of the end of the rope in pulling it out to connect with cars, he had noticed that some of the small wires stuck through the tarred hemp and projected from one-quarter to one-half inch. He did not claim

to have examined the general course of the cable, but said that he discovered these projecting wires while having hold of the end of the cable and pulling it out to grapple with the cars. No complaint or report had ever been made to the defendant on this subject. On the morning of the accident the plaintiff was standing on the south side of the mill. The drum was in almost a direct line between himself and a separator which had clogged up and was throwing grain. It was his duty to go to this separator and adjust the machinery so that it would work properly. The clogging was not an uncommon occurrence. It happened whenever a car of dirty seed followed a car of clean seed, because the clean seed fed faster than the dirty, and was remedied by regulating the feed pipe. There was nothing in the situation causing danger either to person or property. The plaintiff might have gone to the separator by passing over a platform. Instead of doing this, however, he attempted to jump over the drum, which was in operation at the time. In comparison with this way the passage over the platform was entirely safe. In attempting to jump over the drum the plaintiff's leg was caught by the rope and drawn about the drum, and so injured as to require amputation at the knee. At the close of all the evidence counsel for the defendant moved the court to direct a verdict in its favor on the following grounds: First, that from the uncontradicted evidence it appeared that the plaintiff was fully advised as to the situation and surroundings of the place at which he had stationed himself at the time he received his injuries; that said plaintiff fully realized and appreciated all the risks and dangers attendant upon being in said place and assumed the same. Second, that from the uncontradicted evidence no wires projected at the point in the cable where plaintiff was caught and, if any wires did so project from the cable, the protruding wires were not the proximate cause of the plaintiff's injuries. Third, that from the uncontradicted evidence it appeared that the injuries so received by the plaintiff were due wholly and solely to the carelessness of the plaintiff in voluntarily and unnecessarily exposing himself to the danger of having his leg caught and crushed on the drum; that where there existed a comparatively safe way and a more dangerous way known to the plaintiff, by means of which he may discharge his duties, and he selects the more dangerous way, as he did in this case, he cannot recover. This motion was denied, and the cause submitted to the jury, who returned a verdict in favor of the plaintiff in the sum of $4.500. The action of the trial judge in denying the motion was duly excepted to, and constitutes the only error assigned here which it will be necessary for us to consider.

James D. Armstrong, for plaintiff in error.

Humphrey Barton, for defendant in error.

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

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

Upon the entire record we entertain serious doubt as to whether there is any evidence of defendant's negligence which would entitle the plaintiff to recover. The negligence assigned in the complaint is, first, that the defendant failed to cover and protect the drum and cable as required by the factory act of Minnesota, which reads as follows:

"All saws, planers, * * * drums and machinery, including belts, shafting, cables and the fly-wheels of every description * * * in any factory, mill or workshop shall be so located as not to be dangerous to workmen or shall be as far as practicable properly guarded, fenced or otherwise protected."

In view of the fact that the danger from this defect was entirely open and obvious, and that the plaintiff had worked in the immedi-

ate presence of the drum and cable for nearly four years and fully appreciated its dangers, the trial court very properly held, following the decision of this court in St. Louis Cordage Company v. Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551, that the plaintiff assumed any danger arising from the failure to cover or guard the rope and drum.

The second ground of negligence charged in the complaint is that the cable was a defective appliance because the small wires were suffered to protrude through the tarred hemp with which it was covered, thus rendering it more likely to catch the clothing of employés. As already explained, the witness Capen alone testified on this subject. He stated that he discovered the protruding wires while handling the end of the rope in connecting it with the cars. There was no evidence that this condition existed throughout the entire length of the cable. On the contrary, immediately after the accident the cable was examined by three persons, and all of them testified that they found it in perfect condition and free from protruding wires in any part of it which could have caused the injury. Further, the evidence is very slight and conjectural that protruding wires, if any existed, caused the plaintiff's leg to be drawn over the drum. It is confined to the plaintiff's testimony. We give it in full, as it has a bearing upon other points considered in the opinion:

"After setting the piece of iron pipe against the south wall the machine, separator A, was throwing seed over, and I had to hurry across there, and, while I was going across there, the cable caught my pants leg and pulled my foot in under the drum; that is, in attempting to cross over the drum. The drum was running at the time with this cable. It was a part of my duty to take care of separator A, and to rush over and shut it off when I heard it throwing seed. When my pants caught on the cable, I was on the outside of the cable—that is, on the south side of the cable, near the drum—and, when my pants caught on the cable, I was attempting to jump over the drum. The cable caught my pants and pulled my foot in between the cable and the drum."

It will be noticed that there is no express statement here that plaintiff's pants were caught by protruding wires, but it is argued by counsel that because such wires would make the cable more likely to catch the clothing of employés, and because plaintiff's evidence is open to the construction that the wires caught his clothing, therefore it was a question for the jury to determine whether the injury was in fact caused by the wires. That, however, is largely to substitute conjecture for proof. It is a matter of common knowledge that revolving drums and pulleys catch and draw in the arms and legs of employés. It is because of that danger that such statutes as the one above quoted from Minnesota have been adopted in nearly all the states. The plaintiff's trousers were not produced at the trial, and there was no testimony that they furnished any evidence of having been caught by the protruding wires. We have, then, a case in which the cable itself would have been an entirely adequate cause for the injury, and the only evidence that the protruding wires were a factor in the result is that they would have made the cable still more dangerous. Under all these circumstances the inference that plaintiff's injuries were caused by pro-

truding wires on the cable seems to us a matter of pure conjecture, and insufficient to support a verdict.

We prefer, however, to place our decision upon a ground which is entirely free from doubt, namely, plaintiff's contributory negligence. There was no necessity justifying his conduct in attempting to pass over the revolving drum. He could have reached the place to which he desired to go by means of a platform, which, at least in comparison with the way that he did adopt, was entirely safe. His failure to choose the safe way was, under the decisions of this court, negligence. Morris v. D. S. S. & A. R. Co., 108 Fed. 747, 47 C. C. A. 661. It is not, however, necessary to deduce his negligence by a comparison of methods. The act which he attempted was inherently reckless. Because the cable and drum, when prudently used, were dangerous instruments, the statute of Minnesota required them to be covered. The defendant would have been liable in damages to any employé who was injured by their uncovered condition, provided he had not assumed the risk of such defect. But to hold the defendant guilty of negligence because of its failure to protect the cable and drum by a proper guard, and at the same time hold the plaintiff free from contributory negligence in attempting to jump over the drum while in motion, with full knowledge of the danger of his act, would be to apply an entirely different standard of care to the defendant from that which is applied to the conduct of the plaintiff. We cannot exonerate the plaintiff from negligence without holding that the act which he was attempting at the time he was injured was such as an employé might reasonably and properly perform. This the statute of Minnesota, and the great body of similar statutes to be found in nearly all the states, as well as common experience of the dangers of revolving pulleys and drums, forbid us to do. It was urged upon the trial that the plaintiff was ignorant of the protruding wires, and therefore could not be held to have assumed the risk of injury by their presence, or to have been guilty of contributory negligence in going over the drum, provided his injury was caused by the protruding wires and would not have happened if they had not been present. This contention was completely answered in the case of Gilbert v. Burlington, C. R. & N. Railway Co., 128 Fed. 529, 535, 63 C. C. A. 27. There the plaintiff was injured by an unblocked frog, while walking between two moving cars for the purpose of loosening their coupling. Mr. Barton, representing the plaintiff, made the same argument there which he now makes in behalf of the plaintiff here, and was answered by the court, speaking through Judge Sanborn, as follows:

"Counsel next say that, even if the plaintiff failed to exercise reasonable care to protect himself against the ordinary dangers of walking along the track between the cars and uncoupling them, he did not fail, in the exercise of ordinary care, to protect himself against the particular danger from the unblocked guard rail, because he was ignorant of its condition, and could not have been negligent about it. * * * While it is true in cases of little danger, when the negligence of the plaintiff is remote, and does not clearly contribute to his injury, * * * that a servant may not be guilty of contributory negligence in exposing himself to a risk of which he is ignorant, and of which an ordinarily prudent person would not have been aware, although he fails to exercise ordinary care to protect himself against known dangers,

that rule is not of universal application. It is not applicable to cases in which the danger is known and great, and the negligence of the servant is clearly and directly contributory to the injury. An employé rides upon the pilot of an engine when there are cars on which he could ride with safety. He is injured through the negligence of the master, of the effects of which he was ignorant, when he would have suffered no harm if either he or the master had not been guilty of want of ordinary care. He cannot recover, because his negligence contributes to the injury which the unknown negligence of the master concurred to cause. A pedestrian is about to cross a railroad. It is his duty to stop and look and listen before he crosses. It is the duty of the railroad company to ring a bell or sound a whistle to warn him of approaching trains. A train comes without whistle or bell, and gives no warning of its approach. The footman walks onto the railroad without stopping or looking along the track to the right or the left, and he is injured. He cannot recover, although he had no knowledge that the train carried no bell or whistle, and that no signal would be given, because his negligence contributed to the injury. A brakeman carelessly jumps onto the brakebeam of a moving car and seizes a handhold not placed upon it to sustain a strain of that character, when there are other handholds for the purpose of enabling men to climb upon the cars, which he ought to have used. He is ignorant that, through the negligence of the master, one of the screws which keeps the handhold he seizes in place does not secure it. He pulls out the screw, falls, and is injured. He cannot recover, because his negligence directly contributes to his injury. Indeed, where the plaintiff knows he is exposing himself to great danger, and his negligence directly contributes to his injury, it is not his want of care with reference to the particular negligence or defect that concurs to injure him, but his general breach of duty toward his master, his failure to exercise due care in view of the knowledge which he has, that is fatal to his recovery. When he knowingly departs from the line of duty, and unnecessarily causes his own injury by putting himself in a place which he knows to be dangerous, it is no excuse for his breach of duty that the place was more dangerous than he supposed it to be, or that he did not know the exact degree of the danger he carelessly incurred. One who voluntarily and unnecessarily exposes himself to a known and great danger, and thereby directly contributes to his injury, cannot escape the fatal effect of his contributory negligence because the negligence of the defendant which concurred to produce the injury, and of which he was ignorant, made the danger greater than he supposed it to be."

The only answer to this sound and clear exposition of the law which the plaintiff offers is this: He says that he was not negligent in attempting to jump over the drum while in motion, because other employés had been accustomed for a long time to do the same thing. This argument, however, is fully met in the same case from which we have just quoted:

"Counsel * * * call attention to the testimony of several witnesses to the effect that it was the custom or habit of the servants of the company to ignore the lever on the opposite side of the train, and to step in between the cars, when they were moving, and uncouple them with their hands, when the lever on their side of the train would not produce this effect, and they insist that it was not negligence for the plaintiff to follow the ordinary course pursued by his associate operators in cases of this character. But, 'if a man exposes himself to a risk unnecessarily, he is guilty of negligence, although it be shown that other persons have done the same thing and escaped unhurt. The inherent quality of an act is not changed, whether done by one or many.' Dawson v. Chicago, R. I. & P. R. Co., 114 Fed. 870, 882, 52 C. C. A. 286, 288. The danger of entering and walking between the moving cars was so imminent and obvious that no custom to do so unnecessarily could deprive the act of its inherently negligent character."

The same is true of the plaintiff's act in this case. The attempt to jump over the revolving drum, about which a cable is winding, is an

act so obviously negligent that its quality cannot be changed by the fact that others have done it and escaped unharmed.

The trial court ought to have granted the defendant's motion to direct a verdict in its favor. The judgment will therefore be reversed, with direction to grant a new trial.

EVANSVILLE & HENDERSON TRACTION CO. v. HENDERSON BRIDGE CO.

(Circuit Court of Appeals, Sixth Circuit. October 14, 1905.)

No. 1,396.

RAILROADS—KENTUCKY STATUTES—RIGHTS OF FOREIGN CORPORATIONS.

Const. Ky. § 202, provides that "no corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this commonwealth"; and section 211 provides that no railroad corporation organized under the laws of another state shall exercise the right of eminent domain, or acquire right of way or real estate within the state, until it shall have become a body corporate, pursuant to the laws of the state. Ky. St. 1903, § 841, provides that any such corporation may "for the purpose of possessing, controlling, maintaining, or operating" a railway in the state become a corporation, citizen and resident of the state, by filing its articles of incorporation as therein specified; section 763 provides the manner of organizing railroad corporations within the state, which includes the filing of an affidavit showing that a certain amount of stock per mile of the proposed line has been subscribed, and a certain amount of the same paid in; and section 765 provides that no railroad corporation of another state shall exercise the power of eminent domain or acquire right of way, or purchase or hold land for railroad purposes until it shall have become a corporation of the state in the manner and form provided in section 763. *Held*, that under said provisions a foreign railroad corporation, which merely complied with section 841, by filing its articles of incorporation acquired only the right therein given to "possess, control, maintain, and operate" a railroad in the state, and that it had no power to exercise the right of eminent domain or to maintain a suit to subject the property of another to its use without becoming a full Kentucky corporation by organizing as such under section 763.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 138.]

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

For opinion below, see 134 Fed. 973.

Edwin C. Henning, George Du Relle, and John J. McHenry, for appellant.

Helm Bruce (H. L. Stone, B. D. Warfield, Wilbur F. Browder, R. A. Miller, and Helm, Bruce & Helm, of counsel), for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The Evansville & Henderson Traction Company is an Indiana corporation, formed for the purpose of constructing, maintaining, and operating an interurban street railroad from Evansville, Ind., to Henderson, Ky., the contemplated motive

power being electricity. The Henderson Bridge Company is a Kentucky corporation which owns a bridge, with the necessary approaches and tracks, across the Ohio river, from Henderson to a point opposite on the Indiana side, which is used solely for railroad purposes. The bill was filed to enjoin the bridge company from refusing to permit the traction company to use this railroad bridge as a part of its projected interurban line and operate its cars over the same by the use of electricity, if the court should be of the opinion that the bridge is adapted to such use, and if not, by the use of steam. Incidentally, there is a prayer that the traction company be permitted to equip the bridge with the appliances necessary for the operation of its cars by electricity, and that the court fix the rates of toll and regulations for the use of the bridge. The court below sustained a demurrer to the bill on the ground that the traction company had not complied with the provisions of sections 763 and 765 of the Kentucky Statutes of 1903, limiting the right of foreign corporations to acquire rights of way in the state, and that the Indiana statute relied upon by the traction company as authorizing the use of the bridge, has no force south of the low water mark of the Ohio river on the Indiana side, which constitutes the southern boundary of Indiana. The case is here on appeal.

1. The Constitution of Kentucky provides:

"Sec. 211. No railroad corporation organized under the laws of any other state, or of the United States, and doing business, or proposing to do business, in this state, shall be entitled to the benefit of the right of eminent domain or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this commonwealth."

The complainant avers and contends it became a body corporate in pursuance of this requirement by complying with the provisions of section 841 of the Kentucky Statutes of 1903, which reads:

"Sec. 841. No company, association or corporation created by, or organized under, the laws or authority of any state or country other than this state, shall possess, control, maintain or operate any railway or part thereof, in this state, until by incorporation under the laws of this state, the same shall have become a corporation, citizen and resident of this state. Any such company, association or corporation may, for the purpose of possessing, controlling, maintaining or operating a railway or part thereof in this state, become a corporation, citizen and resident of this state by being incorporated in the manner following, namely: By filing in the office of the Secretary of State, and in the office of the railroad commission, a copy of the charter or articles of incorporation of such company, association or corporation, authenticated by its seal and by the attestation of its president and secretary, and thereupon, and by virtue thereof, such company, association or corporation shall at once become and be a corporation, citizen and resident of this state. The Secretary of State shall issue to such corporation a certificate of such incorporation."

On the other hand, it is submitted, and the court below found, that the applicable sections of the Kentucky statutes, which must be complied with before a foreign railroad corporation can condemn land or acquire a right of way within Kentucky, are sections 765 and 763, which the complainant has not complied with, and which read:

"Sec. 765. No railroad corporation, organized or created by or under the laws of any other state, shall have the right to condemn land for, or acquire

the right of way for, or purchase or hold land for its depots, tracks, or other purposes, until it shall have first filed in the office of the Secretary of State of this state, in the manner provided in the first article of this chapter, its acceptance of the Constitution of this state, and shall have become organized as a corporation under the laws of this state, which it may do by filing in the offices of the Secretary of State and the railroad commission articles of incorporation, in the manner and form provided in section 763 of this article."

"Sec. 763. Any number of persons, not less than seven, may associate to form a corporation for the purpose of constructing, operating and maintaining a railroad. Such persons shall execute articles of incorporation, which shall specify the name of the proposed railroad, the number of years the corporation is to continue, the amount of its capital stock, and the number of shares into which the same shall be divided; the number of directors, which shall not be less than five nor more than fifteen, and their names; the places from and to which, and the names of each county into or through which it is intended to be constructed, and its length as near as it may be. Each subscriber to such articles shall set opposite his name his place of residence and the number of shares subscribed by him. Whenever two hundred and fifty dollars per mile has in good faith been subscribed, and twenty per cent. thereof paid in in cash, to the persons named in the articles as directors, and an affidavit made to that effect by two of said named directors and attached thereto, a copy of said articles and affidavits shall be filed in the office of the railroad commissioners, and in the office of the Secretary of State, and when a certificate of such fact is delivered by the said officers to the incorporators, the persons who have subscribed such articles shall be a body-corporate by the name specified in the articles, and as such may sue and be sued, contract and be contracted with, have a seal, and change the same at pleasure; may elect or appoint directors, who shall choose from their number such officers as may be necessary; may require from any officer or employé a bond for the faithful discharge of his duties, and prescribe such by-laws for its government, and exercise such powers as are necessary to the conduct of its business not inconsistent with law."

A comparison of the provisions of section 841 with those of section 765 leads us to believe that the court below was right in its conclusion. Section 841 provides that no foreign corporation "shall possess, control, maintain or operate any railway" in Kentucky, without first complying with its provisions, while section 765 provides that no foreign railroad corporation "shall have the right to condemn land for, or acquire the right of way for, or purchase or hold land for its depots, tracks, or other purposes," until it shall have first complied with its provisions. A corporation which simply desires to maintain and operate its line in Kentucky, must become a corporation, citizen and resident of Kentucky, by filing in the office of the Secretary of State, and in that of the railroad commission, a copy of its charter or articles of incorporation, by virtue whereof it at once becomes such corporation, citizen and resident. This is not the organization so much as the naturalization of the foreign corporation. Compliance with this section does not create a corporation subject to the organization tax of Kentucky (C., N. O. & T. P. R. R. Co. v. Commonwealth, etc., 83 S. W. 562, 26 Ky. Law Rep. 1106), or deprive the foreign corporation thus naturalized of the right to sue or be sued in the federal courts as a citizen of another state (Davis v. C. &. O. Ry., 75 S. W. 275, 25 Ky. Law Rep. 342; Louisville, etc., Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 563, 19 Sup. Ct. 817, 43 L. Ed. 1081; Walters, Adm'r v. C. B. & Q. R. R., 186 U. S. 479, 22 Sup. Ct. 941, 46 L. Ed. 1266).

But a foreign corporation which desires to condemn land and acquire

a right of way in Kentucky, must do something more than merely file there its articles of incorporation. The Constitution of Kentucky (section 202) provides that:

"No corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this commonwealth."

And section 763 requires a domestic corporation, organized to construct a railroad, not only to file its articles of incorporation, but proof that at least $250 per mile has in good faith been subscribed, and 20 per cent. thereof paid in in cash before it can proceed to business. A compliance with this provision affords, of course, a certain guarantee of responsibility and there would seem to be no just reason why a like guarantee should not be required of a foreign corporation under similar circumstances. Indeed, the provision of the Constitution to which we have referred (section 202) would seem to forbid the preference which would result from permitting a foreign corporation to condemn land and acquire a right of way in Kentucky without filing proof that it is something more than a mere paper corporation, that its stock has been subscribed and paid in at least to the amount required of a domestic corporation.

On the whole, while the question is not free from doubt, and we regret there seems to have been no authoritative expression from the Court of Appeals of Kentucky upon the precise point, we are inclined to agree with the lower court that the traction company, not having complied with the provisions of sections 765 and 763, could not maintain this action, which in effect was one to acquire a right of way over the bridge owned by the appellee upon terms to be fixed by the court. Having reached the conclusion that the complainant had no right to bring the suit, we deem it unnecessary to discuss the questions raised as to the effect of the provisions of the Kentucky and Indiana acts regulating or assuming to regulate the construction and operation of the bridge.

The judgment is affirmed.

WILLIAMSON v. LIVERPOOL & LONDON & GLOBE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1905.)

No. 2,151.

1. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—STATUTE ALLOWING DAMAGES AND ATTORNEY'S FEES AGAINST INSURANCE COMPANIES.

Rev. St. Mo. 1899, § 8012, providing that "in any action against any insurance company to recover the amount of any loss under a policy of fire, life, marine or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss the court or jury may * * * allow the plaintiff damages not exceeding ten per cent. on the amount of the loss, and a reasonable attorney's fee," is not void as in violation of the equality clause of the fourteenth constitutional amendment.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 703; vol. 28, Cent. Dig. Insurance, § 1498.]

2. PLEADING—ERROR IN STRIKING OUT—WAIVER BY AMENDMENT.

Where a motion to strike out a portion of a petition in a federal court was erroneously sustained and the ruling duly excepted to, and such motion did not go to any insufficiency or technical defect in the petition, but was in effect a demurrer to so much of it as alleged a distinct and substantive part of plaintiff's cause of action, the plaintiff did not waive the error by complying with the order permitting him to file an amended petition omitting the averments objected to.

3. COURTS—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE.

The rule of practice in Missouri that the filing of an amended petition in compliance with an erroneous order, which struck out parts of the original petition, is a waiver of the error, is not binding upon the federal courts in that state.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 899–902, 921.]

Conformity of practice in common-law actions to that of state courts, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

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

Florence Williamson sued the insurance company to recover the amount of a total loss under three policies of fire insurance, and in addition thereto damages for vexatious delay in payment, and attorney's fees. During the progress of the litigation which ensued the company tendered and deposited in court the entire amount of the policies and costs to that time. Thereafter the controversy, which was confined to the matter of damages and attorney's fees, was determined in favor of the company. The plaintiff then instituted this proceeding in error.

Boyle & Guthrie, for plaintiff in error.

M. A. Fyke and Ed. E. Yates, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

The claim for damages and attorney's fees, in addition to the loss under the policies, was asserted upon the authority of a Missouri statute, which provides that, if in an action upon a policy of insurance it appears from the evidence that the company has vexatiously refused to pay, the court or jury may in addition to the amount of the loss allow the plaintiff damages not exceeding 10 per cent. thereof, and also a reasonable attorney's fee. Rev. St. Mo. 1899, § 8012. The plaintiff's petition contained appropriate averments in support of her rights under the statute, but upon motion of the company the trial court ordered them stricken out and gave the plaintiff three days in which to file an amended petition. Exceptions to this ruling were duly preserved. The learned district judge applied to the case the doctrine of Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, and held that the Missouri statute was in contravention of the equality clause of the fourteenth amendment, in that, being directed against insurance companies alone, it deprived them of the equal protection of the laws. The plaintiff thereupon filed an amended petition precisely like the original, except that the averments relating to the additional damages and attorney's fees were omitted. Afterwards, but

while the cause was still pending, the cases of Life Association v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922, and Insurance Co. v. Lewis, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204, were decided. In the Ellis Case the Supreme Court had held to be unconstitutional a state statute which imposed upon railroad corporations a penalty in the shape of a liability for attorney's fees for failure to pay certain debts. In the opinion of that court the power of reasonable classification of the subjects of state legislation and the adaptation of different rules to the different classes was admitted, but it was said that the classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." It was also held that the debts, the failure to pay which gave rise to the penalty, were not so different from those of other corporations as to justify the hostile discrimination against railroad companies alone.

In the Mettler Case it was decided that a classification of life and health insurance companies separately from fire, marine, and inland insurance companies and mutual benefit and relief organizations doing business through lodges and benevolent associations was not so arbitrary or devoid of reasonable basis as to be subject to constitutional objection. A state statute was therefore upheld which imposed upon life and health insurance companies refusing to pay a loss when due a penalty of 12 per cent. thereof, and in addition a reasonable attorney's fee. The doctrine of the Mettler Case was adhered to in Insurance Co. v. Lewis. Inspired, doubtless, by these later decisions, the plaintiff asked leave to amend her amended petition by reinserting the averments as to damages and attorney's fees authorized by the Missouri statute. The trial court denied the application, upon the ground that by filing the amended petition the original one was abandoned, and that plaintiff thereby accepted the ruling of the court and waived all errors in its decision. This conclusion of the trial court seems to be in accord with a rule of practice in Missouri, although a statute of that state provides in effect that, if a plaintiff fails to amend his petition as ordered, he goes out of court, and, if a defendant so fails in respect of an answer, judgment may be rendered against him as upon default. Rev. St. Mo. 1889, § 2066.

So these questions arise: Was the original order of the trial court directing the elimination from plaintiff's petition of the claim for damages and attorney's fees erroneous? If it was erroneous, did the plaintiff waive her exceptions thereto by complying with the order to file an amended petition? The first of these questions is that of the validity, under the fourteenth amendment, of the Missouri statute in virtue of which the claim was asserted. If it is not answered affirmatively by the Mettler and Lewis cases, it certainly is by the later case of Insurance Co. v. Dobney, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. Ed. 821. That case involved the constitutionality of a Nebraska statute providing for a reasonable attorney's fee to be taxed as part of the costs in a suit upon a policy of insurance written to insure real property against loss by fire, tornado, and lightning. The scope of the decision is well

illustrated by a statement of the objections to the validity of the statute, all of which the Supreme Court found to be untenable. It was said:

"All the grounds relied upon to demonstrate that the statute allowing a reasonable attorney's fee in case of the unsuccessful defense of a suit to enforce certain insurance policies is repugnant to the equality clause of the fourteenth amendment, are embraced in the following propositions: First, because it arbitrarily subjects insurance companies to a liability for attorney's fees, when other defendants in other classes of cases are not subjected to such burden; second, because, whilst the obligation to pay attorney's fee is imposed on insurance companies in the cases embraced by the statute, no such burden rests on the plaintiff in favor of the insurance companies where the suit on a policy is successfully defended; and, third, because the statute arbitrarily distinguishes between insurance policies by allowing an attorney's fee in case of a suit on a policy covering real estate, where the property has been totally destroyed, and excluding the right to such fees in suits to enforce policies on other classes of property or where there has not been a total destruction of the property covered by the insurance."

We must conclude, therefore, that the trial court erred in its first ruling, and that, assuming that the averment of vexatious delay in payment could be substantiated by proof, the plaintiff possessed a valid cause of action for damages and attorney's fees in addition to the amount of the policies.

Were the error in the original ruling of the trial court and the exceptions thereto waived by the filing of an amended petition? It should be observed that the motion sustained by the trial court was not directed to an alleged indefiniteness, incompleteness, or insufficiency of statement in the petition, nor to mere technical defects therein. On the contrary, it was in effect a demurrer which, being sustained, struck a vital blow to a substantial part of plaintiff's cause of action. It is well settled in the federal practice that in cases of the former character exceptions to an erroneous ruling are waived by the filing of an amended pleading in obedience thereto, but such is not the rule where the action of the court results in the denial of a substantial right. In the case before us, had the claim for damages and attorney's fees constituted a separate and independent cause of action, instead of being auxiliary to and dependent upon that for the primary loss under the policies, and had the plaintiff asserted it in a separate count in her petition, the attack of the company would have taken the form of a demurrer; and under such circumstances the filing of the amended petition after due exception to the ruling of the court would not have constituted a waiver. Worthington v. Beeman, 91 Fed. 232, 33 C. C. A. 475. The fact that the claim was auxiliary and dependent made it none the less one of substance, nor does that fact add weight to the present contention of the company.

In Great Western Coal Co. v. Railway Co., 98 Fed. 274, 39 C. C. A. 79, a case that arose in Missouri, this court held that, where a plaintiff is erroneously required to elect before trial between two counts of his petition which stated the same cause of action in different forms and under which there could be but a single recovery, and he saves an exception to such ruling, he does not waive the exception by going to trial on the remaining count. The rule of Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237, was considered analogous, namely, that a person

does not waive a valid objection to the mode of service, if, after appearing specially and moving to set the wrongful service aside, he answers to the merits and goes to trial, first having reserved an exception to the action of the court in refusing to quash the service.

Another phase of the proposition now presented was considered by this court in Board of Commissioners v. Sherwood, 64 Fed. 103, 11 C. C. A. 507. The defendant answered after a demurrer to the petition was overruled, and it was urged that the ruling of the trial court on the demurrer was erroneous. It was said:

"We have once or twice decided, in accordance with the rule which now generally prevails, that a demurrer will ordinarily be waived by answering to the merits. Where it is apparent that the transaction out of which a cause of action is supposed to have originated could not give rise to a meritorious cause of action, the rule is of course different; but a mere incompleteness or uncertainty of averment—a failure to state some fact which should have been stated to make a technically good declaration or complaint—will be of no avail in this court, when it appears that after a demurrer was overruled the party answered to the merits and went to trial on issues raised by his answer."

In Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415, the court said:

"When the declaration fails to state a cause of action and clearly shows that upon the case as stated the plaintiff cannot recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial, without losing the right to have the judgment upon the verdict reviewed for the error in overruling the demurrer."

The Missouri rule upon this subject is not binding upon the courts of the United States. The purpose of the act of conformity (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) was to secure a harmony between the state and national courts in respect of the general structure or framework of pleading and practice in civil causes, other than those in equity and admiralty, but it does not require an adherence to the state rules in all their subordinate and minor details. The elasticity of the phrase "as near as may be" was doubtless intentionally employed to enable the national tribunals to reject such provisions as would unwisely incumber the administration of the law and tend to defeat the ends of justice. Especially in the matter of the amendment of pleadings has plenary power been conferred by Congress upon those courts; and whether amendments when authorized and made work a waiver of substantial rights or a release of errors should be determined by the principles which obtain in those jurisdictions and not by those which prevail in the state tribunals.

A reference to some of the many adjudicated cases and an indication of the point of departure from the state practice will show how wholly outside the rule of conformity is the matter now before us. Lincoln v. Power, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224 (manner of charging the jury); Southern Pacific Company v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942 (the effect of a special appearance to challenge the jurisdiction of the court); Fishburn v. Railway Co., 137 U. S. 60, 11 Sup. Ct. 8, 34 L. Ed. 585 (motions for new trial and bills of exceptions); United States, etc., Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60 (special verdicts); In re Chateaugay, etc., Iron Co., 128 U. S.

544, 9 Sup. Ct. 150, 32 L. Ed. 508 (the perfection, settling, and signing of bills of exceptions); Indianapolis, etc., Railroad v. Horst, 93 U. S. 291, 23 L. Ed. 898 (submission of interrogatories to the jury, and the granting of motions for a new trial); Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286 (reducing instructions to writing); Western Union Tel. Co. v. Burgess, 108 Fed. 26, 47 C. C. A. 168 (the taking of the written instructions to jury room); Consumers' Cotton Oil Co. v. Ashburn, 81 Fed. 331, 26 C. C. A. 436 (time for taking exceptions to instructions); McElwee v. Lumber Co., 69 Fed. 302, 16 C. C. A. 232 (the submission of special questions to the jury, and, if submitted, the effect of the answers upon the general verdict); O'Connell v. Reed, 56 Fed. 531, 5 C. C. A. 586, and Bowden v. Burnham, 59 Fed. 752, 8 C. C. A. 248 (joinder in attachment suit of claim due with one not due); Texas, etc., Ry. Co. v. Nelson, 50 Fed. 814, 1 C. C. A. 685 (continuances).

We are of the opinion, therefore, that the error in the ruling upon the motion and the exceptions thereto were not waived by the plaintiff. No escape from the effect of this conclusion can be found in the argument that when she afterwards sought the reinstatement of the expunged claim the granting or refusal of leave to amend was discretionary with the trial court. The question still harks back to the initial error, the exception thereto, and the absence of a waiver. Nor can the fact that the company tendered and deposited the amount of the policies into court affect it. In doing so the company was acting within its legal right to endeavor to protect itself from future costs and interest, but it could not thereby deprive the plaintiff of her right to continue the assertion of the remainder of her claim. The essential elements of an estoppel, which the company invokes, are lacking.

The plaintiff also complains of the denial of her application for leave to file a supplemental petition setting up certain matters which arose after the commencement of the action. The application was addressed to the sound discretion of the trial court, and, not being abused, its action will not be reviewed in this court.

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

LINDEBERG et al. v. DOVERSPIKE et al.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1905.)

No. 1,174.

EQUITY—PROCEDURE UNDER ALASKA CODE—FINDINGS.

Under Code Civ. Proc. Alaska (Carter's Ann. Codes) § 372, which regulates the practice in the trial of causes of an equitable nature, and provides that the court "shall set out in writing its findings of fact upon all the material issues of fact presented by the pleadings, together with its conclusions of law thereon; but such findings of fact and conclusions of law shall be separate from the judgment, and shall be filed with the clerk * * * and constitute a part of the judgment roll of the case," it is not reversible error to state such findings and conclusions in an opinion filed by the judge and referred to in the judgment, at least where no objection or motion for further findings was made.

Appeal from the District Court of the United States for the Second Division of the District of Alaska.

W. H. Metson, J. C. Campbell, Thomas H. Breeze, and Ira D. Orton, for appellants.

W. Lair Hill, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellants were copartners in the business of furnishing water to the city of Nome, Alaska, and they brought a suit against the appellees to enjoin them from discharging mud, dirt, tailings, and impure water into the waters which were the source of supply of the appellants' water works. The appellees answered the complaint, the appellants replied, and upon the issues so made testimony was taken, upon which the court entered a decree in which it was recited, among other things, that the opinion of the court, made and filed in writing, fully sets forth the facts and conclusions of law upon which the decree was based, and that the appellants were not entitled to an injunction as prayed for, and that the suit be dismissed, at the appellants' costs.

The assignments of error relied upon on the appeal are that the court made and entered a final decree without filing a written decision stating the facts found and the conclusions of law separately, and in failing to file a decision in writing stating the facts found and the conclusions of law. The appellants base their assignments of error upon the provisions of section 209 of the Code of Civil Procedure (part 4 of Carter's Annotated Codes of Alaska), in which it is said:

"The decisions shall state the facts found and the conclusions of law separately without argument or reason therefor. Such decision shall be entered in the journal and judgment entered thereon accordingly."

That provision of the Code, however, applies to the trial of issues in a law action where a jury trial has been waived. The provision which regulates practice in the trial of causes of an equitable nature such as the case at bar is section 372. It is there provided that the court—

"Shall set out in writing its findings of fact upon all the material issues of fact presented by the pleadings, together with its conclusions of law thereon; but such findings of fact and conclusions of law shall be separate from the judgment, and shall be filed with the clerk and shall be incorporated in, and constitute a part of, the judgment roll of the case."

Now the clerk's certificate in this case certifies that the transcript is a true and exact transcript of the complaint, answer, reply, decree, assignments of error, petition for order allowing appeal and order allowing same, bond on appeal, and opinion. There is no reference therein to findings of fact and conclusions of law, which under the statute should have been filed separately from the decree, and there is no certificate that such findings and conclusions were not on file and of record in the court below. It must be presumed, in the absence of proof to the contrary, that they were duly made and were on file.

But, if it should be argued that the recital in the decree to the effect that the opinion of the court fully sets forth the facts and conclusions

of law upon which the decree was based is sufficient to indicate that no other findings of fact and conclusions of law were filed, the answer is that the opinion contains findings of fact and conclusions of law, and was intended by the court to serve the purpose of findings of fact and conclusions of law. The most that can be urged against it is that its adoption for that purpose was informal. In the absence of objection on the part of the appellants in the court below, or a motion for further findings in the case, it is certainly not reversible error that none other were filed.

The decree of the court below will be affirmed.

MICHIGAN HEADLINING & HOOP CO. v. WHEELER.

(Circuit Court of Appeals, Sixth Circuit. December 11, 1905.)

No. 1,406.

MASTER AND SERVANT—ACTION FOR INJURY OF SERVANT—QUESTIONS FOR JURY.

Plaintiff, a young woman 19 years old, was employed with other women on the second floor of defendant's factory, which was built on a side hill so that such floor on one side was about on a level with the ground and a window on that side was customarily used by plaintiff and her co-employés as a passage for entering and leaving the room, and also as a seat. A shaft projected through the building, near and a little below the window, having a band wheel on its outer end. By a law of the state (Bates' Ann. St. Ohio, §§ 4364–69, 4364–89c), shafts in factories near the floor were required to be boxed, and where women were employed the employer was required to provide seats, but such shaft and wheel were not boxed, nor were seats provided other than the window. While sitting in the open window plaintiff's skirt was caught by the revolving wheel, and she was dragged outside and seriously injured. She was not warned of any danger in so using the window. *Held*, in an action to recover for the injury, that the determining issues were whether the window was properly used as a passage and seat with the knowledge of defendant, so as to impose upon it the duty of boxing the shaft and band wheel, or whether it was negligent as a matter of fact in not so doing, and whether, under all the circumstances, plaintiff in seating herself in the window assumed the risk or was guilty of negligence contributing to her injury, all of which issues were for the jury under proper instructions.

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

Alex L. Smith, for plaintiff in error.

O. S. Brumback, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This is the same suit which was before us in the case of Wheeler v. Oak Harbor Headlining & Hoop Company, 126 Fed. 348, 61 C. C. A. 250, in which we reversed the judgment of the lower court sustaining a demurrer to the second amended petition, and remanded the case for further proceedings. Subsequently, a third amended petition was filed, then an answer and reply, and the case went to trial, resulting in a verdict and judgment for the plaintiff. The rulings of the court below are now here for review.

It is strongly urged that a verdict should have been directed for the defendant. The grounds are substantially those presented in the argument upon the sufficiency of the petition in the former case, and were considered in our former opinion. There is no material difference between the petition upon which the case was tried and that formerly before us. The additional averment is that there was a small band wheel on the end of the projecting shaft and that the plaintiff's dress was caught by the revolving shaft or band wheel. This does not materially change the case. Upon the trial, testimony was introduced tending to sustain all the material averments of the petition, and it became a question for the jury whether a case was made out, in view of the conflicting testimony by the defendant.

There was testimony tending to establish the following facts: The plaintiff was a young woman about 19 years old. She had been employed in the factory from May until September, when she was hurt. The factory was engaged in the manufacture of wooden strips known as "headlinings." She helped pack these headlinings. Aside from the experience thus gained, she was inexperienced in machinery. The factory was built on the side of a hill, so that the second floor was on a level with the top of the hill, and one could step out of the window of the room in which she was employed onto the ground. There was a passage way to this room through the basement, where most of the machinery was located; but it was narrow, dark, damp, obstructed, and somewhat dangerous. The three women employed in the room where the plaintiff worked were therefore in the habit of entering and leaving the room through the sliding window, which opened onto the ground, and this habit was known to the defendant. Although the law of Ohio made it the duty of the defendant to provide seats in this room where the women worked, none were provided, and they were in the habit of sitting in the window when not at work. This habit was also known to the defendant. Projecting from the building on the outside, below and near this window, was a revolving shaft with a band wheel, used for operating a grindstone. If this window was in known use as a passageway by its employés, it was the duty of the defendant, by the law of Ohio, to box or cover the revolving shaft and band wheel; but this was not done, nor did the defendant warn the plaintiff of the danger of coming in contact with this shaft and band wheel. On the day of the accident, at or shortly before 7 o'clock in the morning, the plaintiff reached the factory, passing by the shaft and band wheel. While waiting for headlinings to pack, she seated herself in the window and began to read a letter. The testimony conflicted as to whether she was sitting on the outside or the inside of the window, and as to whether the revolving shaft was in operation when she sat down or not. The weight of the testimony goes to show she was sitting on the inside of the window, and the jury specially found that the shaft was not in operation when she sat down. While she was so seated, her skirt in some way came in contact with the revolving shaft or band wheel then in operation, and she was violently dragged outside and seriously injured.

This outline of the testimony sufficiently suggests the questions which, in accordance with our former holding, were rightfully ones for the jury to determine, under proper instructions by the court. Among them were these: Whether the window was legally used as a passageway by the employés, so that, under the law of Ohio, the defendant was guilty of negligence in not boxing the shaft and band wheel. Whether the window was, to the knowledge of the defendant, so used as a seat, required by the law of Ohio to be furnished female employés, as to impose upon the defendant the duty of making and keeping its locality safe for those using it. Whether the defendant, either as a matter of law or fact, was negligent in not boxing the shaft and band wheel. Whether the plaintiff, in view of all the circumstances, when she seated herself in the window, assumed the risk of her clothing coming in contact with the shaft and band wheel, or was guilty on her part of negligence which contributed in bringing about the accident.

These and the other questions raised in the case, were submitted by the court to the jury. The charge was exceptionally clear and fair. Aside from the fact that it submitted these leading questions to the jury, the criticism made of it is insubstantial. The requests refused, so far as they had merit, were fully covered by it. The criticism of the modification made in the fifth and sixth requests as given, does not appeal to us.

The court charged the jury as follows:

"And even if you find defendant was negligent in not boxing or covering the exposed shafting or band wheel, or in failing to warn plaintiff of the dangers arising therefrom, if you also find that the window was not a passageway, in the sense just explained, and that the danger to plaintiff of getting her skirt caught in the shafting was an open and obvious one, and would be apparent to an ordinarily prudent person of her age and experience, in the exercise of ordinary observation, then plaintiff, even if she did not at the time realize the danger, must be held to have assumed the risk of injury from this cause; and your verdict should be for the defendant."

The defendant below insists that in place of the words "an ordinarily prudent person of her age and experience, in the exercise of ordinary observation," the court should have inserted either "a person of ordinary intelligence," or "a person of ordinary common sense in the exercise of ordinary observation." We can perceive no difference in the meaning of these phrases which would warrant the reversal of the judgment and the sending back of this case for a new trial. If there was any difference, the defendant got the benefit of it; for the danger was more likely to be apparent to a person with some experience, however slight, than to one with none at all.

The other assignments of error do not seem to us to demand discussion. The case was fairly submitted, and, as we held before, it was properly one for the jury to determine.

The judgment is affirmed.

EATON et al. v. HOGE et al.

(Circuit Court of Appeals, Eighth Circuit. November 17, 1905.)

No. 2,282.

COURTS—JURISDICTION OF FEDERAL COURTS—AMOUNT IN DISPUTE.

In a suit by the several owners of water rights in a stream, joining as complainants for convenience only, to enjoin the obstruction of the stream or the diversion of water therefrom by defendants, the matter in dispute must exceed $2,000, exclusive of interest and costs, as to each complainant, to give a federal court jurisdiction.

[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.]

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

For opinion below, see 135 Fed. 411.

James W. McCreery, for appellants.

Nellis E. Corthell, for appellees.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

CARLAND, District Judge. Appellees commenced this action against the appellants in the court below for the purpose of restraining and enjoining appellants from setting up or asserting any claim, estate, or interest in and to the waters of Sand creek, or any part thereof, as against the appellees or any of them, and from obstructing and diverting, or in any manner interfering with, the natural flow of the waters of said creek. Appellees are citizens of the state of Wyoming. Appellants are citizens of the state of Colorado. The issue in said action was as to the validity of the water rights on Sand creek claimed by appellees, and as to their priority over the water rights claimed by appellants on said creek. The trial court, after a hearing upon pleadings and proofs, entered a final decree in behalf of appellees, enjoining and restraining appellants from setting up or asserting any claim, estate, or interest in or to the waters of Sand creek, or to any part thereof, as against the appellees or any of them, and from obstructing and diverting, or in any manner interfering with, the natural flow of the waters of said creek. It is alleged in the bill filed by appellees that they are owners of certain water rights along Sand creek, in the state of Wyoming, and the particular ditches through which each of the appellees received their water from said creek are mentioned and described, as well as the land which said water is used to irrigate. No one of the appellees has any interest whatever in the water right claimed, ditches used, or land irrigated by the other. They have a general interest in the principle to be established by the litigation, but the relief to be granted to each appellee is separate and independent from that to be granted any other appellee. The bill alleged that the matter in dispute exceeded, exclusive of interest and costs, the sum of $2,000. This allegation is denied by the answer of appellees. There is no allegation in

the bill as to the value of the matter in dispute in regard to the water right of each individual appellee. There is no competent or relevant testimony in the record as to the value of the matter in dispute, so far as the individual water right of any appellee is concerned. It is not claimed that appellants sought to appropriate or appropriated any of the waters of Sand creek prior to May, 1902. Testimony was introduced tending to show the flow of water in said creek from the year 1890 down to the date of filing of the bill in this case, which was November 8, 1902. Mr. Hoge when on the stand was asked the question:

"Q. During the time you have been acquainted with Sand creek from 1890, has there been sufficient supply of water flowing in the stream during the irrigating season to fulfill the needs of irrigation along that stream; these plaintiffs including yourself?

"A. I think not.

"Q. What has been the state of the supply of the water during the irrigating season in these years?

"A. Some years we have an abundance of water for irrigating through May and up to the middle of June. I have always irrigated up to even the 20th of July when I have the water. Some years I don't have any water."

Mr. Hoge also testified as to the average crop of hay on his place. Without any evidence in the record as to how much, if any, damage resulted to the crops of appellee by the taking of water out of Sand creek by appellants, Mr. Hoge was asked this question:

"Q. Could you make any estimate of the damage that would ensue on the deprivation of that water to these plaintiffs?

"A. It would be a very large amount extending into many thousands of dollars. The loss would be many thousands of dollars each year.

"Q. Would it be more than $2,000 each year?

"A. Yes; it would."

Counsel for appellants moved, when this testimony was offered, to strike out the last two questions on the ground that they were irrelevant and incompetent, and that no proper foundation for them had been laid, and because the answer called for was entirely speculative and not based on facts. This motion should have been granted for the reason that there was no evidence that the water taken by appellants out of Sand creek subsequent to May, 1902, caused the damage concerning which Mr. Hoge was testifying, and for the further and much better reasons that the action was not brought by appellees to recover any damages, and the evidence sought to be adduced was wholly irrelevant and incompetent upon the issue as to the value of the matter in dispute, whether the value of the matter in dispute was the combined interest of appellees or the interest of each individual appellee. The matter in dispute in this case is the individual water right of each appellee as affected by the relief prayed for. There is no competent evidence in the record upon this proposition. Smith v. Adams, 130 U. S. 175, 9 Sup. Ct. 566, 32 L. Ed. 895. Notwithstanding the question of jurisdiction was not raised by any assignment of error, we are compelled, by Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508], whenever it shall appear that a case before us does not really and substantially involve a dispute or controversy within our jurisdiction, to dis-

miss the suit. Minnesota v. Northern Securities Co., 194 U. S. 65, 24 Sup. Ct. 598, 48 L. Ed. 870; Steigleder v. McQuesten, 198 U. S. 141, 25 Sup. Ct. 616, 49 L. Ed. 986. Whether the jurisdiction of the court is dependent upon the citizenship of the parties, or whether the case is one arising under the Constitution and laws of the United States, the matter in dispute, exclusive of interest and costs, must exceed $2,000. U. S. v. Sayward, 160 U. S. 493, 16 Sup. Ct. 371, 40 L. Ed. 508; Act March 3, 1887, c. 373, § 7, 24 Stat. 555; Act Aug. 13, 1888, c. 866, 25 Stat. 437 [U. S. Comp. St. 1901, p. 579].

The rule relative to the value of the matter in dispute is thus stated by Mr. Justice Bradley in Clay v. Field, 138 U. S. 464, 479, 11 Sup. Ct. 425, 34 L. Ed. 1044:

"The general principle observed in all is that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone."

In this case the interests of appellees are distinct, and they are joined in the suit for the sake of convenience only. Therefore the matter in dispute must exceed $2,000, exclusive of interest and costs as to each appellee. This rule is well settled and established by the following decisions of the Supreme Court of the United States: Water v. Northeastern Railway Co., 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206; Northern Pacific Railway Co. v. Walker, 148 U. S. 391, 13 Sup. Ct. 650, 37 L. Ed. 494; Fishback v. Western Union Telegraph Co., 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630; Citizens' Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; Chamberlin v. Browning, 177 U. S. 605, 20 Sup. Ct. 820, 44 L. Ed. 906; North American Transportation & Trading Co. v. Morrison, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. Ed. 1061; Wheless v. St. Louis et al., 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583.

Upon the face of the record the Circuit Court was without jurisdiction, but as, perhaps, by amendment the bill might be retained as to some or all of the appellees, we will not direct its dismissal, but will reverse the decree of the Circuit Court at the costs of the appellees, and remand the cause to that court for further proceedings in conformity with this opinion; and it is so ordered. Act March 3, 1891, c. 517, § 10, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552]; Northern Pacific Railway Co. v. Walker, 148 U. S. 391, 13 Sup. Ct. 650, 37 L. Ed. 494.

DENVER & R. G. R. CO. v. ARRIGHI.

(Circuit Court of Appeals, Eighth Circuit. November 10, 1905.)

No. 2,227.

1. WRIT OF ERROR—EFFECT OF REVERSAL—RIGHT TO DIRECTED VERDICT.

The reversal of a judgment by an appellate court, on the ground that the trial court erred in refusing defendant's motion to direct a verdict in its favor, does not entitle defendant to a directed verdict on a second trial, unless the evidence is substantially the same.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4665.]

2. MASTER AND SERVANT—ACTION FOR INJURY OF BRAKEMAN—CONTRIBUTORY NEGLIGENCE.

The mere fact that a plaintiff, while employed as a brakeman by defendant railroad company, was injured in coupling cars with a link and pin coupling, used by defendant in violation of Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], creates no presumption that he was negligent, and unless his contributory negligence is conclusively shown by the evidence it is a question for the jury.

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

Arrighi sued the railroad company to recover damages for an injury to his hand, caused as he alleges by the negligence of the company in not equipping its cars as provided by section 2 of the act of Congress of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), relating to automatic couplers. In support of his case Arrighi introduced evidence, which was undisputed by the company, showing the following facts: While in the employ of the railway company as a switchman, and on the 19th day of November, at Salida, Colo., Arrighi was injured while endeavoring to effect a coupling of two narrow gauge freight cars, one of which was at the time employed in moving interstate traffic. Neither car was equipped with couplers coupling automatically by impact. The drawbars of each were equipped with link and pin couplings. It therefore became necessary for Arrighi to go between the ends of the cars in the performance of his duties. Arrighi entered the employ of the railroad company November 12, 1901, and the seven days intervening between this date and the date of his injury was all the experience he ever had with link and pin couplings and as switchman. He was 32 years of age and had worked for seven or eight years for the Rock Island Railway Company as brakeman on passenger trains, but said trains did not use the link and pin coupling. There was no defect in the coupling itself which contributed to the accident. Arrighi was the only witness who testified as to how he made the coupling. He testified upon this matter as follows: "I went over and set my pin on the coupling at the end of a string of cars that was standing still, then I stepped back and gave the signal for the engineer to come ahead for me to make my coupling. The link was in the moving car coming towards me. I took hold of the link as the car approached to guide it, and when I got the link in the coupling my hand was caught, and I could not possibly get my hand out. I tried to get my hand out at the earliest time possible. It was necessary to raise the link in order to have it go into the drawhead on the standing car." There was no evidence whatever that Arrighi was in any wise negligent in the way he made the coupling unless the fact that he was injured is such evidence. Upon this state of facts the railroad company moved the trial court at the close of plaintiff's evidence to direct the jury to return a verdict in its favor, which motion was refused, and an exception taken to such ruling.

William W. Field (Joel F. Vaile and Charles W. Waterman, on the brief), for plaintiff in error.

William L. Dayton and Harvey Riddell, for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

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

This case was before this court on writ of error at a previous term of this court, and the judgment therein was reversed and a new trial ordered. Denver & R. G. R. Co. v. Arrighi, 129 Fed. 347, 63 C. C. A. 649. A new trial having been had, the case is again here on exception to the ruling of the trial court in refusing to direct a verdict for the railroad company. At the prior hearing of the case this court was of the opinion that a verdict ought to have been directed for the railroad company on account of the contributory negligence of the defendant in error. If the facts shown by the present record are the same as on the former hearing, the decision then made is the law of the case, and the judgment now sought to be reviewed must be reversed in accordance therewith. The evidence introduced at the first trial is not before us, except as it appears from the opinion of the court. We are convinced from an examination of the opinion that the evidence introduced at the second trial could not have been the same as that introduced on the first for the following reasons: It is stated in the opinion that Arrighi was thoroughly acquainted with the link and pin coupling. This fact does not appear in the record in this case. It is stated in the opinion that Arrighi adopted the most dangerous method of performing his duty. This fact does not appear in the record now under consideration. From all that now appears in the record he adopted the only way practicable to make the coupling. It is stated in the opinion that it did not appear that Arrighi ever made any effort to remove his hand. It appears in this record that he withdrew his hand as soon as possible. We therefore are of the opinion that we are not concluded by the judgment rendered when the case was first here.

Two grounds are seriously urged by the counsel for plaintiff in error why the judgment below should be reversed: First. That the decision of this court on the first writ of error absolutely entitled the plaintiff in error to a directed verdict in its favor. Second. That the evidence on the second trial affirmatively shows that Arrighi's injuries resulted from his own contributory negligence and not proximately from the failure of the railroad company to equip its cars with automatic couplers as prescribed by Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]. The first point for the reasons heretofore stated we do not think well taken. The decision of the second point requires an examination of the evidence now before us. The act of negligence alleged against the company is not disputed, but it is urged that the evidence shows that Arrighi's want of ordinary care in making the coupling was the proximate cause of his injury and not the negligence of the railroad company.

The position of counsel for the railroad company may be stated thus: The trial court and this court must take judicial notice that thousands of couplings were made daily with link and pin couplers when they were in use without injury to the person making the same. Therefore, in a case like the one at bar, where the counsel for the company can point to no act of negligence on the part of Arrighi, the court must presume as matter of law that he was negligent because he was injured; there being nothing in the evidence to show that he was prevented in any manner from exercising ordinary care in making the coupling. If the court could take judicial notice that no man exercising ordinary care was ever injured in making couplings with link and pin, then there would be force in the position of counsel for the railroad company, but judicial notice is a two-edged sword in this case. If, on the one hand, the court shall judicially take notice that thousands of couplings were daily made with link and pin when they were in use without injury to the person making the same, we may also take judicial notice that the use of link and pin couplers are so inherently dangerous to life and limb that the attention of Congress was repeatedly called to the fact by the President and legislation urged to remedy the evil. 9 Messages and Papers of the Presidents, p. 51. The act under which Arrighi brings this action was the answer Congress made to the demand made upon it. We cannot presume that Congress legislated in order to protect careless and negligent employés alone; on the contrary, we must presume that Congress legislated because it was well known that employés in the exercise of ordinary care were continually being injured by the use of the link and pin coupler on account of its inherent danger. We conclude, therefore, that the mere fact that Arrighi was injured created no presumption against him, and that it was for the jury to say whether he exercised ordinary care in making the coupling. Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Northern Pacific v. Tynan, 119 Fed. 288, 56 C. C. A. 192; St. Louis I. M. & S. Ry. Co. v. Leftwich, 117 Fed. 228, 54 C. C. A. 1; Choctaw, O. & G. Ry. Co. v. Tennessee, 116 Fed. 23, 53 C. C. A. 497.

Other errors assigned have been considered and found to be without merit. The judgment of the trial court must be affirmed, and it is so ordered.

CITY OF DENVER v. BARBER ASPHALT PAVING CO.

BARBER ASPHALT PAVING CO. v. CITY OF DENVER.

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

Nos. 2,247, 2,252.

INTEREST—TIME FROM WHICH INTEREST RUNS—COLORADO STATUTE.

Mills' Ann. St. Colo. § 2252, which provides that "creditors shall be allowed to receive interest when there is no agreement as to the rate thereof at the rate of eight per centum per annum for all moneys after they become due, * * *" is mandatory in an action at law to recover for labor performed and materials furnished, and requires the allowance of interest

at the statutory rate from the date of demand of payment, and the court cannot, as in equity cases, take into consideration the laches of plaintiff in bringing suit.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Interest, §§ 95–105.]

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

Henry A. Lindsley and Halsted L. Ritter, for city of Denver.

Thomas H. Hardcastle, for Barber Asphalt Paving Co.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

PHILIPS, District Judge. In 1890 and 1891 the city of Denver entered into contracts with the Barber Asphalt Paving Company for the paving of certain streets. The contracts contained a stipulation that the contractor should keep in repair, at its own expense, the pavings for a period of five years next after the acceptance of said work by the city. The work was done by the said paving company and accepted by the city. In June, 1896, a short time before the expiration of the five years' period, the paving company was notified by the city engineer that certain of said streets were out of repair, demanding that it repair the same in compliance with the stipulation of said contract. The paving company asserted that only a small per cent. of the repairs called for was due to ordinary wear and tear, and that most of the damage to the pavement was caused by leaking gas from the mains of the Denver Consolidated Gas Company underlying the pavement, and also by reason of steam from the Denver Steam Heating Company, whose pipes ran under the pavement, and declined to make these repairs until provision should be made for the payment of the cost of the same. After considerable correspondence between the parties a resolution was passed by the board of public works under which the Barber Asphalt Paving Company made the repairs. The paving company and the city being unable to agree upon how much of this work of repair came within the terms of said resolution, suit was instituted on July 25, 1902, in the United States Circuit Court for the District of Colorado, by the paving company against the city to recover for said repairs. To this action the city interposed a general denial, and also raised question as to the legality and authority of the contract under which the work was done, especially insisting upon a provision of the city charter to the effect that no officer of the city should have authority to impose upon the city any liability to pay money until a definite amount of money had been appropriated therefor.

The court found the issues for the plaintiff, and rendered judgment in its favor for $4,752.71. In its opinion the court, inter alia, said:

"It seems that the plaintiff is entitled to recover in the suit. There is a specific amount named in the complaint which I understand to be that which was found to be due for these repairs. The plaintiff claims interest from September, 1896. I think there was unreasonable delay in bringing the suit, and therefore interest will be not allowed except from date of suit, which was July 25, 1902. The clerk may compute the interest and enter judgment accordingly."

The city of Denver sued out writ of error to reverse this judgment; and the Barber Asphalt Paving Company sued out a cross-writ of error, complaining of the action of the trial court in allowing interest on the amount recovered only from the date of the institution of the suit, instead of from the date of the demand of payment for the work done. The city of Denver did not press its writ of error before this court, but abandoned the same.

The only question, therefore, to be decided is did the circuit court err in not allowing the cross-plaintiff in error interest on its claim from the date of demand, which is conceded to be the 1st day of October, 1896?

This question is controlled by the statute of the state of Colorado and the construction placed thereon by the Supreme Court. Section 2252, Mills' Ann. St., in force at the time of this transaction, is as follows:

"Creditors shall be allowed to receive interest when there is no agreement as to the rate thereof, at the rate of eight per centum per annum, for all moneys after they become due, on any bond, bill, promissory note, or other instrument of writing, or on any judgment recovered before any court or magistrate authorized to enter up the same within this state, from the date of entering up said judgment until satisfaction thereof be made; also, on money due on mutual settlement of accounts from the date of such settlement on money due on account from the date when the same became due, and on money received to the use of another and detained without the owner's knowledge."

Interest is a compensation for the use of money for its detention; and, under the rulings of the Supreme Court of Colorado, interest, whether as damages or under the statute, must be given from the date of the demand of payment for labor performed and materials furnished. Omaha & Grant Smelting Company v. Tabor, 13 Colo. 41–58, 21 Pac. 925, 5 L. R. A. 236, 16 Am. St. Rep. 185; Bergundthal v. Bailey, 15 Colo. 257, 25 Pac. 86; Mine & Smelter Supply Company v. Parke & Lacy Company, 107 Fed. 881, 47 C. C. A. 34.

This being an action at law on a contract for work done and materials furnished, the statutory provision respecting the allowance of interest is mandatory. It leaves no discretion in the court to take into consideration, as in equity cases, the laches of the demandant in bringing the suit. The demand made upon the defendant city on October 1, 1896, after the completion of the work, put it in default. And as by the decision and judgment of the Circuit Court it wrongfully withheld the amount found to be due and owing, the statute rules the case.

The case must therefore be remanded, with directions to the Circuit Court to set aside and vacate so much of the judgment as allowed interest only from the 25th day of July, 1902, and enter a judgment allowing the statutory interest at the rate of 8 per cent. per annum on the sum found to be due from the 1st day of October, 1896.

A. KLIPSTEIN & CO. v. GRANT et al.

(Circuit Court of Appeals, Fifth Circuit. December 5, 1905.)

No. 1,488.

ELECTION OF REMEDIES—ACTS CONSTITUTING ELECTION—BRINGING OF SUIT.

Where a party has two remedies inconsistent with each other, the bringing and prosecution of a suit based on one theory, with knowledge of his rights and of the facts, is an election of such remedy, and he cannot thereafter maintain a suit to enforce the alternative remedy.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Election of Remedies, § 12.]

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

The following is the opinion of Newman, District Judge, in the Circuit Court:

I am satisfied that this bill must be dismissed, for the reason that complainants have already sought a remedy which is entirely inconsistent with the one they now seek. The suit which is shown by the pleadings to have been heretofore brought and prosecuted to a conclusion by Klipstein & Co. in the Circuit Court was upon the theory of the ratification of a sale by C. L. Allen to the Allen-Miles Company. The present proceeding is entirely inconsistent with the position taken in the former suit. The correct rule of law as I understand it on the subject is stated in 7 Encyc. Pl. & Pr. pp. 362, 363, 364. The election of a remedy is considered by the authorities to be complete when suit is brought; certainly it is complete when carried to a conclusion. In Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52, the rule is stated in the syllabus in this way: "When a party has two remedies, inconsistent with each other, any decisive act by him, done with knowledge of his rights and of the facts, determines his election of his remedy." In the opinion, after quoting a number of authorities, the following occurs: "The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies." In this case of Robb v. Vos is a quotation from the opinion in Thompson v. Howard, 31 Mich. 309, 312, as follows: "A man may not take contradictory positions; and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again." The same doctrine is laid down in Bacon & Company v. Moody, 117 Ga. 207, 43 S. E. 482. For this reason the bill cannot be maintained.

I entertained some doubt, as was expressed at the hearing, and I still have some, as to whether the Allen-Miles Company should not have been made a party to this proceeding, and as to whether the case could properly proceed in the Circuit Court, instead of on the equity side of the bankruptcy court. But this matter need not be considered in view of the opinion entertained, as expressed above, on the merits of the proceeding.

A decree may be taken dismissing the bill.

On Motion for Rehearing.

This is a motion for a rehearing in a case disposed of by an opinion of the court filed April 22, 1905. The motion for a rehearing must be denied. Even if there be merit in the claim that ignorance of the fact that Klipstein & Co. had been, as to the larger part of their indebtedness, omitted from the list of indebtedness of C. L. Allen, assumed by the Allen-Miles Company, relieved Klipstein & Co. from the legal effect of the election made in bringing the action at law against C. L. Allen and the Allen-Miles Company, still it seems to me

that the fact that Klipstein & Co. through their counsel obtained such knowledge during the pendency of the suit at law, and then prosecuted that suit to a conclusion, would have the same effect. But, be that as it may, it may be proper to say now that, even if the doctrine of election of remedies did not control in this case, the bill and everything stated in it is insufficient to justify the court in making a decree setting aside the contract between C. L. Allen and the Allen-Miles Company. It does not appear that any fraud in this matter was perpetrated upon any one. Allen apparently put all his business assets into the Allen-Miles Company and received full value in stock of that company and stock in proportion to the amount put in by Miles. If the consolidation of the business of Allen and Miles into the Allen-Miles Company was made to defraud creditors, this record fails to show it. The fact that Klipstein's debt was put at $1,225.10 appears to have been due to the fact that the list of creditors was made in May, when the debts seems to have been that amount. No fraudulent intent or purpose as against Klipstein & Co. is shown. If the intention of the Allen-Miles Company really was to assume the entire indebtedness of Klipstein & Co., the remedy would seem to have been in that direction rather than in the one now attempted to be pursued.

I do not think the bill states a case to justify the rescission of the contract between Allen and the Allen-Miles Company, even as to Klipstein & Co., and consequently, independently of any other consideration as to whether the present proceeding is a proper one or not, it would be doing a useless work to grant a rehearing and allow an amendment, when even as thus amended the bill would not state a case justifying the relief asked. The motion for a rehearing will be denied.

Henry A. Alexander and Shepard Bryan, for appellant.

Benj. F. Abbott, C. P. Goree, Jno. M. Slaton, Benj. Z. Phillips, L. Z. Rosser, and Morris Brandon, for appellees.

Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. The decree appealed from seems to be in all respects just and correct, and it is therefore affirmed.

JOHNSON et al. v. FOOS MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. November 29, 1905. On Rehearing, January 31, 1906.)

No. 1,418.

1. PATENTS—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

The fact that a defendant, sued for infringement of a patent by making and selling the patented machine, has made and sold but one such machine, and that pending the suit the purchaser was licensed by complainant, does not deprive a court of equity of jurisdiction to award an injunction, unless it further appears clearly that there is no reason to apprehend the making by defendant of other infringing machines.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 492.]

2. SAME—INFRINGEMENT—SALE OF PARTS OF COMBINATION.

Where all the parts of a patented combination were old, and the only invention is in their new arrangement, one who makes and sells the old parts is not chargeable with infringement, provided it was done with no purpose to contribute to plans of another intending an infringement by combining such parts in accordance with the patent.

3. SAME—SUIT FOR INFRINGEMENT—DISCLAIMER OF INTENTION TO INFRINGE IN FUTURE.

The assertion in the answer of a defendant, sued for infringement of a right to make the devices complained of as an infringement, in the absence of a very express denial of a purpose to exercise the right claimed, justifies the presumption that further infringement is to be apprehended, if that device shall prove to be an infringement, and the coupling with such assertion of a general averment that defendant does not intend to employ the patented device or to interfere with the rights of complainant cannot be construed as a disclaimer of an intention to continue to make the infringing device.

4. SAME—VALIDITY AND INFRINGEMENT—PROCESS AND MACHINE FOR DELINTING COTTON SEED AND HULLS.

The Johnson patent, No. 506,268, for a process and apparatus for separating cotton seed and hulls from the fiber adhering thereto after ginning, was not anticipated, and discloses invention as to the process claim; but the mechanical claim, as well as patent No. 654,550, to the same patentee for improvements thereon, is void for lack of patentable invention, being for an aggregation of old parts, each of which performs its old function. The process claim of patent No. 506,268 also *held* infringed by defendant, which built and sold apparatus adapted and intended to be employed to practice such process, and thereby contributed to infringement by the user.

On Rehearing.

5. SAME—COSTS.

Rev. St. §§ 973, 4922 [U. S. Comp. St. 1901, pp. 703, 3396], which provide that a plaintiff or complainant recovering judgment or decree for infringement of part of a patent shall not recover costs, where the claims of the patent were too broad and no disclaimer was entered before suit, do not apply to the costs in an appellate court, where the decree below dismissing the suit is found erroneous, and the complainant was compelled to appeal to obtain the relief to which he was entitled.

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

W. R. Wood and R. H. Parkinson, for appellant.

H. A. Toulmin and W. A. Scott, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is a bill to restrain infringement of two patents granted to W. C. Johnson. The first is for certain "improvements in processes of an apparatus for treating cotton seed and hulls," and the second for "improvements in means for separating the fiber from cotton-seed hulls." The first patent was issued December 11, 1894, and bears the serial No. 506,268, the second is No. 654,550, and was issued October 25, 1898. The cause came on to be heard in the court below upon the pleadings, exhibits, and a voluminous book of evidence, but the trial judge, without passing upon the merits of the ease, dismissed the bill because he thought that the single machine made, sold, and installed by the defendant company had been subsequently licensed by complainant, upon the user agreeing to pay a royalty, and that no further infringement was threatened. The remedy at law he therefore held to be adequate to recover damages for the single infringement averred to have occurred before the bill was filed and no case made requiring an injunction against further infringement. This

result the learned trial court rested upon the authority of Woodmanse & Hewitt Mfg. Co. v. Williams, 68 Fed. 489, 492, 15 C. C. A. 520, 524, where this court said:

"The ground upon which a court of equity will take cognizance of a suit for an infringement of a patent is the relief through an injunction. There is nothing so peculiar to a suit for damages and profits for infringement of a patent as will, independently of some recognized ground of equitable jurisdiction, justify a court of chancery in assuming jurisdiction. It must appear that the legal remedy at law is inadequate, and if the case is one in which equitable relief by injunction is inappropriate, as where the patent has expired, or where the circumstances are such as to justify a court in refusing equitable relief, the suit will not be entertained for the mere purpose of an account of past damages and profits. Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975; McLaughlin v. Railway Co. (C. C.) 21 Fed. 574; Clark v. Wooster, 119 U. S. 325, 7 Sup. Ct. 217, 30 L. Ed. 392."

The principle there stated is perfectly sound, but, as we think, not applicable to the facts of this case. It is true enough that no injunction can go against the further use of the machine alleged to infringe which was made and set up at Memphis, Tenn., for the Southern Cotton Oil Company in October, 1899, because the buyer of that machine, upon notice from complainants, obtained a license and agreed to pay royalty. But independently of the fact that a patentee may not enjoin his own licensee, an injunction against one charged to have made and sold an infringing device would not operate to enjoin a buyer or user of an infringing device without joining him in the suit or otherwise seeking relief directly against him as an infringer.

We can also agree with the Circuit Court that a single infringement by making and selling a single infringing machine would not justify the interposition of a court of equity for the purpose of restraining further infringement by the making and sale of other infringing machines, if it appeared clearly that there was no reason to apprehend any further infringement. But that is not this case. The principal parts of the machinery constituting the machine of the complainant's patent had been made by the Foos Manufacturing Company, the defendant in this case. Both Mr. Robert H. Foos and Mr. Winchell of that company had visited the complainant's plant at Memphis, and had been consulted about certain matters connected with the operation of the machinery. It may as well be said here as later that all of the parts composing the apparatus covered by the claims of the two Johnson patents were old. The novelty, if any, consists in the combination and new and useful results thereby accomplished. The arrangement of the different parts was therefore of the essence of the invention, and the Foos Company had a legal right to continue to make and sell attrition mills and other parts of the mechanism which were old, provided only that they did so with no purpose to contribute to the plans of one intending an infringement by combining the parts. Heaton Peninsular Button Co. v. Eureka Mfg. Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 26 C. C. A. 107; German Am. Filter Co. v. Loew Filter Co. (C. C.) 103 Fed. 303; Loew Filter Co. v. German Am. Filter Co., 107 Fed. 949, 47 C. C. A. 94.

The claims of the first Johnson patent cover both a process and an

apparatus. The Foos Company is charged, not simply with having made and sold attrition mills and separators to the Southern Cotton Oil Company, but that they made and combined these and other parts according to a plan which was intended to employ the process of the patent and which infringed the mechanical claims of the Johnson patents as well. For the purpose of this branch of the case we shall assume that the apparatus thus installed, combined, and put in operation was an infringement of the patents owned by complainants. That Mr. Foos and Mr. Winchell of the Foos Company were familiar with the arrangement and mode of operation in the mill of the complainants is satisfactorily established. Thus under date of March 25, 1895, the defendant wrote as follows:

"Tennessee Fiber Company, Memphis, Tenn.—Dear Sirs: We note yours of the 22nd and are pleased to note your faith in both Mr. Winchell and the mills. We are quite sure, now that he has seen you and the machines in operation, that everything will be all right as soon as we get the pulleys. We will crowd the work to the utmost, and hope to make shipment in a very short time. As they are ordered, it will require some special work, which necessarily makes more delay than the ordinary run of stock.

"Yours truly, Foos Manufacturing Co., H. S. B."

Subsequently complainants heard something of a purpose by defendants to put up similar machinery for others, and therefore wrote about it. To this the defendant replied under date July 8, 1895:

"Tennessee Fiber Company, Memphis, Tenn.—Gentlemen: We note yours of the 6th, and cannot make any definite answer, as our Mr. Winchell is in Texas at present; but we will communicate with him and advise you just as soon as we can get word. We can assure you, however, that there is some misunderstanding, as Mr. W. we know appreciates the value of your combination, and would do nothing that would interfere in any way with your plans, knowing as he does that our interests are just the other way. You appreciate this of course. We hope to be able to write you more definitely upon the subject in a few days.

"Yours truly, Foos Manufacturing Company, H. S. B."

The admission of appreciation of the value of the "complainant's combination" and promise not to interfere with their plans is significant. In June, 1899, complainants wrote to defendant company, in which, among other things, they said:

"We understand that Memphis parties are figuring with you for machines similar to ours, for the purpose of making fiber and bran from cotton seed hulls. We are perfectly willing to give these parties the use of our patents and the benefit of our experience on payment of a fair royalty for the same. We will very promptly prosecute any infringements of our patent rights. We do not wish to make you any trouble, and would warn you against making or selling any machines to be used in our process. We have kept your Mr. Foos posted as to the developments of this business and he has had our assurance that we would push same as fast as we saw that it could be done profitably, and that we would use your mills. We are now in a position where we will either double the capacity of our plant or build for some one else a similar plant, and we will soon be in a position to figure with you, provided, of course, you respect our patents and the confidence we have always reposed in you as to the development of this business.

"Yours very truly, [Signature not copied.]"

To this the defendants replied as follows:

"Mr. W. C. Johnson, General Manager Tennessee Fiber Company, Memphis, Tenn.—Dear Sir: We have yours of the 6th inst. with order for two sets of plates with bolts, and same shall have our prompt and careful attention. We note what you say in regard to parties at Memphis who are figuring on mills for grinding cotton-seed hulls, and in reply would state that such is the fact. Our business, you understand, is the manufacture and sale of machinery, and it would be impossible for us to dictate for what purpose or how such machinery was to be used. You certainly cannot expect us to decline to sell our machinery to anyone who might give us an order for same. We are rather surprised at your statement that you have kept the writer posted as to the development of your business, and think you must have some one else in mind. The fact is that, while he has called at your office quite a number of times during the last five years, he has never been inside of your plant, except once, and that was soon after you started and remembers very little, of anything, about your system which you stated to him the last time he saw you was now entirely different from what it was then. Further than this, we know nothing as to your method or system of doing this work nor have you ever imparted to us any information on the subject. If there is going to be any business in this line, we of course would like to have it, and would be pleased to figure with you when you are ready to place your order for more mills; but at the same time you can hardly expect us to decline to furnish mills to other parties if they should favor us with their orders. You can rest assured, however, that we will not knowingly disregard your patents so far as they cover your system and method for doing this work, or betraying any confidence you may impose in us. The writer will possibly be in Memphis some time this summer, and will be pleased to talk with you further on this subject.

"Very truly yours, The Foos Manufacturing Company,
"Robert H. Foos, Vice President."

During the summer and fall of 1899 the defendants did set up for the Southern Cotton Oil Company machinery which we for the present must assume infringed the Johnson patent. Touching this plant Mr. Johnson testifies to an interview with Mr. Foos, vice president:

"Q. Did you, after the correspondence with the Foos Manufacturing Company, referred to in your testimony, have any personal discussion with its representative regarding the controversy? and, if so, please state with whom and what the attitude taken was. (Objected to as immaterial.) A. Yes, sir. Mr. Robt. H. Foos, representing the Foos Manufacturing Company, was in the office of the Tennessee Fiber Company after they had sold machinery and started operation of the Southern Cotton Oil Company's cotton-seed hull plant. I said to Mr. Foos that he had infringed our patents, and that he had committed a breach of good faith with us in putting these people into the business, and I took occasion to formally notify him that we would sue him for the infringement of our patents. He replied that the patents were not worth the paper they were written on, and he expected to put in similar plants throughout the South, that he had waited long enough on us to develop the business, and that he expected to push it himself wherever anyone would purchase machinery from him. Q. Did Mr. Foos upon that occasion either admit or deny that the said plant installed at the Southern Cotton Oil Company's place of business here was designed and constructed and erected by the Foos Manufacturing Company? A. Yes, sir; he admitted that he had done this, said that he had no objection, if the Southern Cotton Oil Company would permit it, to our seeing his machines in operation. He openly defied us in our patents, saying that, if we could make the same hold, we undoubtedly had a good thing, but he was not going to wait on us any longer."

This denial of the validity of complainant's patents and threat to place similar plants to that complained of through the South is not denied

by Mr. Foos in any evidence to which our attention has been called. The plant for the Southern Cotton Oil Company was finally installed October, 1899. Instead of suing that company as a purchaser and user, the complainants settled with it by giving them a license upon a contract for a royalty. In February they filed this bill against the Foos Company.

The answer was filed June following. The solicitors for the appellees have insisted that this answer is a disclaimer of any intent to further infringe. After denying the validity of the complainant's patents, that Johnson was the original inventor, that the invention was patentable, or, if valid, that complainants owned the patents, it most vigorously denies all infringement. The only paragraph which bears in any way upon respondent's future intentions follows this interposition of every possible defense in a patent case, and reads as follows:

"Respondent denies that it has made, used, sold, or employed machines for treating cotton-seed hulls such as contained and referred to in said letters patent sued on, or in either of them; and denies that it has infringed either or both of the said letters patent by making, or using, or selling any machine whatsoever, or by employing or authorizing the use or employment of any process whatsoever contained in, or covered by, either or both of said letters patent; and denies the infringement wherewith it is charged in and by said bill of complaint; and denies that it has caused, or is threatening to cause, the complainants any loss, damage or injury, irreparable or otherwise, and denies that the alleged letters patent embody alleged inventions capable of conjoint use; and denies that it has conjointly or severally made, used, or sold or employed the machines or process attempted to be covered in and by the patents sued on, or either of them; and denies that it has prepared, is preparing, or intends in anywise, to employ either or both of said alleged inventions, or in anywise to interfere with any of the alleged rights of complainants."

This is followed by a paragraph in these words:

"Respondent, further denying the charge of infringement, avers the fact to be that respondent has erected but one machine or apparatus, and that for practicing the old and well-known art of treating cotton-seed hulls to make a paper stock from the lint and an animal feed of the hulls, and that this one machine, which respondent furnished to third parties, has since been in part dismantled and re-organized by said third parties of their own volition and will, without the concurrence, assent, co-operation, and wishes of the complainants acting in concert with and at the suggestion, or with the permission, of said third parties; and, further, that said one machine of respondents, aside from novel details, was built and operated upon the disclosures and teachings of the prior art, as the same existed and was taught by the practices, publications, illustrations, and printed writings of others at various dates long prior to the alleged inventions embodied in either or both of the patents sued on."

The averment that it is not employing or intending "to employ either or both of said alleged inventions," or in anywise "to interfere with any of the alleged rights of complainants," cannot be construed as a disclaimer of the purpose or intent to duplicate the machines theretofore made and set up for the Southern Cotton Oil Company. If, as the answer avers, these machines do not infringe, and were built according to the practice and teaching of the old art, why should they desist? If respondents had intended to disclaim any purpose to make or sell any more of the devices averred to be infringing devices whether infringements or not, and thus escape the jurisdiction of a court of

equity, their answer should have frankly so stated. Reading the answer as a whole the disclaimer of any purpose to infringe must be understood as not estopping them from supplying just such devices as they had before made; that plant, from their point of view, not being an infringement.

It is immaterial that pending the litigation there has been no further infringement. Whether there has been or not is only a matter for consideration if an accounting for damages shall be ordered. They have never put upon the record their purpose not to duplicate the device which they did make, nor contradicted the evidence that they intended to continue to make and sell such devices. The assertion of a right to make the devices complained of as an infringement, in the absence of a very express denial of a purpose to exercise the right claimed, justifies the presumption that further infringement is to be apprehended if that device shall prove to be an infringement. Cayuta Wheel Co. v. Kennedy Valve Co. (C. C.) 127 Fed. 355; Westinghouse Machine Co. v. Press Pub. Co. (C. C.) 127 Fed. 822, 827; Potter v. Crowell, Fed. Cas. No. 11,323. The case is distinguishable from that of the Globe-Wernicke Co. v. Brown & Besley, 121 Fed. 91, 57 C. C. A. 434, in the fact that an intention to continue to make and sell the devices complained of was avowed before suit was brought, and is not disavowed upon the record.

This brings us to a consideration of the validity of the first patent to W. C. Johnson issued December 11, 1894. Two claims, the first and second, are involved. The first is for a process for treating cotton-seed hulls, and the second is for an apparatus in which the process may be employed. After the process of ginning for the elimination of the cotton has been concluded there remains the cotton seed. The pulp or inner substance of the seed contains a valuable vegetable oil, which is extracted by the separation of the pulp from its hull and the extraction of the oil by heat and compression. After the oil has been extracted there remains a product which, ground into a meal, constitutes a rich food for cattle. After saving the cotton by ginning, and the oil and meal inclosed within a woody capsule, there remains the cotton-seed hulls.

This patent deals with the problem of separating the woody hull from a fine cotton fiber which surrounds and is attached to the hull. The presence or absence of kernels in the hulls does not affect the problem. Hence the inventor sometimes speaks of the material with which his invention has to deal as cotton seed and hulls. In fact, the hulls as supplied by the oil mills contain some seed, and his problem involved the handling of both the seed and the empty hulls. The hulls or capsules themselves, if ground into a bran and freed from the short, fine fiber adhering after ginning, constitute a very useful cattle food, and, when mixed with cotton-seed meal, a still more nutritious and valuable cattle food. This adhering cotton fiber, when separated from the capsule, is a valuable stock in the manufacture of paper, as a substitute for rags. The Johnson patent deals with the problem of the separation of the hull from its fiber, so as to leave a bran substantially free from fiber, and a fiber substantially free from bran, without injury to either.

That the process of the patent and the apparatus devised for the employment of the process accomplishes this result better and cheaper than any method or apparatus before known or used is abundantly established by the evidence. The evidence shows that the plant constructed and operated by the Tennessee Cotton Fiber Company of Memphis, Tenn., is successfully handling 24 tons of hulls per day, and is deriving, approximately, from this daily consumption 8 tons of fiber and 16 tons of bran. That Johnson was not the first to realize the value of these by-products of the cotton seed must be conceded. That he was not the first to make a bran partially free from fiber, and a fiber comparatively free from bran, must be also conceded. That he was the first to discover a process and devise an apparatus by which these cheap products could be produced in the best condition of each and at such low cost as to be commercially valuable is clearly shown by the evidence in the transcript. There remains therefore only the question as to whether his process and apparatus or either are novel and patentable.

First as to the process. Prior to Johnson's there were several methods for eliminating the lint from cotton hulls. One of the best known and most used was that of destroying the hulls by chemical agents which did not injure the cotton fiber. This involved a sacrifice of more than half the value of the raw material, and made the cost of the method altogether too great for commercial purposes. There can, of course, be no anticipation of Johnson's method, which was purely mechanical, by one which involved chemical agencies alone. Another method somewhat well known was that best shown by the patents to Emil Bohn of Galveston, Tex., being patents No. 437,084, issued September 23, 1890, and No. 438,984, issued October 21, 1890; the first being for a method, and the second for apparatus. Bohn's plan was to comminute the hull, including the fiber, force this commingled mass of hull and fiber through a screen for the purpose of separating the coarser parts of the hull with their still adhering fiber, and a recovery of such fiber as passed through the screen or separator by an air blast. The comminution of the hulls and fiber was accomplished by a grinding cylinder armed with a series of "sharp knife-like ribs," operating against a "series of knives" in the incasing cylinder. Bohn, in his process specification, says:

"In carrying out the invention the cotton-seed hulls and adherent fiber are introduced into a mill, A, and ground until the hulls and fiber are practically separated and reduced to comparatively small particles."

This mass of comminuted hulls and fiber is then carried in a confined chute to a screen, through which the finer particles are forced and then acted upon by an air blast; the theory being that the fine particles of fiber will be carried further by the air suction, the particles of hull as the heavier particles dropping by gravity into the first receptacle, while the lighter will be floated on to the second. The coarser particles which were not forced through the screen constitute what Bohn called "a marketable article of second grade." The material deposited by gravity in his first receptacle consists, says the patent, "principally of hulls and constitutes an article of food for stock." That which reached his second receptacle he says "consists of very fine particles of hulls and fiber and constitute the first-grade article." Bohn's

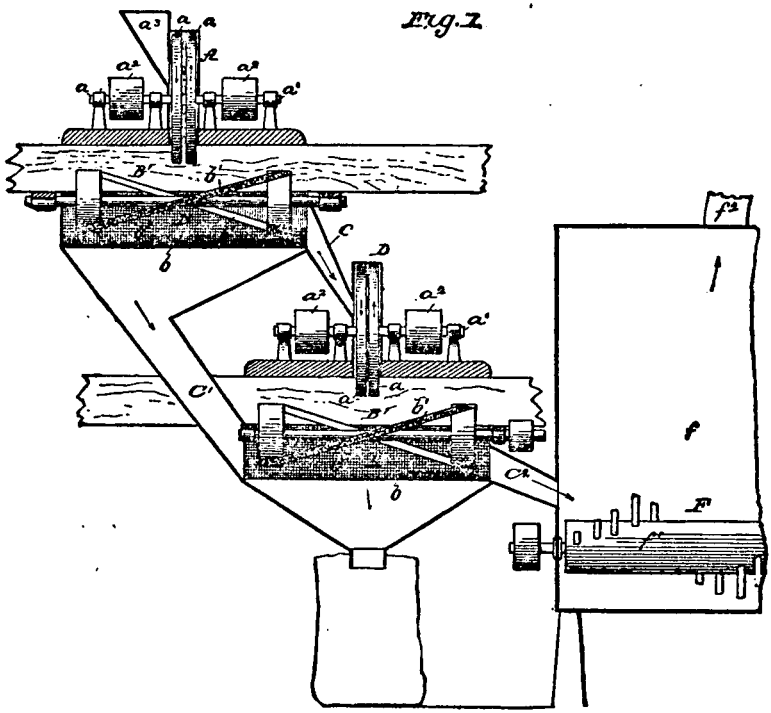
method and apparatus were employed by W. C. Johnson before he made his own discovery under the personal direction of Bohn. It was not a successful or commercially valuable experiment. The particles not passing through his screen, because of their coarseness, contained an excess of fiber, which, as fiber, was wasted and was injurious to the bran as a cattle food. His second-grade stuff was of little value as paper stock because it contained too much bran, and because the fiber was so comminuted by the grinding process as to be of less value as a paper stock than if saved as a larger fiber. From a ton of seed his average product was about 200 pounds of his "first-grade" fiber, and this, on account of the shortness of the fiber, was of diminished value.

The method of the patents to Burnett, Sears & Burnham of 1888 and 1890, being patents Nos. 380,087 and 440,259, is somewhat analogous to that of Bohn and encountered the same difficulties. Cotton seed or cotton-seed hulls were fed into a perforated cylinder in which a shaft revolved at high speed, armed with wings or beaters. The material is driven by these beaters with great force against the perforated walls of the cylinder by the centrifugal force of the rapidly rotating beaters, and the fiber, eliminated by the friction of the hulls against the rough walls of the cylinder and against each other, is forced through the meshes of the cylinder, together with the finer parts of the hulls. The particles of hulls are supposed to fall by gravity to the bottom of the chamber while the particles of fiber are floated by an air blast to another place of deposit. The method upon principle does not differ materially from that of Bohn. There is the same comminution of hulls and fiber. This mass is forced through the meshes of a perforated cylinder, which answers to the screen of Bohn, and a separation of those particles which get through by gravity; the lighter particles of fiber being carried farthest by a current of air. This method was used under remarkably favorable circumstances by the American Stock Food & Fiber Company at St. Louis. The product was subject to the same objections as that produced by Bohn. Neither constituent was separated in its best condition.

The plan was abandoned for another. That substituted for it was the method of the patent of J. P. Burnham of July 31, 1894, No. 431,391. This patent recognizes upon its face that the utility of the cotton fiber from cotton hulls is largely destroyed if the already short fibers of the lint are further shortened or ground up in the process of recovering them, and that the value of the hulls is also diminished if they are too finely ground up and the cotton lint not cleanly removed. To accomplish the separation without injury to either, Burnham avoided all grinding of hull or fiber and undertook to break or eliminate the lint from the hull by centrifugal action. It did not prove a commercial success, for the St. Louis concern soon ceased to do business and sold its plant to others, who did nothing with it. Under the Burnham process the hulls were not converted into bran, or, if so, by an independent and subsequent operation, for under his plan the lint was to be separated from the unground or unbroken hulls by a process of attrition which was not intended to break them up at all. The method of Burnham, whether workable or not, was not the process of Johnson, and his patent

is not an anticipating patent for that reason as well as because it had not been issued at the date of the Johnson application. Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68; Dubois v. Kirk, 158 U. S. 64, 15 Sup. Ct. 729, 39 L. Ed. 895; Anderson v. Collins, 122 Fed. 451, 58 C. C. A. 669.

The specifications of the Johnson patent betray a knowledge of the efforts theretofore made to produce a branless fiber and a fiberless bran from cotton seed and cotton hulls by mechanical means, and describes a process which he claims will accomplish the desired end by separating the two independent products in their best condition. The discovery he says consists "in breaking the hulls by attrition and concussion and then conducting the broken mass forcibly and rapidly into a separator which thoroughly separates the fiber from the hull and kernel." The mechanism suggested in which to employ his method, and the subject of the second or mechanical claim of his patent is shown below:



His description of his method is best understood when read in connection with the figure above set out. The patentee says:

"In carrying out my invention, I employ a rotary breaker or grinder, A, consisting of the disks, a, arranged vertically in close proximity and revolved rapidly in opposite directions by means of the shafts, a^1, a^{11}, carrying the pulley wheels, a^2, a^2. The seeds and hulls with the adhering fiber are fed to the breaker or grinder by means of a hopper, a^3. The disks are so constructed and arranged that the hulls and kernels are broken or split without cutting the fiber, and the revolutions of the two disks are such that the broken mass is

forcibly ejected into a separator, B, located directly beneath the breaker or grinder. This separator, B, consists essentially of a U-shaped trough, b, formed of some strong bolting or screening material, such as wire gauze, the mesh thereof being very fine. A rotary brush, B^4, is journaled within the said trough, said brush consisting of a series of oblique arms, b^1, carrying brushes, b^2, which contact with the face of the wire gauze or screen. As the broken hulls and kernels and fiber are received into the separator, the rapidly revolving brush forces them into contact with the wire gauze and carrying them around separates the fiber from the hull and forces said hulls and kernels through the mesh; and the fiber being restrained from passing through, is fed out at the end of the separator into a chute, C, by means of which it is led to a second breaker or grinder, D, similar to the breaker, A, except that the disks are arranged somewhat closer than in the first instance. The object of this second breaker is to break or grind any particles too large to be forced through the separator, B, and also to accomplish a further separation between the hulls and fiber. The hulls, etc., after passing through the second breaker, D, are received into a second separator, E, which is also similar to the one before described. The separated hulls, etc., which were forced through the first separator are received into a chute, C^1, and by that means conducted to the second separator, where they are given another treatment, so that every particle of fiber may be separated and a uniform grade of food stock produced. The finished product is then conducted to a bag or other suitable receptacle by means of a chute, C^2. The fiber has, by these various operations, been thoroughly separated from the hulls and kernels, and the operations have been such that the fiber has not been cut or injured, so that a uniform quality of long stock is obtainable which can be used in the manufacture of paper if so desired. The batting or wadding thus produced can be conducted directly from the second separator; but if a particularly fine quality of stock is desired, we lead it into a beater, F, consisting of a chamber, f, and a rotary beater, f^4, the revolutions of which are so rapid that the fiber is thrown upward toward a passage, f^2, and all dirt and impurities will fall of their own weight to the bottom of the beater. Connected with the passage, f^4, is a conductor which leads to the collecting room."

The two claims in issue are as follows.

"(1) The process herein described, which consists in first breaking the hulls and seeds by attrition or concussion and forcibly ejecting the mass into a separator, conducting the fiber to a second breaker and subjecting the same to a finer and closer grinding operation, and then forcibly ejecting the ground mass into a second separator, the bolted mass from the first separator being led also to this second separator and finally conducting the separated fiber away from the second separator, substantially as shown and described.

"(2) In an apparatus of the class described, the combination with the vertical rotary disks, a, a, of the horizontal separator, B, arranged beneath the same, the chute, C, leading from the end of separator, the chute, C^4, leading from the bottom of the separator, the second breaker, D, the disks of which are arranged closer together than the disk, a, of the first breaker, the horizontal separator, B^4, and the chutes for conducting the fiber and bolted material, substantially as shown and described."

The material to be dealt with was of a most difficult character. The fine, fuzzy fiber adheres very closely and stubbornly to the woody capsule. Johnson realized from his experience with the Bohn method, and his knowledge as a practical paper maker, the necessity of making the separation between the two constituents as clean as possible. As we have already seen under the methods of the old art, as illustrated by the Bohn patent and that to Burnett, Sears & Burnham, the hulls were subjected to grinding, whereby both hulls and fiber were ground into fine particles, so fine as to pass through the fine meshes of a screen or separator. The fiber was expected to pass with the bran through the

screen; a separation more or less thorough being made after so passing by an air blast. This method resulted in eliminating some of the fiber, but in such a comminuted condition and so commingled with the bran as to be of diminished value. Johnson's discovery was that, if the hulls were subjected to attrition as distinguished from grinding, two things would result: First, that more of the fiber would be cut loose from its attachment than by the other plan; and, second, that the detached fiber was separated in better condition, not being comminuted as by a technical grinding action. This being the condition of the material after a treatment by attrition, his next step was to separate the fiber so far as detached from the broken hulls with which it was commingled by means of a screening operation, whereby the fine bran is forced through the meshes of the separator. This fiber, by reason of its noncomminuted condition, he found did not pass with the fine bran through the meshes of his separator. This fiber, thus restrained from passing together with the particles of hull left in the separator, he subjects to a second treatment by attrition in a mill like the first, except that the disks are arranged closer together, the better to break the partly reduced hulls too large to pass the meshes of the separator and to further carry on the delinting process. The product of this second treatment, together with the material which passed through the meshes of the first separator, he carries to a second separator like the first; this second treatment by screening effecting a more complete separation of the bran and fiber. The success of the whole method is thus made to turn upon successive operations which avoid cutting the fiber while under treatment.

"The disks are to be so constructed and arranged that the hulls and kernels are broken or split without cutting the fiber."

The "fiber is restrained from passing through" the screen and is "fed out at the end of the separator." The means, method, or process constitutes a patentable process, consisting, as it does, of a series of treatments of a peculiarly obstinate material, each treatment having relation to the character of the material acted upon and to the condition produced by the preceding treatment. The result is the separation of the material into its two distinct constituents; the bran being substantially free from fiber and the fiber practically free from bran. Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860; Cochrane v. Deener, 94 U. S. 780, 787, 24 L. Ed. 139; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968; Am. Fibre Co. v. Buckskin Fibre Co., 72 Fed. 508, 18 C. C. A. 662. In Mowry v. Whitney, cited above, a patent was sustained for a process for making cast iron wheels, by retarding their cooling by a second application of heat, until all parts of the wheel were raised to the same temperature and then permitting the heat to subside gradually. In Cochrane v. Deener, cited above, the patent was for a process of manufacturing flour, which consisted in passing the ground meal through a series of bolting reels composed of cloth of progressively finer meshes which passed the very fine flour and retarded the passage of certain impurities. It was held to be a patentable process.

Defining a process, Mr. Justice Bradley in that case said:

"A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or not be new or patentable, whilst the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence."

In Am. Fibre Co. v.. Buckskin Fibre Co., cited above, this court sustained a process "for reducing fibrous sheets to a soft and pliable condition, consisting in first moistening them and then pounding while in a moist condition."

It is not enough to say that it was not new in milling to gradually reduce a material to its several constituents by a series of breakings and screenings. The breaking operations of Johnson were applied to a most peculiar material and the thorough separation of the fuzzy, silky lint from the capsules of the cotton seed, a most unusual and difficult operation. This delinting, in order to save the lint in its best condition, must be so done as not to cut it up. This last consideration was not presented in any of the gradual reduction processes known to the milling of grain. But not only did commercial considerations require the separation of the lint fiber without injury, but the successful separation of the detached lint from the commingled mass of broken hulls and fiber by the screening steps of Johnson would be practically unavailing unless the fiber reached the gauze screen of the separator without the comminution which resulted from the old methods of breaking the hulls. So it is that Johnson's successive screenings for successful results depend upon the method in which the antecedent operation of breaking has been conducted.

It is therefore no anticipation of his process to find a general resemblance in the fact of a series of successive breakings and screenings. Each breaking and each screening under his plan had regard to the peculiar material to be handled and its condition as a result of the preceding operation upon it. A process patent can only be anticipated by a similar process. Carnegie Steel Co. v. Cambria Iron Co., cited above. No such similar process has been shown, and the evidence leaves little reason to doubt either the novelty or great utility of Johnson's process as secured by the first claim of his first patent. Such a process may be wholly independent of the particular machinery or appliance used, and is something more than the functions of the machine in which it is employed. Am. Fibre Co. v. Buckskin Fibre Co., 72 Fed. 508, 18 C. C. A. 662.

This brings us to the patentability of the mechanism employed which is the subject of the second claim of the patent. The steps of the Johnson process may be carried out in any apparatus adapted to do the things in the order which he prescribes. The claim does not include any peculiar or novel form of disk, nor disks operated in any novel manner. The vertical rotary disk of the Cogswell mill, a device open to all and well known, were in fact used by him. The disks were, therefore,

confessedly old. The novelty is in arranging his disks so that the material to be acted upon shall be subjected to "attrition and concussion" rather than the ordinary method of grinding used by Bohn and by the Burnett, Sears & Burnham devices. But the construction and arrangement of the "vertical rotary disks" of the claim is described in his specifications only as one by which "the hulls and kernels are broken or split without cutting the fiber." That result is either a consequence of attrition as distinguished from grinding or we are not informed as to how it is attained. The arrangement, then, must be such as shall result in a mass of seed and hulls being rubbed against a similar mass and not against the hard grinding surface of the disk. This is a purely mechanical arrangement, presumptively within the competency of one skilled in this line of business.

The next step is the forcible ejection of the broken mass into a separator below. But this, too, is a result of the oppositely rotating disks at a suitable velocity. The separator described as "the horizontal separator, B," arranged beneath his mill, is not unlike in essentials of construction or function the separators of the old art. The rotary brushes journaled within the trough of the separator force the mass of broken hulls and fiber into contact with the screen or wire gauze forming its bottom, with the result of forcing the finer particles of hulls through the meshes, the detached fiber or lint, being "restrained" from passing through, "are passed out at the end of the separator" into a chute there placed leading to a second mill. This second mill is like the first, except that the disks are arranged closer together, so as to break up any particles of hulls which were too large to pass through the screen of the first separator, and also to "accomplish a further separation between the hulls and fiber." The material reaching the second mill is now subjected a second time to attrition and conducted to a second separator like the first. To this second separator the broken hulls which passed through the screen of the first separator are conducted by a properly arranged chute, and, together with the larger particles or hulls which had failed to pass through the screens of the first separator, are given a second treatment like that of the first separator, "so that every particle of fiber may be separated and a uniform grade of food stock produced."

Now, the essential difference between what Johnson does and what Bohn and others were doing consists in the fact that the separation between the fiber and the broken hulls occur, or is intended to occur, in Johnson's device as a result of forcing the bran through the meshes, leaving the fiber behind, while in the older devices the separation occurs after both hulls and fiber have passed through the screen, the hulls dropping by gravity into one receptacle, while the fibre, so far as detached, is carried by an air blast to a more distant place of deposit. It cannot be denied that all of the elements which enter into Johnson's combinations are old, nor that the function of each element in the new combination is substantially what it was before combined. That the combination and arrangement is not that of any former device for separating cotton seed or hulls from the attached fiber may be conceded. But it is difficult to see that these elements, when combined, constitute anything

more than an aggregation in which each element accomplishes a distinct result without co-operation with any other.

In Goodyear Rubber Co. v. Rubber Wheel Co., 116 Fed. 363, 370, 53 C. C. A. 583, 590, we said:

"The here bringing together of old parts, allowing each to work out its own effect without producing some new machine or product, is not invention. A combination of old elements, to be patentable, 'must produce a different force or effect or result, in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union; if not, it is only an aggregation of separate elements.' Reckendorfer v. Faber, 92 U. S. 347–357, 23 L. Ed. 719. 'In a patentable combination,' said Mr. Justice Matthews, speaking for the court in Pickering v. McCullough, cited above [104 U. S. 310, 26 L. Ed. 749], 'of old elements, all the constituents must so enter into it as that each qualifies every other. * * * It must form either a new machine of a distinct character and function, or produce a new result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise, it is only a mechanical juxtaposition, and not a vital union.'"

But we are further of opinion that the device of the patent does not involve a patentable invention. That no device in existence could be employed according to the method of Johnson we concede. A rearrangement of the parts of any known device would have been essential to carry out his method. But the fundamental discovery was that by subjecting cotton seed or hulls to a series of treatments by attrition and by screening the fiber was saved in its best condition. When he disclosed his process, he disclosed enough to enable any mechanic familiar with the art or industry to which this discovery belonged to construct the apparatus essential to the employment of the patented process. Thus his claim is for "the vertically rotary disks, a, a." Referring to his specifications, we find that these disks are to be arranged "in close proximity and revolved rapidly in opposite directions." But his disks are not novel in the arrangement and operation, so far as described. The details are left to the ingenuity of the one desirous of using his method. The "disks are so constructed and arranged that the hull and kernels are broken or split without cutting the fiber." Manifestly, as he has said that he broke the hulls by attrition, the arrangement must be one which will subject the material to attrition or we have no direction concerning the construction and arrangement of his disks so as to avoid cutting the fiber. The arrangement and construction of the disks, then, is one which is clearly within the common knowledge of a mechanic familiar with the art. There is nothing novel—that is, nothing involving invention—about "the horizontal separator, B." The fiber does not pass through its meshes because it has been detached in an uninjured condition and therefore is "restrained" from passing through the meshes of the separator, as it would do, along with the fine bran, if comminuted as usual when subjected to grinding as distinguished from attrition. We fail to find that the construction of an apparatus to employ the method of his process claim involved patentable invention. When he disclosed his plan for the treatment of the peculiar material, its simplicity conveyed to any one skilled in the

industry all the knowledge necessary to supply it. We think, therefore, that the claims under both patents in issue are invalid for want of patentable novelty.

A vigorous effort has been made to show that Emil Bohn, of Galveston, Tex., the inventor of the two patents issued to Emil Bohn heretofore referred to, was the first and real discoverer of the process or method secured to Johnson by the first claim of his first patent as well as of the device of that patent. We have given attentive consideration to this contention, and are convinced that the whole defense is without any solid foundation whatever. Bohn was working upon the plan of his patent, and there is nothing in evidence which shows that he ever had any conception of the process of Johnson up to the time that he quit the service of Johnson and his associates; his method and his devices having proven commercially of little if any value. Certain it is that Johnson's process was not the method of Bohn's, and Johnson's device is not that of Bohn's patent. There is no evidence of serious import that Bohn ever made a plan or model or set up a device adapted to employ Johnson's process, or that he ever conceived of the complete reversal of his own methods which was necessary in the working according to Johnson's discovery.

We have rarely heard a case in which the evidence to show that a patentee was not the real inventor or discoverer of the patented process or means which is of so weak and uncertain a character as that presented by the present transcript. The alleged infringing device made and installed by the Foos Manufacturing Company for the Southern Cotton Oil Company at Memphis, Tenn., is a substantial duplication of the device of Johnson. It embodies that device with certain additions or modifications, wholly colorable in character. The Foos Company were, upon the evidence in this record, familiar with the device employed by the Tennessee Fiber Company for employing the method of Johnson's patent, and had themselves constructed parts of it, and were familiar with the mode of operating the complete plant. This knowledge they utilized by building and installing a plant substantially similar, adapted and intended to be employed according to the process or method of the Johnson patent. This was done and their purpose of supplying plants avowed because they did not regard Johnson's patent as valid. In this they erred.

They have infringed the process of Johnson because they supplied the apparatus adapted to employ Johnson's process with intent that the plant should be or would be operated as that put in for the Tennessee Fiber Company. It was therefore guilty of contributing to the infringement of the first claim of the Johnson patent. Heaton Peninsular Button Co. v. Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 26 C. C. A. 107.

The complainants are entitled to a perpetual injunction. The decree dismissing the bill must be reversed, with the costs of both courts, and remanded, with direction to enter a decree in accord with this opinion and for such further accounting as may be deemed necessary.

On Rehearing.

This case comes on now to be heard upon a petition to disallow all costs under sections 973 and 4922, Rev. St. [U. S. Comp. St. 1901, pp. 703, 3396], and to modify the opinion of the court in respect to the scope of the Johnson's process claim. The suit was upon two patents. The first included three claims, one for a process and two for a mechanism by which the process might be employed. We sustained the process claim as valid and found infringement. Only one of the mechanical claims was in issue, and that only was passed upon. That we held invalid as not involving invention. The second patent contained four claims for improvements upon the mechanical claims of the first patent, but only two were in issue, and those were held invalid as not involving invention.

It is now insisted that as the complainant did not, before suit, file a disclaimer in the Patent Office of the claims found to be invalid, no costs should be recovered by the appellant patentee in this court. Sections 973 and 4922, Rev. St., read as follows:

"Sec. 973. When judgment or decree is rendered for the plaintiff or complainant in any suit at law or in equity, for the infringement of a part of a patent, in which it appears that the patentee, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor, no costs shall be recovered, unless the proper disclaimer, as provided by the patent laws, has been entered at the patent office before the suit was brought."

"Sec. 4922. Whenever, through inadvertence, accident, or mistake, and without any willful default or intent to defraud or mislead the public, a patentee has, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer, every such patentee, his executors, administrators and assigns, whether of the whole or any sectional interest in the patent, may maintain a suit at law or in equity, for the infringement of any part thereof, which was bona fide his own, if it is a material and substantial part of the thing patented and definitely distinguishable from the parts claimed without right notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer. But in every such case in which a judgment or decree shall be rendered for the plaintiff no costs shall be recovered unless the proper disclaimer has been entered at the patent office before the commencement of the suit. But no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer."

The effect of these provisions is to save the claims which are valid if they are definitely distinguishable from those parts of the patent claimed without right, whether there has been a disclaimer or not. But, if there has been no disclaimer entered in the Patent Office before suit brought, it is specifically provided that the patentee shall not recover any costs. O'Reilly v. Morse, 15 How. 120, 121, 136, 14 L. Ed. 601; Seymour v. McCormick, 19 How. 97, 107, 15 L. Ed. 557; Gage v. Herring, 107 U. S. 640, 646, 2 Sup. Ct. 819, 27 L. Ed. 601; Metallic Extraction Co. v. Brown, 110 Fed. 665, 49 C. C. A. 147; Fairbank v. Stickney, 123 Fed. 79, 59 C. C. A. 209; and Kahn v. Starrels (C. C. A.) 136 Fed. 597; Ide v. Thorlicht, 115 Fed. 137, 150, 53 C. C. A. 341.

But does the statute apply to this court when the trial court has erroneously denied relief upon those claims of the patent which were in

fact valid? The decree of the court below, when all the claims are found invalid, is, as in the case now before us, a judgment dismissing the bill with costs. To set aside such a judgment or decree, and obtain relief upon the claims that had been erroneously held void, a proceeding in error is necessary. If the result of such review is to convict the trial court of error, and the case is remanded for further proceedings in conformity to the opinion of the Supreme Court, shall the successful appellant pay his own cost? If the mandate of this court requires the trial court to enter a decree sustaining some parts of the patent and finding infringement, the statute will then have application and the patentee will not be allowed his costs because he had not entered his disclaimer before starting his suit and has put the defendant and the public to the disadvantage incident to his having asserted certain parts of his patent without right. We are not satisfied that either section applies to a decree of this court where the decree of the court below is found erroneous, and that court is directed to enter a decree sustaining some of the claims of the patent in suit. If that court had rendered the proper decree, the patentee would not have been compelled to come here to obtain that measure of relief to which it is found he was entitled. It would be a harsh rule which would not allow him to recover the costs of his appeal from an erroneous decree so far as relief was denied upon the claim of his patents which were good because success has not attended the whole of his contention.

In equity causes this court directs the imposition of costs according to the circumstances, and apportions them or denies cost altogether by no iron-clad rule. Indeed, such a rule could not be well prepared, and would more often than otherwise lead to injustice. Northern Trust Co. v. Snyder, 77 Fed. 818, 23 C. C. A. 480. The real substantial value of the Johnson patent consisted in its process claim. Over that the conflict raged. The mechanism by which it was to be employed was found not to involve invention, because we found that, "when he disclosed his plan for the treatment of the peculiar material, its simplicity conveyed to any one skilled in the industry all the knowledge necessary to supply it." Much of the record was made up of evidence endeavoring to show that Johnson was not the discoverer or first inventor of his process. In such circumstances we do not feel that the statute requires this court to deny the appellant his costs in this court. This is the view taken by the Circuit Court of Appeal of the Third and Seventh Circuits. Kahn v. Starrels (C. C. A.) 136 Fed. 597; Ide v. Thorlicht et al., 115 Fed. 137, 150, 53 C. C. A. 341.

We are aware of the fact that in O'Reilly v. Morse, 15 How. 60, 120, 124, 14 L. Ed. 601, the order shows that neither party recovered costs in the Supreme Court. But in the later case of Seymour v. McCormick, 19 How. 96, 106, 107, 15 L. Ed. 557, it appears that there were five claims in McCormick's patent, but that infringement of only the fourth and fifth was charged. It was, nevertheless, urged below that one of the claims not in issue was invalid, and that there could be no recovery upon the good claims in issue because there had been no disclaimer of the invalid claim. The court below held that all the claims of the patent were valid and that the fourth and fifth had been infring-

ed. The Supreme Court held that one of the claims, not in issue, was invalid; affirmed the decree of the court below as to the other claims; but directed that it be corrected as to costs, so as to allow neither party costs in court below. But the costs of the Supreme Court were all taxed to the appellant. If the statute had been regarded as applying, neither party would have recovered such costs.

The direction that the costs of this court will be paid by the appellee we adhere to. The court below will, however, disallow costs incurred in court below prior to decree upon mandate of this court. We give no direction touching future costs, if an accounting be had. The court did not hold that Johnson was the first to use attrition as a method of separating cotton lint from the hulls, and no such discovery was necessary to sustain Johnson's process claim. His discovery consisted in his method of applying attrition through a series of successive operations; "such treatment having regard to the character of the material operated upon, and to the conditions produced by the preceding treatment." A verbal change has, however, been made in one paragraph, that no possible mistake may occur as to what we found Johnson's invention to be.

CENTRAL FOUNDRY CO. v. COUGHLIN.

(Circuit Court of Appeals, Fifth Circuit. December 5, 1905.)

No. 1,468.

1. PATENTS—INFRINGEMENT—IMPROVERS.
   Where a patent is for an improvement on a known machine by a mere change of form or a new combination of parts, the patentee cannot invoke the doctrine of equivalents to establish infringement by another, who has also improved the original machine by the use of a different form or combination performing the same functions.

2. SAME—FOUNDRY LADLE.
   The Coughlin patent, No. 553,055, for a foundry ladle divided into compartments, each compartment having a detachable pouring spout attached to the body of the ladle by means of flanges, covers a new combination of parts, the most of which are old, its principal features being the partitions and removable spouts; and it is not infringed by a ladle which has neither the partitions nor spouts described in the patent.

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

John P. Tillman and W. P. Preble, for appellant.
J. A. Estes, for appellee.

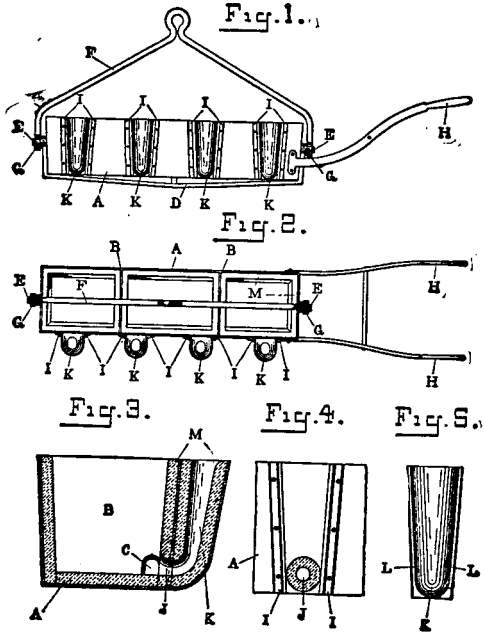
Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

SHELBY, Circuit Judge. This was a suit in equity brought by William T. Coughlin against the Central Foundry Company, a corporation. The suit is for an infringement of letters patent No. 553,055, issued to the complainant. The case was tried on its merits, and the Circuit Court entered a decree for the complainant, directing the statement

of an account to ascertain the complainant's damages, and granting a perpetual injunction. The defendant appealed, and the decree granting relief to the complainant is assigned as error.

The invention in question in this case relates to improvements in foundry ladles. Ladles for handling molten metal have been in use for many years. It is usually an iron or steel vessel of such size as circumstances may require, with a spout or nozzle from which to pour the molten metal. The ladle is ordinarily used by letting the metal run into it from the furnace, and it is then carried by an overhead trolley, or other device, to the mold in which the casting is to be made. The metal is then poured from the ladle into the gates or openings of the mold.

The patent in question was issued to the complainant January 14, 1896. The ladle, with the improvements claimed, is shown by the figures 1 to 5, inclusive, which accompany the specifications:



The specifications forming a part of the patent show that the ladle has a number of spouts, so as to permit it to pour into a series of molds at the same time from a series of compartments into which it is divided. It is further shown that the object of the invention is to provide an oblong foundry ladle having a series of pouring spouts extending upward on one side of the body, and a series of pouring apertures leading to the spouts and formed near the bottom; the ladle being provided with a series of detachable pouring spouts on the sides, and with one or more partitions in the body or shell. The shell, A, is made of metal, and this shell is provided with one or more cross partitions, B, with

apertures, C, best shown in figure 3. The apertures are provided in these partitions, B, to allow the metal to flow from one compartment to another to equalize itself in the ladle. A suitable suspension device and handles are attached. A series of metallic flanges, I, are attached to the other side of the ladle, and are bent to form a groove between one edge and the shell. These flanges are attached in pairs having the grooves facing each other, and are made slightly tapering toward the bottom. A pouring aperture, J (figures 3 and 4), is provided in the side of the ladle near the bottom, and between each pair of flanges, to permit the molten metal to flow from the ladle spouts. These detachable spouts, K, are made of metal, and provided with side flanges, L, adapted to fit the groove between the flanges, I, and the sides. This construction allows the removal or replacing of the spouts at will to replace a damaged spout, or for other purposes. The inside of the ladle, including partitions and spouts, is lined with fire brick, M, fire clay, or other suitable noncombustible material. In use the ladle, when filled or partly filled with molten metal, is turned on its pintles, H, H, for the purpose of tipping it, and to cause the molten metal to flow through the spouts into a number of molds; the number of molds and the gates in the same corresponding to the number and positions of the spouts of the ladle, so that at the same time a number of molds can be filled.

At the time this patent was granted, January 14, 1896, the development of the art in question was such that the inventor could lay no just claim to having invented all the devices shown in his specifications. On this point the record shows no controversy. It is well known that overhead trolleys and foundry ladles were in general use. Prior patents are in evidence, showing long-bodied ladles with several spouts (No. 370,159); and one (No. 361,352) showing a ladle in which a partition is set, which divides the ladle into two parts; and one (No. 330,003) which shows a detachable spout for milk pails; and one (No. 377,747) which shows a foundry ladle with a projecting trough spout and a flanged sliding partition, which is removable; and one (No. 540,292) which shows a foundry ladle with a nozzle near the upper edge, held on by clamps and detachable. These older patents are offered by the defendant to show that there is nothing new in many of the ideas suggested by the specifications. This position of the defendant is conceded by the complainant, for he seeks to maintain the validity of his patent by the contention that it is a patentable combination of well-known devices.

We approach the real controversy in the case when we note the single claim made by the inventor at the conclusion of his specifications:

"What I claim as new, and desire to secure by letters patent, is: In a foundry ladle, the combination of the shell, A, having cross partitions, B, secured therein, the partitions provided with an aperture, C, a series of flanges, I, rigidly attached to the outside of the shell, the flanges forming grooves to attach the tapering spouts, K, the spouts having flanges, L, L, formed on the sides, the flanges adapted to enter the grooves, substantially as described."

In plainer words, the claim is for a combination—a foundry ladle with cross-partitions, each with an aperture; the ladle having flanges

attached to its side, forming grooves for a series of side flanges for the purpose of holding the detachable spouts on the sides of the ladle in such manner that they can be readily removed. The leading or most prominent features or devices of the combination claimed as new are the partitions and the removable spouts or nozzles.

The patent in question is for the combination described in the specifications and stated in the claim. A combination is an entirety. If one of its elements is omitted, it ceases to exist. It is well settled, therefore, that the omission of any one ingredient of the combination covered by the claim of the patent averts any charge of infringement based on such claim. Prouty v. Draper, 16 Pet. 336, 10 L. Ed. 985; Black Diamond, etc., Co. v. Excelsior Coal Co., 156 U. S. 611, 15 Sup. Ct. 482, 39 L. Ed. 553. The patent being for the combination, it cannot be doubted that, to make a case of infringement, it must be shown that the defendant has used, or is using, every ingredient of the combination. Walker on Patents, § 349, and cases cited in note 2. The evidence, so far from showing this, shows that the defendant does not use any of the devices covered by the patent. Instead of using the partitions described in the patent, the defendant strengthens its ladle by two iron bars extending across it, and, instead of using removable spouts or nozzles fastened by flanges in grooves, it uses spouts fastened in some part by clamps, or it uses those fastened by a bolt passed through the walls of the ladle. The evidence, in brief, shows that the complainant's invention was used with the complainant's acquiescence for a short time, but that it was abandoned before the suit was brought; the defendant being notified that the complainant no longer acquiesced in its use.

But the complainant seeks to avoid the effect of the foregoing principles by insisting that the several devices used by the defendant are the equivalents of certain parts of the combination patented. An equivalent is defined as a thing which performs the same function, and performs that function in substantially the same manner, as the thing of which it is alleged to be an equivalent. But in the application of rules on the subject we must have in view the patent alleged to be infringed. If it is for a primary invention—one which performs a function never performed by an earlier invention—the patentee will have the right to treat as infringers those who make or use machines 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. But if the invention is a secondary invention (like the one at bar, if we concede all that is claimed for it)—that is, one which performs a function previously performed by earlier inventions, but which performs that function in a substantially different way from any which preceded it; an improvement on a known machine by a mere change of form or a new combination of parts—the patentee cannot treat another as an infringer who has improved the original machine by the use of a different form or combination performing the same functions. The first inventor of improvements cannot invoke the doctrine of equivalents and suppress all other improvements. Walker on Patents (4th Ed.) § 359, and cases cited. For stronger reasons, the

first inventor of an improvement in a machine cannot prevent another from using the old machine without the improvements.

It is true that a combination patentee may in a proper case claim the benefit of equivalents; that a defendant cannot adopt and use the combination, and avoid liability for infringement by making a substitute of some other device for one of the things used in the combination. Such a substitution, it is well settled, would not avoid the charge of infringement. Imhaeuser v. Buerk, 101 U. S. 647, 25 L. Ed. 945. But the case at bar does not fall within the influence of that principle. The defendant does not use all of the improvements claimed as the combination, omitting one and using a substitute for that. The defendant uses different devices altogether; the ladle used by it having none of the improvements claimed. To carry the doctrine of equivalents to the length contended for would make the granting of a combination patent for a machine confer on the patentee, not only the right to enjoin others from using his patent, but also the right to enjoin others from using all old and well-known machines, in use at the time the patent was granted, intended to effect the same results produced by the new invention. If it be conceded that the complainant has a valid combination patent for improvements on foundry ladles—a question which we do not decide—it does not deprive the defendant or others of the right to use foundry ladles which do not embrace the combination claimed in the complainant's patent.

The decree of the Circuit Court is reversed, and the cause remanded, with instructions to dismiss the bill.

PENNSYLVANIA STEEL CO. v. PETTIBONE, MULLIKEN & CO.

(Circuit Court of Appeals, Third Circuit. October Term, 1905.)

No. 5.

PATENTS—INFRINGEMENT—RAILROAD SWITCH STANDS.

The Strom patent, No. 498,196, for an improvement in railroad switch stands of the Mansfield type, which consists in placing the crank which moves the connecting rod on the target shaft below the segment gear, but within the case, for the purpose of breaking the force of the wheel thrust of cars against the gearing when the switch is operated automatically, is not infringed by a switch stand in which the crank is placed on the end of the target shaft extended below the casing for the sole purpose of allowing the gearing to be completely inclosed by the case, and thus protected from clogging by sand or snow.

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

For opinion below, see 133 Fed. 730. See, also, 134 Fed. 889.

Walter C. Pusey and Joshua Pusey, for appellant.

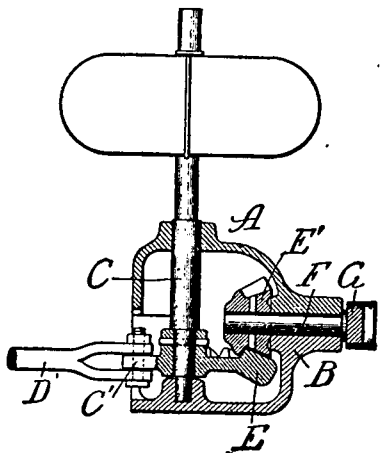
Philip C. Dyrenforth, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. Patent No. 498,196, dated May 23, 1893, was issued to Axel A. Strom, assignor, etc., for an improvement in switch stands of the class of which the "Mansfield switch stand" is typical, and that stand is described in the opinion of the court below as follows:

"The Mansfield stand consists of a case and base inclosing the segment gear, a vertical target shaft, upon which a horizontal segment gear is rigidly fixed, and which meshes with a vertical gear fixed to a horizontal bar extending back and out of the case, to which is attached an arm weighted at the end. The stand is bolted firmly to the ties outside the track. The connecting rod is pivotally connected to the lateral extension upon the horizontal segment gear, designated 'the crank lug on segment gear,' and at the other end it is secured in the usual manner of connecting rods to the rail of the point or split switch that is to be operated. The switch is operated either by hand by an attendant, or automatically. When by the former, he raises the weighted arm and throws it over to the opposite side, in which operation it describes a half circle of 180°. This turning of the weighted arm turns the arm shaft, and with it the vertical gear, through a half circle, and, by reason of the relative radii of the vertical gear and horizontal gear, it moves the latter through an arc of 90°. The segment gear being rigidly fixed to the target shaft, the latter, and with it the target shown toward its upper end, is correspondingly turned through an arc of 90°. Manifestly, therefore, the turning of the weighted arm in a half circle, which turns the segment gear through an arc of 90°, draws the connecting rod, attached to this segment gear, with it, and thus shifts the switch rail to which the connecting bar is secured. To reset the switch it is only necessary to return the weighted arm to its original position. Secondly, should the switch be set against a train passing through trailing, and no attendant to turn the switch, it is intended to be operated automatically by the foremost wheels of a locomotive or car passing through the switch. In this event the flange of the wheel strikes the switch rail, and thrusts it over against the stock rail with a force measured by the speed of the train. The blow struck by the wheel against the rail is transmitted by the connecting-rod directly to the crank lug; the segment is turned by the thrust through an arc of 90°; and the vertical beveled gear, and with it the arm shaft and weighted arm, is thrown over through an arc of 180°."

In aid of this description a drawing of the Mansfield stand is here inserted:



In this drawing A is the case, B is the base, C is the target shaft, D is the switch-rod connecting bar, E is the segment gear on shaft C, E′ is the gear on shaft F, F is the shaft having the weighted arm or lever G, and C′ is the crank lug on segment gear.

The claims of the Strom patent (all of which the Circuit Court held to be valid, and to have been infringed by the appellant) are as follows:

"(1) In a switch-stand, the combination with the casing of a rotary-shaft having a crank-section at which to connect the switch-bar, a gear, E, fastened to said shaft at a point beyond its crank-section where the springy quality of said shaft between the gear and crank may play, and a shaft, F, carrying a gear, E′, meshing with the gear, E, and a weighted arm, G, substantially as and for the purpose set forth.

"(2) In a switch-stand, the combination with the casing of a vertical rotary target-shaft having a crank-section at which to connect the switch-bar, a gear, E, fastened to said shaft at a point above its crank-section where the springy quality of said shaft below the gear may play, and a shaft, F, carrying a gear, E′, meshing with the gear, E, and a weighted arm, G, substantially as and for the purpose set forth.

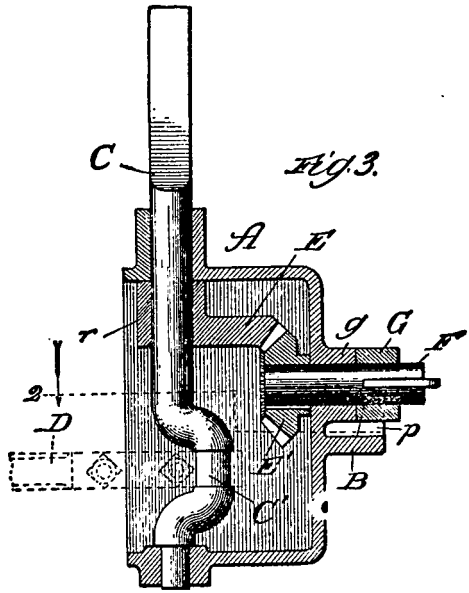
"(3) In a switch-stand, the combination with the casing of a base, B, a vertical rotary target-shaft having a crank-section at which to connect the switch bar, a gear, E, fastened to said shaft at a point above its crank-section where the springy quality of said shaft below the gear may play, a shaft, F, carrying a gear, E′, meshing with the gear, E, and a weighted arm, G, and stops, m, on the base in the path of the weighted arm at opposite sides of the shaft, F, substantially as and for the purpose set forth."

It is not necessary to examine these claims in detail, for, from the specification, and from the testimony of Strom himself, it plainly appears that his entire invention (if he made one) was based upon the hypothesis that there was "a degree of springiness" in the Mansfield target shaft which could be utilized to obviate the breaking and wearing of parts, which, as he asserted, had resulted from the stands being so constructed that—

"The full force of any excessive wheel-thrust against the switch is transmitted through the connecting-rod, not only to the crank on the target-shaft, but also to the gear connection thereof with the weighted arm."

To this transmission of force to the gear connection he imputed the disadvantages which he ascribed to the Mansfield construction, and to the prevention or mitigation of such transmission he accordingly directed his attention. He supposed, or, as is said in appellee's brief, he "discerned, that the evil lay in having the crank made as a part of the segment gear," and this evil he proposed to eradicate (as is stated in the specification) "by providing the crank as a section in the vertical target shaft, and providing thereon, for co-operation with a beveled gear on the rotary horizontal shaft carrying the weighted arm, a gear or gear segment, secured on the target shaft so far above the crank section therein as to allow for a degree of springiness in the shaft below the gear thereon which will tend to take up any excessive wheel-thrust transmitted to the crank from the switch through the connecting-rod, and thus shield the gear from the effect thereof." In short the stand of the patent differs from the old Mansfield stand only in that, for the crank of the latter, a "crank section" in the target shaft is substituted, and this section is formed, not on the segment gear, but at some undefined dis-

tance therefrom, "where the springy quality of said shaft between the gear and crank may play." Fig. 3 of the patent, which makes this quite apparent, is here reproduced:



In this figure A is the case, B is the base, C is the target shaft, C^1 is the crank-section, D is the switch-rod or connecting bar, E is a beveled gear, which extends from a collar, at which it surrounds and is secured upon the target shaft near the top of the casing, and F is a horizontal rotary shaft carrying inside the casing, in mesh with the gear, E, a beveled gear, E^1.

It is not requisite to pass upon the validity of this patent, and therefore we need not determine whether the target-shaft of a switch-stand is really endowed with a springy quality capable of performing the service which Strom assigned to it, or whether, if it is, there was in fact any such defect in the Mansfield structure as the patent assumes, and for which, if there was, it supplied a remedy. But it is clear, at least, that the monopoly which was granted (whether properly or not) has not been invaded by the appellant. Its stand does not have a crank section, but a crank, and that is placed where it is, not for the purpose, nor with the effect, of utilizing any springy quality (actual or supposed) of the target shaft, but to permit a wholly distinct and manifestly useful object to be accomplished. It is the Mansfield stand, modified only by extending its target shaft through the bottom of the case, and putting its crank on the free end of the extension; and this modification, as the evidence shows, is intended to, and does, provide a switch-stand in which the segment gear and pinion may be completely inclosed, and thus protected from clogging by snow, sand, or rubbish. No such end was contemplated by

Strom, nor would the means he disclosed have attained it. The several figures of the patent all exhibit an organism having the crank-section within the "case or housing for the internal mechanism," in which there is, and must be, an opening for the passage and play of the switch connecting rod; and the statement of the specification that the gear "is removed as far as possible above the crank-section" obviously means that those parts are to be as widely separated as the dimensions of the case, in which both are contained, will permit. As the court below observed:

"The patent in suit, or the Strom patent, places the crank below the segment gear, but inside the case."

And this the appellant has not done, and could not have done without defeating the object it had in view. We are convinced by the proofs, not only that the alleged infringing construction was in good faith contrived to render the production of a closed case practicable, but also that it does not even incidently bring into serviceable action any springy quality that the target-shaft may possess. The crank is not placed as far as possible from the gear, but as near to it as, in view of the extension of the shaft below the casing, it can be placed; and in this connection it is worthy of note that to his crank-section (which, as we have said, the appellant's device does not have) the patentee attributed a material share of the springiness which he ascribed to the shaft as a whole. In his specification he said:

"In case the force of the thrust of the wheel against the switch is excessive, instead of its being exerted fully against the teeth of the gears, E and E', with the danger of breaking them or so wearing them as to impair their operation, the excess will be taken up by the spring in the crank section, C', and portion of the target shaft between it and the gear, E, thereby saving the gears."

The substance of the whole matter, then, appears to be that to facilitate a useful object, which was neither contemplated nor effected by Strom, the appellant has removed the crank of the Mansfield stand from the interior to the exterior of the case, and in doing so has necessarily detached it from the gear; and, if this had not been done before, it would be difficult, we think, to sustain a patent which, being rightly construed, would inhibit it. But it had been done before. In a drawing accompanying the German patent to Schmidt, issued June 5, 1888, for a "self-acting switch," there is shown, and as we perceive it, quite plainly, a thorough and absolute separation of the crank from the gear, and whether, by reason thereof, any springy quality of the shaft was brought into useful operation, we need not inquire, for the means to that end which the patent in suit provides—the separation of the parts—is in the Schmidt drawing represented to be about as great in point of distance as in the stand of the appellant, and might, of course, have been made even greater. And the testimony of the witness Parsons upon this point seems to us to be no less important. The learned judge of the Circuit Court thus summarized it:

"He testified that they had made another pattern of stand, the same as defendant's alleged infringing stand, prior to 1890, and stated that, while manufacturing the old form of Mansfield stand by the old company, they had occasion several times to furnish stands with the crank below the case, in order that the stand could be placed so that the switch-connecting rod could be covered or brought below the surface of station platforms, and that this was

done by simply making the target-shaft longer, with a crank on the lower end of the shaft beneath the case, leaving the segment gear and pinion in the same position as in the Mansfield stand. The aperture in the stand was generally left open, but upon one occasion it was closed; and further claims that at that time no importance was attached to placing the crank upon the target-shaft; that later on the Lake Shore had experienced a great deal of trouble by stands becoming clogged with sand in the summer time and snow in the winter time, and that led the defendant company to get up another pattern of frame adopted for inclosing the gear, having a crank below the case on the proper level for attachment to the switch connecting rod."

This testimony is not incredible. It was not contradicted. The witness who gave it was not impeached. It appears not to have been doubted that the stands he mentioned had in fact been made and used; but, because the learned judge was "not convinced that the witness was certain as to his dates," this evidence was wholly disregarded. We, however, are of opinion that it was entitled to consideration, and that it should have been accepted as showing, at least, that upon no admissible construction of the patent in suit could the charge that the appellant's switch-stand infringed it be sustained. Mr. Parsons was the superintendent of the defendant company, but the story he told was inherently probable, and we find nothing in this record which would justify a suspicion that he did not intend to testify candidly; and, while it is undoubtedly true that evidence of prior use should be clear and convincing, we see no reason to doubt that he was, as he said he was, enabled to fix the times when the stands he described were made, by relation to the happening of the other events to which he referred, and about which it is extremely unlikely he could have been mistaken.

Having reached the conclusion that the Circuit Court's finding of infringement was erroneous, its decree is reversed, and the cause will be remanded to that court, with direction to enter a decree dismissing the bill of complaint, with costs.

BULLOCK ELECTRIC MFG. CO. et al. v. CROCKER-WHEELER CO.

(Circuit Court, D. New Jersey. September 19, 1905.)

1. PATENTS—LICENSE—CONSTRUCTION OF CONTRACT.
A license contract, giving defendant the right to use certain inventions made by complainant, construed, and *held* to expressly except therefrom the invention covered by the patent in suit.

2. SAME—ANTICIPATION—EVIDENCE OF DATE OF INVENTION.
Declarations of a patentee relating to his invention, accompanied by descriptions thereof, and made before his application for a patent was filed, are competent evidence to carry the date of his invention back to the time when they were made.

3. SAME—VALIDITY—EFFECT OF CANCELLATION OF CLAIM.
The cancellation of a claim in an application for a patent, while it is pending in the Patent Office, does not affect the validity of a retained claim which is substantially the same, although, if susceptible of two constructions, it will not be so construed as to cover the canceled claim.

4. SAME—INFRINGEMENT—ELECTRICAL DISTRIBUTION.
The Leonard patent, No. 478,344, for a system of electrical distribution, discloses invention, and was not anticipated by the Smith patent, No. 471,063, which, although prior in date and time of application, is based on an invention made at a later date than that of Leonard. Also *held* infringed as to claims 1, 2, 4, 8, and 9.

In Equity. Suit for infringement of patent. On final hearing. See 121 Fed. 200.

M. B. Phillipp and Clifton V. Edwards, for complainants.
Charles E. Mitchell, Herbert Noble, and Thomas Ewing, Jr., for defendant.

LANNING, District Judge. The complainants seek an injunction to restrain the defendant from an alleged infringement of patent No. 478,344, granted to the complainant Harry Ward Leonard July 5, 1892, of which he is the present owner, and under which the other complainant, Bullock Electric Manufacturing Company, claims to be sole licensee. The defenses are that the defendant has a license to do the acts complained of under a contract between Leonard and it dated May 5, 1896, that the patent is invalid, and that the defendant does not infringe.

First, as to the alleged license. This defense was set up by a plea to the bill, and, on a replication thereto and proofs, was overruled by the late Judge Kirkpatrick, whose opinion will be found in 126 Fed. 375. His order overruling the plea provided that the defendant "have leave to file such answer as it may be advised on or before rule day in January, 1904." Under the supposed authority of this provision this defense is now presented a second time, and the defendant requests the court to consider it, because, it is said:

"New matter has been introduced into the present record that was not before Judge Kirkpatrick, and therefore the question as to whether the defendant is licensed under the patent in suit should be considered and determined in view of the further light thrown upon the proper construction of the license."

Waiving the question concerning the regularity of such practice, I have complied with the request. The contract of May 5, 1896, recites that the Crocker-Wheeler Electric Company, then the owner of certain applications for patents specifically described in the recitals, had by an agreement of that date assigned those applications, and the patents to be obtained thereon, to the complainant Harry Ward Leonard, and that Leonard was then the owner of certain other patents and applications for patents, also specifically described in the recitals, amongst which latter were mentioned:

"No. 463,802 for electrical transmission of power, granted to said Harry Ward Leonard November 24, 1891; * * * No. 476,544 for a system of electrical distribution, granted to said Harry Ward Leonard June 7, 1892; and No. 478,344, for a system of electrical distribution, granted to the said Harry Ward Leonard July 5, 1892."

After its recitals, the agreement proceeds thus:

"Now, therefore, in consideration of the said assignment of the said Crocker-Wheeler Electric Company to the said H. Ward Leonard, the undersigned, the said H. Ward Leonard, grants to the said Crocker-Wheeler Electric Company a nonexclusive, nonassignable license, without limitation or condition or royalty to be paid by it or the purchasers of the apparatus, except as hereinafter specified, to make, use, sell, and practice for the regulation or control of dynamo electric machinery, for the purpose, except respecting patent No. 478,344, of regulating or controlling electric motors of its own manufacture, and for no other purpose, except as hereinafter provided in section 1, page 4, throughout the United States and the territories thereof, any of the inventions aforesaid, whether assigned by the said Crocker-Wheeler Electric Company to the said Leonard, or already owned by him, the said license being given under the aforesaid applications and patents, and any patents, reissues, or extensions which may be hereafter granted upon the said inventions, or any of them, for the full term or terms of the said patents, reissues, and extensions."

By Judge Kirkpatrick's construction of this contract it was held that the license thereby granted did not include patent No. 478,344. The "new matter" now presented is a tripartite agreement dated April 27, 1896, and executed by Harry Ward Leonard, the Crocker-Wheeler Electric Company, and Otis Bros. & Co. By this agreement it was declared that, "if this contract can be consummated within one month, the Crocker-Wheeler Company will assign all applications and inventions of Granville T. Woods assigned to it, to H. Ward Leonard, provided that the said Woods shall consent thereto in writing for the cash sum of $2,400, or less, in lieu of all sums and other considerations which are due or may become due to him as royalties or otherwise under a certain contract between him and the Crocker-Wheeler Company dated October 5, 1895." The agreement further declared that, subject to its conditions, Leonard would give to the Crocker-Wheeler Electric Company "a nonassignable, nonexclusive license without royalty and without limit to the extent of the employment thereof by the said Crocker-Wheeler Company, and its successor or successors in business, to make, use, and sell any of the inventions covered by the existing patents or applications to the said H. Ward Leonard," etc. The final paragraph of the agreement is as follows:

"And this agreement is further conditioned on the said Woods agreeing to transfer to the said Leonard all records relating to the matter in controversy in certain interferences relating to motor regulations now in possession of the Crocker-Wheeler Company, or its attorneys, or of the said Woods, and on the said Woods agreeing not to set up any date prior to the date of the transfers made to H. Ward Leonard in pursuance of this agreement in any controversy relating to motor regulations."

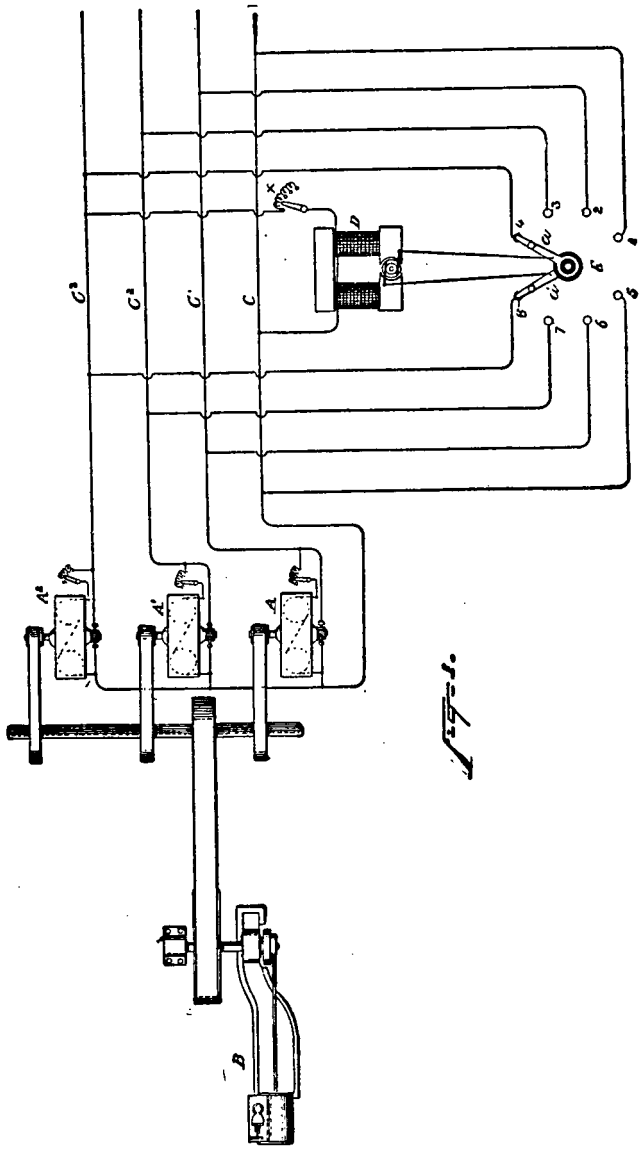
That this language was broad enough to require Leonard to include in his license to the Crocker-Wheeler Electric Company his patent No. 478,344, upon the performance of the conditions precedent in the agreement mentioned, is clear. But the proofs show that Woods never agreed to what the conditions called for. Furthermore, a comparison of the two agreements of April 27, 1896, and May 5, 1896, discloses such material differences between them as to dispel the idea that the later agreement was intended by the parties to it to be a carrying out of the former agreement. The agreement of May 5, 1896, must therefore be construed in the light of the evidence that was before Judge Kirkpatrick. I concur in his construction that that agreement does not include a license to use patent No. 478,344.

The defendant also contends that it is entitled to do the acts complained of as licensee under Leonard's patents, Nos. 463,802 and 476,544, both of which it is clearly entitled to use under the agreement of May 5, 1896. But, in view of the fact that by the construction above given the patent in suit is expressly excluded from the list of patents to which the license applies, the contention, if the patent in suit is to be deemed a valid one, cannot be sustained.

The second defense is that the patent in suit is invalid. In the specification of this patent Leonard says:

"My invention relates in part to the operation and regulation of electric motors. In my application filed August 14, 1891, serial No. 402,651" (for which patent No. 463,802 was granted on November 24, 1891, being the same date on which the application for the patent in suit was signed and sworn to, though it was not filed until November 27, 1891). "I have set forth a method of operating electric motors at any speed or any torque desired, and at the same efficiency under all conditions; such method consisting generally in maintaining the field magnet of the motor at a constant strength and varying the volts on the armature circuit to vary the speed, and the amperes on such circuit to vary the torque. One object of my present invention is to enable this method to be carried out without varying the electro-motive force of the generator which forms the source of supply for the system of conductors with which the motor armature is connected, and also without the necessity of employing an intermediate motor and generator, as was the case in the application referred to, when the motor was supplied from a system of conductors of constant electro-motive force. I thus avoid the loss due to the successive transformations of energy, and also save the cost of the intermediate transforming devices. To accomplish this, I make use of a system of distribution in which there are three or more conductors, between each of the different pairs of which are maintained different electro-motive forces, and I so arrange the motor and suitable switching or connecting devices that the motor armature may be connected between the different pairs of conductors, whereby two or more different electro-motive forces are obtained at its armature terminals; the field magnet of the motor being so arranged and connected as to be maintained at a constant strength."

Figure 1 of the patent will serve to illustrate its general features. It is as follows:

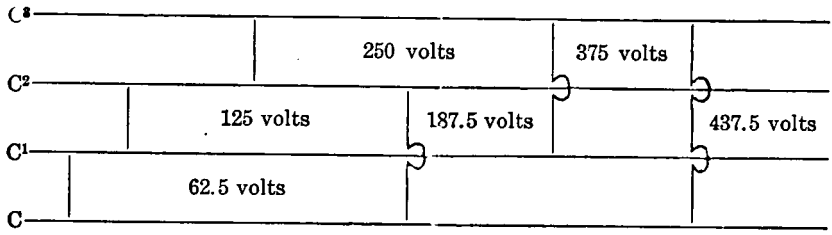


In his specification the patentee describes this figure as follows:

"Referring first to Fig. 1, A, A^1, and A^2 are three dynamo-electric machines of constant difference of potential, all run by the same engine or prime motor B. The three dynamos have their like terminals connected to a common con-

ductor, C, while each has its other terminal connected to an independent conductor, C^1, C^2, or C^3. These three generators are preferably constructed so that each has a different electro-motive force. For instance, A may be of 62.5 volts, A^1 of 187, and A^2 of 437 volts. D is an electric motor whose field magnet is wound for the full difference of potential of 437 volts, and is connected between conductors C and C^3, so that it receives a practically constant electro-motive force and is maintained at practically a constant strength. It is evident, however, that the field magnet may be wound for and connected between the common conductor and any one of the other conductors. The armature terminals of the motor are connected, respectively, with the arms, a, a^1, of a switch, E, which arms are insulated from each other and are movable independently. Arm a moves over the four contact blocks, 1, 2, 3, 4, which are electrically connected, respectively, with the four conductors, C, C^1, C^2, and C^3. Arm a^1 moves over contacts, 5, 6, 7, 8, connected, respectively, with the same conductors. It will be seen that in the position of the switch arms shown there is no difference of potential at the motor terminals, both being in connection with conductor C^3; but by moving the switch arms upon the contact blocks various differences of potential may be obtained. Thus, if the armature is connected between C and C^1 (that is, with the switch arms on blocks 2 and 5, or 6 and 1) the armature will receive only the 62.5 volts of generator A; if between C and C^2 (that is, blocks 5 and 3, or 1 and 7) there is obtained the 187 volts of generator A^1; or, if between C and C^3 (blocks 5 and 4, or 1 and 8), there is obtained the electro-motive force of A^2, or 437 volts. Connecting between C^1 and C^2 (blocks 6 and 3, or 2 and 7) gives the difference between A and A^1, or 125 volts. Between C^2 and C^3 is the difference between A^1 and A^2, or 250 volts; or between C^1 and C^3 gives 437—62.5=375 volts. I am thus enabled to obtain by the manipulation of the switch any one of the following voltages at the motor-armature terminals, viz., 62.5, 125, 187, 250, 375, or 437 volts, and each of these may be obtained in either direction, so that the motor may be reversed and run in either direction at any one of the different speeds which are attainable by these variations of electro-motive force. It will be understood that when the electro-motive force of one generator is opposed to that of the other the weaker generator is run as a motor and assists the prime motor in the operation of the other generator."

It will be observed that the four-wire system above shown gives six different speeds. A three-wire system will give but three different speeds. A five-wire system will give ten different speeds. The number of speeds is ascertained by multiplying the number of wires by the number of wires less one and dividing the product by 2. The six different speeds of the four-wire system above described are shown in the following figure:



The great advantage of such a system of electric distribution, especially in machine shops where tools are required to be operated at varying speeds, is apparent. The defendant contends, however, that the patent in suit is anticipated by patent No. 455,454, granted July 7, 1891, to Edwin Wilbur Rice, Jr. That is a patent for an improvement in electric railways. But it is shown by Messrs. Wagner and Kennel-

ly, two expert witnesses for the complainant, to fall far short of embodying the distinguishing features of the patent in suit. Professor Kennelly says:

"The Rice patent is for an electric railway motor system employing four conductors. These motors are series motors, or are not shunt motors such as are set forth in the patent in suit. Moreover, only three different voltages are obtainable by the method indicated in the Rice patent; that is to say, one motor terminal is permanently connected to one conductor, and the possible combinations of the systems are limited to the changes that can be made in the connection of the other terminal. These changes are three in number, or one less than the number of wires; whereas, in the Leonard system the field windings of the motors would be permanently connected to one pair of wires, and both of the armature terminals would be capable of connection to any of the four wires in appropriate combinations so as to obtain six different voltages and speeds. The Rice system would require seven wires to obtain as many voltages and speeds as the Leonard system of the patent in suit obtains with four wires."

The Smith patent, No. 471,063, is also referred to by the defendant's expert witnesses as an anticipation of the patent in suit. The application for this patent was filed November 11, 1891, 16 days before Leonard filed his application for the patent in suit, and was granted March 15, 1892, while Leonard's patent was not granted until July 5, 1892. If the Leonard patent is not defeated by the Smith patent, it seems unnecessary to refer to any of the other patents mentioned as anticipations of the Leonard patent; for the defendant's witness Mr. Eyre says that he knows of no patent prior to that of Smith which discloses a multiple-wire system of distribution, a shunt motor (or, as he prefers to call the motor described in the Leonard and Smith patents, a separately excited motor), and means for changing the connection of the motor from one of the wires of the system to another to vary the speed of the motor. Both the Leonard and Smith patents disclose this method of controlling the speed of motors. That it involves invention seems clear. In Loom Co. v. Higgins, 105 U. S. 591, 26 L. Ed. 1177, Justice Bradley 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."

The question on this branch of the case therefore is: Was Leonard or Smith, in contemplation of the law, the original or first inventor? The same question is presented in the case of Otis Elevator Company v. Bullock Electric Manufacturing Company, in which the patent in suit is the Smith patent. That case was argued with this case on much the same proofs. Smith and Leonard were examined in both cases, and the question will be disposed of in this case.

In its answer to the bill of complaint the defendant alleges, upon information and belief, that:

"The said letters patent to Harry Ward Leonard, if construed so broadly as to cover and embrace any apparatus made, sold, or used by this defendant, are invalid because the same were surreptitiously and unjustly obtained by the said Harry Ward Leonard for what was invented in fact by another, to wit, Rudolph C. Smith of Yonkers, county of Westchester and state of New York, who was using reasonable diligence in adapting and perfecting the same."

In my judgment the defendant's proofs fail to support this allegation. The earliest date that Mr. Smith satisfactorily fixes for the disclosure of his invention to any one is November 5, 1891. Leonard, on the other hand, has introduced in evidence a description of his invention written out by him and containing also illustrative drawings. The written matter and the drawings are on pages 199 to 212 of a record book kept by him. At the end of the description, on page 212, are the following entries:

"Matters on pp. 199 to 212 explained to me by Mr. Leonard Oct. 3, 1891.
"[Signed] H. W. Seeley."
"Matters on pp. 199-212, inclusive, explained to me by Mr. Leonard prior to this date, viz., Oct. 5, 1891.
"[Signed] A. D. Vance.
"H. J. Westover.
"C. H. Bloomer.
"Oct. 5, 1891."

Mr. Seeley was Leonard's patent solicitor and is now dead, but his signature was duly proven. Mr. Vance and Mr. Westover have been sworn and testify to the genuineness of their signatures and the appended dates. Vance also testifies to the genuineness of Bloomer's signature. The first part of the written description is dated September 15, 1891. On September 16th Leonard wrote to William Sellers & Co. of Philadelphia, concerning his invention, and on October 30th, pursuant to arrangements with them, he went to Philadelphia to have his invention tested at their works. On November 2d Leonard wrote them requesting an early report on the test. On November 24th Leonard's application for a patent was sworn to by him. On November 27th the application was filed. And on November 28th Sellers & Co. sent to Leonard a report of the test made October 30th. I am satisfied that the test there made was the multiple-voltage system of the Leonard patent. Nor do I think the objection that the description of the invention in Leonard's record book, connected as it was with his explanation of it to four different persons, is incompetent evidence to carry the date of the invention back of the time when he filed his application in the patent office. In considering the question of the admissibility of such evidence, the Supreme Court, in Philadelphia & Trenton Railroad Co. v. Stimpson, 14 Pet. 461, 462, 10 L. Ed. 535, said:

"The next exception is to the admission of the evidence of William A. Stimpson, Richard Caton, and George Neilson, as to certain declarations and statements and conversations of the plaintiff as to his invention prior to the date of his original patent, in order to rebut the evidence of the defendants as to the invention or use by other persons of the same contrivance before that date. The objection is that, upon general principles, the declarations and conversations of a plaintiff are not admissible evidence in favor of his own rights. As a general rule this is undoubtedly true. It is, however, but a general rule, and admits and requires various exceptions. There are many cases in which a party may show his declarations comport with acts in his own favor, as a part of the res gestae. There are other cases, again, in which his material declarations have been admitted. Thus, for example, in the case of an action for an assault and battery and wounding, it has been held that the declarations of the plaintiff, as to his internal pains, aches, injuries, and symptoms, to the physician called to prescribe for him, are admissible for the purpose of showing the nature and extent of the injuries done to him.

See 1 Phillips on Evid. (8th Ed., 1838) pp. 200-202, c. 12, § 1. In many cases of inventions it is hardly possible in any other manner to ascertain the precise time and exact origin of the particular invention. The invention itself is an intellectual process or operation, and, like all other expressions of thought, can in many cases scarcely be made known except by speech. The invention may be consummated and perfect, and may be susceptible of complete description in words, a month or even a year before it can be embodied in any visible form, machine, or composition of matter. It might take a year to construct a steamboat, after the inventor had completely mastered all the details of his invention, and had fully explained them to all the various artisans whom he might employ to construct the different parts of machinery. And yet, from those very details and explanations, another ingenious mechanic might be able to construct the whole apparatus and assume to himself the priority of the invention. The conversations and declarations of a patentee, merely affirming that at some former period he invented that particular machine, might well be objected to. But his conversations and declarations stating that he had made an invention, and describing its details and explaining its operations, are properly to be deemed an assertion of his right at that time as an inventor, to the extent of the facts and details which he then makes known, although not of their existence at an antecedent time. In short, such conversations and declarations, coupled with a description of the nature and objects of the invention, are to be deemed a part of the res gestae, and legitimate evidence that the invention was then known to and claimed by him; and thus its origin may be fixed, at least, as early as that period. This view of the subject covers all the parts of the testimony of the witnesses objected to in the Circuit Court; and we are of opinion that the court were right in admitting the evidence."

And to the same effect are McCormick Harvesting Mach. Co. v. Minneapolis Harvester Works (C. C.) 42 Fed. 152, and Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 646, 23 C. C. A. 367.

Leonard also was diligent in adapting and perfecting his invention. Whatever delay there was in the filing of his application, which was less than two months after he had disclosed it to other persons, seems to have been due to the illness of his patent solicitor. Disregarding the proofs on the question as to whether Smith did not "surreptitiously and unjustly" obtain a patent for what Leonard had invented, and assuming the utmost good faith on the part of Smith, it appears that Leonard was the first inventor of the system described in his patent, for, as already observed, there is nothing in the case to show that Smith ever disclosed his invention to any person whomsoever before November 5, 1891.

Claims 1 and 2 of the patent in suit purport to be method claims. They are as follows:

"(1) The herein-described method of changing the speed of an electric motor, which consists in maintaining upon each one of three or more conductors a potential different from that which is maintained on any other one of the conductors, and connecting the armature terminals of the motor with different pairs of said conductors, substantially as set forth.

"(2) The herein-described method of varying the speed of an electric motor, which consists in maintaining its field magnet at a constant strength and connecting its armature terminals with one or another of two or more constant potential sources, the potentials of which are different."

The defendant contends that these two so-called method claims disclose no method save that described in patent No. 463,802. To support this contention reference is made to the language of the specification of the patent in suit above quoted, whereby the patentee ex-

pressly declares that one of the objects of his present invention is to carry out the method described in his former patent. But it seems to me that the construction thus contended for is too narrow. The method here described saves the cost of the intermediate transforming devices of the former patent, and also avoids the loss of electric energy caused by those transforming devices. It sacrifices the expensive method of securing refinement of control of motor speeds, described in the former patent, for a less refined, but commercially a more useful, method of control. In the Telephone Cases, 126 U. S. 531, 8 Sup. Ct. 780, 31 L. Ed. 863, a claim of one of the patents under discussion was as follows:

"The method of, and apparatus for, transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth."

The court said:

"The language of the statute is that 'any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter' may obtain a patent therefor. Thus, an art (a process) which is useful is as much the subject of a patent as a machine, manufacture, or composition of matter. Of this there can be no doubt, and it is abundantly supported by authority."

In each of the claims now under consideration, the method therein described reveals an art, or process, which consists in so controlling electric force as to make it accomplish a new result not theretofore secured. Neither of them can properly be regarded as reciting the mere function of the apparatus therein mentioned. I think these claims set forth patentable processes in advance of anything contained in Leonard's patent, No. 463,802.

But the defendant further insists that the claims are void because of certain proceedings in the patent office while the application for the patent was pending there. In the course of those proceedings, after the Smith patent had been granted, Leonard was notified that the examiner in charge of his application had concluded that claims 1, 2, 3, 4, 5, 6, 7, and 11 of his application were met by patent No. 471,063 of Rudolph C. Smith, and that in order to obtain an interference with the claims of that patent the applicant should file an affidavit under rule 75 of the Rules of Practice. Instead of adopting this course, Leonard amended some of his claims and canceled others, and thus avoided an interference and eventually secured the patent in suit. Amongst the claims canceled was the then third claim. The canceled third claim was as follows:

"(3) The combination with three or more conductors, upon each one of which is maintained a potential different from that which is maintained on any other one, of an electric motor and switching devices whereby the armature of the motor may be connected between different pairs of said conductors, substantially as set forth."

Comparing this claim with method claim 1, Mr. Richard Eyre, the defendant's expert witness, said:

"No argument can be advanced that can make these two claims relate to different combinations. Leonard deliberately avoided an interference, cancel-

ing a claim for that purpose, and retaining an identical claim, except that in form the canceled claim was drawn to apparatus, while the claim retained purported to be a method claim. I need hardly point out that it would be impossible to employ the apparatus in the way set out in the canceled claim without practicing the supposed method of the retained claim."

Conceding, for the purpose of the argument, that method claim 1 and canceled claim 3 are the same in substance and differ only in form, no authority has been referred to holding that, if one of several claims in an application for a patent be canceled while the application is pending in the patent office, a retained claim substantially the same as the canceled one is thereby annulled. If the retained claim be susceptible of two or more constructions, it is a well-settled rule that it will not be so construed as to make it the equivalent of the canceled claim; but, if two claims in an application for a patent should inadvertently be expressed in identical language, the withdrawal or cancellation of one of them would not affect the other.

But the two claims are not substantially the same. The conclusion is irresistible that the patent office did not so regard them, for otherwise claim 1 would not have been allowed. Claim 1 is for a process. The rejected claim was for a mechanical combination. It is true that the combination described in the rejected claim seems to be described in claim 1. But that fact does not lead to its rejection. In the great case of O'Reilly v. Morse, 56 U. S. 118, 14 L. Ed. 601, the Supreme Court said:

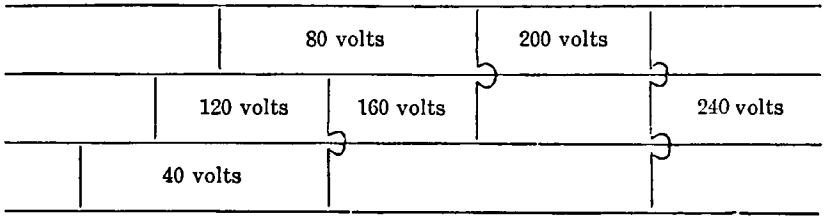
"The provisions of the acts of Congress in relation to patents may be summed up in a few words. Whoever discovers that a certain useful result will be produced, in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for it; provided he specifies the means he uses in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes. And, if this cannot be done by the means he describes, the patent is void. And, if it can be done, then the patent confers on him the exclusive right to use the means he specifies to produce the result or effect he describes, and nothing more. And it makes no difference, in this respect, whether the effect is produced by chemical agency or combination, or by the application of discoveries or principles in natural philosophy known or unknown before his invention, or by machinery acting altogether upon mechanical principles. In either case he must describe the manner and process as above mentioned, and the end it accomplishes. And any one may lawfully accomplish the same end without infringing the patent, if he uses means substantially different from those described."

It seems to me that the method claims of the patent in suit comply with this rule, and that the rejection of the original third claim does not necessitate a construction so limited as to annul them.

The last question to be considered is: Is the defendant's system of electric distribution an infringement of the Leonard patent? In their brief, the counsel for the defendant say:

"It is a characteristic feature of the defendant's system, patented to it in the Dunn patent, that from the four wires are obtained six voltages or electrical pressures which differ from each other in proper sequence by equal amounts; that is to say, the voltages are in ratios of 1, 2, 3, 4, 5, and 6, and the resultant speeds will have the same ratios. As illustrated in the patent, the highest voltage is 240, and the steps are 40, 80, 120, 160, 200, and 240. But these numerical values may be modified indefinitely. It is the ratios that are important."

The different voltages shown by the diagram illustrating the Leonard system, above given, are 62.5, 125, 187.5, 250, 375, and 437.5. The ratios here are 1, 2, 3, 4, 6, and 7. The following diagram illustrates the defendant's system:



It will be observed that in the defendant's system the voltages and speeds increase regularly in arithmetical progression; but in the Leonard system they also increase regularly in arithmetical progression, except that one of the steps is twice as great as any of the others. In both systems the same principle is applied. There is nothing in this "characteristic feature" of the defendant's system that distinguishes it in any material respect from the Leonard system. It may be observed, further, that the Dunn patent was not applied for until June 18, 1903, while the bill in this cause was filed June 12, 1902.

In considering the claims of the patent separately, the defendant argues that claims 1 and 2 are not infringed because of the limited construction that it insists must be given them in view of the cancellation of the old third claim above referred to. This point is disposed of by the conclusion already expressed that the construction of the claims is not affected by the cancellation of the original third claim.

Claims 3, 5, 6, and 7 constitute a group distinguished from the other claims by reason of the fact that they each refer to a common return conductor. The defendant insists that the system used by it has no such common return conductor as these claims specify. The counsel for the complainants on their direct examination of Mr. Wagner, their first expert witness, questioned him only as to claims 1, 2, 4, 8, and 9. At the beginning of Mr. Wagner's cross-examination, in answer to an inquiry from defendant's counsel, complainant's counsel stated that they expected to rely on no other claims. Later, they changed their minds, and introduced testimony concerning an alleged infringement of claims 3, 5, 6, and 7. I think infringement of these claims has not been shown. Mr. Wagner admits that in the defendant's system there is no wire to which like poles of all the sources are directly connected. Dr. Crocker, an expert witness for the defendant, says:

"The term 'common conductor' has an exceedingly definite significance in electrical engineering, and it applies perfectly to a particular one marked C in Fig. 1 of the patent in suit. This conductor is permanently connected to one terminal of each of the three generators, and is therefore common to them. In defendant's system there is no conductor corresponding in this respect."

It seems to me this is a fair statement of a material difference between the two systems.

The argument of the defendant that claims 4, 8, and 9 of the Leonard patent are not infringed is based on the theory that the Smith patent must be considered as a part of the prior art. The essential feature of these claims is that they require, between every pair of wires in the system, a difference of potential different from that maintained between every other pair. Mr. Eyre says:

"Claims 4, 8, and 9 only differ from the specific illustration of the Smith patent in that they require a different difference of potential between every pair of the three or more conductors. In other words, these claims in language differ from Smith's specific showing, only because Smith shows as an illustration 'the three-wire system of distribution, as that is the most common system in use.' I cannot think that this is a substantial differentiation, as Smith specifically states that he may employ any other multiple-wire system having more than three wires, and I propose to show that multiple-wire systems having different differences of potential were well known."

But we have already seen that the Smith patent is not an anticipation of the Leonard patent. Leonard was the first inventor of the system he describes, and is entitled to protection as such inventor. Barnes Automatic Sprinkler Co. v. Walworth Mfg. Co., 60 Fed. 605, 9 C. C. A. 154.

In my opinion the defendant must be held to have infringed claims 1, 2, 4, 8, and 9 of the patent. There will be a decree to that effect.

HOE et al. v. MIEHLE PRINTING PRESS & MFG. CO.

(Circuit Court, S. D. New York. September 28, 1905.)

1. PATENTS—INFRINGEMENT—RIGHT OF ACTION.
   The fact that no machine has ever been made and shown to work successfully under a patent does not prevent the owner of the patent, if it is valid, from restraining infringement of it.
2. SAME—PRINTING PRESSES.
   The Read patent, No. 688,690, for improvements in bed motions for cylinder printing machines, was not anticipated and discloses invention, but is of narrow scope and is not entitled to a broad construction of its claims to extend them beyond the actual invention described, which consists in the main of the use of a two-part bed driving wheel; the rim being mounted and movable directly upon the body of the wheel. As so limited, *held* not infringed.

In Equity. On final hearing.

Philipp, Sawyer, Rice & Kennedy (Moritz B. Philipp, and James J. Kennedy, of counsel), for complainants.

Alexander & Dowell and Munday, Evarts & Adcock (John W. Munday and Arthur E. Dowell, of counsel), for defendant.

HOLT, District Judge. This is a suit to restrain the alleged infringement of a patent, No. 688,690, issued December 10, 1901, to George F. Read, and by him assigned to the complainants, for improvements in bed motions for cylinder printing machines. The defense is a denial of invention or of infringement.

The complainants, R. Hoe & Co., are printing press manufacturers,

doing business in New York. The defendant, the Miehle Printing Press & Manufacturing Company, is a printing press manufacturer, having a place of business in New York, and its principal manufactory in Chicago. The patent relates to a form of printing press in which the bed of type is moved horizontally, forward and backward, the paper to be printed running over a cylinder above the type bed and receiving the impression while the bed is being moved forward. This form of press is principally used for particular forms of fine printing, particularly multicolor work. The bed of the presses in ordinary use must be large and heavy; the movement back and forth, in order to meet the modern demands for rapid work, must be very rapid; and, as it is essential that the paper upon which multicolor and other fine printing is done register and receive the impression very accurately, the machine must move very smoothly and without any tremble or jar. It is obvious, therefore, that an essential difficulty in the operation of these machines is to provide that, at the end of each backward and forward movement of the bed, the motion be reciprocated, that is, retarded and stopped, and then started and renewed in the opposite direction, without sudden violence or jar. This patent relates to improvements in the mechanism for reciprocating the type bed.

The machine shown and described in the Read patent has a form carrying bed mounted on ways beneath the impression cylinder, and on its underside carrying two oppositely facing racks arranged in different, but adjacent, vertical planes. A main or bed driving shaft is journaled horizontally in the frame beneath the bed and carries a bed driving wheel, which is referred to as "a compound wheel," because it has a body or hub fast on the shaft and a "toothed rim" or "ring gear" which is much narrower than the hub or body of the wheel, and is splined to the said hub or body so as to be movable thereon longitudinally of the shaft axis, but nevertheless to rotate with the shaft. The "toothed rim," when in one position on the hub, meshes with the upper of the vertical racks of the bed to drive the bed in one direction, and, when shifted on the hub to its other position, meshes with the lower rack to drive the bed in the opposite direction. The means for shifting the gear back and forth on the hub comprise a yoke embracing a groove in the toothed rim and operated by an appropriate cam. The end of the main shaft, or the hub or body referred to, carries a crank pin which has timely engagement with a part of the traveling bed when near the end of its uniform movement in either direction, and reverses such movement, starting the bed with an appropriate acceleration in an opposite direction. The parts are so combined that the toothed rim, in engagement with one of the racks, drives the bed toward the end of its traverse until the said rack becomes disengaged from the rim, whereupon the crank pin continues the movement of the bed, first slowing it down, finally stopping, and immediately reversing it. During this reversal the yoke has shifted the toothed rim on the hub so that it is ready to engage the other rack as soon as the bed starts its return stroke under the driving force of the crank pin. When this takes place, the toothed rim couples

with the rack, and drives the bed with a uniform movement to the other end of its traverse, and a similar operation is repeated.

It is admitted by counsel that the claims sued upon do not involve the construction of the reversing mechanism, so long as some mechanism is provided for this purpose which is independent of the toothed rim, and that the only claims of the patent involved in the suit are claims 1, 4, 5, 6, 11, and 15. These claims are as follows:

"(1) The combination of the bed, two facing racks in different planes carried by the bed, a wheel having a rim and a body of greater thickness than said rim, the rim being adapted to move longitudinally of the axis of the wheel on said body from engagement with one of said racks to engagement with the other of said racks, and means for giving such movement to the rim, substantially as described."

"(4) The combination with the bed racks located in adjacent vertical planes, of a rotatable shaft having an enlargement on one end, a sliding gear actuating said racks, means independent of the gear for controlling the bed during the reversing operations, and means for shifting the gear from one rack to the other during such reversing operations, said gear being made in ring form and being slidingly mounted upon the enlargement of said shaft, substantially as specified.

"(5) The combination with the bed racks located in adjacent vertical planes, of a sliding ring gear, an enlargement or hub on the gear shaft on which enlargement the gear is splined, a yoke operating in a groove formed at the side of the gear, and means for operating said yoke in sliding the gear, substantially as specified.

"(6) The combination with the bed racks located in adjacent vertical planes, a sliding ring gear, an enlargement or hub on the gear shaft upon which enlargement said gear is mounted and to which it is splined, a bearing for said shaft, and means for shifting the gear, substantially as described."

"(11) The combination of a rotatable shaft having a large hub or crank disk on one end, a rack frame provided with parallel racks disposed in different planes, an annular or ring pinion slidably mounted on but rotating with said crank disk, means independent of the racks and pinion for reversing the movement of the rack frame at each end of its stroke, and means for shifting the pinion upon the disk from engagement with one rack into engagement with the other during the period of reversal."

"(15) The combination with the bed racks arranged in adjacent planes, a rotatable longitudinally-immovable shaft having a large hub on one end, a gear mounted on the said hub and sliding from one rack to the other, said gear being independent of the shaft bearing, and means for slowing and reversing the bed, substantially as described."

Most of the things mentioned in these claims are old. The two facing racks in different planes, the wheel adapted to be shifted axially from one rack to the other, and means for giving such movement to the wheel, were all shown in previous patents and known in the prior art. The only thing described in these claims which is new is having the rim of the wheel slidingly mounted upon an enlargement of the shaft constituting the main body or hub of the wheel, or, as otherwise described in the claims, having the sliding ring gear splined on or slidingly mounted on the enlargement or hub on the gear shaft. The Miehle patent of 1890, which is admittedly the nearest to the Read patent of any issued before it, has the appearance of a double wheel having a movable rim; but the rim is not mounted directly upon the rectangular member which drives it, but is mounted upon a sleeve solidly journaled to the frame of the press. The rim surrounds the rest of the driving member, but is not supported by it. The invention

of Read consisted, in my opinion, substantially in mounting the rim of the wheel directly on the hub or body of the wheel; its rotation being made uniform with the hub either by the use of splines, or by making the main body of the wheel rectangular. This construction, it is claimed, has greater simplicity and several advantages over the Miehle structure with a sleeve. An application for a patent upon this same idea was filed both by Read and by Miehle; an interference was declared between them in the Patent Office; a hearing was had; Read was decided to have been the original inventor, and the patent was accordingly issued to Read. No machine, before this suit was brought, was ever made by the complainants under the Read patent; but the defendant, after it had filed its application for a patent, and before the decision of the interference in the Patent Office, made and sold 13 machines substantially embodying the idea which Miehle and Read both claimed to have invented, and the patent for which was ultimately issued to Read. One of these machines was found to work unsatisfactorily, except at a slow rate of speed; and, after repeated efforts to adjust it and correct it, it was rejected and returned by the purchaser as a failure. The defendant claims that the fact that Hoe & Co. had never, before the suit, manufactured any machines under the Read patent, and that one of these which the defendant manufactured and sold, before the decision upon the interference, proved unsuccessful, establishes that a machine made strictly in conformity with the Read patent could not be made practically successful. But a machine has been made by the complainants since the beginning of the suit, which, although it was not constructed strictly in conformity with the Read patent, appears to have substantially conformed to it. This machine has done satisfactory work at a high rate of speed; and the fact that no evidence is produced in reference to the working of 12 of the 13 machines made in substantial conformity with the Read patent, and sold by the defendant, is suggestive. The defendant must know to whom the machines were sold, and must have been able to ascertain whether they worked satisfactorily. If they had worked unsatisfactorily, the defendant would presumably have offered proof of it, and I think that the fact that no evidence has been given by the defendant in respect to the operation of those machines raises a presumption that they accomplished satisfactorily the purpose for which they were bought. The fact that no machine has ever been made and shown to work successfully under a patent does not prevent the owner of the patent, if it is valid, from restraining an infringement of it. (Bement v. National Harrow Co., 186 U. S. 70, 90, 22 Sup. Ct. 747, 46 L. Ed. 1058); but the fact that no machine has ever been made in exact conformity with either the Read patent or the Miehle patent of 1890 explains the difficulty of determining as an actual fact whether a machine made under either patent would be practically operative. I think, however, upon the whole, that the proof warrants the inference that a machine made under the Read patent would operate successfully. I think, however, that the substantial invention involved in the Read patent is the mounting of the rim of the two-part wheel directly upon the body of the wheel. The defendant claims that, if the term "mounted on" does

not necessarily mean "supported by," the Read patent involves no invention over the Miehle patent of 1890, because in the Miehle patent of 1890 the rim was mounted on the main body of the crank head, which corresponds in that patent to the hub of the wheel in the Read patent, although not supported by it. But, in my opinion, the idea of mounting the rim directly upon the main body of the wheel, instead of attaching it to a sleeve over the main body of the wheel and having it carried simultaneously with the main body of the wheel by means of splines or a rectangular hub, was novel, and was patentable.

The complainant claims that in several minor respects the Read patent has certain other incidental advantages over any prior machine. It is claimed that the rim of the wheel having no work to do during the reversing operation is free from the friction ordinarily incidental to the reversing operation; that in the Read patent, the rim being the only part of the wheel to be moved longitudinally, the mass to be shifted is reduced to a minimum; that the fact that the distance of the reversing crank pin from the shaft journal is shorter in the Read patent causes greater rigidity in the reversing mechanism; that the overhang or distance from the crank pin to the shaft journal is less under the Read patent than the Miehle patent, causing greater stability of parts; and that, in the Miehle patent, owing to the presence of the sleeve within the shaft journal, the sleeve and gear may be liable to the pinch and friction of the shaft against the journal seat during reversal. All these claims seem to me to be, to a greater or less extent, valid. It is claimed that the main body of the wheel and the main shaft remain undisturbed longitudinally in their bearings during the shifting movement, but this also seems to me to be equally true in the Miehle patent. Upon the whole, however, in my opinion, there are various points in respect to which a machine made under the Read patent would be superior to any previously constructed. The entire result was a distinct and substantial improvement, and I think that the patent issued for it was valid.

But it seems to me obvious that the Read patent is not to be regarded as a pioneer patent, to be construed broadly, so as to cover every device for accomplishing the same result, but is to be confined substantially to the specific steps in advance invented and described in the patent. The ordinary meaning of one thing being mounted upon another is that it is directly supported by the other. There is nothing in the drawings or the specifications or the claims of the Read patent which points to any different or more enlarged claim. The patentee, at the end of his description of the construction of the machine, says:

"I am aware that the moving of a bed-driving wheel laterally, so as to engage alternately with racks placed in different vertical planes, is not new; but making the wheel in two parts, the central or body portion of which may remain fixedly secured to the shaft and carry the crank pin, 9, while the rim only has a lateral movement, is an essentially novel construction."

I think that this statement shows that the patentee had no idea of claiming that his invention covered a rim mounted on and supported by a sleeve covering the body of the wheel. In Miehle's application, between which and Read's application the interference was declared,

Miehle expressly asserts that his present invention is an improvement on the construction shown in his patent of 1890, and says, in substance, that the improvement consists in mounting the gear upon the hub instead of securing it directly to the shaft. Read must have become familiar with that statement in Michle's application, and with the Miehle patent of 1890, during the interference contest, and it must be presumed that he intended to claim as his invention something essentially different from the idea embodied in the Miehle patent of 1890. At all events, if Read meant to claim a patent for a rim mounted on a hub but not supported by it, he was bound to state his claim in his patent so clearly that every one skilled in the art could not fail to see it and read it there. I think that he intended not to make such a claim. At all events, he did not.

It is a fundamental rule that a patentee is required to point out in his claim the exact nature of his invention, so that the public can clearly know what he claims, and can avoid infringement. Rev. St. U. S. § 4888 [U. S. Comp. St. 1901, p. 3383]. I find nothing in the drawings, specifications, or claims of the Read patent which would justify the broad interpretation claimed for it by the complainants, but I think that the Read patent is valid in respect to the actual invention which is described in it; that is, the use of a two-part wheel, the rim being mounted and movable directly upon the body of the wheel. But if this is the correct construction of the Read patent, I am not able to see that the machines manufactured by the defendant infringe it. In the defendant's machines the rim is solidly supported upon the frame of the machine, somewhat differently from, though in a manner essentially similar to, the mode of support shown in the Miehle patent of 1890. In both cases the rim receives its support from the sleeve; but in the one case the sleeve revolves with the rim, and in the other the rim revolves on the sleeve. I cannot see, therefore, that the defendant, in constructing and selling its present machines, infringes the Read patent.

It seems to me, in view of the Miehle patent of 1890, that it is impossible to hold that the machines made by the defendant infringe the Read patent, without also holding that the Read patent involves no invention, unless the invention is confined to the minor advantages previously referred to. The fact appears to be that both the Read machine and the defendant's present machine have some advantages over the Miehle patent of 1890. I have already alluded to several points in respect to which the Read patent seems superior. Some improvements in arrangement shown by the Read patent are also substantially accomplished in the defendant's present machines, particularly the small amount of overhang and of mass to be shifted. But, in my opinion, there is nothing in these improvements in the arrangement of parts which is patentable, except as combined with the main idea of the invention with which they are used, either that of Read, in mounting the rim on the hub of the wheel, or of Miehle, in mounting the rim on a sleeve over the hub. There is one point particularly in respect to which the present Miehle construction seems to be superior

to any preceding machine, including Read's. In the present Miehle machines, the rim being supported upon the sleeve, the friction of rest in shifting the rim from one rack to the other, at the end of the backward and forward motion of the bed, does not have to be overcome, as explained in the evidence of Mr. Wiles and as illustrated on the argument. The rim of the wheel being in rotation on the sleeve when the longitudinal shifting is necessary, the element of friction of rest is absent; and apparently, for this reason, the wheel may be moved longitudinally, when in rotation upon the sleeve, much more easily than it can be when entirely at rest.

My conclusion is that the Read patent is valid, but that the defendant has not infringed the patent, and that therefore the bill should be dismissed, with costs.

BRAGG MFG. CO. v. MAYOR, ETC., OF CITY OF NEW YORK et al.

(Circuit Court, S. D. New York. October 8, 1905.)

1. WITNESSES—REFRESHING MEMORY—NEWSPAPER ARTICLES.
   Upon the issue of prior invention, witnesses testifying as to the use of such invention by others may properly refresh their memories as to the time of such use by reference to contemporaneous newspaper articles describing the invention which they read at the time.
   [Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 877, 882, 888,]

2. COURTS—COMITY—PRIOR ADJUDICATION—VALIDITY OF PATENT.
   Prior decisions sustaining a patent are to be given effect under the rule of comity only as to matters which were before the court. With respect to defenses or evidence not before the court the action of the court in a subsequent case is purely original.

3. PATENTS—PRIOR INVENTION—GONG ATTACHMENT FOR ENGINE HOUSES.
   The Bragg reissued patent, No. 6,831 (original No. 165,438), for a gong attachment for engine houses, *held* void for prior use of the invention by others.

In Equity. On final hearing.

Eaton & Lewis (Eugene H. Lewis and John C. Rowe, of counsel), for complainant.

John J. Delaney (John R. Bennett, of counsel), for defendants.

HAZEL, District Judge. This is a suit in equity, instituted on June 15, 1891, for infringement of reissued letters patent No. 6,831 to Robert Bragg, dated January 4, 1876. The application was filed October 9, 1875. The validity of claims 3 and 4 of the patent has several times been sustained at final hearing. See Bragg v. City of Stockton (C. C.) 27 Fed. 509, and Walker v. City of Terre Haute (C. C.) 44 Fed. 70, where the opinions of the court are reported. The invention relates to "improvements in gong attachments for engine houses." The specification describes the mechanism operated automatically to utilize the force accumulated by the motion of a gong hammer in striking the gong. The object of the patentee was to contrive an adjustment of the assembled parts so that accumulated power could be transmitted to a place distant from the gong, and to enable the operation of the mech-

anism to effect the release of horses from their stalls or the ringing of a bell. The specification states:

"My invention is principally applicable, however, to fire engine houses, where it can be used for releasing horses from their stalls at the very instant of the first stroke of an alarm, and for striking an alarm to awaken the engineer or fireman."

And that:

"My invention consists in the employment of an arm, which is so situated that at the first stroke of the hammer upon the gong it will also strike this arm, which has attached to it any suitable mechanism, so that the force of the blow will release through this arm, a weight. The fall of this weight will pull a rope, which is connected with the mechanism to be operated, in such a manner that the pull upon it will operate the mechanism. * * * The operation will be as follows: The gong hammer, upon its first stroke, will strike the pad, E, and thus force the rod, D, and the arm, or lever, C, back until the roller, G, is released from the recess, F."

The claims involved read as follows:

"(1) The trip-rod, D, arranged as described, and the oscillating lever, C, for the purpose of releasing a suspended weight by the movement of a gong hammer, substantially as and for the purpose described.

"(3) In combination with the weight, B, caused to fall, as shown, the bell-crank lever, I, cord, K, and lever, L, for releasing the slide, O, and weight, R, and thus releasing the horses by means of the cord, T, substantially as herein described.

"(4) The trip-rod, D, oscillating lever, C, and suspended weight, B, in combination with the hammer of a gong, for the purpose of operating mechanism distant from the gong, substantially as above described."

Various mechanical devices, according to the specification, may be substituted to obtain the desired result. The reissue did not consist of the details of construction or the configuration of the essential elements. The principal point of novelty claimed is broadly the operation of the specified means directly from the gong hammer. Complainant contends that the invention in suit was of broad scope, and that the patentee was a pioneer in the art. This construction of the claims, however, upon the new facts presented, is thought to be beyond its due. The defenses are anticipation, noninfringement, and prior use and invention by others. The state of the art as shown by antecedent patents will be briefly considered. In the patent of Chambers, No. 93,673, August 17, 1869, the device was used to move feed and water to animals at a predetermined time, the mode of operating the device being much like that of the apparatus in suit. Its principal details of construction, though embodied in a different form from the gong attachment for engine houses in controversy, are nevertheless familiar mechanical equivalents. In the Haller patent, No. 30,141, of 1860, for improved electro-magnetic burglar alarm, the accumulated force was utilized for lighting a lamp by a match and ringing a bell. According to the specification, a heavier device is moved to do that which a light gong hammer is incapable of doing. The arrangement consisted of ropes or chains extending in front or on the side of the house, and passing over pulleys which were mechanically secured to double armed levers. The arms of the levers were connected with a movable rock shaft, which had an arm extending therefrom, adapted to impinge a spring, closing the circuit of an electro-magnetic

alarm, and causing the hammer to sound a bell. On the first stroke of the hammer, the friction wheel of the self-lighter is set free, and a light appears. In the patent to Farmer, of 1859, No. 22,602, the drawing attached to the specification indicates a combination for operating a water motor by accumulated force, obtained by means of suspended weights. Reference to the simplified diagram in evidence and the Farmer patent, discloses that:

"If the motion of the armature, D, were employed directly to operate the valve, k, and to raise the detent, q, as it might be, a very great comparative electrical power would be required; but if the armature, D, is used only to liberate a weighted arm, poised nearly vertically, or a series of any number of weighted arms be employed, each arm being heavier than the one which precedes it, and employed to liberate that which succeeds it, the last one liberating the machinery by its momentum in falling, only a small fraction of the same electrical power will be required."

According to the defendant's expert witness, the citations substantially described the principle of the patent in suit, and that the complainant's apparatus is merely a trifling modification of that which was commonly known. The evidence, however, indicates that Bragg applied a known principle assisted by new instrumentalities, to a new use, and if he was the first and original inventor, something new was created of patentable merit. The patent therefore cannot be held invalid for want of novelty, despite the similarity of the principle of mechanism as shown in the anticipated patents. As was said in Diamond Drill & Machine Co. v. Kelly (C. C.) 120 Fed. 289:

"The principles of mechanics are always the same, and, in the almost endless combinations of them possible, it is not to be expected that duplicates will not occur."

Under the doctrine of Hobbs v. Beach, 180 U. S. 392, 21 Sup. Ct. 409, 45 L. Ed. 586, the adaptation of old elements to a new use, and the minor changes required for that purpose where a new industry was practically established, may be within the realms of invention. And, even though the anticipatory references belong to a nonanalogous class, they may still be considered to determine the scope of the claims. Jones v. Cyphers (C. C.) 115 Fed. 324. The question of patentability and construction of claims, however, is not necessary to the decision of this controversy. The comparisons that have been made between the Bragg device and the mechanism of the prior art were merely to indicate the probable scope of the claims, and the probability of its conception and use by others prior to the invention in suit. Haworth v. Stark (C. C.) 88 Fed. 512. Lee v. Upson & Hart Co. (C. C.) 43 Fed. 670. The evidence of prior use by others seems to be sufficient to defeat the patent. The invention of Flanders in 1869 will be briefly considered first. The testimony tending to show an installation of the device as early as 1869 is not entitled to probative weight. It was deemed strange in the Terre Haute Case, that if the device was publicly used as claimed, the attention of the committee from a Philadelphia engine company sent to the city of Boston in the spring of 1869 to inspect fire houses and apparatus was not apprised of the improvement. The evidence shows that some of the members of the committee visited the engine house where the device was claimed to have been in

actual use. The point was urged that contemporary records of the Boston fire department made no mention of such mechanism. True, the witness Flanders explained that the record of the fire department only scheduled property owned by the city, but it may still be presumed that if the device had been in public use as claimed, the attention of the visiting members of the committee would have been directed thereto. Furthermore, a number of witnesses, members of the engine company, testified that during their connection with the said engine company, in the year 1869, and for several succeeding years, their attention was never called to the device, nor did they ever hear of its use. Such being the evidential facts in relation to the suggested prior use, the conclusion reached by the learned court in the Terre Haute Case was undoubtedly correct.

To establish the defense of prior use, stress is justly placed upon the testimony relating to the Higgins and Bailey apparatus. The proofs show that, in 1872, Higgins was engineer of steam fire engine No. 6, in the city of Albany. He devised means prior to July 28, 1872, to automatically unfasten the horses in the stalls at the instant that the alarm was sounded. His recollection as to the exact time when the device was in use is based upon a news item in the Sunday Press, published in the city of Albany, on July 29, 1872. The said item graphically described the manner in which the horses were released and hitched to the pole of the engine under his (Higgins') supervision. Higgins narrated an incident which occurred on the night of September 1, 1872, by which his recollection was refreshed as to the time when the device was in successful operation. The gong, he stated, sounded an alarm of fire, and the horses quickly responding took their places, but, before they could be hitched to the steamer, they obstinately returned to their stalls, making it necessary to lead them to the engine. Soon afterward the horses, while proceeding to the fire, ran away into the river and were drowned. He produced a sketch drawn under his direction showing the device and modus operandi. He testified that, when the gong attached to the wall of the engine house struck a blow, a clamp was drawn back, operating to release a small weight, which, in turn, caused a larger weight to drop, and to thereby release the horses. Further describing his device he said:

"The chain going under the stalls along the timber, coming out to this counterweight that pulled the gas pipe that ran along the face of the mangers, and when that was pulled back the halter that held the horses was released, and the gong under it struck, and the horses threw up their heads, and ran out."

Defendant's witness McCabe, also an employé of the said fire engine house, corroborated Higgins in all material matters. He likewise refreshed his recollection regarding the time when the device was in successful use, by the news item mentioned. He referred to the occasion when the horses ran away, and the fact of their drowning. Afterward, the chief engineer, apprehending that the device might interfere with an alarm, objected to its use, and it was thereafter for a number of years simply used to open the stable doors, instead of to release the

horses. The difference between the Bragg and Higgins constructions was that in the former the horses were released by withdrawing an armature, while in the latter they were unfastened by a hammer coming in contact with the gong. The announcement in the Sunday Press may not accurately have described the Higgins construction, but it is clear that, before its publication, there was in actual use an automatic arrangement by which the horses were released upon the stroke of the hammer upon the gong.

Complainant contends that the device was merely an abandoned experiment. This, however, was not the fact, for the practicability and operativeness of the apparatus is abundantly shown by the evidence. That the use of the device was discontinued by the chief of the fire department does not warrant the presumption that it was incomplete or used merely as a trial test. No witnesses were called by the defendant to contradict or impeach Higgins, although he was subjected to the test of a cross-examination. As has been intimated, the device was substantially like that described in the specification in suit, and equivalent means were employed to attain the result.

The Bailey apparatus. In 1872, Bailey, who was in charge, as engineer of the steamer Hugh Ranken, altered a hand-lever device, then in use, by which the horses were released on the instant of sounding an alarm of fire. The change or alteration consisted of attaching the hand-lever device to the fire alarm telegraph. Bailey says that his device was in successful operation prior to June 20, 1872. It is undeniable that this improvement accomplished the result of the patent in suit by substantially similar means. The important question is whether the Bailey device was completed and successfully used at the time stated by him. Upon this point he is corroborated by three members of the steamer company, and also by newspaper publications and entries in the records of the company. The narratives of the witnesses would ordinarily be regarded as improbable, on account of the lapse of time, but here, as will now be shown, it was indisputably corroborated by facts and documents. The proofs show that on July 26, 1872, the Troy Times, a daily newspaper published in the city of Troy, printed an announcement of Bailey's adjustment and attachment to the fire alarm telegraph, by which the horses were released from their stalls. On the next day, an article of similar import appeared in the Troy Daily Whig. On July 29, 1872, the Troy Daily Press also contained a news item describing Bailey's improvement. Later, on October 1 and 2, 1872, other news items were printed, relating to said inventions. Such publications were distinctly remembered by the witnesses who testified upon the subject, and served to recall to their minds the exact period of time when the improvement was in public use. Such prior use is further shown as has already been said, by contemporaneous entries in official records kept by Bailey and the secretary of the engine company. The entries are as follows:

Monday, July the 14th: "Engineer Bailey commenced putting in his attachment for unhitching horses by means of the F. A. Telegraph."

On the 22d: "Working on hitching apparatus."

On Wednesday, the 23d: "Working on hitching apparatus."

On the 24th: "Completed the hitching apparatus to-day."

On Friday, the 25th: "Hitching apparatus as devised by Engineer Bailey works to a charm. The hammer of the gong in striking the blow, throws back a hinge which lets a small weight fall in the cellar, which, in turn, pulls back a bolt, and lets drop a heavier weight, which is connected by wire and cords with the hitching rod in the barn."

In the circumstances presented, there is no doubt that the Bailey invention was in actual public use before the application in suit, and continued in such use by the engine company mentioned for a number of years thereafter. It is true, the witnesses were unable to testify to an independent recollection of the precise date when the apparatus were first operated. Their memories, however, according to their declarations, were distinctly and positively refreshed by the newspaper items, they having read them at the time of their publications, and hence their evidence is entitled to probative weight. No satisfactory reason for discrediting such evidence has been suggested. The narrative by Higgins in relation to the horses running away and drowning is not helpful, but the significance of the news items in evidence, which directly referred to the subject-matter, and recalled the facts to Higgins and Bailey, cannot be overlooked.

I am not unmindful of the general rule as stated in Thayer v. Hart, (C. C.) 20 Fed. 693, and many other adjudged cases, that evidence of prior invention affords large opportunity for fraud, deception, or mistake, and it must be established by explicit and positive proof. The Bragg patent, having several times been sustained by courts of the highest integrity, a natural hesitation to reach a different conclusion is entertained. This controversy, however, is unquestionably determinative upon the presentation of new facts, from which an entirely different conclusion, I think, is justified. The rule of comity, as frequently said, has its limitations. In Mast Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856, the Supreme Court of the United States succinctly said:

"It has no application to questions not considered by a prior court, or, in patent cases, to alleged anticipating devices which were not laid before the court. As to such, the action of the court is purely original, though the fact that such anticipating devices were not called to the attention of the prior court is likely to open them to suspicion."

The alleged prior use by Flanders as said, was heretofore fully considered in a former litigation; but the devices of Higgins and Bailey together with the antecedent patents of Chambers, Haller, and Farmer were not before the court. After careful consideration, I have reached the conclusion that the Higgins and Bailey devices though unpatented, were in successful operation and use prior to the invention in suit; and that the defendant has established such use by a fair preponderance of the evidence and in accordance with the established rule. Such determination as already remarked renders it unnecessary to discuss more fully the scope of the claims in suit or the issue of infringement.

The bill is dismissed, with costs.

GENERAL ELECTRIC CO. v. GARRETT COAL CO.

(Circuit Court, W. D. Pennsylvania. October 23, 1905.)

No. 31.

PATENTS—INFRINGEMENT—TROLLEY STAND.

The Bentley patent, No. 488,179, for a trolley stand for electric cars, construed, and *held* not infringed by a device which did not contain a spring plunger sliding in the drum to support the trolley pole, which is made an essential element of the combination of each claim, nor any mechanical equivalent thereof.

In Equity. On final hearing.

Betts, Betts, Sheffield & Betts, for complainant.

E. E. Robbins and Glenn S. Noble, for respondent.

BUFFINGTON, District Judge. This is a bill in equity brought by the General Electric Company against the Garrett Coal Company, users of a mining electric locomotive made by the Morgan-Gardner Electric Company. The bill alleges infringement of the first claim of a patent No. 488,179, owned by complainant, which was granted to Edward M. Bentley for a trolley stand for electric cars. The defenses are invalidity of the patent and noninfringement. We will for present purposes assume the validity of the patent, and confine ourselves to the question of infringement. The patent relates to trolleys for electric cars, which the patentee explained frequently jumped off their overhead conductors when passing around curves or over switches; that this was due to the fact the trolley moved stiffly in its bearings, and could not accommodate itself to the movements of the car. His device consisted of a hollow pedestal secured to the roof of the car. Loosely fitting therein was a cylindrical rotatable drum, the upper end of which extended above the cylinder, and was provided at one side with a pair of legs, between which was hinged the trolley pole socket. From this socket a lateral arm projected to the center of the drum, where it had a bearing on a plunger fitted to slide smoothly in the drum, and compress a strong spring seated on the drum bottom. The specification then proceeds:

"The operation is obvious. The spring keeps the trolley wheel normally pressed up against the overhead conductor, but permits the pole to sway up and down, as may be necessary. The drum turns easily on its bearings in the cylinder, and thus provides for the lateral movement of the pole in rounding curves and the like."

Upon this device was granted, inter alia, the claim now in dispute, viz.:

"A trolley stand comprising an upright cylinder, a drum rotatable therein, and adapted to carry a pivoted trolley pole, and a spring plunger sliding in the drum to support said pole, substantially as described."

The alleged infringing apparatus also uses an upright base or cylinder, in which is sleeved a rotatable drum, which supports the trolley pole, which is pivoted thereon. The lower end of the pole extends beyond the supporting pivot to the center of the drum. From this end a strong

tension spring extends to the bottom of the drum, where it is secured by a nut. It will thus be seen the respondent's combination does not embody the element of "a spring plunger sliding in the drum to support said trolley." The importance of this element of a spring plunger is shown by the fact that it is found in every claim of the patent and is described in the specification. No definition of it is found in the dictionaries, and it would seem the term is an original one, used by the patentee to describe that element of his combination. Now in that combination the spring plunger has functions peculiar to itself. In the first place, it serves, as stated in the claim, "to support said pole"; that is, the lateral arm is supported by the plunger, buoyed up from below by the compressed spring. Indeed the word "support" implies sustaining from beneath, as is indicated by its definition, "to bear by being under," and its derivation, subportare. It has also the function of "sliding in the drum" for the purpose, or, as stated in the specification, where it is described, as "fitted to slide smoothly in the drum." This, it will be observed, enables it to compress the spring without the latter buckling. Now in respondent's device no plunger, or anything at all resembling one, is employed, or, indeed, anything that can be regarded as a mechanical equivalent thereof. It is true a spring is used, but the use of springs to maintain contact between a trolley pole and an overhead wire was known before this patent. In that device, too, the pole is supported by the pivot on the drum, and, while the tension of the spring pulls the trolley pole against the wire, it serves in no way to support it in the sense of carrying its weight. In the patentee's device the spring does support the trolley. This it does by compression and the plunger; that is, the "spring plunger sliding in the drum" is the indispensable co-operating aid required to support or carry the weight of the pole. In the respondent's device the expansion of the spring pulls the trolley end up, and in doing so the drum or surrounding sleeve in no way co-operates with the spring, or modifies its action. It will be noted the spring of the Bentley device cannot be extended above the top of the drum, while the respondent's can and does.

We are accordingly of opinion the element of a spring plunger is not found in the respondent's device, or can its tension spring be adjudged the mechanical equivalent of Bentley's spring plunger sliding in the drum to support the trolley pole. Such being the case, the absence of this element in respondent's combination relieves it of the charge of infringement. Cimiotti Co. v. American Co., 198 U. S. 409, 25 Sup. Ct. 697, 49 L. Ed. 1100.

MURRAY CO. v. CONTINENTAL GIN CO.

(Circuit Court, D. Delaware. October 26, 1905.)

No. 249.

PATENTS—FEEDING SEED-COTTON TO GIN—INFRINGEMENT.

The apparatus covered by claims Nos. 1, 2, 9 and 12 of patent No. 472,607, dated April 12, 1892, granted to Stephen D. Murray, assignor to William Burr and John H. Deems for "Improvements in Apparatus for Elevating, Distributing, and Feeding Seed-cotton to Gins," and of claim No. 8 of patent No. 644,532, dated February 27, 1900, granted to Stephen D. Murray for "Improvements in Cotton-elevators and Gin-feeders," if not void for want of invention must, in view of the prior art, receive such a narrow and limited construction as to negative infringement.

(Syllabus by the Court.)

See 126 Fed. 533.

Oliver Mitchell and Arthur W. Spruance, for complainant.
Melville W. Church and E. J. Smyer, for defendant.

BRADFORD, District Judge. The Murray Company, a corporation of Texas, filed its bill against the Continental Gin Company, a corporation of Delaware, alleging infringement of letters patent of the United States No. 472,607, No. 488,446 and No. 644,532; but patent No. 488,446 need not now be considered, as the counsel for the complainant has since the bill was filed abandoned all claim for relief in this suit with respect to it. Patent No. 472,607, dated April 12, 1892, was applied for May 29, 1891, and was granted to Stephen D. Murray, assignor to William Burr and John H. Deems, for "Improvements in Apparatus for Elevating, Distributing, and Feeding Seed-cotton to Gins." Patent No. 644,532, dated February 27, 1900, was applied for April 24, 1899, and was granted to Stephen D. Murray for "Improvements in Cotton-elevators and Gin-feeders." In the description of patent No. 472,607 the nature and objects of the invention are thus stated:

"This invention relates to certain new and useful improvements in machines or apparatus for elevating, distributing, and feeding seed-cotton to gins; and it consists, substantially, in such features of arrangement, construction, and combination of parts as will hereinafter be more fully described and claimed. The invention has for its object to provide a machine or apparatus which shall enable seed-cotton to be elevated, distributed, and fed directly to two or more gins at the same time without greatly increasing the consumption of power beyond that required for performing the same work in connection with a single gin. The invention has for its further object to provide a machine or apparatus of the character referred to, which can be adapted to any ordinary gin or gins or any arrangement of gins. The invention has for its further object to enable ready access to be had to all parts of the gins, and also to greatly economize in space over many former inventions for a like purpose. The invention has for its still further object to provide a machine or apparatus of the character referred to which shall possess the quality of great durability, and one in which the moving parts are comparatively few and not liable to become as quickly worn as when of a more delicate construction. The invention has for its still further object to greatly reduce the quantity of machinery usually employed to do the work of elevating, distributing, and feeding cotton to gins, and thereby rendering the machine or apparatus much less expensive to build. The invention has for its

final object to provide means whereby the cotton is fed to the gins in a compressed sheet or bat, and also to provide simplified devices for actuating and regulating the speed of the feed-rolls."

The charge of infringement as to patent No. 472,607 has been restricted to claims 1, 2, 9 and 12, which are as follows:

"1. In apparatus for elevating, distributing, and feeding seed-cotton to gins, the combination, with a suction pipe or tube, of a box or casing having side air-passages and a central screened space, and a chute or feeder communicating with said space, substantially as described.

"2. In apparatus for elevating, distributing, and feeding seed-cotton to gins, the combination, with a suction pipe or tube formed in its under side with an opening, of a box or casing having a central space communicating with said pipe or tube and provided with side air-passages having inner screen-walls, and a chute or feeder communicating with said central space, substantially as described."

"9. In apparatus for elevating, distributing, and feeding seed-cotton to gins, the combination, with the chute or feeder, of a set of feed-rollers supported at the bottom of said chute or feeder and means for regulating the feed of said rollers, substantially as described."

"12. The combination, with a suction-pipe, of the box or casing constructed of two or more central spaces and provided with the screened air-passages and a chute or feeder suspended beneath each of said central spaces, substantially as described."

In the description of patent No. 644,532 the nature and object of the invention are thus stated:

"This invention relates to cotton-elevators and gin-feeders, and especially to that class of such apparatus employed for elevating and feeding seed-cotton to cotton-gins wherein an air conduit or tube is arranged longitudinally along and communicates with the cotton-distributing casing or trunk, provided with screens arranged therein at points above feed-chutes that lead to the gin-feeders in such manner that the seed-cotton is drawn by suction through the distributing casing or trunk and at the points where the screens are located drops by gravity into the feed-chute and by the latter is conveyed to the gin-feeders, which operate to feed the cotton to the cotton-gins, as in letters patent Nos. 472,607, 488,446 and 560,914 respectively dated April 12 and December 20, 1892, and May 26, 1896. The object of the present invention is to provide an improved air conduit or tube for delivering the cotton to the feed-chutes, to form the feed-chutes in two removable sections to facilitate the ready insertion and removal of the flexible valves, to combine with the gin-feeder improved cotton-cleaning mechanism and means for conveying off the dirt, and finally to improve, simplify, and render more efficient this class of apparatus generally."

The charge of infringement as to patent No. 644,532 has been restricted to claim 8, which is as follows:

"8. In an apparatus for feeding seed-cotton to cotton-gins, the combination with a feed-chute or receptacle-box, of a casing, feed-rollers arranged in the casing, a picker-roll disposed beneath the feed-rollers, a chute for delivering the cotton from the picker-roll to the gin, a screen located beneath and in rear of the picker-roll, a box or trough for catching the dirt which drops by gravity through the screen, means for directing the dirt into said box or trough and a conveyer arranged in the box or trough and operating to discharge the dirt therefrom, substantially as described."

The defendant contends that the complainant has failed to establish title to patent No. 472,607, one of the two patents on which a right of recovery is now set up. This is an immaterial point from the view the court takes of the case and need not further be alluded to.

I do not think that the merits of the case require elaboration or enlargement and shall, therefore, content myself with the brief statement, after careful examination of the evidence, exhibits and briefs, that, if the patented apparatus in suit are not void for want of invention, they can, in view of the prior art, receive only such a limited and narrow construction as to negative infringement. The bill accordingly must be dismissed with costs. Let a decree be prepared and submitted.

THOMSON-HOUSTON ELECTRIC CO. v. INTERNATIONAL TROLLEY CONTROLLER CO.

(Circuit Court, W. D. New York. May 8, 1905.)

No. 249.

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
   Where the validity of a reissue patent has been adjudged by the Circuit Court of Appeals, a defense of laches in applying for the reissue, set up by a defendant in a subsequent suit for its infringement, is not sufficient ground for refusing a preliminary injunction, where infringement is not denied.

2. SAME—TRAVELING CONTACT FOR ELECTRIC RAILWAYS.
   A preliminary injunction granted, restraining infringement of the Van Depoele reissued patent, No. 11,872 (original No. 495,443), for a traveling contact for electric railways on a prior decision sustaining its validity.

In Equity. Suit for infringement of reissued letters patent No. 11,872 (original No. 495,443), for a traveling contact for electric railways, granted to Charles J. Van Depoele November 13, 1900. On motion for preliminary injunction.

Betts, Betts, Sheffield & Betts, for complainant.
Howard P. Denison, for defendant.

HAZEL, District Judge. The propositions relating to the proper construction of the claims of the earlier patent, together with the validity of the reissue, have recently been fully and finally decided by the Circuit Court of Appeals for this Circuit in Thomson-Houston Electric Company v. Black River Traction Company, 135 Fed. 759, 68 C. C. A. 461, and this court, of course, is bound by that decision. Hence it is entirely needless to again construe the claims, or to determine the validity of the reissue patent or narrate its history or that of the litigations in which the generic patent was for a number of years involved. Nor is it useful to dwell upon the grounds leading to the decision holding the reissue valid. The single point, infringement not being disputed, upon which stress is laid is the question of laches. Defendant contends that the reissue patent was granted by the Patent Office seven years and six months after the original patent, and therefore was not applied for within a reasonable time after the discovery of the mistake upon which the reissue was based. Assuming the defense of laches well pleaded and maintainable, which may be doubted where the question has been considered by the appellate

court (American Sulphite Pulp Co. v. Burgess Sulphite Co. et al. [C. C.] 103 Fed. 975), I am well satisfied that the peculiar circumstances which prompted the application for a correction of the earlier patent were such as to excuse any delay. The delay was not unreasonable, and certainly is explained by the usual course of litigation in which the original patent was involved.

An injunction pendente lite may issue.

STAR CO. v. COLVER PUB. HOUSE.

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

COURTS—UNITED STATES COURTS—PROCEDURE—PRELIMINARY INJUNCTION.

It is the rule in the federal courts that a preliminary injunction will not be granted unless the papers present a clear case.

In Equity. On motion for preliminary injunction.

Clarence J. Shearn and Edward A. Freshman, for complainant.
Archibald Cox, for defendant.

HOLT, District Judge. The rule is well settled in the federal courts that a preliminary injunction will not be granted except when the papers present a clear case. Stevens v. Missouri, K. & T. Ry. Co., 106 Fed. 771, 45 C. C. A. 611; Blakey v. National Co., 95 Fed. 136, 37 C. C. A. 27. In my opinion, this case is not clear, but doubtful. The application is based on two grounds—the alleged violation of a trade-mark, and unfair competition. In the first place, I think it doubtful whether there can be a trade-mark in the word "American" or "Magazine," or in a combination of the two. Moreover, the thing sold which infringes a trade-mark must obviously be substantially similar to the thing entitled to the trade-mark. The defendant publishes a magazine. The complainant publishes a supplement or addition to its Sunday issue of a daily newspaper. It seems to me that it is merely a part of a newspaper, and not a magazine. Indeed, as I understand the title, it is not called a magazine. It is called "The American Magazine Supplement"; that is, a supplement or addition to the usual issue of the newspaper, containing matter the general character of which is or aims to be similar to that published in a magazine. The word "Magazine" in this title appears to me to be an adjective qualifying the word "Supplement," and not itself an independent noun. It also seems equally dubious to me whether any successful case can be made out of an unfair competition in business. I cannot see, upon a consideration of the facts shown in the moving papers, and upon an inspection of the different publications, how the magazine published by the defendant can ever be mistaken for the supplement published by the plaintiff, either by readers or advertisers, or any persons whatever.

A preliminary injunction would obviously cause considerable damage to the defendant. Under all the circumstances, the motion is denied.

KESSLER & CO. et al. v. ENSLEY CO. et al.

(Circuit Court, N. D. Alabama, S. D. September 16, 1905.)

No. 133.

1. ESTOPPEL—CORPORATIONS—RATIFICATION OF PRIOR ACTION—ACCEPTANCE OF BENEFITS.

Where, under authority given by a resolution of its stockholders, the property of a corporation was conveyed to trustees with power to sell and to apply the proceeds to the payment of the company's debts, and the company, with full knowledge of all the facts, allowed the trustees to proceed under the trust to sell property until its debts were paid, and accepted a reconveyance of the remainder of the property and retained the same, such action was a ratification of the conveyances, and steps by which the trusteeship was created and any irregularities or defects in the original proceedings are immaterial, nor can the company or one suing in its right deny the title or authority of the trustees or the validity of their acts, except for fraud or breach of trust.

2. CORPORATIONS—PURCHASE OF PROPERTY BY OFFICERS—CURING DEFECTIVE TITLE.

Lands of a corporation were sold on execution and purchased by the judgment creditor, who conveyed to a second corporation organized for the purpose, in which one of the directors of the first was a stockholder. An agreement was made between the first company and its creditors to convey its property to trustees, who were to sell sufficient to pay its debts and reconvey the remainder, and pursuant to such agreement it conveyed its statutory right of redemption to the lands sold to the trustees, and the second company also conveyed to them its rights therein, thus vesting them with full title. *Held*, that any equity in favor of the first company which existed in the property while held by the second company, by reason of the fiduciary relation between its organizer and the first company, was extinguished by the conveyance of the property to the trustees, to be held and disposed of for the benefit of the first company, and that certain of the property which was thereafter purchased from the trustees by the second company and such stockholder therein was not affected by such equity.

3. SAME—VALIDITY OF PURCHASE BY FORMER OFFICER—EVIDENCE CONSIDERED.

Evidence considered relating to a purchase of lands of a company by a former director, and by a corporation of which he was a large stockholder, from trustees to whom they had been conveyed under an agreement between the company and its creditors, made by direction of its stockholders, to be sold primarily for payment of its debts, and the transaction *held* not affected by fraud or concealment of facts on the part of the purchaser, or collusion with the officers of the company or the trustees, nor impeachable on the ground of inadequacy of consideration; the proposition to purchase, before being made to the trustees, having been openly made to the company at a meeting of stockholders, and by them recommended for acceptance to the trustees.

4. SAME—PURCHASE BY DIRECTOR FROM TRUSTEES—BURDEN OF PROOF AS TO VALIDITY.

A purchase of property of a corporation by a director or former director from trustees whose selection he did not control, but who were chosen by the stockholders and creditors to hold the property in trust to sell and pay the company's debts, is not within the strict rule which is applied in case of a purchase by a director from his fellow directors, and the burden of proving that improper influence moved the trustees in making the contract rests upon him who assails it.

5. SAME—SUIT BY STOCKHOLDER—LACHES.

Where a land company, owning a large tract of land of speculative value and largely indebted, conveyed its land to trustees, to be sold so far

as necessary to pay its debts, and certain of such lands were purchased from the trustees by a former director and a corporation in which he was interested, who took possession, made improvements, brought in manufacturing industries, sold lots, and built up a town, stockholders of the company who had knowledge of such facts and to whom knowledge of all other facts relating to the transaction was accessible are barred by laches from maintaining a suit in equity to set aside the purchase by a delay of four years before taking any action to that end, during which time the property had greatly increased in value, largely through the efforts and expenditures of the purchasers.

In Equity. On final hearing.

This was a bill, filed April 25, 1902, by Alfred Kessler and others, minority stockholders of the Ensley Land Company, against the Ensley Company and others, in right of the Land Company, which refused to sue, to set aside the conveyance of a choice body of its lands, which the bill alleges were purchased by four of the defendants, in fraud of the Land Company. The case was before the court on demurrer to the original and amended bills. 123 Fed. 546; 129 Fed. 398. The Ensley Land Company is here referred to as the Land Company, to distinguish it from the Ensley Company; and for brevity the Tennessee Coal, Iron & Railroad Company is referred to as the Tennessee Company. Only a summary of the allegations of the bill, which is quite lengthy, is necessary to a proper understanding of the case.

At the time of, and just before the culmination of, the grievances complained of, the defendant Shook was president of the Land Company and vice president of the Tennessee Company; Baxter was a director of the Land Company and president of the Tennessee Company; Bowron was a director of the Land Company and vice president of the Tennessee Company, McCormack was a director of the Land Company and general manager of the Tennessee Company, Ramsey was assistant general manager of the Tennessee Company, and Barker was president of a bank which held a number of claims against the Land Company, and afterwards became co-trustee with Bowron under a deed of trust to secure creditors of the Land Company. The theory of the bill was: That the defendants, with the exception of Barker, while officers of the Tennessee Company, which owned a majority of the stock of the Land Company, by means of their control of the majority stock, elected what persons they pleased as officers and directors of the Land Company and thus controlled its affairs, and so mismanaged the corporation as to involve it in debt. That they formed a conspiracy, in the latter part of the year 1896, or early in the year 1897, to acquire the property for themselves, and in order to more effectually carry out this conspiracy, and to deceive the Tennessee Company and other stockholders, not in the conspiracy, and to give their purchases a semblance of legality, they formulated the plan of the trusteeship, under which Barker and Bowron became trustees, and were clothed with the title of the company to sell its lands in payment of its debts. That as officers of the Tennessee Company they knew the fact, of which the other stockholders were ignorant, that the Tennessee Company had determined to build a steel plant at Ensley, knowledge of which, if made known to the public, would have greatly increased the value of the lands at that time, and have enabled the officers of the company, by putting the property on sale in the usual way, to have raised enough money to pay its debts, and thus avoided the trusteeship altogether, but that they concealed this knowledge from the stockholders. That in pursuance of the conspiracy Shook secretly induced Mrs. Warner, the owner of a judgment against the Land Company, to sell all the property of the company under execution in January, 1897. That she did so and went into possession. That in December, 1897, the defendants, who concealed their connection with the Ensley Company, caused that company to be formed, and to purchase the lands from Mrs. Warner, and then caused the Ensley Company to convey them to Barker and Bowron as individuals, with the secret understanding that, as soon as the title of the Land Company could be gotten into the trustees, they would make the sales complained of to the Ensley Company and to McCormack. That in pursuance of this conspiracy a meeting of the stockholders of the Land Company was called for the 10th of January, 1898,

which for want of a quorum adjourned over until the 25th of that month, when Shook made the following report to the stockholders: "To the Stockholders of the Ensley Land Company: Since your last annual meeting all the property of the Ensley Land Company has been sold by its creditors. On the 25th of January, 1897, the realty was sold by the sheriff, and bought in by the executrix of the estate of James C. Warner, deceased, who was the owner of what is known as the 'Birmingham Railway & Electric Company judgment,' for $15,168.91. About the 18th of September last the personal property was sold for $525, under an execution obtained by Napoleon Hill, of Memphis, Tenn., for $13,348.96. The result of these sales left the Ensley Land Company nothing but the statutory right of redemption. The aggregate amount of indebtedness due is about $130,000. For the purpose of liquidating these debts, the creditors have agreed upon a plan of having the property conveyed to two trustees, Messrs. N. E. Barker and James Bowron, with the understanding, when a sufficient amount of property has been sold to pay off the debts of the Ensley Land Company and the expenses incident to the execution of the trust, that all the remaining property shall be conveyed to the Ensley Land Company. For the purpose of enabling the trustees to make absolute title to the property they may sell, it is necessary that the Ensley Land Company shall waive its statutory right of redemption. I suggest that our attorneys be requested to draw up such papers as will make effective the will of the stockholders in this respect, and that the directors be authorized to consummate an agreement with the trustees appointed by the creditors."

This report was spread upon the minutes. At that meeting, by a vote of 2,597 shares in the affirmative to 30 in the negative, a resolution, moved by the defendant McCormack and seconded by the defendant Shook, was adopted, which, after reciting the sale under the Warner judgment, etc., that the company owed other debts, and that its property was more than sufficient to pay its debts offered for sale in the ordinary manner, provided, in substance, that upon the execution by Barker and Bowron of a declaration of trust the terms of which should be satisfactory to the board of directors, and providing for the payment of claims of creditors according to their priority, that the president on behalf of the Land Company release and convey the statutory right of redemption. On the 21st day of February, 1898, Shook, in pursuance of the resolution, made a conveyance to Barker and Bowron in the name of the company, they having made a declaration of trust, which is recited in the company's conveyance, by which not only the statutory right of redemption is released to the trustees, but all the right, title, and interest of the company was conveyed to them. At that meeting the following proposition from the Ensley Company was put upon the minutes:

"We will give you $14,600 for 220 acres of land described as follows: 40 acres in townsite, 40 acres near K. C. road, 60 acres beyond Eubanks, 40 acres near No. 3 slope, 40 acres near shaft No. 1. (2) We will guaranty the building of 20 houses on this land in 6 months, 40 houses in 12 months, and 50 houses in two years. (3) You to name a price on each lot and block you are willing to put upon the market, and give us the exclusive right to sell the same, paying 10 per cent. commissions on all such sales. When lots are sold on time or in connection with our building operations, we to pay the fixed price ourselves, less the 10 per cent. (4) We will guarantee the sale of ——— of your lots the first year and ——— in two years the building of houses thereon ——— months. (5) We will cause to be erected, in one year from this date, at Ensley, a foundry and machine shop of capacity to do all work obtainable and to enlarge same as business demands. (6) We will cause to be put in operation a red brick making plant with capacity to furnish brick for all local demands. (7) We will cause to be erected and operated a planing mill with cutoff saws sufficient for the needs of the town. (8) We will locate a drug store at Ensley. (9) We will locate a lumber yard and builders' supply store. (10) Proper material being found at Ensley and furnished us at competitive prices, we will cause to be erected a plant for the manufacture of bolts and nuts. (11) Also a plant for the manufacture of rivets. (12) Also a plant for the manufacture of steel plow shapes. (13) Also a plant for the manufacture of boilers and bridges. (14) Suitable material being found at Ensley, we will erect a plant for the manufacture of lime. (15) If found

practicable, and molten steel is sold us at reasonable prices, we will cause to be built a plant for the manufacture of steel castings. (16) For the location of industries, free sites to be donated by you. (17) It is understood that in the location of manufacturing industries we are to have the support and approval of the trustees and of the Tennessee Company, who would be expected to give industries at Ensley as low net prices on raw material as given any one located elsewhere." Whereupon the following action was taken by the stockholders: "Resolved, that it be recommended to the trustees that they trade with the Ensley Company on the lines indicated in the proposal which is submitted by the Ensley Company at this meeting." That after the president of the Land Company executed the conveyance to Barker and Bowron they made the sales complained of to the Ensley Company and to McCormack; the other defendants, with the exception of Barker, having a secret interest therein. The bill further alleged that the property was sold for about one-tenth of its value. That the sales were by acreage, and not by blocks and squares as laid out in the plan of the city, and were, in fact, secret sales. That the trustees allowed the purchasing defendants to select the choicest portions of the property adjacent to the reservation by the Tennessee Company for the steel plant, which was built at that point a few months after the sales. That the Tennessee Company was indebted to the Land Company in the sum of $40,000 or $50,000, which defendants failed to collect, which could have been utilized by them to relieve the Land Company from the pressure of creditors, most of whom were willing to wait for the payment of their claims. The opinion states other facts which are set forth in the bill as badges of fraud, and certain objections which it makes to the validity of the proceedings at the stockholders' meeting and the legal and equitable effect of the several conveyances. The excuse given for not earlier filing the bill was held sufficient in Kessler & Co. et al. v. Ensley Co. et al., 129 Fed. 398, and need not be here repeated. The bill prayed a decree vacating the sales to the respondents, and requiring them to reconvey the portions of the land which had not been sold, and account for those which they have sold to bona fide purchasers, and for a decree against the defendants individually for their several breaches of trust, and also "for a decree requiring them to account for the rents, issues, profits, and proceeds received by them as the result of or by reason of any of their dealings aforesaid." The court dismissed the bill on the merits, and also for laches.

J. W. Baker, T. M. Steger, Smith & Smith, and I. K. Boyesen, for complainants.

Knox, Acker & Blackmon, James C. Bradford, John F. Martin, and E. J. Smyer, for defendant.

JONES, District Judge (after stating the facts). The bill is lengthy, and the agreed facts and the testimony are voluminous. The evidence follows the range of the acts and motives of a number of individuals over a period of several years, in which the history and conduct of large corporate concerns are unfolded in support or denial of bitter charges of fraud against corporate managers. Such complaints must be heard by courts with painstaking care, and the discharge of the duty in this case compels extended examination of the evidence. It is not practicable, without swelling this opinion to an intolerable length, to detail or dissect the many minute facts and circumstances which have had the attention of counsel in their earnest and able arguments, or to do more, in dealing with this mass of evidence, than to discuss the prominent facts and controlling features of the case. Some legal questions, decisive of many of the contentions, must first be disposed of.

1. It was held on demurrer to the amended bill that the Land Company, as the case was then presented, had ratified the conveyances and

steps by which the trusteeship was created, and the title and powers lodged in the trustees, and was legally bound by all the lawful acts of Barker and Bowron in the execution of their trust. Kessler et al. v. Ensley Co. et al. (C. C.) 129 Fed. 397. The proof shows, with knowledge that the title to its property which had passed to Mrs. Warner had been conveyed by her to the Ensley Company, which, in turn, had conveyed to Barker and Bowron, and being fully advised of the resolution of the stockholders' meeting held January 25, 1898, looking to the creation of the trusteeship, and that the conveyance then authorized to the trustees had been made and delivered, the Land Company allowed the trustees to continue in possession of the property and title thus acquired, and to go forward in the execution of the trust for over a year, applying the proceeds of sales of the property while in their hands to the payment of the Land Company's debts, and that the company received and kept the declaration of trust, settled with the trustees, taking from them, and collecting as its own, notes and securities for lots sold, and finally holds all the unsold lands under a reconveyance from these trustees. It cannot accept and retain the benefits of the trusteeship and at the same time repudiate the powers and title under which it held and lawful acts done thereunder. It cannot now deny that they were its trustees, and had its title to the lands and its authority to sell them, nor can it undo or assail their acts, except for fraud, breaches of trust, and the like, as is open to others to undo or avoid the acts of their trustees. Having acted with full knowledge, it it is bound by its election and ratification and the legal and equitable rights thereby created against it. Neither it nor any one standing in its shoes can now recall its act, or the consquences which flow from it. Pneumatic Co. v. Berry, 113 U. S. 327, 5 Sup. Ct. 525, 28 L. Ed. 1003; Taylor v. A. M. Ass'n, 68 Ala. 229.

It is, therefore, no longer of legal consequence that the corporate meeting, at which the creation of the trusteeship and the conveyance by the Land Company to the trustees were authorized, was held at Birmingham, instead of at Ensley, as required by the by-laws; or that there were infirmities in the sheriff's sale; or that the proxy upon which the majority of the stock was voted at that meeting was irregular or unauthorized; or, as urged, that the directors alone, not the stockholders, had authority to order the conveyance or the relinquishment of the statutory right of redemption to the trustees; or that these things could not be legally authorized, except after advertisement for 30 days; or that the board of directors did not pass any resolution or take any formal action expressing satisfaction with the terms of the declaration of trust; or that the resolution did not authorize the conveyance of all of the company's right, title, and interest. The corporation, acting through the proper instrumentalities and in the proper mode, could legally have done all the things complained of. These objections involve matters wholly intra vires, and private, as distinguished from public, wrongs. Such acts may be cured by corporate acquiescence or ratification; and here we have both on the part of the Land Company.

2. It is urged by complainants that "Barker and Bowron were

themselves trustees ex maleficio after they purchased from the Ensley Company, and they could not convey the lands freed from the trust, except to a purchaser without notice," and that the Ensley Company and McCormack and Ramsey were not such purchasers, and, "if the proceedings of the stockholders and deed made by Shook on February 21, 1898, be held sufficient to confer title on Barker and Bowron, trustees, they were inoperative, because the legal title was already in Barker and Bowron, and when they acquired it the statutory right of redemption merged, leaving the equitable estate in the Ensley Land Company, and a conveyance to the trustees never passes the equitable estate to them." As we understand this contention, it is that the lands had never been freed, as to the purchasing defendants, from the trust resulting from the dealings with Mrs. Warner, and that McCormack and Ramsey and the Ensley Company now hold the portion of the lands repurchased by them from the trustees, after the trustees bought from the Ensley Company, subject to the resulting trust which the law impressed upon it, by reason of McCormack's fiduciary relations, while the Ensley Company held the title under purchase from Mrs. Warner.

Bowron and Barker doubtless were trustees ex maleficio as regards the Land Company, so long as their title rested only on the deed from the Ensley Company, but that infirmity of their trust was cured, and thereafter they became perfect trustees, rightfully clothed with the whole title. They acted in behalf of the Land Company and its creditors jointly, with the sanction and commission of both, to effect a purpose highly beneficial to both. They were seised first in right of judgment creditors whose liens were superior to the right or title of the Land Company, if the title had remained in it. Next, they held the legal title of the Land Company by purchase from the Ensley Company. That company acquired title from Mrs. Warner, whose conveyance, under her execution, extinguished the title of the Land Company. When Mrs. Warner put her title in the Ensley Company, that company, owing to McCormack's interest in it and his fiduciary relations at that time to the Land Company, acquired only the legal title, and the equitable estate or title remained in the Land Company. When, however, the Ensley Company conveyed the title to Barker and Bowron, in furtherance of a direct trust to them, for the Land Company and its creditors and that plan was consummated by the Land Company's conveyance to the trustees, whatever trust or equity had resulted or been impressed upon the lands, as between the Ensley Company and the Land Company, by reason of McCormack's fiduciary relation while the title was in the Ensley Company, was extinguished and disappeared. McCormack, the fiduciary, acquitted himself of the duty which the law imposed upon him, and the title was cleansed of any estate created in the lands or against him by his purchase of the Land Company's property from third persons. Equity regards as well done, however irregular or defective the mode by which it is accomplished, that which ought to have been done. The Ensley Company's conveyance to the trustees put the title to the estate where the law and equity alike demanded it should be lodged. The equitable estate which the Ensley Company's

purchase created in favor of the Land Company, while the Ensley Company held the property, was founded only upon the status of a purchase by a fiduciary, and when that status was destroyed by the conveyance to Barker and Bowron and the conveyance by the Land Company to them, that particular equitable estate which was founded only on that status perished with it.

The legal and equitable quality of the estate which Barker and Bowron held, after the conveyance to them from the Ensley Company, was, so far as concerns the Land Company's statutory right of redemption, precisely what it would have been, had Bowron and Barker purchased directly from Mrs. Warner, and held in no other right, for the trustees could not be vested, by the conveyance from the Ensley Company, with any greater or different degree of title than had been divested out of the Land Company, by the sale and conveyance to Mrs. Warner. Neither the conveyance by the Ensley Company to Barker and Bowron nor their declaration of trust would have extinguished the statutory right of redemption, if the trustees had not acquired it from the Land Company. Until the Land Company conveyed or relinquished its statutory right to the trustees, it is clear it could have exercised that right at any time within the statutory period, and its exercise would have terminated all the estate and title Barker and Bowron acquired by the purchase under the conveyance from the Ensley Company alone.

The relinquishment of the statutory right by the Land Company to the trustees will be treated in equity as a transfer of the right to its creditors; the trustees being regarded only as the conduit to pass that right to the creditors. It did not merge in the legal title, although, after the conveyance by the Land Company to the trustees, the prior legal and equitable estate of the Land Company were both put in the trustees. In equity, different rights and titles held by a trustee as a security for debt will not be held to have merged, when it does not promote the accomplishment of the trust or detracts from the value of the security. The trustees were armed with the statutory right of the Land Company for the benefit primarily of creditors, and, next, for itself. The only equity or estate which remained in the Land Company, after its consent and that of creditors to the trust and its conveyance to the trustees, was the equitable right to redeem the property from the trust upon the payment of the debts, or to compel its faithful application to that purpose. With this single exception, the whole estate, legal and equitable, had been lodged by the several conveyances, directly in Barker and Bowron, as trustees, and the title, during the time they administered the trust, was not charged or affected by the extinguished equitable estate of the Land Company in the property against the fiduciary, which existed under his purchase only while the Ensley Company held it, and which perished not only because the status upon which that equity alone was built, had been destroyed, but because it was inconsistent with the estate which the Land Company itself conveyed to the trustees and the rights the creditors took thereunder.

Consequently the conveyance by Barker and Bowron, trustees, to the Ensley Company and McCormack and Ramsey of a portion of the

property which the trustees bought from the Ensley Company, could not be ineffective, for want of estate or power in the trustees as against the Land Company, to convey a good legal and equitable title to the Ensley Company, McCormack, and Ramsey, nor would it carry back or regraft upon the title thus conveyed to them by the trustees the trust or equity impressed upon the property while it remained in the hands of the Ensley Company, under its first purchase, because of McCormack's fiduciary relations to that purchase. If any trust is now impressed in favor of the Land Company upon the title to the portion of the lands resold by the trustees to the Ensley Company, McCormack, and Ramsey, it cannot be because McCormack was interested in the Ensley Company at the time it surrendered its title to the trustees, but it must arise either because of actual fraud in the subsequent repurchase from the trustees, treating it as an independent transaction, or because the original acquisition of title by the Ensley Company and its conveyance to the trustees and their reconveyance of a portion of the land to the Ensley Company, McCormack, and Ramsey, were parts of one and the same fraud, or because, independent of these things, the purchase from the trustees was effected while McCormack occupied such relations to the Land Company, and under such circumstances, though he had ceased to be a director, that a court of equity ought not to permit the sale to stand.

3. The general rules for judging the conduct of persons charged with fraud are stated in Conard v. Nicoll, 4 Pet. 295, 7 L. Ed. 862, where the Supreme Court of the United States laid down three rules which should govern in weighing the evidence, which that court in the subsequent case of United States v. Arredondo, 6 Pet. 691, 8 L. Ed. 547, declared incontrovertible:

"(1) That actual fraud is not to be presumed, but should be proven by the party who alleges it; (2) if the motive and design of an act may be traced to an honest and legitimate source equally as to a corrupt one, the former ought to be preferred; (3) if a person against whom fraud is alleged should be proved to have been guilty of any number of instances, still, if the particular act sought to be avoided be not shown to be attended with fraud, it cannot be affected by these other frauds, unless in some way or other it be connected with or form part of them."

4. As the warp and woof of complainants' charge of fraud centers around defendants' conduct while they were officers of the Land Company and at the same time officers of the Tennessee Company, and the motives which complainants ascribe to that conduct, it is necessary to go minutely into the history of the Land Company and its affairs, and also to inquire somewhat fully into the condition and policy of the Tennessee Company during that period, and into the events which led to the formation of the Ensley Company, and its connection with the transaction. It will facilitate an understanding of these matters to state here that some time before, and at the culmination of, the transactions complained of Shook was president of the Land Company and vice president of the Tennessee Company; Baxter was a director of the Land Company and president of the Tennessee Company; Bowron was a director of the Land Company and vice president of the Tennessee Company; McCormack was a director of the Land Company

and general manager of the Tennessee Company; Ramsey was assistant general manager of the Tennessee Company, and had no connection with the Land Company; and Barker was an outsider, representing creditors, having no connection with either company, save as trustee for the Land Company and its creditors to sell its property to pay its debts. As all the charges of fraud and collusion are denied, and also of interest, save on the part of McCormack and Ramsey, in the purchases, we will consider separately the various acts relied on as badges of fraud, and the just inferences to be drawn from each of them singly, and then take them as component parts of one continuous administration of the property, in view of all the facts and circumstances, in order the better to judge what countenance and form should be given the final outcome.

The Land Company.

5. The Ensley Land Company was incorporated on the 14th of January, 1887. Two weeks thereafter the Tennessee Company conveyed to it 3,797 acres of land, reserving the mining and mineral rights in the land, receiving in return $10,000,000 of the stock, at which the whole property was capitalized. The Land Company was the conception of Enoch Ensley, the owner of the Pratt mines and the Alice furnaces, which he merged in the Tennessee Company, retaining a considerable portion of the stock. After the sale Ensley took a companion to a place in the present corporate limits of the town of Ensley, and pointed out the lands, saying:

"This is the center of a great manufacturing city which is to bear my name. I intend to build four big blast furnaces and a steel plant on the line of the Pratt railroad, and then it is my purpose to bring other manufacturing plants here that will work up all the product of the furnaces and steel plant, including wire rod mills, hoop mills, and car works. I intend to fill this valley, from the foot of the chert ridge to the railroad, with manufacturing plants and business houses, and I intend to use the whole of this chert ridge for residences, and the day the work commences I will agree to pay $200 a foot for this corner lot; and here I will build the Bank of Ensley."

It was natural, with these expectations, that the company should be organized upon inflated values and operated upon expensive plans. The company from the beginning encouraged manufacturing and other enterprises. It authorized its directors to donate easements and rights of way and sites for manufacturing plants, and to expend 75 per cent. of the proceeds of the sales of lots in aid of manufacturing and other enterprises, and in the improvement of the property. Waring, an eminent sanitary engineer, was employed to make plans for a town. Some sanitary ditches were cut. Streets were surveyed and the trees cut out of them, and work done upon some of them. A two-story wooden hotel and two or three cottages were erected near the spot which was expected to be the center of the future town. A dummy line, giving rapid communication with Birmingham, ended near the hotel. Mines of the Tennessee Company were opened conveniently near by, and it built the blast furnaces. The lands, after advertisement, were put upon the market, and then withdrawn from sale in expectation of higher prices, and subsequently put upon the market, but without success. The tide of prosperity was then ebbing and did not soon return.

The enterprise stagnated. Bushes grew up in the streets and ditches, and the center of the town remained as before, a barren field, and the only roads were the ordinary country roads. The total gross sales of lands from the organization of the company to the appointment of Barker and Bowron as trustees, were $2,350. The company had contracted debts, and borrowed money, from time to time, upon a scale commensurate with the expectation of its founders. As lots were not sold, the amount of the debts continued to climb up, and, not being paid, were put in suit and judgment. In the five years just prior to the stockholders' meeting at which the trusteeship was formally created, judgments had been rendered each year against the company, amounting in all during that period to $50,617, and duly recorded, creating liens in the order of their record, and there were also outstanding what were called judgment notes and other debts. Ensley was the first president of the Land Company, and held office until 1891, when he was succeeded by T. T. Hillman. Both of them were men of fine intelligence and high character, who had achieved success and distinction in the business world. In the last year of Hillman's presidency he notified the stockholders that the sale of all the company's property was threatened under execution on the Warner judgment. That sale took place in January, 1897. In September of that year Napoleon Hill, another judgment creditor, sold under execution all the personal property of the company, including its office furniture. Mrs. Warner took possession under her purchase. The company did not then have even a corporate home, and its office naturally was moved to Birmingham, the office of the Tennessee Company, its chief stockholder. The municipality of Ensley was first incorporated January 24, 1899, nearly 12 years after the Land Company was organized, some 80 voters participating in the election for incorporation, and a few more than a score of persons resided on the lands, when the trustees took possession of them.

When defendant Shook succeeded Hillman as president of the Land Company, in November, 1897, that company had nothing whatever in its possession or under its control, but its statutory right of redemption. Creditors continued to press the collection of their debts. Hill, on account of the gross overvaluations of the land, in which the subscriptions to its capital stock were paid, claimed that the Tennessee Company was liable to creditors of the Land Company, as upon an unpaid stock subscription, and brought suit against it accordingly. He was also threatening to redeem from Mrs. Warner. The attorney of the Tennessee Company had given the opinion that there was great doubt of the company's right to redeem from a judgment creditor, if one redeemed from Mrs. Warner. If there had been a market for the property, the condition of the title prevented making sales in the usual way. Even with creditors assenting to the trust, no one would buy from the trustees with the right of redemption remaining in the Land Company. Investors would naturally decline to purchase, when the profits from increase in values could be taken from them by redemption of the lands, at the option of the company. In January, 1898, the debts of the Land Company amounted to about $130,000.

Its capital stock had been reduced from $10,000,000 to $500,000 in April, 1893. The evidence shows most clearly that the defendants were in no wise responsible for the straits to which the company now found itself reduced.

Beginning in January, 1897, the directors of the Land Company, its attorney, and the attorney of the Tennessee Company, and Shook, Baxter, and Bowron began actively to plan to extricate the company from its difficulties. Baxter, Bowron, and Shook, and the attorney of the Tennessee Company, each, had conferences or correspondence with different creditors, and with officers of the respective companies. A circular was issued and sent to creditors dealing with the indebtedness and condition of the company, suggesting the basis of the plan which, with no practical changes, though the mode of execution was somewhat different, was afterwards carried out. The negotiations with the judgment creditors were conducted only to a limited extent by Bowron, and apparently left mainly to Walker Percy, the attorney of the Tennessee Company. He visited New York, conferred with the officers of the Tennessee Company and with representatives of some of the creditors there, and induced the clients of F. G. Dow to assent to the plan. Early in the year Baxter had written to Barker, the president of a prominent Birmingham bank, the largest judgment creditor, to get his co-operation, which was given. Baxter suggested the bank might act as trustee in event of a mortgage, or as agent for creditors, if they would pool their claims. Barker replied it would be better to have an officer of the bank and also an officer of the Tennessee Company to act. Some time in October or November, 1897, at a conference between the attorney of the Land Company and the attorney of the Tennessee Company and Shook, it was agreed, in line with Barker's suggestion, that Bowron should be selected on the part of the Tennessee Company and Barker as the officer of the bank. The executive committee of the Tennessee Company was fully advised of the plan, and on December 20, 1897, authorized certain guarantees to induce the clients of F. G. Dow to assent to the arrangement. When Shook wrote the Trust Company for the proxy to be voted at the intended meeting, at which the whole matter was to be submitted to the stockholders, Hillman, a former president of the Land Company, was advised, and also wrote the Trust Company, saying, in substance, that the plan was decidedly for the benefit of the Tennessee Company and also of the Land Company, with whose affairs he was well acquainted. The meeting was called for the 10th of January, 1898, and then adjourned over for the want of a quorum until the 25th of January, 1898, when it was held. Notice of the meeting and a copy of the circular urging attendance were published in the Birmingham Age-Herald, and mailed to every stockholder of record in the Land Company. It evidently reached those of the stockholders whose correct addresses were know to the secretary. The Trust Company received both notices, as also Hill, who resided in Memphis, Tenn., the latter sending them to his attorney, White, at Birmingham, directing him to attend the ensuing meeting in his interest. The fullest publicity was given to the plan, and the purpose of the call of the meeting which was to pass on

it. Nothing about the plan was hatched in secret, nor was anything clandestine done or attempted to be done to procure its adoption. Every official or body, having the right to speak or act in behalf of either company, was informed and approved the plan.

6. Much testimony has been taken as to the ability, and argument made as to the duty, of the defendants to have procured the necessary money for the creditors from the Tennessee Company, and thus avoid the trusteeship altogether, or at least put the trustees in such a position that they would not be forced to make speedy sales. The real question, however, is not whether the best plan was attempted, but whether the plan actually determined on was honestly conceived and pursued, and formed with reasonable care and skill. The Tennessee Company evidently preferred the plan of a trusteeship under which creditors would wait until sales could be made to pay their debts, and was co-operating with the officers of the Land Company for its consummation. Aside from the Tennessee Company's not being under duty to furnish the money, the testimony as to its condition at that time, in connection with the well-known history of the times, shows that the Tennessee Company itself was then hard pressed, and that it is extremely improbable that it would have aided, at that time, to the extent complainants insist it would have done. The following extract from a letter from the treasurer of that company to the chairman of its finance committee, under date of September 22, 1897, is very pertinent. In this letter the treasurer, after expressing surprise that nothing had been done to meet October interest, says:

"The company is now making money for the first time in half a year, after having been on the brink and at the very verge of collapse. It will require several months nursing and care, even with the profitable business in sight, before it can regain a condition of what I consider normal ease, and it will require a year of as good business as we can hope for to put it in what anybody else would consider decent and reasonable financial shape."

Later, in the same year, the Tennessee Company was pledging its pig iron account to secure money, and there is evidence that it was called on to meet heavy demands outside of its current expenses. Evidence was introduced that a few months later the Tennessee Company was borrowing money at easy rates. But, whatever may have been its financial condition at this time, the company was under no legal obligation to shoulder the burden of the rescue of the Land Company, and there is nothing in the evidence which shows that it purposed to do so, or that the defendants kept it from doing more than it did, or withheld from the controllers of its finances and destinies any information bearing on the subject.

7. It is urged, however, that the resolution of the executive committee of the Tennessee Company October 7, 1897, directing its officers "to co-operate with the reorganization committee of the Ensley Land Company, in the plan looking to the adjustment and settlement of the affairs of that company with existing creditors," and authorizing them "to take such steps and incur such liability as in their judgment they may deem proper," shows both willingness and ability, which were at the disposal of defendants, to prevent the creation of the trusteeship, or, at least, the making of the arrangement that was made, whereby the

right of redemption was released to the trustees. It is to be observed that this resolution is not a general letter of credit to the officers. They were to exercise the authority of incurring such liability as in their judgment might be proper, only in co-operating with the reorganization plan. All concerned construed the resolution as not intended to involve the Tennessee Company where it could be avoided, and the executive committee was consulted, and its authority asked to the steps taken to that end. Significant evidence of the disposition of the Tennessee Company, at that time, not to go further than it was absolutely compelled to do to make the plan a success, is found in a letter from Bowron to Woodward, chairman, dated November 1, 1897. The finance committee, it seems, had declined to authorize a guarantee to the clients represented by Dow to induce them to come into the plan, on the idea that there was nothing in the claim against the Tennessee Company by creditors of the Land Company on account of the inflated stock. Bowron sends a statement of the Alabama law on the subject from the Company's counsel, saying, with Dow's clients out of the way, the attorneys thought there would be no further danger of suits on that account against the Tennessee Company, except those pending, which they thought would be defeated on the ground of estoppel. Hill, it seems, was one of the original stockholders. It was only after the danger of action by Dow's clients was pressed that the executive authorized the guarantee which finally brought Dow's clients into the agreement, and that authority was withheld until as late as December 20, 1897. The object of the resolution was not to obviate the necessity of carrying out the plan as determined on, by buying up claims of creditors or paying them in cash, but to use the credit of the Tennessee Company, only so far as might be necessary to induce the creditors to assign their claims to the trustees and wait for sales of the lands to satisfy debts. Hence it was later on, after negotiating with Hill, as late as February, 1898, that the Tennessee Company guarantied the payment of his claim within a certain time, and paid a part, to induce him to assent.

8. It is urged that, at the time of the formation of the trusteeship and sales complained of, the Tennesse Company owed the Land Company between $40,000 and $50,000, which the Land Company directory should have utilized to relieve the Land Company. This indebtedness is said to be made up of a liability of the Tennessee Company for timber cut off the premises of the Land Company, the collection of rents for houses which belonged to the Land Company, and the sum of $1,600, received under a conveyance by it to the Ensley Railway Company for rights of way. The evidence as to all these matters is quite meager and indefinite. The claim for the timber arose, according to the witness who seems to have most knowledge of it, because contractors of the Tennessee Company, when it was erecting some improvements at Ensley, cut timber with its consent or direction. The amount or value of the timber is not stated, neither is the date when it was cut. The collections for house rent are alleged to have commenced in 1887, and come down to 1903. The meager proof shows that these houses were built by the Tennessee Company be-

fore the Land Company was incorporated, and that they were very near the Tennessee Company's mines. It is insisted that the mining rights which the Tennessee Company reserved authorized it to use the surface of the soil to support houses near the mines for operatives. It does not appear how long the Tennessee Company exercised control over these houses after the conveyance to the Land Company, or whether the holding was adverse, or for a sufficient length of time to ripen into a title. It is not at all clear that the sum of $1,600, said to have been received by the Tennessee Company for the conveyance to the Ensley Railway Company of date July 5, 1887, was not made in furtherance of, and really as a part of, another conveyance of later date, August 17, 1887, by the Land Company, to the Ensley Railway Company as a part of the consideration given it to induce it to build into Ensley. There is nothing upon the books of either company in regard to these claims. They were not presented to the Tennessee Company, either by the predecessors or the successors of the defendants in the management of the Land Company's affairs. The Tennessee Company has never passed on these claims or acknowledged them. The clerks and officers who testified as to the memorandum reports concerning these matters have no personal knowledge of their correctness. Moreover, it appears that the declaration of trust was prepared by the respective attorneys of the Land Company and the Tennessee Company, who, we must infer, knew whether the one was debtor to the other, and the Tennessee Company was mentioned as a creditor of the Land Company, the payment of whose claims was subordinated to those of judgment and other creditors. When the trustees reconveyed to the Land Company, which was only after all the creditors were settled with, the money being raised by notes of the Land Company indorsed by the Tennessee Company, the latter was recognized as a creditor and note given accordingly. Shook is the only one of the defendants who says he heard of the matter before this suit. He had "heard talk that the Tennessee Company was indebted to the Land Company for rent and timber, but what he heard was not definite, nor had any accounts been formulated." Personally, he knew nothing about it, except as to the cutting of some timber for mining purposes. He stated, as to the houses for which rent is claimed, that there were some houses, "a laboratory, and some little tenement houses, built on what was thought to be the reservation," but it turned out that the houses were on lands conveyed to the Land Company. It is also shown that in 1894 an opinion had been given by the attorney of the Tennessee Company adverse to the right to cut timber to light the furnaces, but to the effect that it might cut timber for mining and transporting coal to market. Defendants insist that bringing these matters forward at this time is due to the exigencies of the litigation. Certainly, in this state of the proof, no court can find that the Tennessee Company was indebted to the Land Company in the sum named or in any other amount, and most assuredly it does not furnish any basis for a judicial finding that the failure to collect these amounts is a circumstance to prove fraud, or shows a breach of trust on the part of the defendants.

The Steel Plant.

9. As far back as 1891, the Tennessee Company began to consider the advisability of erecting a steel plant. The next year it appointed a committee to investigate the erection of a steel plant at South Pittsburg, Tenn., and later on a committee charged with the same subject was empowered to employ an expert and recommend a location. In 1893 the Tennessee Company leased the Henderson Steel Works, at Birmingham, and a committee, which considered the result of the experiments at steel making there, reported that it "was unnecessary to make any argument as to the advisability of the company's erecting a steel plant, as the reasons were so potent they took it for granted they would be admitted." The same year the governing committee of the Tennessee Company received a report from the steel committee after a visit to various works. In 1895 the president, in his report to the stockholders, urged the erection of a steel plant without delay. In the same year the executive committee appointed a special committee to take up the subject. In 1896 the president, in his report, again referred to the subject, and recommended that full authority be given the directory, and a resolution was passed by it to establish a steel plant, to be operated by the company, or otherwise, with discretion to act as they deemed best. At a meeting of its directory, shortly afterwards the whole matter was referred to a committee with power to act, and next day the directors passed a resolution for the erection of a steel plant near the company's furnaces in the Birmingham district, to cost $800,000, provided the president can secure not less than $300,000 from the railroads and persons locally interested. The testimony shows that the annual reports of the president of the Tennessee Company for the years 1894, 1895, and 1897 were mailed to every stockholder of record of the Tennessee Company. In March, 1896, a prominent article was published in the Birmingham Age-Herald on that subject, alleging that $1,000,000 had been provided by the Tennessee Company and the Sloss-Sheffield Steel & Iron Company, in combination with certain railroads, to erect a steel plant. Various articles in the newspapers had been published by Messrs. Bowron, De Bardeleben, and Hillman, at various times in 1894, 1895, 1896, and 1897. A special pamphlet had been published by the Tennessee Company on February 1, 1897, which was prepared by Ramsey and approved by Bowron, Shook, and Baxter, which contained a reference to Ensley, the interest held in it by the Tennessee Company, and directing attention to its suitable location for steel works, a copy of which pamphlet the testimony shows was mailed to all the stockholders, including complainants. From 1896 to December, 1897, nothing further was done upon the subject. Baxter had urged the matter upon his company, and had conferences with president Smith, of the Louisville & Nashville Railroad Company, who was urging the necessity for a steel plant in the Birmingham district, and insisting, if the Tennessee Company would not undertake its building, he desired its assistance to enlarge the steel plant of the Birmingham Rolling Mills. Stobert, a banker at Pratt City, being asked whether the question of building a steel plant at Ensley had been much discussed in that neighborhood, stated:

"Yes, sir; there had been talk of it for several years. It was a matter of common knowledge in Ensley, Birmingham, and Pratt City, and in that vicinity, that such a question was being agitated and considered by the Tennessee Coal, Iron & Railroad Company. The location of the steel plant at Ensley had been the subject of discussion in the press and among the people in that locality for years."

Up to 1898, for one reason or another, all these efforts came to naught. The upshot of the long discussion and agitation was that on the 20th of December, 1897, the executive committee of the Tennessee Company disposed of the subject by a resolution to the effect, if the "Birmingham Rolling Mills would enlarge its plant to a daily output of 500 tons, and buy basic iron from the Tennessee Company, it would agree to take $100,000 of the proposed issue of bonds at the same rate as taken by the Louisville & Nashville Railroad and other large subscribers, to be paid at the rate of 10 per cent. per month in pig iron at current market rates, and the Tennessee Company would agree not to build directly or indirectly a competitive plant in the Birmingham district for ——— years, provided the work was promptly pushed to completion." Eight days after the adoption of this resolution, which was a decision not to erect a steel plant at Ensley, but to build it elsewhere, the Ensley Company conveyed the lands purchased from Mrs. Warner to Barker and Bowron.

10. It is urged, however, that the defendants had some secret knowledge, which it was their duty to disclose, concerning the steel plant at Ensley. This insistence is founded on the fact that, about a week after the Tennessee Company's determination not to build a steel plant at Ensley, both Baxter and Bowron wrote the executive committee of the Tennessee Company expressing regret at its action, and that Bowron, in his letter, arguing the matter, asked:

"Is it not possible while you and associates are working up there on the railroad that you can agree to turn us loose down here on the steel plant? It is one that we understand, and we feel willing to wrestle with it."

In this same letter he stated his opinion, if the committee would give the officers the permission to go ahead, they would not only put up steel works within a year, but would find the money themselves to accomplish it. On January 3, 1898, Woodward replied to Bowron, stating, among other things:

"The committee is perfectly willing to turn the officers loose, and will treat very hospitably any plan which may hereafter be stipulated which will bring about the desired result, without drawing upon funds which do not exist."

And he added that:

"The resolution in reference to the Birmingham Rolling Mills must be rescinded, if we are to build a steel plant in the Birmingham district."

Baxter, on the 6th of the same month, writes to the executive committee:

"That we will at an early date enter heartily into the subject, and I really have great hopes of success."

Baxter, on the 10th of January, writes that he had an interview with Mr. M. H. Smith, in which the former stated that the Louisville & Nashville Railroad and the Southern Railway would each have to

subscribe $200,000, and the project could not succeed if their subscriptions were less. Smith took the matter up with Belmont, and was favorable to it. On March ———, 1898, Baxter wrote to Belmont asking for $200,000 from the Louisville & Nashville Railroad, and a similar amount from the Southern. No answer was received at that time, as he had to consult with others. On the 4th of March, 1898, Bowron wrote Woodward that he had not written sooner about the steel plant because the permission given by the committee "to get up a plan without calling upon the members for financial assistance, required that they should look elsewhere for money; and that he had not gone far enough in the negotiations to make an intelligent report." On the 17th of March the resolution authorizing the directors to subscribe to the bonds of the Birmingham Rolling Mills was rescinded. On the 21st of March, 1898, the executive committee were authorized to employ an independent expert to report to the committee on the expense of constructing a steel plant and the cost of producing steel at Ensley. In April, 1898, the committee on steel plant was requested to prepare the necessary plans for the organization of an underwriting syndicate to subscribe to $1,100,000. On the 12th of July, 1898, a meeting of the stockholders was directed to be called on the 15th of September, 1898, to determine whether they would give their approval to the disposal of the property to the Alabama Steel & Shipbuilding Company. The first subscription was obtained April 6, 1898. On the 30th of that month the local officers of the Tennessee Company were informed that it would be necessary for at least $150,000 of the necessary amount to be underwritten in Alabama. The underwriting agreement was completed June 30, 1898. Under its terms no subscription was binding until that time, for it was conditioned on all being subscribed. The matter was to be finally determined by the action of the stockholders' meeting September 15, 1898.

From this recital, it is manifest when the stockholders of the Land Company met January 25, 1898, and passed a resolution providing for the trusteeship, and directing the conveyance to Barker and Bowron, and when the trustees accepted the proposal of the Ensley Company and McCormack and Ramsey, the Tennessee Company had not only determined not to build a steel plant at Ensley, but, on the contrary, had determined to aid the Birmingham Rolling Mills, and that resolution was not rescinded until March 17, 1898. It was impossible, therefore, in the nature of things finite, for any of the defendants to have concealed from the stockholders at the meeting of January 25, 1898, knowledge of a determination of the Tennessee Company, which did not then exist.

At the time of the creation of the trusteeship and the sales of the 230 acres to the Ensley Company, McCormack, and Ramsey, the defendants were not possessed of any knowledge which was not open to the public, except, perhaps, the fact that the Tennessee Company had declined to build at Ensley, and decided to build the steel plant at Birmingham, and that defendants were endeavoring to induce it to change its mind, or to get others to build at Ensley, and had strong hopes of success. As late as March, 1898, Bowron had written that

they "had not gone far enough to make an intelligent report." Every intelligent person about Birmingham and Ensley, and certainly every stockholder of the Land Company, knew of Ensley's attractiveness as a location for a steel plant, and that frequent efforts had been made to locate one there, and was aware that every one interested in Ensley had strong hopes that a steel plant would be built there in the near future. This was the sum and substance of all the information of any value the defendants could have imparted to anybody, at the time of the transactions complained of. The outcome of their venture, viewed by the fate of similar undertakings, was very uncertain and problematical. To have announced that the Tennessee Company had declined to build at Ensley and determined to build elsewhere, and that defendants were making efforts, which they hoped would succeed, to induce it to reconsider, which had not then progressed far enough to enable them to form any intelligent judgment as to the result, would only have been the same old story with which the public was entirely familiar.

Being under no duty to the Land Company to procure the building of a steel plant at Ensley, their plans not involving the use of any of its property or corporate powers, there could be no possible breach of duty to any of the stockholders on the part of Baxter, Bowron, and Shook, the only defendants engaged in the effort, in not divulging their intentions and hopes, at least until their endeavors had reached such tangible measure of success that prudent men entrusted with the duty of determining whether a long-delayed purpose to build a town at Ensley, which must speedily commence operations if the Land Company would save its property, could fairly say that the risk of harm from delay in waiting for the steel plant would be more than counterbalanced by the reasonable prospect of gain if the plant were erected. Their efforts and intentions had not assumed anything like that vitality and form, when the trust was created and the trustees sold the 230 acres. Moreover, from what persons, who should have been informed, did they conceal their intentions? The only persons upon whom the authority and duty rested to sell the lands were the trustees, Bowron and Barker. Bowron knew all that had taken place, and so did Baxter and Shook, with whom Bowron was advising. The Tennessee Company, the holder of the majority of the stock, was fully advised. The fair inference is that Barker was not uniformed. Bowron conferred with him, and they at first declined the proposition, and inevitably, from the range of the discussion, as stated by Bowron, after considering the outlook of affairs, industrial and financial. Barker was the first president of the Alabama Steel & Shipbuilding Company, and naturally interested, as was every thoughtful man in the district, as to the prospect of establishing a steel plant there. It was certainly not good policy for those interested in the Land Company, certainly, not at any time prior to March, 1898, to announce to the general public the fact that they were making efforts to induce the Tennessee Company to reconsider its decision not to build at Ensley, and had strong reason for hoping they would be successful. They could not fairly or truthfully state the facts, without stating why they would make the

effort. The announcement of the attitude of the Tennessee Company at that time would probably have had more effect in deterring persons from investing at Ensley, who might otherwise do so, in the hope of the early building of the plant at Ensley, than would be attracted by the announcement of an adverse decision by the Tennessee Company, accompanied by an expression of enthusiastic opinion that it would be reversed. Under these circumstances the failure to inform the public, or the stockholders generally, and there was no one else concerned who was not fully informed, could amount, in no event, to more than a mistake of judgment, and furnishes no basis of a finding of a fraudulent concealment.

The Ensley Company.

11. On demurrer to the amended bill, upon facts not materially different from the proof, it was said of the purchase from Mrs. Warner by the Ensley Company and the conveyance by it to Barker and Bowron, "as the law devoted the property to the very trust under which Barker and Bowron acknowledged they held it, the dealing with the Warner title in itself neither could nor did harm the corporation." Kessler et al. v. Ensley Co. et al. (C. C.) 129 Fed. 415. In this the court was only following the rule in Clarke v. White, 12 Pet. 178, 9 L. Ed. 1046, that:

"In equity, as at law, fraud and injury must concur to furnish ground for judicial action; a mere fraudulent intent unaccompanied by any injurious acts is not the subject of judicial cognizance."

Still, as that transaction, in view of the subsequent proposition by the Ensley Company and its purchase from the trustees, sheds light upon the frauds charged, it is necessary to examine it. The Ensley Company was organized December 21, 1897, with a capital stock of $42,000, all of which was subscribed in the name of Minor, except two shares in the name of C. A. Nolan and P. G. Shook. Its incorporation proceedings show that it was organized to buy this very land, and, among other descriptions of it, stated that it was the land purchased by Mrs. Warner at the execution sale. Mrs. Warner conveyed the land to the Ensley Company, December 23, 1897. The Ensley Company conveyed to Barker and Bowron by deed dated December 28, 1897, but which was, in fact, not delivered until the 6th day of January, 1898, at which time Barker and Bowron paid the consideration. The day after that the Ensley Company refunded to Minor, McCormack, and Ramsey the amount they had paid into the Ensley Company to raise the money with which Mrs. Warner was paid. On the 17th of January, 1898, after paying the expenses of organization, the Ensley Company divided the money remaining in the treasury in the proportion to the sums contributed, respectively, by Minor, Ramsey, and McCormack; the latter's share being $86.43.

McCormack says he knew the plan to induce all the judgment creditors to assign their claims to the trustees and wait until the lands could be sold had not been consummated, and that several of them had declined to come into it. He was familiar with Percy's opinion that the Land Company might not be able to redeem, if a judgment creditor

should redeem from Mrs. Warner, and he knew she would sell for less than the amount required to redeem, and that Hill, who was threatening to redeem, was endeavoring to buy for a sum less than the amount required to redeem, and had once or twice raised his bid. With a view to prevent this, he was at that time himself negotiating with Percy Warner who was willing to sell, because he (McCormack) wished to get the title in hands friendly to the Land Company and the Tennessee Company. He heard Minor had a sum of money he wished to invest, and he knew Minor was friendly to the Tennessee Company. He went to him, explaining the situation of the title, telling Minor that he would get 10 per cent. interest upon his money, in event he bought the property and it was redeemed, and, if it were not redeemed, he would get the land, which would be a good investment, and McCormack advised Minor to go to Barker, whose bank, Minor says, McCormack told him had the matter in charge. Minor went to the bank and put up his check for $17,000, the whole amount required to buy the land from Mrs. Warner. For some reason, which McCormack does not recall, the trade did not go through at that time, and the check was returned to Minor by the bank. About that time the Ensley Company was formed. McCormack states he had no idea at the time of acquiring any interest in the purchase, but that, after the Ensley corporation was organized, Minor declined for some reason to furnish more than one-half the necessary amount, and he induced Ramsey to furnish some of the money and he contributed the balance to make up the other half. He further says that after the Ensley Company had distributed all of its assets the idea occurred to him, as he had recently had some success in building a town, to purchase some of the property, and, as the corporation was already in existence, to utilize it for carrying out his plans.

Minor corroborates the statement that McCormack, at the time the company was formed, was not to have any interest. Minor says he intended to take the whole thing for himself and to let his two brothers share it with him. His recollection of the whole matter is hazy and quite indistinct. He says he did not charge his memory particularly with the facts, and left the whole matter of the negotiations to McCormack. He speaks of having the whole interest, both in reference to the time when he put up his check in bank and also as to the stock. Minor could not recall the reason Barker gave him why the $17,000 check was returned to him. He could not recall what Barker said to him, or, for that matter, what explanation anybody gave him why the trade did not then go through. He speaks of the Warner title as a mortgage. He does say that his conception of the whole thing was that the Ensley Company was organized for the purpose of buying 200 acres from the Land Company, and "that our company was formed for the purpose of buying that land, and that they proposed to buy from the Land Company." He admits his recollection "is indistinct and his conception of it may have been defective." He refers to a visit he made in company with A. M. Shook and others early in January, 1898, to the lands which he says the company was to buy. He admits he declined to go back into the company, after the money he

paid in had been refunded, because he estimated its proposal would require the expenditure of $50,000 or $60,000. He finally took 10 shares, paying one-half its face value in cash, with the understanding he would pay the rest, if called on. Putting the whole testimony together, the balance of probability from it is, when he speaks of the purpose of the company to buy the lands from the trustees, that he refers, not to the time when the company was formed, but to a time afterwards, when, the company having sold the lands to Barker and Bowron and returned the money contributed by the stockholders, McCormack proposed to him to take an interest in the proposal of the Ensley company to buy part of the lands. It is doubtful, to say the least, whether his testimony contradicts the truth of McCormack's statements that, when the company was formed and stock subscribed, no idea was then entertained of the subsequent repurchase from the trustees. Reading Minor's testimony does not give the impression that his vagueness of recollection was a subterfuge to avoid giving testimony which might injure the Ensley Company, though he was, as counsel very properly brings to the attention of the court, at the time of giving his testimony, an officer of the Ensley Company, and his holdings are now worth several thousand dollars.

The amount of the capital stock, does not seem to accord with the idea that the Ensley Company was formed solely to purchase this land and resell it to the trustees. The capital stock is fixed at $42,000. The incorporators knew it would not require half that sum to buy the land. It may be that the amount of the capital stock was thus fixed to enable it, if redemption were not made, the better to sell at a profit an interest in the venture to others, while retaining a portion for themselves. This is possible; but it is the only theory consistent with the purpose of organizing the company for the sole purpose of buying or holding these lands, to keep them in hands friendly to the Land Company.

McCormack gives the following explanation why the proposition to purchase 10 acres was not made at the same time with the other. He says he had not contemplated it at that time. Hill had not come into the trusteeship until February 11, 1898, which date is fixed by an entry in Bowron's diary. To induce Hill to assign his claim, an offer was made to him to take the interest on his claim, amounting to about $4,000, in lands. Hill and his attorney, Baxter, and others went out to Ensley, and McCormack went along. McCormack says Hill, standing on the porch of the old hotel at Ensley, told Baxter that he would take his $4,000 in 40 acres of land, to be selected by him around the hotel and including it. Baxter replied the 40 acres ought to bring more than that. Hill replied he would not give more. Then Baxter turned to McCormack, and asked what he thought of it. McCormack's reply was that the price was too low, and that he would give $4,000 for 10 acres, to be selected by him. Hill turned to Baxter and said: "Let the fool have it. As the holder of a claim against the Land Company, and as a stockholder in the Land Company, I say let him have it." McCormack says in that way his proposition first came to be made for the 10 acres of land, and he afterwards formally made

it to the trustees, and that it and his first proposition were considered one proposition, and Bowron says they were so treated.

The professed friendliness of McCormack to the Tennessee Company and the Land Company was not unnatural. He had long been an officer of the Tennessee Company, and was a director of the Land Company. It is not at all strange that he should desire to see them saved from loss. The incorporation of the Ensley Company was intrusted to the attorney of the Tennessee Company, who, as McCormack knew, had been working long and zealously to get the judgment creditors to consent to the trusteeship in order to save the property, and the papers showed on their face that it was being formed to buy these very lands. Would McCormack have gone to Percy, or have allowed Minor to do so, if he intended any wrong to the Land Company, in which Percy's client was the majority stockholder?

It is said, when the proposition was read by McCormack to the stockholders, that it was not, in fact, read or made in the name of the Ensley Company, as stated in the minutes, but really by McCormack for himself and associates, and that this goes to prove fraudulent intent. The evidence does not prove the statement that the name of the Ensley was suppressed at the stockholders' meeting. McCormack states that the proposition was made as that of the Ensley Company. The minutes of the meeting recite the same thing. Vail, the secretary of the Land Company, says that, in writing up the minutes after the meeting, he, not being familiar with the names, asked President Shook, whose proposition it was, and "upon Shook's statement the words 'Ensley Company' were written in the proposal and in the resolution adopting it." In another part of his testimony, Vail states that he may have asked Captain W. A. Walker, who presided over the meeting, as to the names, and gotten them from him. Vail was asked what "his best recollection was as to whether the proposal was made in the name of the Ensley Company," and answered: "My best recollection is in the name of the Ensley Company. My best recollection is that that is correct." Again, in another part of his testimony, in answer to the question: "Was the name of the Ensley Company ever stated at that meeting as the proposer of that proposition which you have read?" he answered: "I don't think it was; I don't remember to have heard it." Aldrich left after the resolution adopting the proposal was passed. He states no proposition was made while he was present on behalf of the Ensley Company, and that McCormack made the proposition in the name of himself and associates, saying he could not give the names of his associates, and that there would be five to seven, and that it had not been decided how many there would be. H. K. White says that his attention was attracted to Aldrich from the fact that he voted "no" on every proposition submitted at the meeting. Aldrich was opposed to the whole plan, and evidently more interested in the defeat of the trusteeship and the proposed purchase than in the name of the proposer, and the name may have been mentioned and escaped him. The substance of White's testimony on cross-examination is that:

"He did not hear McCormack assert that the proposition was made in the name of himself and associates, but, hearing him read the proposition, his understanding was that he was making it in behalf of himself and associates, and that he gathered that understanding from McCormack's reading the paper and his remarks and those of Col. Shook thereon."

Bowron states, when the proposition was delivered to him, he knew it was from the Ensley Company. In view of this testimony, it certainly cannot be affirmed that the Ensley Company's name was not mentioned at that meeting. Vail, whose duty it was to keep the minutes, and keep them correctly, was testifying seven years after the event. The minutes were signed as correct by Capt. Walker, who presided at the meeting, when the matter was fresh in men's minds. Walker died before the taking of the testimony began. It is difficult to understand or to reconcile Vail's testimony in one place, that his best recollection is that the proposition was made in the name of the Ensley Company, and that that is correct, with the further statement thereafter that he does not think the name of the Ensley Company was stated at that meeting as the proposer of the proposition, and that he does not remember to have heard it. His recollection even of his own recent testimony was bad.

What plausible hope could McCormack entertain that, by failing to speak of the Ensley Company at that meeting, he could hide his connection with it? The organization of the company and the purpose for which it was formed, as well as its conveyance to Barker and Bowron, had been spread upon the public records fully a month before the meeting. At that very meeting, and prior to the making of his proposal, a resolution had been adopted, reciting the sale under the Warner judgment, and that Barker and Bowron are now the owners of the land, and the deed had been on record some time showing how they became owners. The language of the proposal, as McCormack read it, "We will guarantee, we will build," etc., in connection with his statement that it had not been determined how many associates he would have, could not possibly have left the mind of any man in doubt that McCormack himself was interested in the proposition, no matter in whose behalf it was presented. The suppression of the name of the company at the meeting, when he knew in a short time thereafter, if his proposition were accepted, the Ensley Company would be found in possession of the land which he had proposed to purchase in another name, and carrying out his undertakings, was sure to stimulate and provoke inquiry as to his relations to it. A sensible man, under such circumstances, would not have thought it worth while to suppress the name of the Ensley Company in connection with the proposal made, and a cunning man would have known, after his statement as to what he and his associates proposed to do, that it was worse than a useless subterfuge to hide his connection with the Ensley Company, if it went into possession of the very lands he proposed to buy and began to carry out the undertakings mentioned in the proposition. The failure to disclose his associates was of no significance, so long as they were not persons occupying fiduciary relations to the Land Company. He probably did not know at that time who would go in with him after Minor had concluded not to join.

It is urged that the transaction bears the earmarks of fraud, because Bowron did not know who conducted the negotiations for the conveyance to him and Barker by the Ensley Company. It is quite evident, however, from the whole transaction, and the testimony of Minor, that the conveyance was drawn by the attorney of the Tennessee Company, who was also the attorney of the Ensley Company, who knew of the understanding and the purpose for which the property had been bought. Minor states he paid little attention to the matter, and that, when the conveyance to Barker and Bowron was handed to him as president, he signed it because the papers were handed him by Messrs. Percy and Grubb. Those gentlemen were the attorneys of the Ensley Company and the attorneys of the Tennessee Company, who had been active, in the interest of the Land Company, to put the title in such shape that the Land Company would not lose the property.

It is urged that it is another badge of fraud that McCormack said that he did not know who procured Mrs. Warner to make the deed to the Ensley Company; but this criticism is based on an answer to a question which McCormack failed to understand, and which, when explained to him, he answered, and stated, in substance, that he caused the conveyance to be made by Mrs. Warner to the Ensley Company. Another criticism of McCormack's conduct is based upon the fact that Bowron testified when he heard the cash would be required to take the title from the Ensley Company he was shocked. Shook says, and Bowron corroborates it, that two or three days before this he informed Bowron that such would be the case. Shook had been active in procuring the trusteeship, and knew the fact, and he was informed. Moreover, the evidence does not disclose that Mrs. Warner ever contemplated transferring her title to the trustees and waiting for her money until they could sell the lands. She was no longer a judgment creditor. She had title, and had gone in possession for herself alone. She could not possibly be disturbed, except by some person redeeming and paying her the cash. Her son and agent was not considering going into the trusteeship, but was seeking to convert the land into cash, either by sale or inducing Hill or some other creditor to redeem. There is nothing in the record which justifies Bowron's expectation that she would assign her title to the trustees and wait until they could sell lots. It may be that McCormack, apprehensive, as he states he was, that the plan for the trusteeship would not go through, did what he thought was best for the company, although it might result in disappointing the expectations of Bowron, who states that he had never negotiated with her. The transaction is also criticised because the deed was made to Barker and Bowron individually, and not as trustees. It is quite evident from all the facts and circumstances that the intention all the while was to vest the title in the lands to them in trust. All the creditors had not at that time assented to the plan, nor had the priorities been adjusted, and the purpose could better be effected by a declaration of trust, made in pursuance of formal recognition of the trust by the stockholders at the contemplated meeting which had then been called, but not held, than at the time the conveyance was made to Barker and Bowron, individually. The prompt conveyance of the title to

Barker and Bowron and the amount of purchase money exacted shows that the purpose was to get the property where it could be held for the benefit of the Land Company, and at no greater cost than upon redemption by the company from Mrs. Warner.

Another badge of fraud relied on is that the company after the sale to Barker and Bowron distributed all of its capital. This is not inconsistent with, but rather supports, the claim that at the time McCormack had no intention to utilize the company to purchase any part of the property from the trustees. If there had been, at that time, a purpose to make the proposal, the carrying out of which would have necessitated the use of more money than the Ensley Company had, as afterwards happened upon the purchase in the name of the Ensley Company from the trustees, it would have been a very unnecessary proceeding, from a practical business point of view, to distribute all of its money to the stockholders, and, if money was to be put in again, and stock given for it, it would have been more than useless in putting inquirers off the track as to the parties interested in the company, when that fact must necessarily be disclosed by the subsequent issue of stock, if McCormack or Minor or any one concerned in the formation of the organization afterwards took stock or had to do with it. The sum and substance of the whole transaction was that the property of the Land Company was put where it ought to have been put, and that McCormack made the proposition of purchase openly to those in whom the title was finally lodged, beyond his control, by the conveyance from the Ensley Company. In the light of all these things, if we observe the rule that we "ought not to suppose fraud, when the facts out of which it is supposed to arise may well consist with honesty and pure intention," how can we say that the circumstances attending the organization of the Ensley Company and the incidents of its sale to the trustees show fraudulent intent in doing those things? How can we find, if suspicion arises that the Ensley Company was first formed with bad motive, that it had not been abandoned at the time the Ensley Company conveyed to Barker and Bowron? Whatever suspicion, or however just, may be aroused by the transaction, it is unquestioned, under the evidence, that the other defendants were in no wise interested in the matter or cognizant of it. It is no longer of consequence, for "in equity as at law, a fraudulent intent is not the subject of judicial cognizance unless accompanied by wrongful act."

12. It is insisted that the lands were sold to the purchasing defendants at a grossly inadequate price. The entire tract of 3,790 acres brought, at sheriff's sale, a little over a year before, less than the cash the trustees received for the 230 acres. Although there were a number of judgment creditors who were anxious to collect something on their debt, none of them were willing to redeem from Mrs. Warner, though at least one of them was seeking to purchase from her for less than the amount of her bid, at the time she conveyed to the Ensley Company. To the amount of cash received by the trustees must be added the further consideration of the undertakings of the Ensley Company. These, the witnesses estimated, would require an expenditure of $50,000 or $60,000, which would go to enhance the values

of the residue of the property. A number of shrewd business men about Ensley and Birmingham, whose names are given, and some of whom were examined, being offered an interest in the purchase, declined, thinking the investment a very doubtful one. The mining and mineral rights in the property being reserved, it had no active value, except as ordinary farm lands. Its value aside from that attaching to ordinary farm lands, five or six miles from a city, depended upon the degree of probability, at the time of the sale, of the successful revival of the effort to build a town there, and was, therefore, contingent, and largely speculative.

We pass without much discussion the figures at which the Tennessee Company valued their stock in the Land Company in the former company's balance sheet of debts and resources, and the figures at which Mrs. Warner gave in the property for taxation. Neither is a very satisfactory or reliable guide. She assessed the entire body of lands at $19,000. It is hardly probable, even with the loose ideas obtaining in this state as to the duty to give true values, that the assessor accepted an assessment of only one-third or one-fourth of the value of the whole tract. When Hillman, a former president of the Land Company, wrote the Central Trust Company under date of January 12, 1898, urging the sending of the proxy to Shook, he asks that it be done for the purpose of reviving the Land Company, "and enabling it, if possible, to come clear of its difficulties, so that the stock in your hands may become an asset of real value." The feeling among many people familiar with the property was expressed by Percy Warner, who, explaining why he declined to take stock in the venture, said that he had been operating the street railroad out there without returns for some time, and it "looked pretty dead to me." The prices obtained for lands there, after it was known that the Ensley Company had undertaken to start a town, and commenced operations, and especially after the impetus imparted to values by the knowledge of the intended erection of the steel plant, are not a fair basis upon which to estimate proper prices, at a time when neither of these considerations entered into the estimates of value. Aside from this, unless there is other proof of fraud, inadequacy of price, unless it is "so great as to shock the conscience," is not a fact from which fraud may be inferred. Graffam v. Burgess, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839. After a careful examination of the whole evidence the court is of opinion that the price paid, together with the considerations agreed to be paid in the different undertakings of the Ensley Company, was the fair value of the 230 acres at the time of the sale.

13. It is urged that the trustees made a private, and really a secret, sale to purchasers, who knew, when the public did not, that the property which had then been withheld from the market for years would be for sale. This is not borne out by the facts. The power under which the trustees acted, which the Land Company fully ratified, gave them authority and discretion to make private sales. The stockholders and creditors of the company, and, for that matter, the general public, who were at all familiar with local affairs about Birmingham and Ensley, knew the Land Company's troubles with its creditors alone kept the

property off the market, that its creditors had been pressing it vigorously to collect these debts, and that, when the trusteeship was completed, the creditors and company alike would desire to sell lots as soon as practicable. Notice of the meeting which was held January 25, 1898, which was published nearly a month before that meeting, in a morning daily paper at Birmingham, expressly stated that it was called to dispose of a plan "looking to the sale of the lands," etc., "for the purpose of liquidating debts." The declaration of trust, which made it the duty of the trustees to make sales of lands, was of record. The purchasers here, although the company had not then the title, recognized the stockholders as the real owners, and the offer of purchase of the lands was publicly made to them at a meeting convened to determine how they should dispose of the company's property. It was not accepted until a month later. By a vote which was practically unanimous the stockholders recommended to the trustees to trade along the lines of the proposition. Not only did the holder of the majority of the stock vote in favor of the proposition, but all but one of the few other stockholders who attended the meeting. It was not a sale of the entire property in bulk, but of a comparatively small portion of the entire tract, which was parted with at a fair price, in order to start the town and put the enterprise upon its feet, so to speak, and to bring about a demand for the rest of the property. Under the circumstances the fact that the sale of a portion of the property which had been intended for the town site was made by acres, instead of by lots, was immaterial. At that time the owner of the property had not recorded any map of these particular lands, and blocks and squares were theoretical, rather than real, and no fairer average measure of value than acres. Hopper v. Hopper, 79 Md. 400, 29 Atl. 611. It is true, that the sale of the ten acres was not submitted to the stockholders, but the circumstances under which it came about, which transpired subsequent to that meeting, have been shown in another part of this opinion. It is urged that this was the most valuable part of the land, but that would not matter if a fair price was exacted, and besides, several of the witnesses state, they spoke of it in that manner, because the starting of the town at that point, and building it up there, made that part more valuable than the rest, and this consideration aside, there were other portions which were not sold, fully as valuable.

14. Much evidence has been taken as to the compliance on the part of the Ensley Company with its various undertakings. It did effect sales of lots, put up the agreed number of houses, located a drugstore, and brought about the erection of a brick making plant, a planing mill, a lumber yard, built a supply store, and made other endeavors to attract industries there. There is dispute whether some other industries claimed to have been located by the Ensley Company were not really brought there by the building of the steel plant, and the evidence favors the latter view. Other unperformed undertakings were dependent upon the making of molten steel, which has not yet been made at Ensley. The quantum of compliance, save as it may show fraud in the inception of the purchase, is not matter of importance in the present phase of the question. There is no evidence of bad faith on the part

of the respondents in performing other undertakings. The real attack of the complaint as to the improvements which were made by the Ensley Company is that they were accomplished by the fruits of the trade, the expenditures being from profits, which it is insisted equitably belong to the Land Company.

15. Prior to February, 1897, John W. Gates, of Chicago, a capitalist interested in steel properties, visited Birmingham, and made a proposition to the Tennessee Company looking to the building of a steel plant in that vicinity. In discussing the matter, he expressed great preference for a legislative charter over one taken out under the general law. The negotiations came to naught, but the officers of the Tennessee Company, with whom the negotiations were had, deemed it desirable to have a special charter available for future use, and accordingly procured the passage of the act incorporating the Alabama Steel & Shipbuilding Company, approved February 18, 1897; Baxter, Bowron, and McCormack being named among the incorporators. This charter was approved eight months before Shook became president of the Land Company, and a year before the trustees sold to the Ensley Company. Certainly it could not have been foreseen then that the Tennessee Company in December, 1898, would first determine to aid the steel plant at Birmingham, and that defendants in January, 1898, would endeavor to get it to reconsider that decision. In view of the statements of the bill that the plot was formed in the latter part of the year 1897 or early in 1898, the taking out of that charter, early in 1897, does not go to show a purpose, at that time, to make the sale to the Ensley Company a year later, and to make it more profitable to it by voluntary efforts on their part to build a steel plant at Ensley, without the help of the Tennessee Company, and in the meantime to keep knowledge of their intentions as to the steel plant from the public. It illy comported with the idea of concealing defendants' intentions as to the steel plant to procure a legislative charter for such a purpose, in which defendants were named as corporators, with the publicity attending legislative proceedings and the printing of that charter in the laws of the state. The procuring of that charter is rather an open manifestation and avowal by the defendants, as far back as February, 1897, of their purpose to build a steel plant at the very first opportunity, whether or not they then entertained the purpose to make the sale to the Ensley Company a year later. The use of the charter eighteen months after its passage, by the Tennessee Company as a matter of convenience in adjusting its securities, under these circumstances, does not go to show bad faith of the defendants.

16. One badge of fraud relied on is that P. G. Shook is the son of president A. M. Shook. It is quite apparent from the recital that has been given of the history of the Ensley Company that P. G. Shook was selected as a nominal holder of one share of stock for convenience of organization, he being an employé in McCormack's office, and that originally he was not to have any interest whatever in the transaction. It was afterwards that his small holdings were taken. His father furnished none of the money, and it does not appear that he

knew his son was to have any interest at the time, if he knew he was an incorporator.

The bona fides of the judgment in favor of the Birmingham Railway & Electric Company, under which Mrs. Warner sold the property to the Land Company, is not questioned, and cannot be. It is true, at the time it was rendered, A. M. Shook was a stockholder in that company, and so was Warner. Shook, at that time, had no official relations with that company, and the judgment was transferred to Warner, after being held for some time by the company and others. Warner's will shows that Shook was one of three friends with whom he advised his widow to consult in case of need. Shook testified that he did not confer with her, she being very deaf, but advised with her son who had charge of the collection, and told him to hold on to the judgment, as the debt was undoubtedly good. If any inference can be indulged, in view of Shook's testimony and that of Percy Warner as to how Shook's relations influenced the conduct of the owner of the judgment, it is that it was exerted in delaying the collection, for it was rendered nearly four years before the execution sale. The testimony of the attorneys who had charge of the collection of the judgment, and caused the levy and sale and conveyance, shows they never had any communication whatever with either of the defendants on the subject, or were ever advised or solicited by them in any way to make the sale, and that they themselves were acting under the direct order of the owner of the judgment.

17. From this extended review it clearly appears that the defendants did not mismanage the Land Company, or in any way bring about the distress or pressure which necessitated the creation of the trusteeship; that they were not guilty of any fraud or concealment in planning it or procuring its adoption by the stockholders, or moved by any improper motive in the selection of the persons to whom the trust was confided, and that they did not withhold any information from any one authorized to speak for either corporation, or who should have been consulted; that the trusteeship was a necessary and prudent step to avert a crisis in the affairs of the Land Company, and save its property; that defendants were in no way instrumental in preventing the Tennessee Company from coming to the aid of the Land Company, but, on the contrary, availed themselves of the aid of the Tennessee Company as far as they could; that the defendants were not guilty of any fraudulent concealment of the prospects of building the steel plant, and not at fault in not making known the determination of the Tennessee Company which had not then been formed with reference to the enterprise; that the sales complained of were made openly, and not secretly, and for a fair price. It is also proved by the positive testimony of Baxter, Bowron, Shook, and McCormack, and by the stock books of the Ensley Company, and by all the evidence which seems to have been in their power to produce, that neither Baxter, Bowron, nor Shook were ever, at any time, directly or indirectly, interested in the Ensley Company, or in McCormack and Ramsey, or in its or their purchases. It is not pretended that Barker ever had any interest. There is the most explicit denial of any combination or conspiracy,

express or implied, to enable McCormack or Ramsey or the Ensley Company to acquire the lands secretly, or unfairly, or at less than their value. It does not appear that either of these defendants were of kin or related to McCormack or Ramsey, or in any way interested with them, or that Bowron, Baxter, Shook, or Barker, or either of them, had any motive to injure the Land Company or the Tennessee Company, or to blacken their good standing among men by wrecking the affairs of the Land Company, or that they were in any way in the power of McCormack, or were in financial distress, or controlled by any motive or surroundings which could tempt men in the high places they held in the industrial world to act treacherously in the execution of an honorable trust, in order to put money in the pockets of the Ensley Company, Ramsey, or McCormack, or either of them. Every syllable of the positive testimony supports the denial of defendants of any combination, fraud, conspiracy, of interest with the defendants. There is nothing which can be brought forward to impugn the truthfulness of these statements of defendants, except such inferences as may be legitimately drawn from their various acts, which have been reviewed above. The harshest judgment which can be passed upon those acts cannot justify the finding of any kind of fraud or bad intentions on the part of the selling defendants, but, at most, involves them only in errors of judgment. Unless, therefore, the court proceeds upon the theory that Baxter, Bowron, and Shook, being human, could have sinned against their corporation, and therefore did sin against it, in effecting the trusteeship, or in making and advising the sales complained of, it is impossible, under any legal or moral rule for weighing men's conduct, to find them guilty, under this evidence, of any actual fraud or bad intentions in their several or combined parts in the transactions. What possible motive, under the evidence, could have possessed Baxter, Bowron, or Shook or Barker to conspire with McCormack or desire to despoil the Land Company for his benefit? Baxter, Bowron, Shook, and Barker not being guilty of fraud, or covetous, or impure motive, in these transactions, it is impossible for them to have connived or conspired with McCormack. Without their guilty concurrence, it is impossible for McCormack to have committed the frauds charged against him, whatever may have been his motive or interest, if we solve all doubts on these points against him. There is not a particle of evidence that Baxter, Bowron, Shook, and Barker were deceived. They acted deliberately, in full consciousness of the situation with which they dealt, and with knowledge of all the facts that entered into the measure of their obligations to the Land Company, its creditors, and its stockholders.

18. Under the terms of the deed of trust it is provided that Barker and Bowron are not to charge any fees or commissions for their services, but may pay others for reasonable expenses in aiding them in the administration of the trust. It is further provided that "said N. E. Barker and James Bowron shall not be held liable or responsible for the consequences of any act, done or omitted to be done in good faith, but shall be liable only for willful neglect or misconduct," in the discharge of their duty. Counsel for complainants speaks of the limita-

tion and powers in the declaration of trust as "self-declared," and therefore without efficacy. The deed from the Ensley Land Company to Barker and Bowron as trustees recites that the Ensley Land Company, being largely indebted, etc., "has caused and procured the said N. E. Barker and James Bowron to make a declaration of trust securing said indebtedness." The declaration of trust standing alone was a mere proposal. The stockholders of the Land Company had the right to accept it. They did accept it, and when they deeded the property to the trustees, to be dealt with according to the terms of the trust, that declaration became part of the contract between them and the Land Company as to their powers and liabilities. It was a private, not a public trust. It was not against public policy to limit the liability as there declared. The Land Company has fully ratified the trust and its terms, and it is now too late for it or its stockholders to complain. The private sales complained of were not only not illegal, but were authorized, and there is nothing to show that they were made in fraud or bad faith. The trustees were not bound to advertise before accepting the first offer of sale or making other sales. Whether they should do so or not was a matter of discretion and judgment which the trust left to their determination. The same considerations apply to the time when the property should have been put upon the market, and whether it was wise or not to accept the offer of the Ensley Company and McCormack and Ramsey, instead of awaiting the outcome of the efforts to build a steel plant.

From what has been said of the failure to make known to the public the probability of the building of the steel plant, the most that can be said of the failure to advertise that fact after the Ensley Company went in possession is that it was an error of judgment. The evidence shows that the newspapers published the fact that the Ensley Company would begin the building of a town there, and the number and kind of manufactories and other enterprises it had agreed to start there. Ensley itself had been advertised for years. There is nothing to show that, in fixing the price of lots to be sold by the Ensley Company on account of the Land Company, the trustees did not take into consideration what they knew about the building of the steel plant. The trustees were not invested with any power or charged with any duty to collect the alleged indebtedness of the Tennessee Company. The omission to incorporate in the conveyance to the Ensley Company, or to otherwise take an obligation of the Ensley Company to carry out its undertakings, was, notwithstanding the broad limitation of liability, so plainly a duty that, if intentionally omitted to be done, it was not an act omitted to be done in good faith. If inadvertently done, it was such gross negligence as to amount to willful neglect within the meaning of the declaration of trust. It was as negligent a breach of duty as if the trustees failed to try to collect a note until it was barred. This omission is not excused by the fact that the trustees believed the cash offer for the land was a good bargain by itself, and did not relieve them from the obligation to take all proper steps to make this part of the proposal legally obligatory.

The matter, however, is no consequence now. Aside from the ques-

tion whether the nature of the undertaking was not such that damages on its breach were purely speculative, the evidence shows that the Land Company has elected to waive its performance. One of the terms of this proposal, the performance of which was part of the consideration of the trade, was that the Ensley Company should have the exclusive right to sell the lands which should thereafter be put upon the market, at prices fixed by the trustees, for a certain commission. That stipulation went to the entire proposal. Under it neither party could compel performance unless that other party performed on his part. The Land Company did not choose to stand in the shoes of the trustees in this respect, and cannot recover any damages of the Ensley Company, when it elected to take the sales of the lands out of their hands, and ceased to pay commissions to the Ensley Company. The proof, therefore, discloses nothing for which the trustees can be called to account as for a breach of trust. Under the review we have given of the evidence it also results that Baxter, Bowron, and Shook are not liable, as directors, for what they did in the creation of the trust or in aiding or advising the trustees in the selection of the lands sold, or the prices to be obtained therefor, or for not collecting the alleged indebtedness from the Tennessee Company.

19. In the vision of after events, all can see now that it would have been far better to have delayed placing the lands on sale, after the title came into the hands of the trustees, until the outcome of the efforts to erect a steel plant at Ensley should be known. Similar undertakings, under as favorable auspices, had failed before. The trustees at first declined acceptance of the offer, and demanded better terms, to which there was a refusal to accede. The time had come, in their opinion, when they must act one way or the other. One of the trustees had no prior connection with either of the companies, and after conference, which we do not doubt was honest and conscientious, agreed with his co-trustee as to the advisability of the acceptance of the offer. The times were then unsettled. The country was on the brink of war with Spain. No one could predict what conditions would arise in the near future, and what industrial and financial conditions would result, or what effect they would have upon the building of a town at Ensley. The Land Company had been ill-starred and subjected to many vicissitudes. Creditors, who reluctantly yielded indulgence, were clamorous for their money. They had put the property in the hands of trustees to turn it into money, with the legal and moral understanding that it should be done as soon as practicable. Interest was eating into the property at the rate of over $800 a month, and delay was costly. Prudent men, under such circumstances, might well have deemed it the part of wisdom to begin selling at the earliest fair opportunity, and to take the proverbial bird in the hand, which is worth two in the bush. Courts are never harsh with honest trustees about mistakes in reading future events, or the effect they will have on business committed to their charge.

20. Did McCormack occupy such relations to the Land Company at the time of his negotiation and purchase as justifies or permits a court of equity to set aside his purchase, although there be no actual fraud?

A director acting openly may purchase for himself from a board of which he is a member, they not being interested, if he does not assume to act for the corporation and his colleagues do not rely upon him. Such purchases, while of evil tendency, are not absolutely forbidden, or regarded as carrying such weight of adverse presumption as makes them constructively fraudulent, and therefore to be set aside, as, of course, on seasonable objection. When assailed, they will not be upheld, unless it can be shown that the transaction was not effected by fraud, and that the scales by which the bargain was weighed were not tipped in the director's favor by the influence of the relation, or by his use of any information, which was not equally possessed by those with whom he dealt. A director who buys corporate property of his fellow directors does not take his purchase wholly without the reason of the rule, merely because his proposal, made while he was yet in office, did not ripen into a contract until its acceptance a few weeks later, when he had ceased to be a director. Whether or not such dealings can stand depends upon the facts of each particular case. Williams v. Powell, 66 Ala. 20, 41 Am. Rep. 742; Daniel v. Hill, 52 Ala. 430. The familiar reason of the rule is that a director, whose position proves alike confidence reposed and ability to influence, having dealt for his own advantage with one by whom the confidence is extended, may have exercised that influence contrary to the purpose for which the law created the trust, and therefore his acts, like those of any person who stands in fiduciary relations to another, will not be sustained when questioned in a court of equity, unless it appears that he has not used his position, intrusted to him solely to advance the welfare of the corporation, to unfairly promote his own personal gain.

In the case of a purchase by a director from a trustee, whose selection he did not influence or control, who was chosen by creditors and stockholders to hold corporate property in trust to sell to pay debts, the reason of the rule and presumption it indulges, in contracts by a director with his associates, or with stockholders, does not exist. The relation between a director and such a trustee is not one in which confidence is given and reposed between them. No power is vested, no duty is imposed, and no confidence is reposed, in the director as to the sale. The duty and the confidence are reposed elsewhere—in the trustee, not in the director. There is no presumption of law that a trustee so situated will subordinate his judgment and will to the influence of a director or former director. When the director makes, and such a trustee accepts, an offer of purchase, the burden of showing that improper influence moved the trustee in making the contract is upon him who assails it. There is a burden resting upon the director-purchaser, not on the ground of any trust or confidence in the matter of the sale, but because he stands in fiduciary relations to the corporation, as to his dealings with its property, and has therefore to show that, in his contract with the trustee, he did not avail himself of any information which was not equally possessed by the trustee. With this one exception, the director stands, as regards the presumption of influence over such a trustee, as any other purchaser would stand on that issue. Close relation by blood, family ties, and the like, between

the purchaser and the trustee may always be shown, in connection with the other facts and circumstances, to impeach the bona fides of the sale and so here the relation between Bowron, Baxter, Shook, and McCormack, while they were directors of the Land Company, or the relations of the trustees to him, then or afterwards, taken in connection with the whole case, should be looked at in determining the bona fides of the sale.

The court does not doubt that McCormack was imbued with the firm belief that a steel plant would be built at Ensley, if not by the Tennessee Company, by some one else, at some indefinite time, in the not distant future, and that he considered the chances of that probability becoming a fact, in weighing the advisability of his venture, and was willing to risk his money, in any event, but thought his purchase would be more valuable, because a steel plant would be built there in the near future. His proposition distinctly shows that he had this in mind. The very terms of it suggested to the stockholders' meeting his belief that sooner or later a steel plant would be built there. The fifteenth proposition of the Ensley Company reads:

"If found practicable, and molten steel is sold to us at reasonable prices, we will cause to be built a plant for the manufacture of steel castings."

This does not necessarily show, however, that McCormack knew or believed at that time that any proposition had assumed definite shape as to reconsidering the determination of the Tennessee Company to build a steel plant at the Birmingham Rolling Mills. Molten steel, with modern appliances, may be safely carried some miles by rail from the place of manufacture to the place where it is to be utilized for the finished product. McCormack states that he had this in mind when he spoke of steel being sold at Ensley, and that he believed, at the time of his proposal, that the building of the steel plant at Birmingham was an assured fact, and that the Tennessee Company was under contract not to build one for itself for a term of years. He states he knew nothing "of any further efforts being made by the Tennessee Company's officials than they had been making for many years to procure the capital to build a steel plant." It is not shown that, in his efforts to induce persons to go into the Ensley undertaking, he mentioned any knowledge or information as to the early building of a steel plant there, which would have been probable, had he known that the building of the plant at Ensley had been definitely determined on or was assured. The governing committee of the Tennessee Company, of which he was a member, was charged with duties only as to the physical condition of the property, and the building of the steel plant was not within its province, and he had nothing to do with the correspondence on that subject. Bowron, it is true, had conversed generally with McCormack on the subject of a steel plant, but the inference from his testimony is that this was some time before he wrote the letter asking the New York office to turn the officers loose. It is not an unfair presumption that McCormack knew in a general way, though perhaps not just at the time, what Bowron and Baxter were trying to do. Whatever information he had, he gained otherwise than in the exercise

of any office or duty entrusted to him as a director in the Land Company. He knew the Tennessee Company had declined to build at Ensley, when the Ensley Company made the deed to the trustees, and when the Ensley Company purchased from them. He knew, if he knew all that was going on, that the effort to build a steel plant at Ensley had not taken practical shape and form, and that its success depended upon raising money from outside sources, and that not a dollar had then been subscribed.

If the rights of the Tennessee Company and the duties he owed it are material here, it suffices to say that the persons with whom he dealt in the Land Company trade were the very persons who were making the effort to build the steel plant, and knew far more about the matter than he did. There was nothing he could tell them. The reservation of the Tennessee Company for a steel plant at Ensley, and where it was located, and its situation with reference to the lands of the Land Company had been known for years, and were matters of common knowledge there. There was no unknown quality in the lands, or special use to which they could be put, or hidden elements of value in them. Any one could tell about these things by going over them. The value of the land was not at all uncertain or doubtful, save as that value might be affected by a demand for its use for town lots, and the prospect there was for that demand. McCormack had been appointed a member of the committee, in 1895, to select such portions of the company's lands as it might see proper to offer for sale, and in 1897 he was one of a committee to arrange terms of settlement of the company's debts. No selection of lands was made, nor was anything done by that committee as to a settlement of the debts. The formulation and execution of a plan of settlement under the resolution of 1897, was intrusted to the attorneys of the two companies and to the defendants, Baxter, Bowron, and Shook. McCormack's knowledge as to what was transpiring as to a settlement with creditors could not, of course, shed any light upon the value of the lands. Baxter, Bowron, and Shook had long been connected with the Land Company, and were entirely familiar with its property. They had gone over it about this very time, to induce a creditor to buy portions of it, in part settlement of his claim. They were cognizant of all the conditions present or prospective which might give it value. They had as much knowledge and as much capacity, if not more, than McCormack had, to determine the value of any part of the lands and every question which entered into it. McCormack made his proposition formally to the stockholders while he was a director, in terms which left no doubt that he was interested in the Ensley Company. He repeated his proposition to Bowron for the Ensley Company. He made his own proposition for 10 acres in his own name, when he had ceased to be a director. The two propositions were treated as one, and accepted at a time when his only relation with the Land Company was that of a small stockholder. His former connection with the company, as a director, is therefore material, under the evidence, only to aid in determining the fairness of the trade, in so far as his former relations with the trustees might improperly influence them, and in that it placed the duty on him not to

conceal any fact material to the value of the lands in dealing with them. There is nothing to indicate, in the slightest degree, that he was ever so close to Bowron and Barker, or to Shook and Baxter, who advised with them, as to give him any influence over them, or which would enable him to control their independent exercise of judgment, or in any wise undermine their firmness or sense of obligation to their trust. McCormack presented his proposition to Bowron on the 26th of January, 1898. Bowron states that he took the proposition to Barker, his co-trustee, and discussed it with him for "three-quarters of an hour," being personally in favor of its acceptance. Barker admitted the advantages of the proposition, but thought it desirable to trade, on the basis of retaining for the benefit of the trust, some interest in the profit to be made by the Ensley Company on a resale of the lands. Bowron returned and asked McCormack to concede to the trustees some share of his profits. McCormack took the proposition under advisement. Nothing further transpired in the matter for a month. On the 24th of February, 1898, McCormack advised Bowron that " his proposition could have acceptance or rejection of the trustees as it was." Bowron states the Maine had been blown up in Havana Harbor, stocks were dropping in New York, and capitalists were calling in loans, and he felt the more disposed to accept the proposition, which would relieve the trustees from their obligation for money borrowed from Barker's Bank to pay the Ensley Company, on a note of the trustees indorsed by the Tennessee Company, and would give them enough "spot cash" to put the trustees "in a position of safety." Barker, considering the circumstances and that the proposition was approved by Shook, the president of the Land Company, and Baxter, the president of the Tennessee Company, the parties most largely interested in the Land Company, decided to join in making the sale, and thereupon McCormack was notified of the acceptance of his proposal. It does not appear from the evidence that he importuned either of the trustees to accede to the proposition while it was under consideration. He simply stood fast to his first proposition, and declined, when asked to recede from it.

From the whole testimony it is apparent that the acceptance of his proposal was the deliberate act of the trustees in the exercise of their judgment, after full discussion of the whole subject, in plain view of the situation, as the best thing to do for the company and its creditors. Having made his offers openly, not possessing, and not having exercised, any improper influence on the trustees, and having made no misrepresentations, having utilized no information gained in the service of the Land Company, or elsewhere, which was not equally open and present with the trustees, and having paid a fair price for the lands, the court cannot strike down his bargain on account of his having recently been a director, unless it rules, which is not the law, in the absence of statutory regulations, that a director is not permitted under any circumstances to make an open purchase of property from trustees, who have it in charge to sell, for the payment of debts. No stretch of his former fiduciary relations could make it his duty to plead with the trustees to reject his proposition, or to warn them that possibly he

might make a large profit out of the transaction. That very question was in the minds of the trustees and caused them to deliberate a month before accepting his proposal. They considered the quantum of profits, and withheld acceptance of his proposition for a time while they weighed that very matter. It is not a fact, and no court holds, that the influence of the relation of a former director with trustees, appointed as these were, exists in anything like the degree presumed between guardian and ward, shortly after the termination of the relation. Even if the transaction here had been between guardian and ward, soon after the relation terminated, it could not be overturned under the doctrine of Malone v. Kelley, 54 Ala. 533, Daniel v. Hill, 52 Ala. 431, two great judgments delivered by the late Chief Justice Brickell, which are now landmarks in the jurisprudence of Alabama. It is not necessary to inquire whether, in a suit like this, in right of the Land Company it could rescind a sale for violation of fiduciary duty which a purchaser owed not to it, but to one of its stockholders individually, by reason of relations of the purchaser with that stockholder. Assuming that it may, it is clear that the representatives of that stockholder in this case knew everything that McCormack knew, and of his efforts to make the purchase, that no deceit was practiced, and it further appears that that stockholder, the Tennessee Company, although invited by this bill to join in the complaint against this sale, has not thought proper to do so.

21. In Foster v. Mansfield Railroad Co., 146 U. S. 99, 13 Sup. Ct. 28, 36 L. Ed. 899, it is said:

"The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence, the tendency of courts in recent years has been to hold the plaintiff to rigid compliance with the law, which demands not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

It is not to be supposed that complainants purchased their shares without inquiring what property their company possessed, and what gave it value. They held both old and new shares, and knew there must have been a tremendous loss, or shrinkage in value, to require a reduction of the capital stock from $10,000,000 to one-twentieth of that amount. They knew the Land Company had never paid a dividend. They knew that the value of the company's property was largely speculative, and that the enterprise, from its very nature, would be subjected to many hazards in the trying industrial and financial conditions through which the country was passing, during the period in which the transactions now complained of occurred. The property went into the hands of trustees in January, 1898, to sell for the payment of the company's debts, with the sanction of its stockholders. The trustees made sales and remained in possession nearly a year and a half, when the Land Company, with the help of the Tennessee Company, paid off its creditors and came to its own again, and continued its enterprise. All the while the purchasers were improving the property. The building of the steel plant, the object of so much solicitude and fruitless endeavor, had come to pass in 1898. Manufactories sprang

up and residences and business houses displaced the woods and occupied the fields, and several thousand busy people dwelt, in 1902, near the spot where Ensley uttered his prophecy, more than a decade before, as to the city which was springing up there. Two presidents of the company had reported to the stockholders its critical situation on account of the Warner judgment, and sale under it, and the demands of its creditors. A special meeting had been called to deal with this situation of which notice had been given the stockholders by mail, as well as by publication in the newspapers. Some of the stockholders received these notices. Complainants lived in the same city in which the Tennessee Company, the majority stockholder, had an office, and in whose office meetings of the directory of the Land Company were frequently held. Communication by rail between New York and Ensley was easy. An inquiry could have been sent at any time from the home of complainants, in New York, to Birmingham, and an answer returned by mail within four or five days. The law charged complainants with knowing who their directors were, and complainants therefore knew that McCormack was a director, and the length of his service. The court does not doubt that complainants, long before the filing of their bill in 1902, actually knew that the Land Company had lost and regained possession of its property, that the trustees had been in possession for over a year, selling portions of the property, before it was restored to the Land Company, and that the Ensley Company, McCormack, and Ramsey had gone into possession in 1898, and that shortly thereafter the town began to be rapidly built there.

The excuse the complainants tender for the delay in filing their bill is that they were ignorant of the secret knowledge defendants had as to the steel plant, and also of their secret interest in the purchase, or that McCormack organized, or had an interest in, the Ensley Company when it bought the property from Mrs. Warner, and when it sold to Barker and Bowron. The proof shows that there was no plot, and there was no interest of the directors or trustees in the purchase by the Ensley Company from the trustees, other than that of McCormack, whose interest was open and avowed. There was no determination of the Tennessee Company to build a steel plant at Ensley, at the time of the transactions complained of. The only thing not known to, or concealed from, the complainants, according to the proof, was McCormack's connection with or interest in the Ensley Company at the time it was formed, and when it bought from Mrs. Warner, and when it sold to Barker and Bowron, and why he formed that company.

Complainant's knew that McCormack was a director up to the 25th of January, 1898, and consequently occupied fiduciary relations to the Land Company, at the dates when the Ensley Company was formed, when it purchased from Mrs. Warner, and when it sold to Barker and Bowron. These conveyances were all of record, and there was also on record a declaration of trust by Barker and Bowron, and also, later, a conveyance from them as trustees to the Land Company. These conveyances and the possessions under them showed how the trust was created, and how the Land Company regained title to its property and held possession for nearly three years before this bill was filed.

The steel plant had been erected in 1898. The denials of the bill itself do not disclaim knowledge on the part of the complainants of the open facts of the transaction shortly after they transpired. They knew long before the bill was filed that the Ensley Company, McCormack, and Ramsey were on the lands, improving them, and that they claimed the right to do so under the conveyances from the trustees. The incorporation proceedings of the Ensley Company showed that it was formed to buy this very land, and that none of the defendants appeared as its officers or stockholders of record. The complainants knew then, or were conclusively charged with notice, that the Ensley Company was formed in December, bought the property in December, and sold it to Barker and Bowron as individuals in December, of the same year, 1897, and that, within less than two months thereafter, this same Ensley Company, which had sold the property to Barker and Bowron, as individuals, purchased from them as trustees, paying a greater amount of cash for 330 acres which were carved out of it than it exacted two months before for the entire tract of land, and that the Ensley Company and McCormack, who was a director in December, 1897, and January, 1898, was openly interested in these purchases from the trustees, and in possession of the lands, improving them. The facts and circumstances pertinently suggested the inquiry why the Ensley Company sold the entire tract of land to Barker and Bowron, as individuals, and then repurchased from them as trustees, shortly thereafter, a small part of the same tract, paying therefor, more than the amount for which the Ensley Company sold the entire tract to Barker and Bowron. They pointedly suggested the further inquiry, whether McCormack, who openly avowed an interest in the Ensley Company at the time of its purchase from the trustees, only two months after that company was formed, and after it purchased the property from Mrs. Warner, and sold it to Barker and Bowron before they became trustees, did not have some connection with that company and with Barker and Bowron in the beginning of the trusteeship. An inspection of the record of the incorporation proceedings of the Ensley Company would have shown that whatever interest McCormack or Ramsey had in that company was then kept off the record. The inquiry, so plainly suggested, pursued with any sort of diligence, would have led up to the discovery long before the bill was filed that McCormack promoted the Ensley Company, and its purchase from Mrs. Warner, and its sale to Barker and Bowron, and that he was interested in the Ensley Company at the time, and would also have developed his motive for not appearing of record in its dealings with the property of the Land Company at that time.

If complainants have failed to pay "any attention to the affairs of the Land Company," as one of them frankly testifies, saying that he never attended stockholders' meetings, though he had notice of them, but generally sent proxies whenever asked, their indifference amounted to gross negligence and inattention to their own interest, and cannot excuse them when they become actors and seek to assert those interests in a court of equity. Complainants knew, or were conclusively charged with notice, under the evidence, that McCormack, Ramsey,

and the Ensley Company were all the while going ahead, in reliance upon their conveyances and their contracts with the trustees, expending time, energy, and money, endeavoring to perform their engagement with the trustees, to build up the town, improving the property they purchased for themselves, and involving themselves in onerous engagements, and that the property was rapidly increasing in value. It was highly inequitable, under such conditions, for complainants to remain idle and silent for four years. They had no right, in equity and good conscience, to speculate upon the defendants during this long period, while they were making up their minds whether they would claim the benefit of the venture, if it proved successful, and leave the loss to fall upon the defendants, if it turned out disastrously. Their long delay, under the circumstances, estops them from complaining of the sales in a court of equity. Ashurst's Appeal, 60 Pa. 290; Twinlick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Kent v. Quicksilver Mining Co., 78 N. Y. 159; Sheffield Land Co. v. Neill, 87 Ala. 159, 6 South. 1; Foster v. R. R. Co., 146 U. S. 99, 13 Sup. Ct. 28, 36 L. Ed. 899; Johnston v. Standard Mining Company, 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480; New York City v. Pine, 185 U. S. 99, 22 Sup. Ct. 592, 46 L. Ed. 820.

Let the bill be dismissed.

GEIGER v. TACOMA RY. & POWER CO.

(Circuit Court, W. D. Washington, W. D. October 14, 1905.)

COURTS—CREATION OF FEDERAL COURTS—CONSTRUCTION OF ACT DIVIDING DISTRICT OF WASHINGTON.

Act March 2, 1905, c. 1305, pt. 1, 33 Stat. 824, dividing Washington into two judicial districts, interpreted consistently with the practice of Congress and the judicial history of the country and the general laws in force relating to the federal judiciary and the jurisdiction and powers of the federal courts and judges, lacks none of the essentials of a sufficient organic law, and the Circuit and District Courts of the Western District of Washington as thereby created are the same courts as those previously existing in the District of Washington, having the same judges and officers and the same powers and jurisdiction within that part of the original district remaining after the Eastern District had been carved therefrom, and being still within the boundaries are constituent parts of the Ninth judicial circuit. While the act does not "ordain and establish" courts in said Western District as required by Const. art. 3, § 1, in express words, nor define their jurisdiction and powers further than to fix their terms, nor assign the district to either of the nine judicial circuits, nor provide for the appointment of judges and officers therein, otherwise than by providing that the district judge and officers of the District of Washington then in office shall be the district judge and officers of the Western District, the intention of Congress in respect to all such matters is clear from the act, and the provisions necessary to carry out such intention, which are not expressed, are to be implied.

At Law.

Action to recover damages for personal injury. This case was pending in the United States Circuit Court for the District of Washington, in the Western Division of said District, on the 2d day of March, 1905, on which date the act of Congress dividing the state of Washington into two judicial districts went into effect, and pursuant to that statute the case was transferred and the record certified to the United States Circuit Court for the Western District of Washington, and was tried before the court and a

jury at the July term, 1905, of said court, resulting in a verdict in favor of the plaintiff, upon which a judgment was entered. Upon the hearing of a petition for a new trial, subsequent to judgment, the defendant challenged the validity of the judgment, and of all the proceedings subsequent to the 2d day of March, 1905, and denied the legal existence of the court, on the ground that Congress has not ordained and established a United States Circuit Court for the Western District of Washington. Objections for alleged lack of jurisdiction overruled, and petition for a new trial denied.

E. E. Cushman, for plaintiff.

C. O. Bates and Walter M. Harvey, for defendant.

HANFORD, District Judge. An attack upon the jurisdiction of this court has been made, and its existence denied, in an irregular manner, upon the argument of a petition for a new trial after a judgment in favor of the plaintiff had been entered. The formalities of procedure, however, are not important in consideration of questions affecting jurisdiction, and especially so when the constitutionality of the court is made the subject of a controversy.

It is first in order to make a concise statement of the defendant's contention and the questions submitted for decision, and I deem the following a fair statement: The first section of the third article of the Constitution of the United States provides that:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * *"

By this provision, the Supreme Court is the only national court which can exist without the exercise of the creative power vested in Congress, and all other courts, in which the national judicial power is, or may be, vested, must of necessity come into being by virtue of statutes duly enacted by Congress, and the courts of the United States, inferior to the Supreme Court, have only the powers and jurisdiction conferred by acts of Congress. The jurisdiction of a court, both as to matter and the territorial limits thereof, may be enlarged from time to time by acts of Congress, and, in like manner, diminished, but a national court as a distinct entity cannot be a product of evolution, nor can its origin be veiled in the dimness and forgetfulness of time. Therefore, if this court has a legal existence, there should be found somewhere in the body of the statutes enacted by Congress words appropriate to express a positive intention on the part of Congress to "ordain and establish" it as one of the courts composing the judicial system, and to clearly define its jurisdiction.

"A court" has been defined to be an incorporeal being, and as that body in the government to which the public administration of justice is delegated. It is in this sense that the word "courts" in the Constitution must be understood, and consistently with the general plan of our government and the judicial history of our country the courts ordained and established by Congress, pursuant to the Constitution, should be organized tribunals, their existence should be perpetual, and they should have the administrative and judicial powers pertaining to courts of judicature, and adequate to the efficient administration of justice within the scope and range of national responsibility.

A law which only makes provision for terms of court to be held at specified times and places is inadequate to constitute a court having the attributes of continuity and permanence of existence necessary to be possessed by every court designed to perform the judicial functions of the government within a district. The creation of a judicial district with defined boundaries does not of itself establish any description of tribunal, and a fortiori does not establish a Circuit Court of the United States. Conformably to the Constitution of the United States, all federal judges must be appointed by the President, by and with the advice and consent of the Senate, and hold their positions during their good behavior. A law which purports to fill the office of judge of a newly created judicial district by designating as the incumbent of that office a judge of a different district is as much a departure from the constitutional method of making appointments to the judiciary as would be the designation of a district attorney or collector of customs to be judge of a district. Moreover, without a clear declaration of a specific purpose to do so, there can be no legitimate presumption of an intention on the part of Congress to organize a United States Circuit Court with only a district judge to preside therein, when every other judicial district in the United States is assigned to one of the nine circuits, and circuit judges and a member of the Supreme Court are members of the Circuit Court in each of the other districts. By the foregoing fundamental principles, the organic law of the Western District of Washington must be tested for the determination of the question now raised as to whether a United States Circuit Court does or does not exist therein. The act of Congress entitled "An act to divide Washington into two judicial districts," approved March 2, 1905, c. 1305, pt. 1, 33 Stat. 824, is the organic law, and the whole thereof, because previous to its enactment there was no Western District of Washington, and there has been no subsequent legislation affecting the question. This statute provides that all that portion of the state of Washington which includes certain named counties, with the waters thereof, and all Indian reservations therein—

"Is hereby detached from the judicial district of Washington, and made a separate judicial district, and shall be called the 'Eastern District of Washington,' and the residue of said state of Washington, with the waters thereof, shall hereafter be the 'Western District of Washington.'"

The second section of the act provides that the District Judge of the judicial district of Washington in office at the time this act takes effect shall be the District Judge for the Western District of Washington, and that the clerk of the Circuit Court, the clerk of the District Court, the district attorney, assistant district attorneys, marshal, deputy marshals, deputy clerks, and referees in bankruptcy resident in said Western judicial district of Washington shall continue in office, and be such officers in said Western District until the expiration of their respective terms of office, or until their successors shall be duly appointed and qualified. Section 6 of the act provides that the office of marshal, district attorney, deputy marshals, assistant district attorneys, and all other officers authorized by law and made necessary

by the creation of two districts and all vacancies in either of said districts shall be filled in the manner provided by law, and provides for the compensation of all the officers of the two districts, except judges. The act does not by apt words ordain and establish either a District Court or a Circuit Court in either of the two districts, and, without having in any preceding section mentioned a District or a Circuit Court, the seventh section provides that all causes and proceedings of every name and nature, except criminal, now pending in the courts of the judicial district of Washington, shall be transferred to and proceeded with in the Eastern and Western judicial districts, respectively. That part of the section relating to the Western District reads as follows:

"And all causes and proceedings of every name and nature, except criminal, now pending in the courts of the judicial district of Washington as heretofore constituted, whereof the courts of the Western judicial district of Washington as hereby constituted would have had jurisdiction if said district and the courts thereof had been constituted when said causes or proceedings were instituted, shall be, and are hereby, transferred to and the same shall be proceeded with in the Western judicial district of Washington as hereby constituted, and jurisdiction over the same is hereby vested in the courts of said Western judicial district, and the records and proceedings therein and relating to said proceedings and causes shall be certified and transferred thereto: Provided, that all motions and causes submitted, and all causes and proceedings, except criminal, including proceedings in bankruptcy, now pending in said judicial district of Washington as heretofore constituted, in which the evidence has been taken in whole or in part before the present district judge of the judicial district of Washington as heretofore constituted, or taken in whole or in part and submitted and passed upon by the said district judge, shall be proceeded with and disposed of in said Western judicial district of Washington as constituted by this act."

Section 8 provides that regular terms of the "Circuit and District Courts of the United States for the Western District of Washington" shall be held at the times and places therein specified.

Section 9 provides: "That the terms of said courts shall not be limited to any particular number of days, nor shall it be necessary to adjourn by reason of the intervention of a term elsewhere; but the court intervening may be adjourned until the business of the court in session is concluded."

Section 11 repeals all other laws so far as inconsistent with the provisions of this act, and section 12 provides that the act shall take effect immediately after its approval by the President. Sections 3, 4, and 5 relate exclusively to the Eastern District, and section 10 relates exclusively to prosecutions for offenses committed prior to the date of the act. Having set forth substantially the provisions of this law, it is to be especially noted that there is an omission of the creative words which an observance of the Constitution would indicate as appropriate and necessary to ordain and establish courts. There is also an omission of any general provision defining the jurisdiction and powers of courts within either of the two newly organized districts. The act fails to confer upon the courts mentioned jurisdiction and power co-extensive with that of other District and Circuit Courts of the United States; the only jurisdiction conferred being limited to causes and proceedings pending at the time of the

enactment, except as provided in the tenth section relating to offenses previously committed. The act also omits any provision assigning the newly created districts to either of the nine judicial circuits of the United States, and omits any reference to the Circuit Judges and Justices of the Supreme Court. In view of these defects in the law, there is no United States Circuit Court for the Western District of Washington, unless by judicial construction there shall be read into the law a presumption of intention on the part of Congress to ordain and establish District and Circuit Courts by merely assuming that they would necessarily come into existence to fit into and fill out the organization of the two districts which the act creates. It is the defendant's contention, however, that inferences and presumptions are not permissible for the purpose of supplying apparent omissions in statutes of words essential to create new courts and confer jurisdiction upon them, under the Constitution of the United States.

This court does in fact exist, and it has been recognized and its jurisdiction invoked by litigants and the executive department of the government. The Supreme Court of the United States, as well as the Circuit Court of Appeals for the Ninth Circuit, has treated it as a lawfully established Circuit Court of the United States, subject to the appellate jurisdiction of those tribunals, by issuing writs of mandate directing judgments affecting important rights to be entered in accordance with their decisions, and, on the ground that the court cannot cease to perform its functions, it might decline to listen to the defendant's invitation to declare itself nonexistent, and pass the questions up to the appellate courts for final determination, but I deem it my duty to render a decision and give reasons for overruling the defendant's protest.

In deciding the question submitted, I am required to ascertain the object which Congress had in view when the statute under consideration was enacted, and to give effect to the legislative will, as expressed by its provisions. The crudeness of this piece of legislation must be admitted, and from its crudeness arises the necessity for judicial construction. A law is not to be ignored nor set aside as a nullity merely because its meaning is obscured by imperfections in its composition. If enough is expressed to enable intelligent minds to ascertain the legislative will, necessary inferences must be drawn to supply omissions and correct apparent defects. It is impossible to be mistaken with regard to the real object of this law, when a view is taken of the conditions and circumstances which prompted its enactment. The state of Washington was admitted into the Union of states on an equal footing with the original states, and by the enabling act it was made a judicial district and attached to the Ninth Judicial Circuit. The powers and jurisdiction of other Circuit and District Courts were conferred upon a Circuit Court and a District Court for said district. Pursuant to that law and the compact contained in the state Constitution, Washington entered the Union, and thereafter the Circuit and District Courts were organized, and through them the national government performed its judicial functions within the state. The district being large, and the volume of

business too great for one Circuit Court and one District Court, there was need for additional courts for the prompt and efficient administration of the national laws within the state, and to meet that exigency the statute of March 2, 1905, was enacted. It is certain that the intention of Congress was to reorganize, and not to disorganize, the national judiciary within this state. If the law might be considered as an act which in effect abolished the previously existing courts without establishing successors of each in both districts, it would be both absurd and unconstitutional, because it would deprive the government of the instrumentality essential for the performance of an important part of its functions within the state, and that would be a violation of the compact which permanently binds Washington to the other states as a member of the Union. For that reason, the law must be construed in a way to assert the continued existence of courts competent to enforce the national laws within the state of Washington, and preserve uniformity in the operations of the government in all the states. To that end, it is imperatively necessary to import into the statute a legislative intention to continue all the judicial power theretofore vested in a Circuit Court and a District Court, but to be exerted through a Circuit Court and a District Court for each of the two districts which the act creates. That intention is plainly indicated by the provisions of the act retaining the District Judge and district officers of the district as previously constituted, and their successors, in service in their respective positions, and by the sections which provide for terms of both Circuit and District Courts, to be held in each of the two districts. The scheme of establishing federal courts by assumption and necessary implication is not new, and the lack of a plain declaration in words apt for the purpose of ordaining and establishing courts is not peculiar to this particular statute. Slovenliness of style and inaccuracy in the use of words and phrases, and the omission of important provisions, are noticeable in many of the judicial statutes. I will cite only a few of the many instances to be found in the laws as originally enacted. See an act to establish the judicial courts of the United States (Act Sept. 24, 1789, c. 20, 1 Stat. 73); an act to provide Circuit Courts for the Districts of California and Oregon, and for other purposes (Act March 3, 1863, c. 100, 12 Stat. 794); an act to provide for a District Court and a Circuit Court of the United States for the District of Nevada, and for other purposes (Act Feb. 27, 1865, c. 64, 13 Stat. 440); an act to detach certain counties from the United States judicial district of California, and to create the United States judicial district of Southern California (Act Aug. 5, 1886, c. 928, 24 Stat. 308 [U. S. Comp. St. 1901, p. 324]); an act to amend the Revised Statutes of the United States relating to the Northern District of New York, to divide the same into two districts, and provide for the terms of court to be held therein, and the officers thereof, and the disposition of pending causes (Act May 12, 1900, c. 391, 31 Stat. 175 [U. S. Comp. St. 1901, p. 395]); an act to divide the state of West Virginia into two judicial districts (Act Jan. 22, 1901, c. 105, 31 Stat. 736 [U. S. Comp. St. 1901, p. 440]); an act to divide Kentucky

into two judicial districts (Act Feb. 12, 1901, c. 355, 31 Stat. 781 [U. S. Comp. St. 1901, p. 360]).

Beginning with those of recent date, I find that the act creating the Western District of New York, and the acts dividing the Districts of West Virginia and Kentucky, found on pages 175, 736, and 781 of the thirty-first volume of United State Statutes, are similar in every important particular to the statute under consideration. It is regrettable, however, that those statutes should have been taken as models, instead of the act creating the Middle District of Pennsylvania, and establishing courts therein, found on page 880 of the same volume (Act March 2, 1901, c. 801 [U. S. Comp. St. 1901, p. 405]). The act relating to the state of Nevada constituted that state a judicial district, and provided for the appointment of a District Judge, marshal, district attorney, and for clerks and deputies, and attached the district to what was then the Tenth Circuit, now the Ninth Circuit, and prescribed the place and times for holding terms of the Circuit Court of the United States and of the District Court of the United States for said district, and conferred upon the District Court of the United States for the District of Nevada, and the judge thereof, and upon the Circuit Court of the United States for said District of Nevada, and the judge thereof, the same powers and jurisdiction in said district which are vested in said courts and judges of the United States in the other districts of the Tenth Circuit. The act does not by express words ordain and establish a Circuit Court or a District Court otherwise than by creating a district, providing for the officers necessary to organize courts, prescribing the terms of a District Court and a Circuit Court to be held, and conferring jurisdiction and judicial power upon the courts and judges.

The Circuit Courts for the Districts of California and Oregon were organized pursuant to acts of Congress, approved March 3, 1863 (12 Stat. 794, c. 100). In lieu of a clear declaration establishing a Circuit Court to exist continuously in each of said districts, the effective words of that statute are as follows:

"And there shall hereafter be Circuit Courts held for the districts of the states of California and Oregon by the Chief Justice, or one of the Associate Justices of the Supreme Court of the United States assigned or allotted to the circuit to which such districts may respectively belong, and the District Judges of such districts, severally and respectively, either of whom shall constitute a quorum, which Circuit Courts, and the Judges thereof, shall have like powers and exercise like jurisdiction as other Circuit Courts, and the judges thereof."

The act of August 5, 1886, c. 928, 24 Stat. 308 [U. S. Comp. St. 1901, p. 324], by which the Southern District of California was created, contains no clause creating courts or conferring jurisdiction other than the provisions establishing the new district, and providing for the appointment of a district judge and officers for the new district, and designating the times and places for holding terms of the Circuit and District Courts. That law deserves commendation in one particular. It does not disturb the previously existing courts in California, except to the necessary extent of cutting off part of their territorial jurisdiction, and substituting "Northern District of

California" for "District of California" as the designation of the original district. It detaches from the district as previously existing certain named counties, but omitted to attach the new district to the Ninth Circuit, or any circuit, and it did not designate the judges authorized to hold the Circuit Court therein, unless inferentially by providing: "That the Circuit and District Judges of said Southern District of California shall each, respectively, appoint a clerk for their respective courts." It is only by reason of the fact that the territory comprised within the Southern District of California was within the Ninth Circuit, and is geographically situated so as to be conveniently attached to the Ninth Circuit, and because the act did not express an intention to change the boundaries of the circuit, that said district can be considered as being, by legal implication, a constituent of the Ninth Circuit.

Judiciary Act 1789, c. 20, 1 Stat. 73, under which the federal courts were first organized, created 13 judicial districts, and created a district court for each, and also made provision for terms or sessions of said courts, but it contains no similar words creating or establishing Circuit Courts as permanent, organized bodies. The Circuit Courts originally came into existence by virtue of a clause in the fourth section of the act, which reads as follows:

"And that there shall be held annually in each district of said circuits, two courts, which shall be called Circuit Courts, and shall consist of any two justices of the Supreme Court, and the district judge of such districts, any two of whom shall constitute a quorum."

It has never been supposed that this provision of the first judiciary act required two Circuit Courts to be organized annually in each district, although that is the literal effect, if the word "courts" as there used means organized judicial bodies. If that definition is not comprehended in the sentence, there is no provision in the act whereby the Circuit Courts were established. In the practical interpretation of the law by the operation of the government under it, the words "two courts" mean two terms of a court and the sense of the law is the same as it has been rendered by the compilation of the Revised Statutes of the United States. The same formula by which the Circuit Courts were originally established has been copied substantially in a number of acts of Congress creating additional Circuit Courts. See the act relating to North Carolina (Act June 4, 1790, c. 17, 1 Stat. 126); the act relating to Rhode Island (Act June 23, 1790, c. 21, 1 Stat. 128); the act relating to Vermont (Act March 2, 1791, c. 12, 1 Stat. 197); the act to amend the judicial system of the United States (Act April 29, 1802, c. 31, 2 Stat. 156); the act establishing Circuit Courts in the Districts of Kentucky, Tennessee, and Ohio (Act Feb. 24, 1807, c. 16, 2 Stat. 420). In all of the instances cited Congress has exercised the power to ordain and establish Circuit Courts, by enacting laws creating districts, and, except in the act establishing the Southern District of California, designating the judges to be constituent members of courts styled "Circuit Courts," and providing for the other necessary officers in each district, and fixing the places and dates for holding terms of said courts, and defining their powers

and jurisdiction, except the acts cited which divided the districts of California, New York, West Virginia, and Kentucky. In the new districts which those acts established, the courts must derive their powers from laws under which the national judicial system originally took root, or else from the Revised Statutes of the United States, and subsequently enacted general laws defining the jurisdiction and powers of United States courts and judges. Notwithstanding the omission in each of said laws of accurate words to ordain and establish or create a Circuit Court in each district, the judges, attorneys, marshals, and clerks organized the Circuit Courts, and they have exercised the powers and jurisdiction conferred. They exist in fact and rightfully, although the constitutionality of their existence rests upon necessary implications and legal presumptions. The method, however, of establishing courts, by taking for granted that they will spring into existence naturally to fill the places provided for them in the judicial system, has been sanctioned by time and by the vast importance of the judgments and decrees which they have rendered. It is too late now to question the lawfulness of their existence, although it may not be possible to deny the logic of an assailing argument based upon the postulates that no court inferior to the Supreme Court of the United States can exist constitutionally, until it shall have been ordained and established by a law enacted by Congress, and that a law effective to confer judicial power upon a tribunal not in being must, in positive words, clearly express the legislative will to both create the tribunal and confer the power.

The District of Washington included within its boundaries the whole state of Washington, and it was all within the Ninth Judicial Circuit. As the act dividing the district does not by any express provision, nor by implication, change the boundaries of the circuit, nor diminish the jurisdiction of the appellate courts, nor impair the powers of the justices and judges thereof, the general laws of the United States relating to the jurisdiction, powers, and duties of the Supreme Court and its members, and of the Circuit Court of Appeals, and circuit judges have the same force in both districts now as previous to the division, and the Justice of the Supreme Court allotted to the Ninth Circuit, and the Circuit Judges of the Ninth Circuit, are all members of this court.

The peculiar situation in which I am placed by the defendant's protest at this stage of the case compels me to assign reasons for asserting the lawful authority of the district judge as a member of this court. Perhaps I am magnifying the importance of this matter; but, in view of the many surprises in the decisions of the appellate courts of jurisdictional questions, it behooves the nisi prius courts to look well to the foundation upon which their jurisdiction rests, in every case when a doubt is suggested, and I am constrained to consider the questions raised by the defendant's protest seriously.

Now, as to the question whether there is or is not a lawfully appointed district judge for the Western District of Washington. My appointment as a District Judge was made by the President and confirmed by the Senate, and my tenure is during good behavior, and I

hold a commission issued by the President. The district for which I was appointed originally included within its boundaries all of the territory now constituting the Western District of Washington, and my residence is within that district. There was within the state of Washington one complete organization—division of the district made necessary only one additional organization—and the act provides for only one new set of district officers, and by express provisions retains the existing organization, intact, for service in the Western District, and the only important change effected by the law is the establishment of one new district, with officers necessary to organize the new courts therein. Realities do not give way to mere theories, and the real substantial fact of controlling importance in the determination of this branch of inquiry is that the judicial district originally established when the state of Washington was admitted into the Union, and the courts therein are not changed by the act dividing the district, except in name and by the severing of part of the territory thereof, and the consequential diminution of territorial jurisdiction. The assignment of the District Judge to serve as judge of a district thus reduced is not the same thing as an attempt to make an original appointment of a particular person to a newly created office by an act of Congress, and does not violate the Constitution. A decision to the contrary would necessarily rest upon a theory which would impeach the constitutionality of the Circuit Courts of Appeals of all the nine circuits, for the act creating those courts designates the judges composing them, and all the Circuit Courts in the United States are vulnerable to the same objection, for they all exist by virtue of acts of Congress which designate the judges thereof.

The act of March 2, 1905, dividing Washington into two judicial districts interpreted consistently with the practice of Congress and the judicial history of the country, and the general laws in force relating to the federal judiciary and the jurisdiction and powers of the federal courts and judges, lacks none of the essentials of a sufficient organic law, and I hold that this court exists legally and is, in fact, the same United States Circuit Court in which this action was originally commenced. Its title has been changed to conform to the change made by detaching part of the territory previously within its jurisdiction to form a new district, but in other respects it is the same court, having the same judges and officers, and the same power and jurisdiction within the remaining part of its territorial jurisdiction that it had previous to the division of the district, and it is still within the boundaries of the Ninth Judicial Circuit, and a constituent thereof.

I direct that an order be entered overruling the defendant's protest and denying the petition for a new trial.

BAINUM v. AMERICAN BRIDGE CO. OF NEW YORK.

(Circuit Court, W. D. Pennsylvania. October 23, 1905.)

No. 44.

1. PARTIES—MISNOMER OF DEFENDANT—AMENDMENT.

The plaintiff's statement in an action for personal injury against a foreign corporation, alleged to be a corporation of New Jersey, specifically set out the facts, clearly indentifying the defendant, the work in which it was engaged, and the time and place of the injury. There were in fact two corporations, closely connected and having the same name, except that one was "of New Jersey" and the other "of New York." Both had the same resident agent, on whom the process was served, and the same attorneys, who entered appearance for defendant and prepared the case for trial, when it was discovered that the New York corporation was in fact the one doing the work. *Held*, that the court had power under Rev. St. §§ 948, 954 [U. S. Comp. St. 1901, pp. 695, 696], to permit plaintiff to amend by substituting the name of the real defendant intended, and that such power would be exercised, especially where objection was not made until such time had elapsed as would bar a new action.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, §§ 88–90, 164, 166.]

2. MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—QUESTION FOR JURY.

The question of the liability of a defendant for an injury to plaintiff, a boy 16 years old in its employ, on the ground that defendant's foreman required him to perform an act which subjected him to a danger which a foreman exercising ordinary prudence would not have subjected him to, *held* one for the jury under the evidence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1042.]

At Law. Sur motion for new trial.

Chas. A. Poth and Ward Bonsall, for plaintiff.
Reed, Smith, Shaw & Beal, for defendant.

BUFFINGTON, District Judge. This is a motion for a new trial. On October 11, 1904, the plaintiff, Frank E. Bainum, a minor and citizen of Pennsylvania by his next friend, brought suit in this court for the recovery of damages for personal injuries against the American Bridge Company, averring it was a corporation of the state of New Jersey. In the statement filed with the præcipe, a detailed statement was made of the bridge construction work the defendant was engaged in, the place where it was being done, the employment of the plaintiff by the defendant, the name of the superintendent under whom he worked, and such full particulars as left, or now leave no question as to the identity of the place or manner or circumstances of the alleged injury. The marshal returned the summons as served on "Emil Gerber, authorized agent in Pennsylvania, upon whom service can be made." On November 7th following, Messrs. Reed, Smith, Shaw & Beal, by præcipe filed, entered their appearance "for the American Bridge Company, the defendant above named." The statement and indorsement referred to in the præcipe was simply "The American Bridge Company," without further addition. The

cause was placed upon the trial list and counsel for defendant prepared for its defense, but a short time before trial discovered that the defendant company which had been engaged in the construction work where the accident occurred was not a corporation of the state of New Jersey, but one of the state of New York. In point of fact there was an American Bridge Company chartered by the state of New Jersey, but it was engaged in manufacturing bridges, and the American Bridge Company chartered by the state of New York was engaged in erecting the bridges constructed by such New Jersey company. Both were subsidiary companies of the United States Steel Corporation. The defendant's counsel were employed by both the New York and the New Jersey companies, the casualty work of both companies was in charge of the same person, and the same person was the authorized agent for legal service in Pennsylvania upon both companies.

Under these circumstances, the court regarded the case as one proper for the exercise of that remedial power by way of amendment with which courts are invested in order to effect justice and prevent injustice through mistake. The federal statutes (Rev. St. §§ 948, 954 [U. S. Comp. St. 1901, pp. 695, 696]) are liberal in dealing with amendments. We think discretionary power in that regard was here properly exercised, and the plaintiff allowed to amend by averring an incorporation by New York state, instead of one by New Jersey. There was no question as to the locality of the accident or of the identity of the company engaged in the work or employing the plaintiff. The counsel for that company appeared and prepared its defense, and all parties supposed the real parties to the accident were the parties to the suit. Now, to refuse the beneficient power of amendment, so as to place on record the parties who had all along supposed they were on record, would be shocking to the sense of justice, and especially so when the statute of limitations would bar another suit by the plaintiff. The similarity of names misled counsel for defendant, and the failure of the plaintiff to know that there were two corporations of substantially the same name and engaged in the same general business was quite natural. There was no new cause of action stated, and the fact that the statute of limitations would bar the plaintiff unless the amendment was allowed has been held ground for such allowance. Sanger v. Newton, 134 Mass. 308; Elting v. Dayton, 67 Hun (N. Y.) 425, 22 N. Y. Supp. 154; Risley v. Phœnix Bank, 2 Hun (N. Y.) 349; Dana v. McClure, 39 Vt. 197; Lottman v. Barnett, 62 Mo. 159; Wood v. Lane, 84 Mich. 521, 47 N. W. 1103; Schieffelin v. Whipple, 10 Wis. 81. By permitting this amendment, neither the nature of the case nor the real issue between the real parties is changed, and the federal courts permit amendments in furtherance of justice. Bamberger v. Terry, 103 U. S. 40, 26 L. Ed. 317; Hodges v. Kimball, 91 Fed. 845, 34 C. C. A. 103.

The main complaint now made on the motion for a new trial is that the case was allowed to go to the jury. We think it would have been an unwarranted act on the court's part to itself pass on the issue. Briefly stated, these elements were in the case: The defendant com-

pany had previously done construction work on Brunot's Island, and had left its tools in its office there. At the time of the accident it was doing work at Esplen, on the south side of the Ohio river, opposite the island. A railroad bridge across that stream also crossed over the island, but some 30 feet above the ground.. The Dravo Construction Company, which was doing work on the island for the Philadelphia company, the owner of it, built steps from the ground up to the footpath of the bridge. This enabled workmen and other people to reach either shore by way of the bridge. The steps had two landings, were steep, and the upper portion was shaded from the sun's rays. They had one side rail, which was waist high. They were the only means of getting from the bridge to the defendant's tools. The accident occurred November 29th. It was a cold freezing morning. It grew warmer toward noon, but the sun did not reach the upper part of the stairs where this accident occurred. The defendant's work at Esplen was under the exclusive control of Mr. Riddle, its foreman, who had full power to oversee, manage, hire, and discharge. There was evidence of the condition of the steps that morning, that they were icy, and several of the men slipped on them as they came down. Riddle had been up and down them that morning. He was not asked, and gave no testimony, as to their condition. About 11 o'clock it was discovered the work of the whole erection gang would have to stop until certain tools could be obtained from the office on the island. The plaintiff was employed as tool boy. He was 16 years old, and weighed about 130 pounds. It was contended by plaintiff's counsel that, although he had a lot of idle men waiting until the boy's return, the manager, though knowing the condition of the steps, and requiring haste on the boy's part, sent him to bring an unwieldy, burdensome, and dangerous load up steep, icy, unprotected steps, and that, in view of the boy's youth, this unduly subjected him to an unwarranted risk, which resulted in the accident.

The question of the ownership of the bridge and the steps are not in our judgment material. It suffices to say they were private property and were the only path the plaintiff could go to perform his duty. The steps were steep, icy, and protected by a single rail, waist high; a place that required care and caution when in that condition on the part of a man with his hands free to grasp the rail. The boy was sent for several articles. It was hard to conceive of a more unwieldy, unhandy load to carry, and one that was more likely to embarrass one more in case of a fall. Different witness testify as to the different articles—an auger, a carpenter's square, a spirit level, a carpenter's foot adze, and a two-handled cross-cut saw. To these were added the manager's lunch box, which the boy carried on his little finger, and two dozen long wire spikes in his pocket. The boy makes no mention of the auger, which one of the witnesses spoke of, but described his load and the accident as follows:

"Q. State how you carried them. A. Well, I had the nails in my pocket, and I had the foot adze and the spirit level in my right hand, and I had the cross-cut saw and the square over my shoulder in my left hand, and the lunch box in my right hand. Q. Whose lunch box was that? A. Mr. Rid-

dle's, the foreman's. Q. Could you have carried these tools in one hand, so that you could have held to this railing with this other hand? A. No, sir; nor nobody else could. Q. When you got that load you started up the steps? A. Yes, sir. Q. Did anything happen while you were going up the steps before you got up to the first landing? A. No, sir. Those steps, the sun was on them, and it had melted all the snow on them. There wasn't any ice on the first steps going up, but the other steps were shaded by the bridge. Q. Just describe your fall as well as you can. A. Well, I was going up the steps; I got on the landing, and had turned up the second flight of stairs, and I got to the second step, and my foot slipped, and I tried to catch myself, but had I couldn't; I would have to drop the tools if I would; but I slipped and fell before I could think hardly of catching myself, and I hit the landing, and there was no second railing on the landing; there is a top railing, but there is no second railing, and I slipped under that other railing, and fell 27 feet and lit across a log on the ground."

It will thus be seen the boy slipped on the steps, evidently, and slipped down to the landing, which being unprotected save by a waist-high rail, he went under it and fell to the ground. Part of the tools remained on the landing; part fell below. The boy fell across a log, his back was broken, and he is now an inmate of the Home for Incurables. Under the charge of the court, the verdict of the jury must be regarded as establishing the fact that "the boy was required to perform an act which subjected him to a danger which a foreman exercising ordinary prudence would not have subjected the boy to in the line of that employment." When all the circumstances are considered, the age of the boy, the character of the steps, their icy condition, the unwieldiness of the load, the requirement of haste, we certainly cannot say the submission of the case to the jury was error, and we will not say their verdict was unwarranted. The results of the injury were permanent and so grave that we do not feel impelled to set the verdict aside as unduly excessive.

The motion for a new trial is refused.

LOOK et al. v. PORTSMOUTH, K. & Y. ST. RY.

(District Court, D. Maine. October 24, 1905.)

No. 30.

1. SHIPPING—INJURY OF VESSEL WHILE DISCHARGING—LIABILITY OF CONSIGNEE.

   It is incumbent on a consignee, required by the charter to discharge a vessel, to designate a suitable place for her to lie while discharging, and to know, as far as by reasonable effort it can be ascertained, that such place is reasonably safe; and this obligation extends to all the conditions in which the vessel is placed and to all the dangers to which she is exposed while effecting her discharge, and the consignee is responsible for the negligence or want of knowledge of its agent in charge of the work, through which the vessel is injured.

2. SAME—INJURY OF VESSEL AT DOCK FROM ELECTRIC WIRE.

   Respondent, a street railroad company, was consignee of a cargo of coal, which it was to discharge at a certain dock. The owner of the dock, as its agent, had charge of the discharging, and during the work, to avoid the expense of winding the vessel to bring her after hatch opposite the discharging platform, moved her forward, until her headgear pro-

jected over a bridge and the track and feed wires of respondent's road thereon. Neither the master nor respondent's agent had any actual knowledge of any danger from the wires, and the agent assured the master that there was no danger to the vessel, although there might be danger of breaking the wires. During the night the vessel's chains settled against the wires, and she was set on fire by the electricity and injured. *Held*, that respondent was chargeable with knowledge of the danger, which it was bound to know, and that it was not relieved from liability by the want of knowledge of its agent; also, that the vessel was not chargeable with contributory fault because of the want of knowledge of the master, since it was not his duty to know, and he had the right to rely on the statement of respondent's agent.

In Admiralty. Suit for injury to vessel while discharging.

Benjamin Thompson, for libelants.
Samuel W. Emery, for defendants.

HALE, District Judge. The libelants, as owners of the schooner Frank W. Benedict, seek to recover damages sustained by the schooner while occupying Cutts' wharf at Kittery Point, Me., a wharf used by the respondent for the discharge and storage of its coal, and at which the schooner was docked and lying while the respondent was discharging the cargo of coal consigned to it, and brought for it from Philadelphia. The Frank W. Benedict is a three-masted schooner, of a coal-carrying capacity of 850 tons. In August, 1903, she was chartered to the respondent to carry a cargo of coal from Philadelphia to Kittery Point, Me. In pursuance of the charter, the schooner received on board at Philadelphia 863 tons of coal, for which the usual bills of lading were executed, which provided that the cargo should be delivered to the respondent at Cutts' wharf, Kittery Point, and should be discharged by the consignee. The respondent is engaged in operating an electric road between Kittery Point, Me., and Portsmouth, N. H. The wharf in question is located at Kittery Point in the town of Kittery, and was owned at the time of the injury by Joseph D. Cutts, who was then employed by the respondent to discharge its coal and deliver the same as needed. It is situated about 60 feet below the bridge, which crossed at nearly a right angle with it, and over which the respondent's track and feed wires are located. It extends out from the shore about 150 feet, and is from 35 to 40 feet wide at its outer end, and has upon it a discharging stage. In discharging a vessel, it is necessary to bring the hatch through which the cargo is to be discharged abreast of the discharging stage. In order for a vessel of the character of the Frank W. Benedict to discharge at this wharf from her forward hatch, it was necessary to dock her with her bow pointing up river in the direction of the respondent's bridge. In order to discharge from the after hatch, which was some 38 feet aft of the fore hatch, it was necessary to bring that hatch abreast of the stage. This could be done either by winding the vessel, or by hauling her ahead sufficiently far so that the hatch would be abreast of the stage. If this latter course was adopted, her headgear would necessarily be over the respondent's bridge and over its track and feed wires. The schooner arrived at Kittery Point September 9, 1903. The next morning the master of the schooner, Capt. Look, reported to the respondent

company at its office, and was referred to its agent, Mr. Cutts, as the person who would discharge the cargo at his wharf. The agent told him to dock the schooner when the tide got up. The schooner was docked at high water, the bow heading up river towards the bridge of the respondent company, and her forward hatch abreast of the discharging stage, in accordance with the directions of Mr. Cutts, who was himself upon the wharf, and made the schooner's lines fast. The discharge of the schooner was proceeded with by the respondent, the officers of the schooner giving no directions as to the discharge. On September 14th the discharge from the forward hatch had been completed. To discharge all the cargo from the forward hatch would have involved much extra labor and expense. Just before the discharge from the fore hatch had been completed, Capt. Look and Mr. Cutts had some conversation about winding the vessel, but Mr. Cutts concluded that he could haul the schooner ahead, and save some expense, and that there was room enough to let the schooner go forward sufficiently far to bring the main hatch abreast of the discharging stage. Accordingly the lines were slacked, in order to let the tide set the schooner ahead. After the schooner had been slacked ahead about 32 feet, and within 6 feet of the distance necessary to bring the main hatch abreast of the discharging stage, it was found that there was danger of the vessel fouling the respondent's wires if she went ahead any further. Thereupon, the lines having been made fast, it was found that the schooner's jib boom extended over the respondent's bridge. Mr. Cutts found it necessary to hoist up the schooner's martingale, in order to allow her to go ahead far enough to bring the main hatch to the stage. Accordingly, the martingale was hoisted up at an angle of about 39 deg. At that time the master and mate of the schooner and Mr. Cutts had a conference upon the bridge. The tide was about two-thirds flood. They were in some doubt whether on the low water the schooner's headgear would come down on the wires. Mr. Cutts took measurements, and then stated that he did not think that the headgear and the wires would come together on low water, as there was room enough; the vessel's chains being nine feet above the wires. He further said that he would have the lineman come down the next day, and throw the wires off the arms. There is some dispute as to precisely what was said at this conference, but Mr. Cutts admits that he gave it as his opinion that contact of the schooner's chains with the feed wires would not hurt the vessel. After this conference, and after measurements had been made, the master and mate went back to their vessel, and slacked the schooner ahead six feet further; Mr. Cutts remaining upon the bridge. When the after hatch came abreast of the discharging stage, the schooner's lines were made fast. Mr. Cutts then said he thought there was no doubt but that the schooner would be all right. He then assured the captain if there was any damage it would be to the wires, and not to the schooner. He testifies that he did not think at the time that the schooner would be damaged; that his only fear was about the wires; that he was alarmed about breaking down the wires of the company, and interrupting the service; that he knew nothing of the danger of electricity, and does not claim

that he made any attempt to know anything about it. Later in the afternoon, the crew of the schooner unhooked her jib halyards, put a strap around her two jumper chains, and hoisted them up six inches further, which was as high as they could be hoisted. That night a heavy storm came on, with a strong wind, about south-southwest, blowing up river. About 11 o'clock the mate discovered that the schooner was on fire on the starboard side, near the fore chains. It was found that on the low water the schooner's stern had taken the bottom; that her bow had settled; that her jumper chains had come in contact with the respondent's feed wires; that an electric current had passed through one of the head stays to the topmast head, and then down over the back stays through a chain plate to a point on the starboard side near the exhaust pipe from the engine, with the result that the schooner's starboard side at that point was set on fire. The schooner was aground aft, and there was too much wind to attempt to haul her astern. The fire was kept under control by a stream of water from the pumps. A little later the electric current was shut off from the wires, and the superintendent of the railroad came to the libelants' schooner, and obtained a small piece of rope, one end of which he made fast to the bridge, threw the other end over the feed wires, and hauled them down some two or three feet below the schooner's chains, where they remained until the schooner completed her discharge.

1. In coming to a conclusion as to where the fault lay, the court must first consider what duty rested upon the respondent. Under the contract of carriage, the obligation of discharging the vessel was clearly upon the respondent as consignee. In fulfilling this obligation, it was incumbent upon it to designate a suitable place for the schooner to lie while discharging, and to know, as far as by reasonable effort it could ascertain, that such place was reasonably safe. As a part of its obligation in this behalf, the respondent was charged with the duty of furnishing an agent to have charge of the unloading who should have sufficient knowledge to provide a reasonably safe place for the vessel to unload. It is not necessary for the libelants to prove actual knowledge on the part of the respondent of any unfitness of the dock or of the wharf; it is sufficient that the respondent's agent had means of knowledge. For, while a consignee, upon whom is imposed the duty of discharging a vessel, does not guaranty its safety in coming to or lying at his wharf, he is bound to exercise diligence in ascertaining the condition of the dock and of the berths, and to give notice of any obstruction or of any danger to vessels. This subject has just received the attention of this court in Philadelphia & Reading Ry. Co. v. Walker, 139 Fed. 855. This court has also considered a similar question, and has cited leading authorities upon it, in Thompson v. Winslow (D. C.) 128 Fed. 73. The subject has also been fully discussed in the following cases: The Calvin P. Harris (D. C.) 33 Fed. 295; Hartford & New York Transportation Co. v. Hughes (D. C.) 125 Fed. 981; The Nellie (D. C.) 130 Fed. 213; Smith v. Burnett, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756; Sawyer v. Oakman, Fed. Cas. No. 12,404; Garfield & Proctor Coal Co. v. Rockport & Rockland Lime Co., 184 Mass. 60, 67 N. E. 863, 61 L. R. A. 946, 100 Am. St. Rep. 543.

The contention of the respondent is that its agent, Cutts, did not know that the contact of the jumper chains with the feed wires would be dangerous, and that this ignorance furnishes a sufficient defense. The court cannot sustain this contention. I see no reason for holding that the respondent is excused for ignorance of the effects of electricity when brought in contact with the chains of a vessel, any more than for ignorance with respect to the physical effects of exposing the vessel to a strain from contact with the wires or poles. The obligation to furnish a safe dock must be held to apply to all the conditions in which the vessel is placed, and to all the danger to which she is exposed in effecting the discharge of her cargo. Courts have repeatedly held that a consignee, charged with the duty of discharging a vessel, must know, or take reasonable pains to ascertain, the peculiar construction of the wharf, the condition of the bottom of the dock, and any defects which were capable of being discovered in a landing place. There is no reason reason to hold that such consignee is relieved from the duty of such knowledge with reference to the dangers which would arise to a vessel's headgear by reason of projections or obstructions extending out from the wharf, or from dangers from contact with live electric wires. The respondent had the full charge of these wires. There was nothing occult or mysterious about the effect of electricity when carried over those wires to the chains of a ship. In my opinion, then, the respondent ought not to be heard in court to say that it was ignorant of the dangers arising from those wires, uninsulated, being brought in contact with a vessel's chains. Whatever dangers there may be from live electric wires, the party having control of those wires cannot be allowed to excuse itself on the plea of ignorance. In the case at bar the respondent might have escaped all danger from the wires by winding the schooner, and thus bringing her into a position of safety while she was unloading from her after hatch. Even if the respondent's agent did not incur the expense of turning the vessel around, he might have obviated the danger by putting a rope over the wires, and binding them down, as in fact he did later. A still more effective way of obviating the danger would have been by throwing the wires off the arm, as the agent on the day before the injury said he intended to do the next morning. I am forced to the conclusion that the respondent was in fault.

2. Were the libelants also in fault? The subject of the duty of a libelant under similar circumstances was also considered by this court in the case of The Elmwood, in Philadelphia & Reading Ry. Co. v. Walker, to which reference has already been made. The court there cited and discussed the recent cases bearing upon this subject. In the case at bar it is true that the master of the schooner did not know the danger from the electric wires, but he was not charged with the duty of such knowledge. He had a right to rely upon the direction of the company's agent to discharge at this particular wharf as an assurance that the wharf was reasonably free from dangers and obstructions. He had a right to assume either that the electric wires from the respondent's railroad would not be brought in contact with the ship's chains, or, if so brought in contact with them, that they would not cause damage. In addition to the

assurance which at law the respondent company is assumed to have made by inviting the Benedict to its wharf, the actual assurance made by the respondent's agent tended rather to mislead the master than to put him upon his guard. Mr. Cutts shows clearly a disposition to tell the whole truth in the matter, and admits frankly all statements which he made touching the affair. He says he told the captain: "No harm will come to the vessel anyway; you will get no damage; the damage will be, if you ground on those wires, you will break them down; we will get the damage, that is all." The agent was thinking, as he says, of the dangers to the wires, and not of any dangers which the vessel might encounter. After the assurances of Mr. Cutts, the captain used language indicating that he would take his chances; but those utterances of the captain cannot, in law or in fact, be held to be a waiver of his rights to look to the respondent company for a reasonably safe place of discharge, for the captain was evidently relying upon the assurances of the respondent's agent. He cannot be held to have assumed the risk of damages, the existence of which he did not know. The captain and the agent were both ignorant; but it was the duty of the agent to know the dangers to which he was exposing the vessel. They were dangers within his control; they were dangers that lurked in apparatus and appliances which were vital in the work which his company was doing. The captain, however, was under no such obligation to know the dangers from electric wires. He had a right to assume that the invitation of the respondent company to his vessel to come to a proper place of discharge was an assurance of safety, and he had a right to assume that the special assurances of the agent were made with a due knowledge of the premises. The Stroma (D. C.) 42 Fed. 922, and Panama R. Co. v. Napier Shipping Co., 166 U. S. 280, 17 Sup. Ct. 572, 41 L. Ed. 1004, are cited by the learned counsel for the respondent as controlling in this case; but in those cases both parties had knowledge of all the dangers to which the vessel was exposed, and from which she actually suffered injury. In the case at bar, neither the master of the schooner nor the agent of the respondent had any knowledge whatever of the danger which caused the injury. They were both ignorant. The matter of electricity was not referred to by either. This danger was not in the minds of either. The injury did not result from any cause which was in the contemplation of either the master or the agent. The injury resulted from another and totally different cause, of which both parties were ignorant, but concerning which it was the duty of the respondent to know, while it was not incumbent upon the captain to know. I must then come to the conclusion that the libelants were not in fault. I am therefore of the opinion that the respondent was solely in fault.

The libelants are therefore entitled to a decree in their favor. Reference may be had to an assessor.

THE HENRY B. FISKE.

(District Court, D. Massachusetts. October 18, 1905.)

No. 1,713.

1. SEAMEN—INJURY FROM BREAKING OF APPLIANCE—LIABILITY OF VESSEL.
A vessel is liable for an injury to a seaman, resulting from the breaking of a fitting or appliance, only when those who represented her failed to exercise reasonable care to make the fitting or appliance safe, and where the breaking was due to a defect which might, with reasonable care, have been discovered and remedied.

2. SAME.
A schooner was anchored during a severe gale, when a patent spring rider, which held one of the two anchor chains in use, broke, allowing more chain to suddenly run out from the locker, by which libelant, who was a seaman, and engaged in cleaning the locker, was struck and injured. The part of the rider which broke was made of cast iron, which was the material ordinarily used, and showed no defect. The appliance was not old, was made by a reputable manufacturer, was apparently in good condition, and had been in use without breaking for several hours under substantially the same strain, as well as on previous occasions. *Held*, that the vessel was not liable for the injury, either because of the breaking of the appliance, or because of negligence in the officer in sending libelant into the locker at that time; there being no reason to apprehend unusual danger.

3. SAME—INJURY IN SERVICE—EXPENSE OF CURE.
A seaman was injured without his fault while in the service of a vessel, and was taken to a hospital after the completion of the voyage, at the charge of the vessel, from which he was subsequently discharged as cured. It appeared, however, that he had received other injuries than those treated, which prevented him from working, and made it necessary for him to obtain board, medical attendance, and nursing for a considerable time after his discharge. *Held*, that he was entitled to recover from the vessel the expense so incurred.

In Admiralty. Suit by seaman to recover for personal injuries.

Frank S. Harlow, for libelant.

Lowell & Lowell, for claimant, owners, and master.

DODGE, District Judge. The libel in this case claims damages for personal injuries received by the libelant while serving as a seaman on board the schooner. Its language is for the most part that properly belonging to a libel in rem against the schooner, and the process issued upon it was the warrant and monition usual in such a suit. There was no arrest of the vessel, but due service of the warrant and monition upon her, and also upon her master and her owners, has been acknowledged by counsel representing them all. In the answer which has been filed by the owners they claim the vessel. The libel is capable of being construed as a libel against the master and the owners, as well as against the schooner, and both counsel have treated it as such a libel for the purposes of the hearing.

The cause of action is not one which brings the suit within admiralty rules 12–20. The question whether a suit in rem against the vessel can properly be joined with a suit in personam against the master or the owners may therefore be regarded as open. The Corsair, 145 U. S.

335, 342, 12 Sup. Ct. 949, 36 L. Ed. 727. In view of the facts that the owners of the vessel have raised no objection to the libel, either as claimants of the vessel or as defendants, and that no objection has been raised by the master, who has filed a separate answer, the libel will be treated as properly brought against vessel, owners, and master. The question to be decided will therefore be whether or not the libelant is entitled to recover against either. See The S. L. Watson, 118 Fed. 945–951, 952, 55 C. C. A. 439.

The libelant's injuries were caused by the breaking of a patent rider, which formed part of the tackle, apparel, and furniture of the schooner libeled, on which vessel he was at the time serving as seaman. The schooner, bound from Brunswick, Ga., to Boston with lumber, had been obliged to anchor on Nantucket shoals by a heavy northeast snowstorm. Both anchors were down, and about 90 fathoms of chain out on each anchor. This was nearly all the chain there was, and only a few fathoms of each chain were left on board. A patent rider was used upon each chain, the effect of the rider being, by clutching the chain at a point between the hawse pipe and the windlass, to put the strain of the chain as the vessel surged upon springs contained in the rider, which would in some degree yield to sudden strain and then recover, thus securing an elastic, instead of a rigid, attachment to the vessel. The wind was blowing very heavily and the sea running very high; it was snowing, and the schooner was considerably iced, the weather being very cold. On the morning of January 24, 1905, the starboard rider broke. The schooner had been at anchor when this happened, under substantially the same conditions since the day previous. The grip of the rider upon the starboard chain being thus suddenly released, the chain was suddenly dragged out as far as it would go. As it came upward, out of the starboard chain locker below the lower deck, it struck the libelant, who was engaged at the time in cleaning out the locker, and was standing in the vicinity of the chain. He was in an opening whereby access was had to the locker from the lower deck, and was sufficiently near the chain to be struck by it as it came up. The opening was made by removing two movable planks, forming part of the covering of the locker at the level of the lower deck, in the between-decks. His feet were in the locker, upon the timbers or ceiling of the vessel; the level of the covering of the locker coming about at his waist as he stood in the opening. He was stooping over with a shovel and broom, engaged in removing dirt, which had accumulated from the chain upon the sides or bottom of the locker. By the blow of the chain, he was thrown out of the locker, and rendered unconscious. One, at least, of his left ribs was broken, causing a puncture of his left lung, and he sustained other injuries referred to below. Another man, also in the chain locker at the same time, received no injury. Regarding the above facts, there is no controversy.

1. Damages are claimed by reason of an alleged unsound and defective condition of the rider, which broke. No evidence was offered to prove that the rider was unsound or defective beyond the fact that it broke. Upon the respondent's uncontradicted evidence, it appears

that the vessel was about three years old at the time; that the rider was put into her when she was built; that the part of it which broke was of cast iron; that this is the material commonly used in constructing such appliances, or the corresponding parts thereof; that the rider was bought for the vessel from a reputable and well-known concern, namely, the Bath Iron Works, of Bath, Me., accustomed to manufacture and supply to vessels riders of similar material and construction; that since the vessel was built she had been engaged in making similar voyages, during which the rider had been used whenever occasion required; that the master of the vessel had himself oiled and examined it only a few days before the accident, finding it in apparent good condition; and that the fragments of the broken part of the rider were examined immediately after the accident, but afforded no indication of flaw or defect in material or construction. Unless the owners or master were negligent in regard to the condition of the rider, neither they nor the vessel are liable for the injury to the libelant caused by its breaking. As regards the crew employed on board a vessel, there is no warranty on her part that none of her fittings or appliances shall at any time give way, to their injury. Liability on her part, in the case of an accident of this kind, is incurred only when those who represent her have failed to exercise reasonable care to make the fitting or appliance safe, and arises only out of such defects as reasonable care on their part would have discovered and remedied. The Edith Godden (D. C.) 23 Fed. 43; The France, 59 Fed. 479, 8 C. C. A. 185; The Robert C. McQuillen (D. C.) 91 Fed. 685. The fact that this rider broke may be taken as prima facie proof of negligence in regard to its condition; but the proof that due care was in fact used, so far as the vessel was concerned, is in my opinion amply sufficient to overcome any presumption thus arising. The rider had been tested for the work it was expected to do by its previous use on board. The length of time during which it had been subjected to such use was not sufficient, so far as appears, to afford any ground for supposing that its strength might have become impaired by use or wear. It had held during the previous night and day, under substantially the same test of its strength as that to which it yielded. All that inspection could accomplish toward discovering any weakness in its condition appears to have been done by the master only a short time previously. If it be true that wrought iron, or some metal stronger than cast iron, would have stood a greater strain, it is still impossible to say that the use of cast iron was negligence, in the absence of evidence that anything but cast iron is used for the same purposes, and the evidence that cast iron is the material generally used. In my opinion, no negligence has been shown for which the vessel, her owners or master, are liable, and the rider was not, therefore, unsound or defective in such sense as to give the libelant a right to recover damages against them, or either of them.

2. The libelant contends that it was negligence on the master's part to order him, or permit the mate to order him, to work in the chain locker at a time when the rider was under more than ordinary strain, and proximity to the chain therefore dangerous because of the chance that it might break. But there was, on the evidence, no reason for believing

the rider defective, and no reason for anticipating that it would break. There was no danger from the chain while the rider held, and it had held, as has been said, for many hours under like conditions. The libelant's evidence was that he remonstrated to the mate against going into the chain locker, on account of the danger of getting hurt if anything should break. The mate denied that any such remonstrance was made. The master was not present at the time. I regard it as immaterial whether such remonstrance was made or not, and also immaterial that it would have been possible to clean the chain locker at some time when there would have been less strain on the chain. The selection of the time for doing the work belonged to the officers of the vessel, and the circumstances shown do not disclose such danger necessarily involved in doing the work at the time selected, and then apparent, as warrants the conclusion that the time was selected without due regard to the libelant's safety. If no sufficient reason appears why the breaking of the rider should have been anticipated, such danger as lay in the possibility of its breaking was a risk assumed by the libelant as incident to his employment.

3. By an amendment to his original libel, the libelant has claimed against "said libelees" an alleged expense of $228.46, incurred since his injury for medical attendance, medicines, nursing, board, and lodging. The libelant was injured in the service of the vessel, and the vessel or her owners are therefore liable to him to the extent of his maintenance and cure, and his wages so long as the voyage is continued. The Osceola, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760. No question arises as to his wages; they have been paid to the end of the voyage. As to maintenance and cure, such care and attendance as could be given him on board was provided until the arrival of the vessel at Boston on January 28th. He was sent, upon her arrival, to the U. S. Marine Hospital at Chelsea, and remained there, under hospital treatment, from January 28 until March 20, 1905, when the hospital authorities discharged him, because they considered his cure complete so far as hospital treatment could accomplish it. He had been out of bed and able to sit up since March 1st. The injuries to his ribs and lung were healed. These seem to have been the only injuries of which any notice was taken at the hospital, and he had been there considered able to go out for some days before his final discharge on March 20th. His evidence is that his left leg, besides being cut or bruised, was seriously strained at the time of the accident; that it remained swollen for some time afterward; that, when discharged from the hospital, he was still too lame to go about or to work by reason of this injury to his leg; that he was also very weak, and unable to eat ordinary food; that after March 20th he had to be provided with board and lodging, and to be nursed and cared for until August 4th; also, that he was obliged, by reason of his condition, to incur an expense of $6.81 for medicines and $25 for medical attendance. His evidence was so far confirmed by that of the man at whose house he was cared for during this period and that of the physician who attended him as to satisfy me that the cure of all his injuries was not complete, so far as it was to be effected by ordinary medical means, at the time he left the hospital. While the injuries to his

ribs and lung were then substantially cured, the strain or other damage to his leg and the weakness resulting from injuries so extensive and severe may well have required further rest and treatment, and, on the evidence, I find that further treatment was required. It has recently been decided in this court that, when he has been injured in the service of the vessel, the right of a seaman to maintenance and cure at the vessel's cost does not necessarily terminate with the voyage. McCarron v. Dominion Atlantic Railway Company (D. C.) 134 Fed. 762, 764. The libelant lives in Virginia, and had no home or family in Boston. It being necessary, in my opinion, that he should be taken care of somewhere after he left the hospital, the charge of $10 per week, which was made for his board and lodging and such nursing as was required, seems to me not unreasonable under the circumstances shown. I do not think, however, that he is entitled to claim support and nursing at the vessel's expense during the entire period of four and one-half months between March 20th and August 4th. The physician who attended him did not see him for the purpose of treating his injuries after May 20th, and I think the time for which the vessel is to pay ought not to be extended beyond that date. I allow $80 for eight weeks' board and nursing and the amounts claimed for medicines and medical attendance—in all, $111.81. For this amount, with costs, there is to be a decree against the vessel in rem. There will then be no reason for any decree against the owners in personam. As against them, and as against the master, the libel is dismissed, without costs.

SMITH v. LEHIGH VALLEY R. CO. OF NEW JERSEY.

(District Court, D. New Jersey. October 23, 1905.)

MASTER AND SERVANT—INJURY TO EMPLOYÉ—NEGLIGENCE OF FELLOW SERVANT.

A mate and floatman belonging to the same crew, having the same employer, and being engaged in a common object, although of different rank, and working on different lines to accomplish the undertaking, are fellow servants, and the negligence of the mate, whereby the floatman was injured, is the negligence of his fellow servant; and neither the vessel nor its owner is chargeable with the consequences of such negligence, in the absence of evidence showing that the owner was negligent in the selection of such servant.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 492.

Who are fellow servants, see note to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

(Syllabus by the Court.)

In Admiralty.

Herbert Clark Gilson and William C. Gebhardt, for libelant.
Collins & Corbin and George S. Hobart, for respondent.

CROSS, District Judge. The libel in this cause was filed for damages for personal injuries to the libelant, alleged to have been caused by the negligence of the respondent while he was in its employ as a float-

man on the 2d day of April, 1904, at Communipaw, N. J. Float No. 10, with 12 loaded freight cars thereon, was being propelled by the tug Catasaqua from pier 44, New York City, to certain bridges of the respondent, adjoining a long pier of the Central Railroad Company of New Jersey known as "Pier 1," or the "Cement Dock." The float had two tracks upon it, running longitudinally, upon each of which tracks were six cars, and between the cars was a platform seven feet wide. The tug was attached to the float about midway on its right side. The accident happened at a little after 5 o'clock in the afternoon. The ebb tide was still running, but not strongly. It was high tide by the calendar that day at Governor's Island at 9:20 in the morning, and in the evening at 9:45. This made it low water by the calendar at about 3:20 o'clock in the afternoon, but the evidence shows that at the point in question the ebb tide continues to flow for some time after it is nominally low water by the calendar. The libelant had been in the employ of the respondent for six years, and for the last four and a half years as a floatman, and during his service in that capacity had made many trips with the tug in question, and with all kinds of floats, including floats like the one above mentioned. The accident was occasioned by the movement of the tug, probably forward, which caused the quick running of a line, one end of which was attached by an eye thrown over a cleat on pier 1, and the other end of which had been passed by the floatman once or twice around a bitt on the float. The line, not having been given sufficient turns around the bitt to make it fast, paid off freely, as has been stated, with the movement of the tug and float. The libelant's leg was caught in a loop or kink of the surplus line, which had been coiled on the deck of the float, was drawn against the bitt, and so severely injured that it had to be amputated just below the knee. The evidence shows that it was customary to enter the bridges, which were about 250 feet inside of the outer end of the pier, by approaching the pier at varying angles, depending somewhat upon the course of the tide; that, when the float came near enough to the pier for the purpose, a line was thrown over a cleat on the pier, the other end then made fast to a bitt on the float, when by action of the tug the float would be swung around toward and parallel with the pier, and thence carried forward to the bridge. There were upon the tug and float at the time of the accident the following employés of the respondent: A fireman, engineer, captain, mate, deckhand, and the libelant. The fireman and engineer were at their posts on the tug at the time, and knew comparatively little about how the accident happened. The captain was in the pilot house of the tug, steering, and signaling the engineer as to the movement of the tug and float, and, as the pilot house was not sufficiently high for him to see over the cars on the float, the mate was stationed on top of the cars, directing the libelant, and also signaling with his hands or by his voice to the captain how the tug should be managed. The evidence shows that, just prior to the accident, the tug approached pier 1 slowly and well under control; that the mate directed the libelant to pass the end of the line to a brakeman who happened to be on the pier; that the line was not passed to him in time to place its eye over the first cleat, but it was pla-

ced by him over the second cleat, some 25 feet or more further from the end of the pier towards the floating bridge which it was intended to enter. The libelant claims that his injury happened because the mate directed him to make the line fast to the bitt, to do which it was necessary that the line should be passed around it four or five times, and then, directly after he had given such order, and before the libelant had passed the line more than once or twice around the bitt, and without waiting to see that his order was executed, the mate went across the top of the cars, and gave the signal to the captain to start the tug, which was done without notice, as was customary, having been given to the libelant that the tug was to be started. The line used on this occasion was a new one, and the testimony shows that such a line, especially when wet, was more apt to kink than an older one; but of this fact the libelant must have known, or should have known, because he admitted that he had used new lines before.

It may well be questioned from the libelant's own testimony, which is, however, contradictory on the point, whether the mate was negligent in the respect above mentioned, since he testifies three or four times that, as soon as the eye was placed over the cleat on the dock, the first order given by the mate to the captain was to start the tug, and again, that this order was given to the captain before he, the libelant, was ordered to make the line fast to the bitt on the float. If such were the fact (and he ought to know whether it is or not) he could not have been caught unawares, but, on the contrary, was put on his guard by proper notice, and knew just what would naturally follow under the circumstances.

The important question in the case, however, is whether the mate was or was not at the time of the accident a fellow servant of the libelant. I think he was, and that they were both in the employment of the same master, engaged in the same undertaking, and in the discharge of duties tending to its accomplshment. In 25 Am. & Eng. Enc. of Law (2d Ed.) pp. 132, 133, the rule of law applicable to this case is laid down as follows:

"It is the duty of an owner to see that a ship is seaworthy, properly manned with competent seamen and officers, and equipped with all appliances necessary for its use and the safety of the crew. * * * Where the owner has performed his duty in the respects above mentioned, neither he nor the vessel is liable for injuries to a seaman arising from the perils of navigation or from the negligence of fellow servants."

In the paragraph immediately succeeding the above, the following statement is made:

"By the weight of authority, the master and mates are fellow servants of the seamen, and therefore a seaman who is injured by their negligence cannot recover damages against the vessel or its owner."

Cases can undoubtedly be found both for and against the proposition just stated. Some of those against it, however, have been decided upon the authority of Chicago, etc., Ry. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, a case appearing upon the brief of libelant's counsel. This case, however, can no longer be considered authoritative, for in New England Railroad Co. v. Conroy, 175 U. S. 323, 20 Sup.

Ct. 85, 44 L. Ed. 181, Mr. Justice Shiras, in deliverng the opinion of the court, says:

"While the opinion in the Ross Case contains a lucid exposition of many of the established rules regulating the relations between masters and servants, and particularly as respects the duties of railroad companies to their various employés, we think it went too far in holding that a conductor of a freight train is ipso facto a vice principal of the company."

And at another place he says:

"In so far as the decision in the Case of Ross is to be understood as laying it down as a rule of law to govern in the trial of actions against railroad companies that the conductor, merely from his position as such, is a vice principal, whose negligence is that of the company, it must be deemed to have been overruled in fact, if not in terms, in the subsequent case of Baltimore & Ohio Railroad v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772."

The case from which the above quotations have been taken discusses at considerable length many cases illustrative of the question as to who are, and who are not, to be considered as fellow servants, and the following rule, summarized from the text, is given in the syllabus of the case:

"An employer is not liable for an injury to one employé occasioned by the negligence of another engaged in the same general undertaking. 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; and accordingly, in the present case, upon the facts stated, the conductor and the injured brakeman are to be considered fellow servants within the rule."

It seems to me that the rule thus laid down controls the present case. The mate in the case at bar was a fellow servant of the floatman just as clearly as the conductor in that was a fellow servant of the brakeman. Indeed, the present case, to my mind, seems even plainer. The mate and the floatman were in the service of the same master. They were both bent upon mooring the float at the bridge; that was their common purpose, and, while the mate's share of the work was different from that of the floatman, they both contributed to its accomplishment. It is difficult to conceive of several men employed upon the same work, where at least one of them is not detailed to be on the watch or lookout, or to give directions intended to effectuate the common purpose. Men thus employed are seldom of the same rank, and engaged in identically similar duties. Several additional cases, tending to support the view I have taken, are cited below. In The Egyptian Monarch (D. C.) 36 Fed. 773, it was stated that the prevailing opinion is that, when the master is on board, his subordinate officers and seamen are fellow servants; citing numerous cases. It was likewise held in that case that a second mate, who superintends the reeling in of a hawser, is a fellow servant with a seaman engaged in turning the reel. In Olson v. Oregon Coal & Navigation Co. (D. C.) 96 Fed. 109, it was held that:

"The owners of a ship are not liable in damages for the personal injuries of a seaman, received while on a voyage, by falling or being thrown by the roll-

ing of the vessel down a hatchway, which had been left open through the negligence of a master or other officers, where a proper hatch was provided, and no claim is made of negligence in the selection of the officers."

The case of The E. B. Ward, Jr. (C. C.) 20 Fed. 702, holds that in the admiralty, no more than elsewhere, should the owner, without fault himself, be held as a general warrantor of the competency of any of his servants to the others. All are alike engaged in the common employment of navigating the ship. So, too, in the case of The City of Alexandria (D. C.) 17 Fed. 390, it was held that the navigation of a ship constitutes one common employment, for which all the ship's company are employed. Neither the vessel nor her owners, therefore, would be liable, according to the principles of the municipal law, for injuries happening to a seaman through the negligence of any of his associates in the performance of their ordinary duties; and farther on in its opinion the court says:

"Whatever negligence there was—whether in leaving the hatches uncovered, or in not notifying the libelant as he went down—was negligence on the part of those on board the ship, and in no way traceable to the owners themselves. It was neglect of the officers or men aboard in the performance of their ordinary duties; a neglect against which the owners could not possibly guard. Those who engage in a common employment take upon themselves all the natural and ordinary risks and perils incident to the performance of their duties. Among these are the perils arising from the carelessness or negligence of others who are engaged in the same employment, and it constitutes no exception to the rule that the several persons employed are not in equal station or authority, or that one servant is injured through the negligence of another who is his superior in station, to whom he owes obedience."

A similar rule is declared in The Miami (D. C.) 87 Fed. 757, in which case it appears that a boatswain was engaged with some seamen in lowering a mast, that the mate was assisting in the work, and that it was through his negligence that the boatswain was injured. The court says:

"It is not important that the offending person was the mate and the injured person was the boatswain. The boatswain had immediate charge of the work and of the three sailors detailed to do it, and in connection with such charge was lending manual aid. The mate was superintending the work from a somewhat higher post of command, and he also chose to participate in the actual work to the extent above described. But the superintendence of both mate and boatswain was quite as much a matter of operation as the manual work that both undertook to do, or, if it were otherwise, the accident was caused by the mate undertaking an operative's work. Under such a state of facts, the libelant may not recover."

In Halverson v. Nisen, Fed. Cas. No. 5,970, the negligence disclosed was that of a mate. No negligence whatever was shown on the part of the respondents, and it was not pretended that they failed to exercise due care in the selection of the mate, or that there was any carelessness or neglect in the original outfit and appointments of the vessel. The court held "that the owner of a vessel is not responsible for injuries to a seaman caused by the negligence of the mate, where no personal negligence on the part of the owner appears." See, also, Gabrielson v. Waydell, 135 N. Y. 1, 31 N. E. 969, 17 L. R. A. 228, 31 Am. St. Rep. 793, which likewise holds that the master and seaman of a vessel are fellow servants of different grades. I am constrained, therefore, to find that, if there was any negligence on the part of the mate shown

in this case, it was the negligence of a fellow servant of libelant, and is not therefore chargeable against the owners of the tug.

It was, moreover, insisted on the argument that the owners were negligent in that they furnished too small a tug for the service, and that the pilot house was too low; in other words, that the pilot house should have been sufficiently high to permit the captain to see the libelant where he was at work on the deck of the float. As to the first point, the evidence satisfies me that the tug was sufficiently powerful for the work in hand. From the captain's logbook, it appears that this identical tug, manned, so far as appears, in the same way, had been in constant use for this purpose for an indefinite time, and that in such use it had frequently taken, without difficulty and without accident, floats carrying even a larger number of cars than there were upon the float in question. It was also shown that tugs no more powerful than this was were in successful use by other railroads for the same purpose. As to the height of the pilot house, it may be said that both it and its improper construction, if any, were apparent to the libelant, and yet, so far as the case shows, he had served for a long time with this tug without complaint, in the same capacity that he held when he was injured. Furthermore, improper construction of the pilot house was not assigned in the libel as a matter of negligence. The only assignment which approximates it is that in which it is alleged that his injury was caused "by and through the fault and negligence of the Lehigh Valley Railroad Company, of New Jersey, in failing to provide, operate, and furnish a fit, suitable, sufficient, and seaworthy steam tug to properly, safely, and easily handle and control the said float while in tow, as aforesaid." This language, giving it the broadest construction, does not indicate an intention on the part of the libelant to claim that the pilot house of the tug was of an insufficient and improper height; nor, it may be added, is there any evidence in the case which shows that the tug was improperly constructed in that respect; nor again, is it at all apparent that the accident would have been avoided had the pilot house been higher; for, notwithstanding the testimony of the libelant, it does not seem possible that he could have been seen by the captain from the pilot house, working, as libelant was, on the deck of the float, near to the outer side of the cars furthest away from the tug, unless the pilot house were raised to an impracticable height. The long and successful service of this tug and of other similar tugs shows that it was not ill adapted to the use to which it was put on this occasion. Hence, I do not find, either in this or in any other respect, that there was negligence which could properly be charged to the owner of the tug and float. In view of the conclusion I have reached, it is unnecessary to point out wherein I deem the libelant was himself negligent. The injury he received is severe, and its consequences are deplorable; but, as the negligence which caused it, if any there was, was that of a fellow servant, he is not entitled to recover.

The libel will be dismissed.

UNITED STATES v. NORTHWESTERN OHIO NATURAL GAS CO.

(Circuit Court, N. D. Ohio, W. D. October 27, 1905.)

No. 1,848.

INTERNAL REVENUE—WAR REVENUE ACT—PIPE LINE COMPANIES.

The provisions of section 27 of the War Revenue Act of June 13, 1898, c. 448, Schedule B, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2306], imposing on persons, firms, corporations, or companies "owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars," a special tax on the excess of receipts above such amount, apply only to receipts from the transportation business, and to persons or companies engaged in such business; and a company engaged in the business of producing and buying natural gas, which it conveys by means of pipes to a city, where it distributes and sells the same to consumers, is not engaged in the business of transportation, within the meaning of the act, nor subject to the tax on the excess of its annual receipts from its business above $250,000.

At Law. Trial to the court by stipulation.

John J. Sullivan, U. S. Atty.

Doyle & Lewis and J. W. Schaufelberger, for defendant.

TAYLER, District Judge. In the War Revenue Law of 1898 (Act June 13, 1898, c. 448, Schedule B, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2306]) the following provision occurs in section 27:

"Sec. 27. That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars."

The United States brought this action against the defendant, seeking, under this statute, to recover the amount of tax which it claimed was due from its operations during the years 1899 and 1900. The defendant answered, denying liability, and the following stipulation, embodying an agreed statement of facts, was entered into by the parties:

"(1) The defendant, the Northwestern Ohio Natural Gas Company, is now, and was at all times hereinafter mentioned, a corporation, organized, existing, and doing business under and by virtue of the laws of the state of Ohio, with its principal office at the city of Toledo, Lucas county, Ohio, and within said district.

"(2) Said corporation, during all the times hereinafter mentioned, owned and controlled a pipe line for transporting natural gas, which pipe line and the method of transporting natural gas are hereinafter more particularly described.

"(3) The gross annual receipts of said corporation from all sources for each of the years ending, respectively, June 30, 1899, and June 30, 1900, were more than two hundred and fifty thousand dollars ($250,000).

"(4) During the said two years ending, respectively, June 30, 1899, and June 30, 1900, said corporation was engaged in the business of producing, buying, and selling to its consumers natural gas for fuel and lighting purposes.

"(5) For the purpose of carrying on its said business, said corporation had purchased and leased large tracts of gas-producing territory in the counties of Wood and Hancock, state of Ohio, which territory was located from thirty to forty miles south of the said city of Toledo, and in which territory said corporation drilled its natural gas wells, and connected the same, respectively, by a system of small pipes known as 'lead pipes,' with a large main pipe line, constructed and owned by said corporation, leading from the village of Van Buren, in said Hancock county, through the respective villages of Bowling Green, Perrysburg, and Maumee, in said Wood county, to the said city of Toledo, a distance of about thirty-five miles.

"(6) At the end of said main pipe line at the said city of Toledo, said corporation erected, and during the years aforesaid maintained, and still maintains, a reducing station, where the pressure of said natural gas, coming to said reducing station through said main pipe line, is reduced, and is thence conveyed, through a system of smaller distributing pipes, which reach throughout said city and to the various consumers of such natural gas, and on the premises of each consumer said corporation owns and maintains a gas meter for measuring the natural gas consumed. Said corporation's natural gas is thus carried from its said wells through said lead pipes to said main pipe, thence through said main pipe to said reducing station, and thence through said system of distributing pipes to the premises of its consumers, where it is metered and sold.

"(7) Such reducing stations and distributing pipes and meters are also placed and maintained at the said villages of Perrysburg and Maumee. At the said village of Bowling Green, said corporation sells its natural gas to a local company, which distributes and sells the same to consumers in said village.

"(8) Prior to the year 1898, owing to the low pressure of natural gas from said territory, said corporation was compelled to and did construct a pumping station at the head of said main pipe line at said village of Van Buren, from which its natural gas was forced through said main pipe line to its said reducing stations and its consumers.

"(9) In the month of July, 1899, the supply of natural gas in said territory being nearly exhausted, said corporation extended its main pipe line from said village of Van Buren, southward about one hundred and twenty miles to the county of Fairfield, Ohio, and contracted with the Logan Gas & Fuel Company to purchase such natural gas as said corporation might need for its consumers. Said extension of said main pipe l[illegible]e was completed in the month of December, 1899. This defendant corporation then also constructed, and has since maintained, such pumping station at said Fairfield county, to force the natural gas so purchased through said main pipe to its said consumers in said villages and city; and since the completion of said extension of said main pipe, about ninety per cent. of the natural gas sold and delivered by said corporation to its consumers has been purchased from said Logan Company.

"(10) Said corporation is not a transportation company, except as herein stated. It has never carried or transported, and does not now carry or transport, any oil, natural or other gas, or other thing or product for any other person, firm, company, or corporation, but transports exclusively its own natural gas so by it produced and purchased, as aforesaid, and so transported from the respective places of production and purchase, through its own pipes exclusively, direct to the premises of its consumers, as aforesaid, and there metered and sold to its consumers, as aforesaid.

"(11) The value of transporting said corporation's natural gas from the respective places of production and purchase, as aforesaid, through said main pipe to the places of reduction and distribution, as aforesaid, during the said two years ending, respectively, June 30, 1899, and June 30, 1900, was less than fifteen per cent. of the gross receipts of said corporation during said years from the sale of its said natural gas; otherwise stated, said lead pipes and main pipe line contributed less than fifteen per cent. to the gross receipts of said corporation from its natural gas transported and sold.

"(12) Some of the wells drilled by said corporation on its said territory yielded oil instead of natural gas, and other wells would in time cease yield-

ing natural gas in paying quantities, and become oil-yielding wells. Said corporation, having no facilities for handling the oil so produced by its wells, sold and delivered said oil at said wells to persons and corporations engaged in the oil business, and the income and royalties derived from the sale of said oil was carried into and constitutes a part of the gross receipts of said corporation during said two years.

"(13) The greater part of the surface of the territory so purchased for natural gas purposes is tillable, and said corporation leased the same to farm tenants for tillage, and the rents and income so derived was also carried into and constitutes a part of the gross receipts of said corporation during said two years.

"(14) During and prior to the said two years, said corporation invested its surplus earnings in United States government bonds, and the interest and income accruing and paid on said bonds was also carried into and constitutes a part of the gross receipts of said corporation for and during the said two years.

"(15) During said two years said corporation sold and disposed of junk and sundry machinery and materials of which it had no further use, and the sums derived from that source was also carried into and constitutes a part of the gross receipts of said corporation for said two years.

"(15) The gross receipts of said corporation from all of said sources for the year ending June 30, 1899, were as follows:

From sale of natural gas	$269,552 43
From oil sold at wells, as aforesaid	25,071 71
Rents and income from lands, as aforesaid	2,095 01
Interest on United States bonds	11,600 20
Sale of junk and sundry items	1,288 03
	$309,607 38

"(16) The gross receipts of said corporation from all of said sources for the year ending June 30, 1900, were as follows:

From sale of natural gas	$285,074 77
From oil sold at wells, as aforesaid	32,998 99
Rents and income from lands, as aforesaid	2,152 84
Interest on U. S. bonds	8,467 68
Sale of junk, &c., as aforesaid	3,526 40
	$332,220 68

"(17) Said corporation had no income or receipts from any source except as above set forth.

"(18) Said corporation has refused, and still does refuse, to make any return of the amount of its gross receipts for and during said two years to the collector of the district in which said corporation is located and has its place of business.

"(19) The United States of America, plaintiff herein, has made demand upon said defendant corporation for the sum of four hundred and eighty dollars and forty-seven cents ($480.47), together with a penalty of five per cent. (5%) thereon, and interest thereon at the rate of one per cent. (1%) per month on the sum of one hundred and thirty-six dollars and thirty-nine cents ($136.39) and three hundred and forty-four dollars and eight cents ($344.08), and on said penalty from July 1, 1899, and July 1, 1900, respectively, but said defendant corporation has refused, and still does refuse, to pay the said sum, penalty, and interest, or any part thereof.

"Stipulation.

"It is hereby stipulated and agreed that the above cause shall be submitted to the court, without the intervention of a jury, upon the pleadings and the foregoing agreed statement of facts."

The question before the court is whether the Northwestern Ohio Natural Gas Company was, during the years named, engaged in a business

which made it subject to the tax levied by section 27 of the act. I have no difficulty in coming to the conclusion that, on the statement made, the defendant is not liable. In the first place, I am clearly of the opinion that the defendant is not a company engaged in a kind of business which makes it subject to the statute; and, in the second place, even if it was, the tax could only be levied on so much of its income as is derived from the business of transporting gas and oil by means of a pipe line. It appears that the defendant is engaged, primarily, in the business of supplying natural gas to consumers in the city of Toledo. The price which it receives for the gas thus furnished is payment for the gas. Incidentally, it is necessary for the company to obtain a supply of gas by drilling wells in the neighboring country, and to transport that gas to the place of consumption. To thus transport the gas by means of pipes does not constitute the company a transporting company, nor is it thereby engaged in the business of transporting oil or gas by means of pipe lines. Such transportation is, in the most definite sense, merely incidental. It is not, in any respect, to be distinguished from the business of transporting gas in which a manufactured gas company is engaged; such company having a plant within the limits of a city, and conducting the gas which it thus manufactures through the streets of the city to the places where its customers consume it. I think it would be an absolute denial of justice to come to any other conclusion. The purpose of the law was not to reach any such case. It might as well be said that if the gas company produced $1,000,000 worth of gas at a well, and conveyed it 100 feet to a point where it was all consumed, it would, under this law, be taxed on the $750,000 excess which the value of the gas represented above the $250,000 named in the law.

We are not compelled to rely wholly upon the soundness of this position as a mere statement of general principles, for, so far as I am advised, the courts have never held, in any case, the contrary view. In the case of Carothers' Appeal, 118 Pa. 485, 12 Atl. 318, the court says, speaking of a natural gas company:

"The situation is precisely the same as in the case of illuminating gas, which is manufactured, stored, and conveyed by pipe lines to the places of consumption. The business is that of making and supplying gas for light, and transportation to the consumer is incidental. The same is also true of water companies. They produce, store, and supply to consumers water. Transportation by means of pipes is the means of delivery, and is a mere incident to the business."

So, also, the Supreme Court of the United States, in the case of Spreckels Sugar Refining Company v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496, says:

"We are of opinion that, upon the point last stated, there was error. The gross annual receipts, upon which, in excess of a certain amount, the tax was imposed, were, under the statute, only receipts in the business of refining sugar, not receipts from independent sources. But clearly neither interest paid to plaintiff on its deposits in bank, nor dividends received by it from investment in the stocks of other companies, were receipts in the business of refining sugar."

So that the most that could be said is that, under this section 27, the receipts upon which the tax could be levied would be such sum in ex-

cess of $250,000 per year which the company received for the business of transporting gas. In this case it is agreed that the reward for that part of the business of the defendant company does not exceed one-fifteenth of its total receipts; so that, in any event, there would be no right to recover.

Judgment, therefore, may be entered for the defendant.

MOXIE NERVE FOOD CO. OF NEW ENGLAND v. HOLLAND.

(Circuit Court, D. Rhode Island. December 12, 1905.)

TRADE-MARKS AND TRADE-NAMES—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Statements made on the labels and wrappers of a preparation as to its medical value and the cures it has effected are so largely of matters of opinion rather than statements of fact that, although apparently extravagant, they will not justify a court of equity in refusing a preliminary injunction against an imitator, who is clearly infringing the proprietary rights of the maker.

In Equity. On complainant's motion for a preliminary injunction, and on defendant's motion to dismiss bill for want of equity.

Roberts & Mitchell, for complainant.

Charles A. Wilson and George H. Huddy, Jr., for defendant.

BROWN, District Judge. The complainant has sufficiently proved the unlawful substitution of "Modox" for "Moxie," and is entitled to a preliminary injunction, unless guilty of such fraudulent misrepresentation to the public as to disentitle it to the assistance of a court of equity under the principles set forth in Worden v. California Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282.

The defendant charges fraud in various particulars, only two of which require attention: (1) Statements as to the ingredients of Moxie; and (2) statements as to its curative powers.

Evidence is offered tending to show that Moxie is not prepared as it purports to be, from a "simple sugar cane like plant grown near the equator." The force of the affidavit of George P. Walker to this point is considerably weakened, however, by the stenographic report of his testimony in Moxie Nerve Food Co. v. Chase, and the inconsistency requires explanation which has not been furnished. The chemical analysis seems to account for all but 1.6 per cent. of the contents of a Moxie bottle as nonmedicinal ingredients such as are used in ordinary root beer. As to the possible efficacy of this small quantity of unidentified residuum, there is a conflict of testimony between physicians of the allopathic and homeopathic schools, and the complainant is entitled to the benefit of any doubt upon this point. The existence of a "sugar cane like plant" and of Lieutenant Moxie seem to have been in issue in Moxie Co. v. Baumbach (C. C.) 32 Fed. 205, and to have been decided in favor of the complainant.

The defendant has produced affidavits of a large number of physicians of high reputation, to the effect that the claims of curative ef-

ficiency made upon the Moxie labels and wrappers are absurd, untrue, and, in short, obvious quackery. It is said that the use of the words "Nerve Food" is fraudulent, because there is no such thing as a nerve food; that the claim that it "has recovered brain and nervous exhaustion, also paralysis, softening of the brain, locomotor ataxia, and insanity, when caused by nervous exhaustion" is false and absurd, because paralysis and locomotor ataxia are incurable diseases never caused by nervous exhaustion. A similar opinion is given concerning other statements made upon the wrappers and labels. My attention, however, has been called to no case of authority in which it has been held that representations as to the power of a medicine or preparation to effect cures were fraudulent misrepresentations of fact requiring a dismissal of the bill for want of equity. Proof that testimonials as to particular cures were wholly fictitious would, of course, amount to proof of a fraudulent representation of fact, and would be sufficient to debar a complainant from relief; but to say of a person who took medicine that he was cured or benefited thereby seems to be regarded as more in the nature of an expression of opinion than of a representation of fact.

In School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 105, 106, 23 Sup. Ct. 33, 37, 47 L. Ed. 90, the Supreme Court said:

"As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud. Unless the question may be reduced to one of fact as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter."

Though, by section 3929 of the Revised Statutes [U. S. Comp. St. 1901, p. 2686], the Postmaster General was given power to issue a fraud order, so-called, upon evidence satisfactory to him that a person was conducting a scheme of fraud by the use of the mails, it was held that this did not cover the cases of false opinions, but only cases "of actual fraud in fact, in regard to which opinion formed no basis."

Counsel for the defendant contend that a court of equity should not attempt to determine the merit of a secret or quack medicine, but should dismiss the bill as ipso facto fraudulent. Fowle v. Spear, Cox's Trade-Mark Cases, 67, 7 Pa. Law J. 176.

There is force in the argument that extravagant claims, statements of marvelous recoveries, and secrecy and mystery as to ingredients, are such badges of fraud as to warrant a court of equity in refusing to extend a presumption of good faith to a complainant making such claims, and in refusing relief. See opinion of Mr. Justice Shiras in Kohler Mfg. Co. v. Beeshore, 59 Fed. 572, 8 C. C. A. 215, and cases cited. Unfortunately for the defendant's contention, the case of Fowle v. Spear, supra, seems to be disapproved in the later opinion of Mr. Justice Shiras in Worden v. California Fig Syrup Co., 187 U. S. 516, 527, 23 Sup. Ct. 161, 47 L. Ed. 282. The affidavits of many of the physicians are to the effect that it is a conclusion of common sense that the claims made for Moxie, the statements of its origin, and power to cure serious diseases,

together with the advice of its free use as a beverage by women and all classes of persons, bear on their face the stamp of absurdity, falsehood, and deception. The attitude of the learned doctors towards the complainant's preparation is substantially that of the learned judge in Fowle v. Spear.

It would be, perhaps, consistent with the reasoning in School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 107, 23 Sup. Ct. 33, 47 L. Ed. 90, to hold that statements concerning the efficacy of a secret medicine are to such an extent mere matters of opinion or prediction that it is not practically possible to determine as a fact that the claims are so far unfounded as to justify a court in finding false pretences. If, however, in respect to ordinary sales, courts of law base the rule of caveat emptor upon the common sense view that, in disposing of their wares, men will not adhere to the truth, and that a vendor's opinion concerning the merit of goods is as a practical matter presumptively unreliable, is it not somewhat inconsistent for a court of equity to act upon a presumption that a patent medicine vendor tells the truth upon his labels and wrappers?

In Deweese v. Reinhard, 165 U. S. 386, 390, 17 Sup. Ct. 340, 341, 41 L. Ed. 757, it was said:

"The right, whatever it may be and from what source derived, must be not only one not protected by legal title, but in and of itself appealing to the conscience of a chancellor. A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity."

The appeal to the conscience of a chancellor by one who claims that he has a secret compound which can do what no medicine recognized by the medical profession is able to do, is much weakened by the incredulity of the chancellor as to the truth of the statement. In such cases the appeal often fails to awaken the conscience, and the conscience to command action. See Kohler Mfg. Co. v. Beeshore, 59 Fed. 572, 8 C. C. A. 215.

The statements upon the label or wrapper of a patent medicine bottle do not prove themselves, and are not competent to prove the efficacy of its contents. Notoriety, general use, and commercial value can more readily be attributed to enormous sums expended in advertising than to actual merit. Would it not be reasonable for a court of equity to hold that a complainant seeking to protect his proprietary rights as the owner of a patent medicine should produce legal evidence that it is in fact what it purports to be?

Assuming that the efficiency of medicine is a matter of opinion, the only evidence legally admissible to support claims of this character is the testimony of experts whose qualifications to testify are made to appear to the satisfaction of the court. In this case the complainant has introduced a very large number of affidavits of laymen, who say that they have had various diseases which have been cured by Moxie. It would seem that this evidence is legally inadmissible upon the issue of the curative efficiency of a medicine. The only competent legal evidence to prove this is the testimony of experts giving their opinion. See Commonwealth v. Jacobson, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935,

Jacobson v. Massachusetts, 197 U. S. 11, 23, 25 Sup. Ct. 358, 49 L. Ed. 643.

In Samuel Bros. & Co. v. Hostetter Co., 118 Fed. 257, 260, 55 C. C. A. 111, the Circuit Court of Appeals for the Ninth Circuit said, concerning the defendant's argument that no one preparation could possibly be a remedy for numerous and divers ills, and that the preparation was contraindicated for many ailments which it professed to cure:

"The court will not attempt a minute investigation of this field of inquiry. It is one upon which the experts differ. It is enough to advert to the fact that the preparation purports to be a general tonic, and as such efficacious in restoring strength to those weakened by various ailments, and that it has become widely known and largely manufactured and used, and that it has a commercial value. See Hostetter Co. v. Conron (C. C.) 111 Fed. 737, and cases there cited. The argument that it is a quack medicine, and that it is injurious to the human system, and is contraindicated for some of the ailments which it purports to cure, comes with ill grace from those who imitate it as closely as they may without possessing a complete knowledge of its formula, and by unfair trade sell the simulated article as and for the genuine."

The defendant has failed to prove misrepresentation as to the ingredients; and it is a somewhat novel and serious question of law whether the representation as to curative power can be regarded, in view of the decisions to which we have referred, as a representation whose truth may be inquired into. I should be very loth, however, to adopt a rule that in determining whether a complainant comes into court with clean hands we should draw a technical line between representations of pure fact, such as the ingredients of a medicine, and representations as to the curative power of the contents of a bottle, and classify the latter as representations of opinion, the falsity of which is practically incapable of proof. It is quite probable, however, that, in the administration of equity, the courts would refuse to permit a fraudulent imitator to raise the defense of false opinion as distinguished from misrepresentation of pure fact.

The questions which have been presented and which are suggested upon this motion for a preliminary injunction are too important to be disposed of without careful consideration and further argument. No possible view of the case, however, can render it inequitable to enjoin the defendant from fraudulent substitution. The refusal by a court of equity of relief to those who come with unclean hands is not for the benefit of those whose hands also are unclean. It sufficiently appears that the complainant's Moxie is a harmless beverage for which there is a wide demand. Even should it be subsequently proved that, in order to dispose of the harmless beverage, false claims of medicinal virtue had been made, the rights of the parties may be best preserved until final hearing by granting a preliminary injunction. A similar defense of fraud was raised in this circuit before Judge Colt, in Moxie Nerve Food Co. v. Beach, 33 Fed. 248. Though the opinion does not refer specifically to this question, it was distinctly raised by the affidavits; nevertheless, a preliminary injunction was granted.

The motion to dismiss is denied.

The petition for a preliminary injunction is granted.

DUFFY v. GLUCOSE SUGAR REFINING CO.

(Circuit Court, S. D. Iowa, Davenport Division. October 14, 1905.)

No. 8.

1. COURTS—FEDERAL COURTS—FOLLOWING STATE PRACTICE.
The statutes of a state regulating practice, and the construction given them by the highest court of the state, are binding upon federal courts sitting within the state in actions at law.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 957. State laws as rules of decision in federal courts, see notes to Hill v. Hite, 11 C. C. A. 71; Wilson v. Perrin, 29 C. C. A. 553.]

2. DISMISSAL—IOWA STATUTE—FINAL SUBMISSION OF CASE TO JURY.
Under Code Iowa, § 3764, which provides that an action may be dismissed by the plaintiff "before the final submission of the case to the jury," where on motion at the close of plaintiff's evidence the judge directed a verdict for defendant, and one of the jurors designated as foreman was in the act of signing a verdict by direction of the court, the case had been finally submitted, and an announcement of dismissal then made came too late.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, §§ 15, 16.]

Ely & Bush, for plaintiff.
Cook & Dodge, for defendant.

McPHERSON, District Judge. This is an action for a personal injury. At the close of plaintiff's evidence defendant moved for an order directing the jury to find for the defendant. This motion was argued at length, and taken under advisement by the court until the following morning. Then in the presence of the jury and counsel for both sides the court at some length gave his views of the matter, and concluded with the following statement:

"In my judgment that does not make a case, * * * and for these reasons the court sustains the motion and directs the jury to find and sign a verdict for the defendant."

The court, then addressing the jury, said to one of their number:

"Mr. Morrison, you may act as foreman. Step here to my desk and sign the verdict for the defendant, which I have prepared."

Mr. Morrison, one of the jurors, did as requested, took a pen, and was affixing his signature as such foreman to the verdict for defendant. His signature was partly written, when plaintiff's counsel said, "We dismiss this case." Defendant's counsel objected to the attempted dismissal as coming too late. While that was going on, the signature of the foreman was completed and the verdict left on the table of the presiding judge. Should the verdict be recorded and a judgment rendered thereon, or should there be an order of dismissal?

The Iowa practice acts and the construction given them by the Iowa Supreme Court upon matters of this kind are binding upon this court in actions at law. Central Company v. Pullman Company, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55. The same conclusion has been announced by the Circuit Court of Appeals for this circuit, in a case

which at this writing I cannot cite. The Iowa Code of 1897, § 3764, provides:

"An action may be dismissed, and such dismissal shall be without prejudice to a future action: (1) By the plaintiff, before the final submission of the case to the jury, or to the court when the trial is to the court."

Although the motion was tried to the court, fully submitted, and decided, I suppose that is not the test. The question is: Was the dismissal asked "before the final submission of the case to the jury?" In Hays v. Turner, 23 Iowa, 214, it was decided that in a case tried to the court that after the judge read his findings and conclusions of law, and was about to render judgment accordingly, but had yet not so done, that it was too late for plaintiff to dismiss, over defendant's objections. What the status of the case was which is said to have been "after final submission" in the case of Mansfield v. Wilkerson, 26 Iowa, 482, does not appear.

Belzor v. Logan, 32 Iowa, 322, was a case tried to a referee. He made a report. Later on he announced that he had his second report ready, and would file it when his fees were paid. Thereupon plaintiff was allowed, over defendant's objections, to dismiss. After submission the court allowed plaintiff to amend, and then later on to dismiss, as was ruled in Jones v. Currier, 65 Iowa, 533, 22 N. W. 663. But this was because, in allowing the amendment, it was as though the submission was set aside. Dunn v. Wolf, 81 Iowa, 688, 47 N. W. 887, was an equity case, but it is not disclosed what was the status of the case which is called "after final submission."

In Harris v. Beam, 46 Iowa, 118, the request for dismissal was closer perhaps in point of time to a final submission than any other case, and the dismissal was allowed. The case had been fully argued to the jury. The court in substance instructed the jury that the plaintiff had offered no evidence that he was the owner of the claim sued on, and that the verdict must be for the defendant. At that point plaintiff offered to dismiss, which was allowed, and the Supreme Court affirmed the order. In the opinion it is said:

"A cause is not fully submitted to the jury when the last word of the charge is read. In practice, the jury are directed by the court to retire in charge of a sworn officer to consider of their verdict, or to enter upon the consideration of the case without retiring. This direction by the court to the jury to enter upon the consideration of the case may fairly be regarded as the moment when the final submission of the case occurs. An attorney cannot always tell whether he can safely submit his cause to the jury upon the evidence introduced until he hears the charge of the court. If, in his judgment, the charge is so adverse to him that he cannot safely trust his case in the hands of the jury, he ought, at that moment, to be permitted to dismiss without prejudice to a future action. The statute, in our judgment, does not deny him the right."

If the jury had left their seats for their room for deliberation, it is clear that there would have been a "final submission." In the case at bar the jury was not allowed to go to a room. On their part there was to be no deliberation. Plaintiff's counsel heard the reasons given by the court why in his opinion no case had been made. He then heard the direction to one of the jurors to sign the verdict. He saw

the foreman walk forward to sign. And then, when the foreman was signing, for the first time suggested a purpose to dismiss. And in the case at bar I can see no difference between what in fact was going on and if the jury had among themselves in the jury box, or in a room, had directed the foreman to sign and he was in the act of signing when the dismissal was moved.

In Harris v. Beam there was no motion to direct a verdict. The jury was to retire. In Livingston v. McDonald, 21 Iowa, 160–175, 89 Am. Dec. 563, practically the same holding was made as in Harris v. Beam. In Railroad v. Estes, 71 Iowa, 603, 33 N. W. 124, the case had been fully tried to the court, and the court announced his conclusions. Then the plaintiff asked for a dismissal, which after much contention, and rulings made and then vacated, was refused. And the case was affirmed.

I fail to see what more there was to be done in the case at bar, except for the jury or some one for them to announce the verdict they were directed to return; and, that being so, I believe the case had been finally submitted when the motion to dismiss was made. It was then too late.

UNITED STATES v. NATIONAL BANK OF REPUBLIC. SAME v. NATIONAL BANK OF COMMONWEALTH. SAME v. NATIONAL EXCH. BANK.

(Circuit Court, D. Massachusetts. May 26, 1902.)

Nos. 1,189, 1,190, 1,191.

BILLS AND NOTES—FORGED INDORSEMENT—RECOVERY OF PAYMENTS—PLEADING.

In an action to recover money paid by plaintiff to defendant on a check bearing a forged indorsement of the name of the payee, as money belonging to plaintiff paid out through mistake and without consideration, delay in notifying defendant of the forgery, if such as to defeat recovery, is matter of defense, and need not be negatived in the declaration, nor is an allegation of demand necessary.

At Law. On demurrer to declarations.

The United States Attorney.

Charles K. Cobb, for defendants.

LOWELL, Circuit Judge. The plaintiff's declaration contains many counts arranged in pairs. The pairs are precisely similar except for the dates of the checks therein described. The first pair of counts reads as follows:

"Count 1. And the plaintiffs say that the Pension Agent of the plaintiffs at Boston, in said district, lawfully issued a certain check drawn on the assistant treasurer of the plaintiffs at said Boston, payable to the order of Mahala B. Jaques, a copy whereof, with the indorsements thereon, is hereto annexed, marked 'A'; that a signature purporting to be the true and genuine signature of the said Jaques was afterwards indorsed thereon; that said signature in fact was not the true and genuine signature of the said Jaques, but was false, forged, and counterfeit; that the defendant indorsed said check bearing said false, forged, and counterfeit signature, and presented it for payment to the said assistant treasurer, who paid the amount of the

same to the defendant. And the plaintiffs say the defendant owes them the amount of said check.

"Count 2. And the plaintiffs say that the defendant owes them the sum of $36, received by the defendant to the use of the plaintiffs."

To this declaration the defendant demurred on the following grounds:

"(1) That said count does not state a legal cause of action.

"(2) That no demand is alleged on the defendant for the amount of the check therein specified.

"(3) That no notice was given to the defendant that said check bore a false, forged, and counterfeit signature.

"(4) That no reason is alleged for not making such demand or giving the defendant such notice.

"(5) That the defendant had, up to the time of the bringing of the suit, any knowledge that said check bore false, forged, and counterfeit signature."

Assuming, for the sake of the argument, that undue delay on the part of the plaintiff in notifying the defendant of the forgery will defeat the plaintiff's right to recover, this court has to decide if that delay must be negatived in the declaration or should be set up by way of defense in the answer. The first count of the declaration says nothing about the matter one way or the other. That undue delay is matter of defense is pretty plain. The plaintiff's right of action arises from the mere retention by the defendant of money which, in justice, does not belong to the latter. "Money thus paid under a mistake of fact is recoverable, because it is paid without any actual consideration, and cannot equitably be retained." U. S. v. Park Bank (D. C.) 6 Fed. 852, 853. It has been decided that no allegation of demand upon the defendant is necessary to a right of action. Sturgis v. Preston, 134 Mass. 372; Dill v. Wareham, 7 Metc. 438. In United States v. Clinton Bank (C. C.) 28 Fed. 357, it appears that the defense was set up in the answer. The demurrer, so far as it applies to the first count of the declaration, must therefore be overruled. The second count is plainly good.

Demurrer overruled.

UNITED STATES v. NATIONAL EXCH. BANK OF BOSTON et al.

(Circuit Court, D. Massachusetts. October 2, 1905.)

No. 1,191.

BILLS AND NOTES—FORGED INDORSEMENT—RECOVERY OF PAYMENTS—DEFENSES.

Where plaintiff by honest mistake paid money to defendant upon a check bearing a forged indorsement, mere delay in notifying defendant of the discovery of the forgery, although unnecessary and unreasonable, will not defeat the right to recover back the money paid, in the absence of evidence that the delay has worked damage to defendant.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1273.]

At Law.

The United States Attorney.

Charles K. Cobb, for defendants.

LOWELL, Circuit Judge. This was a suit at law to recover back money paid by the plaintiff to the defendant upon a pension check bearing a forged indorsement. By the agreed statement of facts it appears that the checks were issued quarterly by the United States Pension Agent at Boston between 1884 and 1897. Some of the persons to whose order the checks were drawn were then dead. Others were remarried widows not entitled to a pension. On June 18, 1897, the special examiner of the Pension Bureau reported to the Bureau that the indorsements of some of the checks in suit were probably forged by Munson. On December 18, 1897, notice of these forgeries was given to the defendant by the United States attorney at Providence, and the defendant was informed that at a proper time reclamation would be made upon it. At various dates between February 19 and May 28, 1898, the indorsements upon the other checks were discovered to be forgeries. On July 22, the United States attorney made demand upon the defendant. The writ was dated August 27, 1901. The defendant's amended answer set up that the suit was not brought within a reasonable time after payment of the checks to the defendant; that notice of the forgeries was not given within reasonable time after their discovery; and that if the plaintiff had not been negligent in the discovery, or had promptly given notice thereof, the defendant would have been able to reimburse itself for money paid out by it. No evidence appears of the last allegation, except that above stated.

One who has paid money to another upon a check bearing a forged indorsement may ordinarily recover back the money paid, even though the other be an innocent holder of the check for value. As a general proposition, this is not disputed. But recovery cannot be had, where it would be inequitable, and especially where the negligence of the plaintiff in making the payment, or his delay after discovering the forgery in notifying the defendant, has damaged the latter. The defendant here relies upon the plaintiff's delay in giving notice of the forgery after its discovery. In dealing with commercial paper, the rights of the United States are in these respects like the rights of any other litigant. The delay was considerable, from two to six months. No reason for it is shown, and it must be taken to be unjustified. This, therefore, is the question presented for decision: If A., by honest mistake, pays money to B. upon a check bearing a forged indorsement, and then unnecessarily and unreasonably delays to notify B. of the discovery of the forgery, can he recover back from B. the money paid, in the absence of evidence that the delay has worked damage to B.?

Upon the whole, the authorities answer this question in the affirmative. Daniel on Neg. Inst. (4th Ed.) par. 1372; Oppenheim v. West Side Bank (Sup.) 50 N. Y. Supp. 148, 152; Bank of Commerce v. Mechanics' Bank, 55 N. Y. 211, 215, 14 Am. Rep. 232; Kingston Bank v. Eltinge, 40 N. Y. 391, 396, 100 Am. Dec. 516; Mayer v. Mayor of N. Y., 63 N. Y. 455; Iron City Bank v. Ft. Pitt Bank, 159 Pa. 46, 52, 28 Atl. 195, 23 L. R. A. 615; Third Bank v. Allen, 59 Mo. 310; Koontz v. Central Bank, 51 Mo. 275; U. S. v. Park Bank (C. C.) 6 Fed. 852. In most of the cases cited to support the defendant's contention (see U. S. v. Cooke, Fed. Cas. No. 14,855; U. S. v. Cent. Bank [D. C.] 6

Fed. 134; U. S. v. Clinton Bank [C. C.] 28 Fed. 357; U. S. v. Exchange Bank [C. C.] 45 Fed. 163), there was little consideration of the case of delay without resulting damage, as distinguished from that of delay with damage shown or reasonably inferred. Payment by mistake is the basis of the plaintiff's recovery. The right based on the mistake is effectual, unless the plaintiff is estopped to assert it. Negligence without resulting damage does not create an estoppel. While delay is irritating, while in some cases it may give rise to a presumption of fact that damage has ensued, yet, unless some damage to the defendant is shown, mere delay is insufficient to defeat the plaintiff's recovery. In the case at bar damage is alleged, but the agreed facts contain no evidence to support the allegation.

Judgment to be entered for the plaintiff.

BUFFALO SANDSTONE BRICK CO. v. AMERICAN SANDSTONE BRICK MACHINERY CO.

(Circuit Court, W. D. New York. October 17, 1905.)

No. 106.

CORPORATIONS—SUIT AGAINST IN ANOTHER STATE—JURISDICTION.

A court of New York cannot acquire jurisdiction of a foreign corporation, which is not doing business in the state, by service of summons on its president, who is in the state on private business, even though the corporation had previously done business in the state, and the president, when served, had incidentally called upon the plaintiff in relation to a contract growing out of such business, but which had been completed.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2613.]

On Motion to Quash Service of Summons.

Charles B. Wheeler, for plaintiff.
Clinton & Clinton, for defendant.

HAZEL, District Judge. Motion to quash the service of a summons, in an action instituted in the Supreme Court of the state of New York and afterward regularly removed to this court, upon the ground that the defendant, a Michigan corporation, was not engaged in business within the state of New York, and that its president, when served with the summons, was only casually within the jurisdiction of the court. This court has examined the questions involved and reached the conclusion that the defendant was not engaged in general or special business in this state at the time the service of the summons was had upon its representative, who was temporarily in the state. The adjudications to which attention has been directed by counsel for plaintiff have been examined, and I am satisfied that the visit of the president of the defendant to ascertain the nature of plaintiff's complaint in relation to the machinery installed pursuant to contract did not thereby confer jurisdiction upon this court. Assuming, but

not deciding, that the defendant had actually been engaged in business in this state before the service of the summons, during the time that the machinery was installed, it nevertheless clearly appears that the contract mentioned in the complaint was completed, and that the defendant had ceased to do any further business in this state. The principle of Conley v. Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113, is thought to apply.

The place where the contract was made is questioned. That it was completed in Michigan, where the defendant corporation was domiciled, is undeniable; and, even though the negotiations for entering into it were had in this state, it nevertheless was actually completed in the state of Michigan, the place where it was finally accepted by the defendant. Shelby Steel Tube Co. v. Burgess Gun Co., 8 App. Div. 444, 40 N. Y. Supp. 871.

The point that jurisdiction was obtained, on the ground that an authorized agent of the defendant was engaged in a special transaction at the time of the service of the summons, is not maintainable. As already indicated, the affidavits of the defendant in support of the motion under consideration show that Mr. Ewen, the president of the defendant, was traveling in this state upon personal business, and stopped off at Buffalo, where plaintiff's office was located, to ascertain the nature of the asserted complaint that the contract had been violated by the defendant, and to offer suggestions in relation to the machinery claimed to have been defectively constructed. In these circumstances, upon principle and authority, the service of the summons upon the president of the defendant corporation was unquestionably insufficient, and such service cannot be recognized as valid by the courts of this state. Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Loudon Machinery Co. v. American Malleable Iron Co. (C. C.) 127 Fed. 1008; Wabash Western Railway Co. v. Brow, 164 U. S. 276, 17 Sup. Ct. 126, 41 L. Ed. 431; Barrow S. S. Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Conley v. Alkali Works, supra; Cady v. Associated Colonists (C. C.) 119 Fed. 420; Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co. (C. C.) 124 Fed. 259; Central Grain & Stock Exch. v. Board of Trade, 125 Fed. 463, 60 C. C. A. 299; Johnson v. Computing Scale Co. (C. C.) 139 Fed. 339.

Hence jurisdiction is not acquired over the defendant, it not having surrendered itself to the jurisdiction of either the state court or of this court, and the service of the summons must be set aside. So ordered.

BATES MFG. CO. v. THE BATES MACH. CO.

(Circuit Court, D. New Jersey. October 24, 1905.)

1. TRADE-MARKS—UNFAIR COMPETITION—USE OF NAME.

In the absence of contract, fraud, or facts raising an estoppel, the fact that a person assists in forming a corporation in the name of which his own name is used does not preclude the use of his name as a part of that of another corporation in which he subsequently becomes interested, although it is organized to engage in competing business.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 84.

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

2. SAME—IMITATION OF PACKAGES—INJUNCTION.

A manufacturer will be enjoined from so dressing his goods for the market that they are likely to be mistaken by purchasers for the goods of a competitor earlier in the business.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 73, 74, 83.]

In Equity. On motion for preliminary injunction.

Frank L. Dyer, Delos Holden, and Melville Church, for complainant.
Alfred B. Carhart, for defendant.

LANNING, District Judge. The complainant seeks a preliminary injunction restraining the defendant: First, from using the name "Bates" in connection with the sale of automatic hand-numbering machines; and, second, from imitating the labels on the boxes in which the complainant's machines are packed and placed upon the market. The proofs show that in 1890 Edwin G. Bates and Samuel Insull caused the complainant company to be organized under the laws of the state of New York, for the manufacture and sale of numbering machines under the patents, inventions, and processes theretofore secured by Bates. Bates thereupon assigned his patents to the corporation, taking a part of its capital stock in consideration therefor. The company started its business with Bates as its general manager. For reasons hinted at in the proofs, but not clearly shown, Bates in 1895 sold out his stock and withdrew from the corporation. He thereupon began the manufacture and sale of numbering machines on his own account, and seems to have slowly built up a business until some time in 1899, when he caused the defendant company to be organized under the laws of New Jersey. It appears that the defendant company in 1904 put upon the market a new hand-numbering machine known as "Model No. 49." This machine came into direct competition with certain of the machines of the complainant. The complainant now contends that the defendant has no right to use the name "Bates" in connection with the sale of automatic hand-numbering machines. This contention is founded on the assertion that Edwin G. Bates, when he became a party to the organization of the complainant company in 1890, assigned to the corporation the sole and exclusive right to the use of his name in the manufacture and sale of hand-numbering machines. But in the proofs submitted by

the defendant company this assertion is denied. A written agreement executed by Edwin G. Bates and Samuel Insull on September 13, 1890, is in evidence, but there is nothing in it to support the contention. If Bates transferred to the complainant company the exclusive right to use his name in the business above referred to, it must have been by some method not clearly disclosed in the proofs.

In Howe Scale Co. v. Wyckoff, Seamans, etc., 198 U. S., at page 140, 25 Sup. Ct. 614, 49 L. Ed. 972, it was said:

"We hold that, in the absence of contract, fraud, or estoppel, any man may use his own name in all legitimate ways, and as the whole or a part of a corporate name."

In that case the Circuit Court for the District of Vermont enjoined the defendant company from the use of the word "Remington," or the term "Rem-Sho," as the name or a part of the name of any typewriting machine whatever manufactured by the Remington-Sholes Company. The Circuit Court of Appeals of the Second Circuit considered the injunction too broad, and limited it by enjoining the defendant from the use of the name "Remington." The Supreme Court reversed even this modified decree and directed the bill to be dismissed, and in the course of the argument Chief Justice Fuller, after reviewing the authorities, said:

"Doubtless the Remingtons and Sholes, in using the name 'Remington-Sholes,' desired to avail themselves of the general family reputation attached to the two names, but that does not in itself justify the assumption that their purpose was to confuse their machines with complainant's; or that the use of that name was in itself calculated to deceive. Remington and Sholes were interested in the old company, and Remington continued as general manager of the new company. Neither of them was paid for the use of his name, and neither of them had parted with the right to that use. Having the right to that use, courts will not interfere where the only confusion, if any, results from a similarity of the names and not from the manner of the use. The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and, if defendant so conducts his business as not to palm off its goods as those of complainant, the action fails."

As the case now before me stands, there can be no preliminary injunction restraining the defendant company from using the word "Bates" in connection with the manufacture and sale of hand-numbering machines. Whether the complainant is entitled to relief by injunction must be determined only upon full proofs on final hearing.

But the complainant is clearly entitled to the relief sought on the second ground mentioned in its prayer for relief, namely, that the defendant be enjoined from imitating the labels on the complainant's boxes. The complainant's hand-numbering machines have long been put up in small rectangular boxes, upon the outer surfaces of which are pasted labels setting forth matters supposed to be of interest to the purchasers of the machines. On one end of each of these boxes is a label with the title "A Few Don'ts." The first two words "A few" are in small capital letters; the last word "Don'ts" is in large capital letters. Under this title are seven sentences, each of which commences with the word "Don't" in heavy type. The first sentence is: "Don't use rubber stamp ink upon pad of this machine." The defendant's machines are likewise

packed in small rectangular boxes upon the outer surfaces of which are pasted labels containing matters supposed to be of value to purchasers. On one end of each of the defendant's boxes is a label, at the top of which is the title "A Few Don'ts." The words "A few" are in small capital letters, and the word "Don'ts" is in large capital letters. Under the title are seven sentences each commencing with the word "Don't" in heavy type. Four of these seven sentences are literally the same as those used upon the complainant's boxes. The other three are substantially the same. The labels on the complainant's boxes also contain a series of "Useful Hints" concerning the use of the complainant's machine, while on the defendant's boxes is a series of "Important Suggestions" concerning the use of the defendant's machine. The substance of these "Important Suggestions" on the defendant's boxes is the same as that of the "Useful Hints" on the complainant's boxes. Indeed, in many respects the language is the same. Other striking similarities between the labels upon the boxes of the complainant and the defendant might be pointed out. I am satisfied that the defendant should not be permitted to use these labels in marketing its machine known as "Model No. 49." They are calculated to induce the purchasing public to believe that the defendant's machine known as "Model No. 49" is a product of the complainant company.

There will be a preliminary injunction restraining the defendant from using, in connection with the sales of its machine known as "Model No. 49," any label containing a reproduction in whole or in part of the language heretofore used by the complainant company upon its labels. The exact form of the order for injunction will be settled on notice.

THE NIMROD.*

(District Court, S. D. Alabama. April 4, 1905.)

1. SALES—ARTICLE TO BE MANUFACTURED—IMPLIED WARRANTY OF FITNESS.
Where a manufacturer contracts to supply an article which he manufactures, to be applied to a particular purpose known to him, so that the buyer necessarily trusts to the judgment and skill of the manufacturer, there is an implied warranty that it shall be reasonably fit for the desired purpose, and the seller is liable for any latent defect, not disclosed to the purchaser, either in material or workmanship.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 772, 774.]

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

2. SAME—STEAM BOILER FOR TUG.
Where a contract to manufacture a boiler for a tug provided that it should be satisfactory to the engineer, the fact that the boiler was received by him and put in the tug does not necessarily constitute an acceptance, nor exclude the implied warranty of fitness by the manufacturer with respect to defects which were discoverable only by actual use.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 772–774, 818.]

3. SAME—BREACH OF WARRANTY—MEASURE OF DAMAGES.
The measure of damages for breach of the implied warranty of the manufacturer of the fitness of a boiler built for a tug and placed therein

*Affirmed in Circuit Court of Appeals, 141 Fed. 834.

is the cost of making it sound and fit for the purpose for which it was intended, and compensation for the loss of the use of the tug while the work was being done, which may reasonably be supposed to have been within the contemplation of the parties.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1284–1290.]

4. PARTIES—ACTION ON CONTRACT—USE OF FICTITIOUS NAME.

Where the individual owners of a tug operated the same under the name of the "Tow Boat Company," and in such name contracted for a boiler to be built and placed therein, but there was in fact no corporation by that name, a claim for damages for breach of the manufacturer's warranty of the boiler is properly prosecuted in the name of the owners as individuals.

In Admiralty. Suit to recover balance due on a contract for a boiler for a tug, and cross-libel for damages.

Gregory L. & H. T. Smith, for libelant.
Pillans, Hanaw & Pillans, for claimant.

TOULMIN, District Judge. 1. Where a manufacturer contracts to supply an article which he manufactures, to be applied to a particular purpose known to him, so that the buyer necessarily trusts to the judgment and skill of the manufacturer, there is an implied warranty that it shall be reasonably fit for the desired purpose. This implies that the material and workmanship shall be good, and the vendor is liable in such case for any latent defect not disclosed to the purchaser arising from the manner in which the article was manufactured. 2 Benj. Sales. 988-993; Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Snow v. Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509; 15 Am. & Eng. Ency. of Law (2d Ed.) 1223, 1231; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86; Nashua Iron & Steel Co. v. Brush, 91 Fed. 213, 33 C. C. A. 456; Gage v. Carpenter, 107 Fed. 886, 47 C. C. A. 39; Pullman Car Co. v. Metropolitan Ry. Co., 157 U. S. 108, 15 Sup. Ct. 503, 39 L. Ed. 632.

2. Where a contract provides that work is to be done under the direction and supervision of an engineer or other person, whose determination shall be conclusive upon the parties, both parties are bound unless there is fraud or such a mistake as would show a want of good faith in the person exercising such direction and supervision. Kihlberg v. U. S., 97 U. S. 398, 24 L. Ed. 1106; Chicago & Santa Fe R. R. v. Price, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917. In this case there is no such contract, and no such agreement can be implied from the terms of the contract. It provides that the construction of "the boiler is to be satisfactory to the engineer of the Nimrod." Acceptance of the work as satisfactory forecloses the parties, but such acceptance as satisfactory is a condition precedent, and must be shown. It is not shown in this case. The fact that the contract provided that the boiler was to be satisfactory to the engineer and that it was received and put in the tug would not exclude the implied warranty of the manufacturer if the defects in the boiler were discoverable only by actual use. Moreover, a breach of warranty is not waived by acceptance unless the defects were obvious at the time of acceptance. 24 Am. & Eng. Ency. of Law

(2d Ed.) 1903; Bagley v. Cleveland Rolling Mill Co. (C. C.) 21 Fed. 164.

3. Hartwell & Spotswood owned the tug Nimrod, and under the name of the "Tow Boat Company" operated it, and under that name contracted for and purchased the boiler from libelant. The "Tow Boat Company" is not a corporation, but a name used by Hartwell & Spotswood as individuals operating their tug Nimrod. They can recoup or counterclaim their damages for a breach of the implied warranty to the "Tow Boat Company." The measure of damages is, as a general rule, the difference between the actual value of the boiler and what its value would have been had it conformed to the implied warranty of libelant as to its workmanship and fitness. But purchasers are permitted to recover the cost of making the boiler comply with the requirements of the warranty. 24 Am. & Eng. Ency. of Law (2d Ed.) 1158, 1159; English v. Spokane Com. Co., 57 Fed. 451, 6 C. C. A. 416; 2 Schouler's Personal Property, § 585. The purchasers are also allowed such special damages as may fairly be supposed to have entered into the contemplation of the parties at the time the contract of sale was made, and which might naturally be expected to follow from the breach of the warranty. 24 Am. & Eng. Ency. of Law, supra, 1159, 1160; Pullman Car Co. v. Metropolitan Ry., supra; Stillwell Manufacturing Co. v. Phelps, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035; Crane Co. v. Columbus Constr. Co., 73 Fed. 984, 20 C. C. A. 233; 2 Sutherland on Damages, pp. 407–409, 422; 2 Schouler's Personal Property, supra.

4. The legal title to the tug Nimrod is in Hartwell & Spotswood, whatever may be the equities between them as owners of the tug and the tow boat association as to the net earnings of the tug. The cross-libel is, in my opinion, rightly filed in the name of the tug owners. The Thames, 14 Wall. 98, 20 L. Ed. 804.

On the evidence my opinion is: (1) That there was an implied warranty that the boiler would be constructed in a workmanlike manner, and would be reasonably fit for the use for which it was desired. (2) That the boiler was defective in its construction. That such defects were not obvious at the time the boiler was received by the tug, and were not known to the owners of the tug or to its engineer, but that the evidence tends to show they were known to the manufacturer, the libelant. (3) That there was a breach of the implied warranty. (4) That the cross-libelants have sustained special damages by reason of such breach, the elements of which are the reasonable cost of making the boiler sound and fit for the special use to which it was to be applied, the necessary expense incurred in connection therewith, and loss of the use of the tug during the time necessarily consumed in the work on the boiler. These damages, I think, were such as was reasonably to be anticipated by the parties would accrue in view of the special use to which the boiler was to be applied if it proved to be unfit for the purpose.

The aggregate of the cross-libelants' damages are $1,417.38, from which deduct the amount of balance due to libelant by the tug, to wit, $731.83, leaving a balance due cross-libelants of $685.55, for which let a decree be entered.

WILKINSON v. GOODFELLOW-BROOKS SHOE CO. et al.

(Circuit Court, E. D. Missouri, E. D. November 17, 1905.)

No. 5,218.

MALICIOUS PROSECUTION—GROUNDS OF ACTION—MALICIOUS INSTITUTION OF BANKRUPTCY PROCEEDINGS.

An action for malicious prosecution will lie for the institution and prosecution of a proceeding in bankruptcy without probable cause and with a malicious intent, although not accompanied by any actual seizure of the alleged bankrupt's property.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, § 16.]

At Law. On demurrer to petition.

John A. Harrison and R. F. Walker, for plaintiff.

Wm. B. & Ford W. Thompson and Henderson & Becker, for defendants.

FINKELNBURG, District Judge. This is an action for malicious prosecution, the petition charging that the defendants, with malice and without probable cause, instituted and prosecuted a proceeding in involuntary bankruptcy against plaintiff; that upon a hearing of said proceeding it was adjudged and decreed that the petitioners had failed to sustain the allegations as to the alleged acts of bankruptcy; and that the proceeding was then and there dismissed by the court, and final judgment rendered in favor of the present plaintiff, the defendant in the bankruptcy proceeding. It is further alleged that the defendant, with malice and without probable cause, appealed from the judgment and decree of the District Court, and that subsequently said appeal was voluntarily dismissed by the present defendants, whereby said proceeding in bankruptcy was finally determined in favor of the present plaintiff. The defendants filed a general demurrer on the ground that the petition and the allegations therein contained do not constitute a cause of action against the defendants.

When the demurrer in this case was argued, I thought it well settled that an action for malicious prosecution would lie for maliciously instituting a proceeding in bankruptcy without probable cause. After examining the exhaustive briefs submitted by counsel on both sides I find I was in error. The question is not well settled, but seems to be open to much contention. The argument on the part of the defendants is that a proceeding in bankruptcy, not accompanied by a seizure of the alleged bankrupt's property, is a mere civil action, and that malicious prosecution will not lie for instituting a mere civil action. The bankruptcy proceeding involved in the case at bar was not accompanied by any seizure of property.

The question whether an action will lie for the malicious institution and prosecution of an ordinary civil suit without probable cause is one on which the authorities are divided; a number of courts of last resort (including Missouri) holding that it will, and a number holding that it will not. According to the citations in the briefs, it would appear that

numerically the preponderance is somewhat in favor of the affirmative of the proposition, but that is not of importance. The subject is reviewed by Judge Sherwood in Smith v. Burrus, 106 Mo. 94, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. Rep. 329, in which case the Supreme Court of Missouri ranged itself on the affirmative side of the proposition. The federal courts are also divided on the subject. See Wade v. National Bank of Commerce (C. C.) 114 Fed. 377; Cooper v. Armour (C. C.) 42 Fed. 215, 8 L. R. A. 47; Burnap v. Albert, 4 Fed. Cas. No. 2,170; Tamblyn v. Johnston, 126 Fed. 270, 62 C. C. A. 601. In the case first mentioned there is a strong and persuasive opinion by Hanford, J., on the affirmative side of the question. It is true that in the Tamblyn Case Judge Thayer says that the weight of authority is against the right, but the precise question was not before the court in that case for decision, and the remark may be taken as a dictum.

Thus far I have considered the general question whether an action for damages will lie for the institution of an ordinary civil suit not accompanied by any arrest of the person or seizure of property, and we have seen that there is much conflict of authority on this subject. Passing on, now, to the next question in the case at bar, whether a proceeding in bankruptcy is "a mere civil suit," so as to be involved in the same conflict of authority, or whether such proceeding stands on exceptional grounds, we find a number of English cases, and one decision of the United States Supreme Court, in which suits of that kind were entertained, and in which it was held that the action would lie. They are as follows: Farley v. Dawkes, 4 Ell. & Bl. 499; Brown v. Chapman, 1 W. Bl. 427; Whitworth v. Hall, 2 B. & Ad. 698; Hall v. Weakley, 5 C. & P. 361; Cotton v. James, 1 B. & Ad. 128; Johnson v. Emerson, L. R. 6 Exchr. 329; Stewart v. Sonneborn, 98 U. S. 187, 25 L. Ed. 116. But counsel for defendants call attention to the fact that in all these cases the proceeding in bankruptcy was accompanied either by a seizure of the alleged bankrupt's property, the appointment of a receiver, or other process of similar import, and that the effect of these decisions must be limited to such circumstances. Plaintiff's counsel also cite the following text-writers in support of the right to bring such a suit: 2 Addison on Torts (Wood's Ed.) § 867, p. 81; Cooley on Torts, p. 187; 1 Hilliard on Torts, p. 267; Webb's Pollock on Torts, p. 400; Moak's Underhill on Torts, p. 162. It is claimed that these also refer to proceedings in bankruptcy accompanied by seizure of property. No decisions have been found by counsel on either side on the precise question whether an action will lie for the malicious institution and prosecution of a proceeding in bankruptcy, when not accompanied by a seizure of the alleged bankrupt's property; and, in view of the thorough manner in which this case has been briefed by able counsel on both sides, I assume that none exist.

There being no controlling decision, then, on the precise question involved in the case at bar, and the case being one of first impression, so far as this court is concerned, I feel at liberty to adopt that rule which, in my opinion, best comports with the rights of individuals, sound reason, and the ends of justice. In my opinion, a bankruptcy proceeding

cannot be said to be an ordinary civil suit. It is sui generis, and it is far reaching and drastic in its effects. Whether accompanied by actual seizure of the bankrupt's property or not, it places an embargo on his right to dispose of his property and of his business generally. No prudent person will buy from him, and no prudent person will sell anything to him on credit, even if security is offered, because all transactions between the bankrupt and third persons after the petition in bankruptcy has been filed are liable to be investigated, reviewed, set aside, or controlled as to their validity and effect in case of an adjudication. As the Supreme Court expresses it in Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 275, 46 L. Ed. 405:

"The filing of the petition is a caveat to all the world, and in effect an attachment and injunction."

After the filing of the petition all the property rights of the debtor are practically in abeyance until final adjudication, and those who deal with his property in the interval do so at their peril. Loveland on Bankruptcy, p. 366; Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866.

For the purpose of this demurrer the court will also take judicial notice of the fact that the filing of a petition in bankruptcy is not only published in the daily press, but is usually, if not invariably, reported by the commercial agencies which rate the financial standing of business men. The effect of all this is apparent. The alleged bankrupt's credit is impaired, if not destroyed, and his business paralyzed. Now, all this may be damnum absque injuria, if the petitioning creditors have instituted the proceeding in good faith, though wrongfully; but if a proceeding with such injurious effects is instituted without probable cause, and with a malicious intent to injure the party proceeded against, there ought to be a remedy for the injury inflicted. Mr. Justice Bradley, in speaking of bankrupt proceedings in Stewart v. Sonneborn, 98 U. S., loc. cit. 201, 25 L. Ed. 116, says:

"The power to throw a man into bankruptcy, and thus destroy his business and all hope for the future, is one of great magnitude to be given to one man over another. A wealthy man or firm, with extensive business connections, having this means of destruction in his hands, wields a tremendous power."

It is an elementary principle of the common law that a wrongful act causing injury entitles the injured party to compensation (Wade v. National Bank [C. C.] 114 Fed. 379), and I cannot see any reason why a person who institutes a bankruptcy proceeding in bad faith, and for the purpose of inflicting injury, should be exempt from this rule. My decision therefore is that the institution and prosecution of a proceeding in bankruptcy, without probable cause and with a malicious intent, may be good ground for an action of malicious prosecution, although the proceeding in bankruptcy was not accompanied by any seizure of the alleged bankrupt's property.

The foregoing disposes of the main question presented to the court. Some subsidiary questions of pleading were touched on in the arguments, and are referred to in the briefs. The objection that the petition is based on two distinct torts which should have been stated in sep-

arate counts does not meet with my assent. I think the institution of the proceedings and the subsequent appeal, if wrongfully done, constitute but one continuous tort for the purpose of this case. The other questions of pleading do not properly arise on a general demurrer. They are more appropriately raised by motions to make more definite and certain and other motions to reform the pleadings.

The demurrer will be overruled.

In re BUCHSBAUM.

(District Court, E. D. Pennsylvania. December 12, 1905.)

ALIENS—ALIENS RESIDENT IN UNITED STATES—RIGHT TO RE-ENTER.

An alien, who in good faith has acquired and maintains his residence in the United States, on his return from a temporary absence in a foreign country, is not an alien immigrant within the meaning of the immigration statutes, but has the right to leave and re-enter the United States with the same freedom as a resident who is also a citizen.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Aliens, § 105.]

Habeas Corpus.

David Phillips, for relator.

John C. Swartley, for Commissioner of Immigration.

N. Dubois Miller, for International Mercantile Marine Co.

J. B. McPHERSON, District Judge. The undisputed facts of this case are thus set forth in the petition for the writ:

"The petition of Isadore Buchsbaum respectfully represents:

"That he is a native of Austria, and emigrated to the United States, arriving in New York City, state of New York, on March 10, A. D. 1901, with his wife and family. That thereupon he took up a permanent residence with his wife and family in said city, and established himself in the window cleaning business, in which he still retains his interest. That from the time of his arrival in New York City until on or about April, A. D. 1905, he continuously resided in New York City with his family, pursuing his aforesaid business and acquiring extensive contractual property and rights. That on the 8th day of March, A. D. 1905, he declared his intention of becoming a citizen of the United States before the Circuit Court of the United States for the Southern District of New York.

"In the month of April, A. D. 1905, the petitioner took passage on the steamer Finland for Antwerp, and thither went to Galicia, Austria, for the purpose of settling an estate. Your petitioner, on leaving this country for said purpose, never intended to give up his rights which he had acquired in the United States, but went with the intention of returning as soon as his business was transacted. The petitioner's family, consisting of wife and two children, remained in New York and are still residing there.

"Your petitioner returned to the United States, arriving in Boston, as a passenger on the steamer Marquette, Red Star Line, on November 7, 1905. The United States Commissioner of Immigration at Boston refused him a landing, and on November 9, 1905, ordered his deportation, on the ground that he was afflicted with trachoma.

"Your petitioner avers that he was not given a lawful opportunity to appeal by the said Commissioner of Immigration and he was conveyed on board the steamer Marquette to Philadelphia, where he arrived on November 19, 1905, and he is now illegally restrained of his liberty and illegally held in custody by the respondent John J. S. Rodgers, Commissioner of Immigration, the International

Mercantile Marine Company, and P. F. Young of steamer Marquette, in the house of detention at No. 950 Swanson St., city of Philadelphia, state of Pennsylvania.

"Your petitioner avers that he is a resident of the city of New York, state of New York, United States of America, and that he never gave up said residence. That he was not afflicted with any disease when he left New York City, nor when he left Europe on his return trip to the United States, and, if he has any disease such as alleged, he must have contracted the same on board the steamer Marquette on his return to the United States."

Upon these facts, I am of the opinion that the relator is not subject to deportation. He is not an alien immigrant in the sense applied to those words by the act of 1903, but is a resident of the United States, who has made this country his home, and has the right to leave it on his business affairs and to return to it with the same freedom as residents who are also citizens, either by birth or naturalization. I lay no stress upon the fact that the relator has declared his intention to become a citizen, except as such declaration is relevant to the inquiry whether he is a bona fide resident of the country. After an alien has once become a resident he is entitled to the same liberty of movement enjoyed by residents and citizens alike; and, until he abandons his residence, he is no longer amenable to the excluding provisions of the immigration law. That law is intended to operate when the immigrant presents himself for the first time, but after he has passed the scrutiny of the inspectors and has been admitted he is then entitled to the rights and privileges of residents in the United States as long as he continues to be a member of this class. It is true that in one sense he is always an alien, until he becomes a citizen, although he may reside in this country for many years before he applies to be naturalized. But this is not the sense in which the word has been used in the statutes regulating immigration. In these statutes an alien immigrant is one who offers to take up his residence here, but has not yet carried out his desire. Such an immigrant must fulfill certain requirements or he will not be allowed to land; but, having been once admitted, and having once acquired a residence in good faith, he is not obliged to stay in the country until he becomes a citizen, at the risk of being excluded when he returns to his family or his home. There are many commercial travelers of foreign birth who are still aliens. It is impossible to suppose that the act of 1903 was intended to apply to such persons; but it does apply to them, and to all other persons of foreign birth who have not been naturalized, no matter how long they may have lived in the country, nor what their ties of business or family may be, if the construction contended for by the government be correct. I happen to know that the president of one of our most conspicuous institutions of learning retains his foreign citizenship for certain business reasons. He has been identified with the intellectual life of this country for two generations, and is widely known as a profound scholar, but he is an alien still, and must be inspected whenever he returns from a visit abroad, if the literal meaning of that word must prevail in every case.

But I need not discuss the subject further, since the question has already been decided in the second circuit by Judge Benedict and Judge Lacombe. In the first case, In re Panzara (D. C.) 51 Fed. 275, the point decided is thus stated in the syllabus:

"One who is a resident of the United States, though of foreign birth, and not naturalized, and who is returning from a visit to the country of his birth, is not an alien immigrant within the meaning of the laws regulating immigration."

To the same effect are In re Martorelli (C. C.) 63 Fed. 437, and In re Maiola (C. C.) 67 Fed. 114. The relator's counsel laid much stress upon In re Di Simone (D. C.) 108 Fed. 942, in which Judge Boarman, considers, inter alia, the effect of a declaration of intention upon the status of an alien's children; but, as the case was reversed upon admission of error (108 Fed. 991, 46 C. C. A. 689), although it is not known what the error was, since no opinion was filed by the Circuit Court of Appeals, I think it inadvisable to permit the opinion of the District Court to have any influence on the pending case.

Believing, therefore, that the relator is entitled to his liberty, it is ordered that he be discharged.

In re SAX.

(District Court, E. D. Pennsylvania. December 20, 1905.)

No. 2,067.

BANKRUPTCY—SUMMARY ORDER TO PAY OVER MONEY—GROUNDS.

A bankrupt should not be summarily ordered to pay over money or deliver property to his trustee, unless the court is morally certain that he has been guilty of fraudulent concealment and that obedience to the order can be enforced. That he has failed to account satisfactorily for goods which went into his business is not sufficient to warrant such an order, where he denies the concealment of any money or property belonging to the estate, and the fact of concealment has not been made to appear by convincing evidence.

In Bankruptcy. On certificate from referee.

Furth & Singer, for bankrupt.
Wessel & Aarons, for trustee.

J. B. McPHERSON, District Judge. An attentive reading of the testimony has satisfied me that the referee's order cannot be supported. He directed the bankrupt to pay over to his trustee the sum of $2,305 in cash, basing the order upon the finding:

"That the said bankrupt, Henry Sax, has in his possession, or controls, the sum of $2,305 in cash, or in goods of that value, being the assets and property belonging to his estate in bankruptcy, which he fraudulently and unlawfully conceals from the said trustee in bankruptcy."

The alternative form of this finding suggests the lack of certainty in the evidence, and when it is added that there is not a word of testimony to support the additional finding—

"That the bulk of the goods purchased by the bankrupt during the last three months preceding his bankruptcy either never reached the store, or else were clandestinely and fraudulently removed therefrom,"

—enough has been said, I think, to indicate the reason why the order cannot stand.

Fraud must be proved, and is not to be presumed. I do not deny

that the bankrupt, who is certainly not a literate person, has probably failed to account satisfactorily for some of the merchandise that went into his business during the year before his failure, but calculations and estimates based on such uncertain evidence as is now before the court are not reliable enough to justify an order that may send a man to jail for an indefinite period. If it be clearly shown that a bankrupt has money or goods in his possession that belong to his trustee, he must take the consequences of a refusal to hand them over, but he should not be summarily directed to pay unless the court is morally certain that there has been concealment and that obedience to the order can be enforced. If the bankrupt has been guilty of fraudulent concealment, but no longer has the goods or the money, he should be prosecuted. He should not be imprisoned on a summary proceeding for contempt, unless he is disobeying an order with which he is able to comply. The Court of Appeals of this circuit has given us instructions on this subject in Trust Co. v. Wallis, 11 Am. Bankr. Rep. 360, 126 Fed. 464, 61 C. C. A. 342, to which I refer as authority for the proposition that, where the bankrupt denies the averment that he is concealing property which belongs to the estate, the fact of concealment must be made out by testimony of unusual cogency:

"The court may, by summary order, direct the delivery and turning over to the trustee by the bankrupt, or by any third person holding the same under his order and control, any property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. For disobedience of such order, the court in bankruptcy undoubtedly has the power, by attachment for contempt, to enforce compliance with such order, and punish refusal to comply. This power, however, is far reaching and drastic, and must be exercised with cautious discretion. If the bankrupt denies that he has possession or control of the property, or if a third person in possession thereof claims to hold it, not as the agent or representative of the bankrupt, but by title adverse to him, and there is no evidence to indisputably show that such denial or claim is false or fraudulent, and that the case is one of simple concealment or refusal on the part of the bankrupt, or of the one in possession, to deliver up the property as ordered, it would be an unwarranted stretch of power on the part of the court to resort to a summary proceeding for contempt for the enforcement of its order. In the absence of fraud or concealment, the bankrupt court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control. If it shall appear that he is not physically able to deliver the property required by the order, then confessedly proceedings for contempt, by fine and imprisonment, would result in nothing, certainly not in compliance with the order."

The order of the referee is therefore reversed.

CHADWICK v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. November 17, 1905.)

No. 1,446.

1. INDICTMENT—MOTION TO QUASH—GROUNDS.
A motion to quash an indictment, based on an affidavit that the grand jury received certain incompetent evidence, is insufficient, where it is not alleged nor shown that there was not other and competent evidence on the subject upon which the indictment was based.

2. CRIMINAL LAW—MOTION TO QUASH INDICTMENT—REVIEW OF RULING.
A motion to quash an indictment is addressed to the sound discretion of the trial court, and in general its ruling thereon is not reviewable, and especially where the motion was heard on affidavits which are not in the record.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3042.]

3. CONSPIRACY—ELEMENTS OF OFFENSE—VIOLATION OF NATIONAL BANKING LAWS.
While it is a settled rule of criminal law that an indictment for conspiracy will not lie where a plurality of agents is logically necessary to complete the crime which it was the object of the conspiracy to commit, such rule does not apply to an indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for a conspiracy between the defendant, who had no official connection with a national bank, and an officer of such bank to violate Rev. St. § 5208 [U. S. Comp. St. 1901, p. 3497], by causing a check of defendant drawn on the bank to be certified by such officer when defendant did not have a sufficient amount on deposit to pay the same.

4. INDICTMENT—JOINDER OF COUNTS—COMPELLING ELECTION.
Counts charging separate conspiracies with officers of a national bank for the violation by such officers of Rev. St. § 5208 [U. S. Comp. St. 1901, p. 3497], by certifying checks when the drawer did not have sufficient funds on deposit to pay the same, may be joined in the same indictment under Rev. St. § 1024 [U. S. Comp. St. 1901, p. 720], and, unless it apears that substantial rights of the defendant will be prejudiced by their trial together, the court may properly refuse to compel the government to elect between them.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 447.]

5. CRIMINAL LAW—EVIDENCE—ADMISSIONS.
On the trial of an indictment for conspiracy, letters shown to be in the handwriting of the defendant, addressed to an alleged co-conspirator and containing self-charging admissions, are admissable in evidence, although it is not proved that they were transmitted to the persons to whom they are addressed, and their interpretation and weight are matters for determination by the jury in the light of all of the evidence in the case.

6. CONSPIRACY—PROOF OF INTENT—KNOWLEDGE OF THE LAW.
On the trial of an indictment charging defendant with conspiring with officers of a national bank for the certification of checks by such officers when the drawer had no funds on deposit, in violation of Rev. St. § 5208 [U. S. Comp. St. 1901, p. 3497], it is not essential to conviction to prove that defendant had knowledge that such false certification was in violation of the statute; the necessary criminal intent being imputed where it is shown that the parties to the transaction acted with knowledge of the facts.

7. CRIMINAL LAW—NEW TRIAL—MISNOMER OF JUROR.
It was within the discretion of the trial court to deny a motion for a new trial, based on the ground that the given name of one of the jurors who was accepted and sat on the trial was not the same as the name on the jury list which was drawn and called when the jury was impaneled; it being shown that the juror who served was the one summoned and actually intended, that he appeared in good faith, and that there was no person having the name on the list, which was so written through mistake.

8. SAME—TRIAL—ARGUMENT OF COUNSEL.
There is a degree of liberty allowable to counsel in a criminal case, whether for the government or the accused, in respect to the line of argument they shall pursue and the inferences to be drawn from the evidence, which a trial judge should respect unless the facts of the case are overstepped or arguments used which plainly abuse the privilege, and a reviewing court should not reverse a judgment because of the refusal of the trial court to interfere with an argument of counsel, unless it was plainly unwarranted and so improper as to be clearly injurious to the accused.

9. SAME—WAIVER OF OBJECTION.
A defendant who deems himself prejudiced by language used by counsel in argument should promptly and publicly object and point out the language deemed improper, and then take exception if the trial judge fail to condemn it. Unless this is done, error cannot be predicated on the refusal of a trial judge to grant a new trial on account of such language.

10. SAME—SENTENCE—CUMULATIVE TERMS OF IMPRISONMENT.
Under convictions upon separate counts for distinct offenses of the same character judgment may be entered and sentence passed for a specified term of imprisonment upon each count, and the terms may be made consecutive and cumulative.

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

The following is the full charge given by Taylor, District Judge, to the jury:

The testimony in this case having been completed, it now becomes my duty to define the law applicable to the facts given in evidence, and to instruct you as to the rules of law which you are to consider, and by which you are to be controlled, in weighing and construing the testimony. It is for you, and for you alone, to determine what the facts are. It is for the court, and the court alone, to define the law by which these facts are to be applied to the indictment in this case. If it should seem to you, at any time during this charge, that the court has an opinion respecting what may or may not be a fact in this case, you will still remember that the court's conclusion is in no sense to weigh with you, or control you, in your finding and determination of what the facts are. The Congress of the United States, from time to time, has seen fit to enact certain laws intended to aid in the honest and efficient administration of national banks. While it is not necessary that I should say anything to you respecting the need or the merit of any particular law passed for that purpose, yet I ought to say to you, and do say, that legislation of that general character is highly meritorious, and manifestly needful. We are so accustomed to repose confidence in banks, especially in those banks organized under federal laws, and, to a certain extent, supervised by federal officials, that, if stringent legislation looking to the protection of stockholders and depositors was not enacted and enforced, the property of innocent persons would be put in great jeopardy, and the confidence of the public in such institutions would be greatly impaired. No less important than this is the regard which the law has for the safety and liberty of individuals; and this is manifest when we consider the safeguards which it throws around those who are charged with crime. It is your duty to consider at once the necessity of enforcing the laws of the country and of giving full protection to persons charged with offenses against those laws. These considerations should cause

you to give most careful attention to your duties in this case, to the end that, on the one hand, if the defendant be guilty as charged, these salutary laws may be enforced; and, on the other hand, that she be not found guilty unless, by proof satisfactory to the law, you shall so find her.

The defendant in this case is presumed to be innocent until the contrary is proved; and this presumption, you will bear in mind, remains with the defendant as her right, until, upon all the testimony in the case, that presumption is overcome and her guilt is proved by testimony which satisfies you, beyond a reasonable doubt that she is so guilty. I will define further on in my charge what is meant by reasonable doubt. In the effort by Congress to bring about an honest administration of the laws regulating national banks, two acts, which now concern us, have been passed; and upon them, and what is known as the "conspiracy statute," this indictment has been based. These acts are section 5208, the act of July 12, 1882, and section 5440.

Section 5208 is as follows: "It shall be unlawful for any officer, clerk or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check," etc. [U. S. Comp. St. 1901, p. 3497.]

Act July 12, 1882, c. 290, § 13, 22 Stat. 166 [U. S. Comp. St. 1901, p. 3497], is as follows: "That any officer, clerk or agent of any national-banking association who shall willfully violate the provisions of an act entitled 'An act in reference to certifying checks by national banks,' approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof," etc.

Section 5440 is as follows: "If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty," etc. [U. S. Comp. St. 1901, p. 3676.]

The indictment in this case charges the defendant, in 16 counts, with violating section 5440, which I will call the "conspiracy statute," and charges this violation in two different forms—that is to say, 8 different checks are the subjects of this indictment, and as to each check conspiracy is charged against the defendant, first, in unlawfully conspiring with another to certify a check, by an officer of the bank, when an amount of money equal to the amount specified in the check was not on deposit to the credit of the person drawing the check; and, second, in unlawfully conspiring with another to certify a check, by an officer of the bank, before the amount of the check had been regularly entered upon the books of the bank to the credit of the drawer of the check. Counts numbered 1, 3, 5, 7, 9, 11, 13, and 15 make this charge respecting eight different checks that they were certified when funds were not on deposit; and the remaining counts 2, 4, 6, 8, 10, 12, 14, and 16 based upon the charge that the amount of the check had not been regularly entered upon the books of the bank to the credit of the maker. We thus see that the odd-numbered counts relate to the deposit of funds to the credit of the drawer, and the even-numbered counts relate to the regular entry, on the books of the bank, of the amounts of such deposits, to the credit of the drawer. To put it otherwise, the odd-numbered counts charge a conspiracy to commit the crime defined by the law which forbids the certification of a check unless the person drawing the check has on deposit with the bank, at the time the check is certified, an amount of money equal to the amount of the check; and the even-numbered counts charge a conspiracy to commit the crime defined in the act of July 12, 1882, which forbids the certification of a check before the amount thereof shall have been regularly entered to the credit of the drawer of the check.

I trust, gentlemen of the jury, that you will not handicap your free consid-

eration of this case by any apprehension that it will be difficult for you to understand it, or to apply the facts as you find them to the law as I shall give it to you. I think that you understand the case, and, if you do not, I am sure that it will be clear to you when such additional light as is needed is given to you by this charge. You must remember that you are to look at the facts, and apply the law to them as given you by the court, exactly as you would look at other important concerns affecting yourselves. You should approach the consideration of the whole case with a confidence that you will arrive at a conclusion satisfactory to your judgment and your conscience, precisely as you are satisfied that you will arrive at a like conclusion in any important matter of your own, after you have given to it full and careful consideration.

There are no distinctions to be drawn in this case so fine that the ordinary mind cannot apprehend them, nor are there any mysterious processes, either of reasoning or of legal procedure, which you need fear will cloud your inquiry, or interfere with your arriving at a perfectly intelligent conclusion. The questions here are practical questions for you to decide, and all that is needed is that you give your very best attention to their consideration. Let me impress upon you, at the outset, that the defendant in this case is presumed to be innocent until her guilt is established by proof which satisfies you, beyond a reasonable doubt, that she is guilty. This presumption abides with her all through the case, until it is, as I have said, removed by the proof; and every material element necessary to make up the crime of conspiracy in this case must be established by like proof, satisfying you, beyond a reasonable doubt, of its existence.

A reasonable doubt is not mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after full consideration of all the evidence, leaves the minds of the jurors in such a condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge. Every person is presumed to be innocent until he is proved guilty. If, upon such proof, there is reasonable doubt remaining, the defendant is entitled to the benefit of it by acquittal. It is not sufficient to establish a probability, though a strong one, that the fact charged is more likely to be true than otherwise, but the evidence must establish the truth of the fact to a reasonable and moral certainty—a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

I am asked by the defendant to charge, and I do charge, that, in order to find the defendant guilty, "the evidence must be such as to exclude every single reasonable hypothesis, except that of the guilt of the defendant. In other words, all of the facts proved must be consistent with, and point to, the guilt of the defendant, not only, but the facts must be inconsistent with her innocence." And this, also, I charge at the request of the defendant. It matters not how clearly the circumstances point to guilt, still, if they are reasonably explainable on a theory which excludes guilt, then it cannot be said that the facts in the case are sufficient to satisfy the jury, beyond a reasonable doubt, of the guilt of the defendant, and in that event she should be acquitted. I am asked by the defendant to charge the following: "If, after consideration of the whole case, any one of the jury should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror not to vote for a verdict of guilty." I give you that charge, with this additional injunction; that if, after a consideration of the whole case, fully, carefully, and honestly made after comparison with his fellow jurors with a view of arriving at an honest conclusion, still one of the jury should entertain a reasonable doubt of the guilt of the defendant, it would then be the duty of such juror not to vote for a verdict of guilty.

I will proceed now to define to you the several acts which the law forbids, and of which the government claims the defendant was guilty.

The usual business carried on by banks is to receive moneys on deposit from persons who desire a safe place to keep their funds, and a convenient place from which they can, when needed, be withdrawn, and to loan money to persons who desire to borrow it. According to the usual custom of such banks,

of which the Citizens' National Bank of Oberlin was a type, the money deposited by a customer of the bank would be entered to his credit, and when the depositor desired to withdraw from the bank any or all of the funds so deposited and carried to his credit, he would draw an order on the bank for the amount of money desired. This order is commonly called a check.

In the transaction of the business of a bank, and in the transaction of the business of a depositor, it sometimes becomes desirable that the depositor, in addition to drawing this order or check against the fund to his credit in the bank, desires that the person to whom the check may be delivered shall be authoritatively advised and informed by the bank that the depositor has to his credit in the bank an amount of money equal to the amount of the check which he thus draws. This act of authoritative information that the maker of the check has such funds to his credit in the bank is, according to the custom of banks, usually evidenced by an indorsement on the face of the check, signed by some competent officer of the bank, declaring that the check is good. This proceeding is called the certification, or certifying, of the check, and operates to add to the liability of the maker of the check for its amount the liability of the bank for a like amount, for it is a contractual assurance by the bank that funds to that amount are on deposit in the bank to the credit of the maker, and that the bank will hold such funds, equalling the amount of the check, to be used solely for the satisfaction and payment of the check. If, therefore, an officer of the bank thus certifies a check drawn by one of its customers, or by one who is not a depositor in the bank, when the person who draws the check does not have to his credit in the bank the amount for which the check was drawn, an obligation or liability is created against the bank which may injuriously affect the interests of the other depositors and the stockholders of the bank. Thus we see the reason of the statute which declares unlawful the certification of a check when the person drawing the check does not have on deposit with the bank, at the time the check is so certified, an amount of money equal to the amount specified in the bank. But legislation on this subject has not stopped with the prohibition against certifying checks when there is not a sufficient amount to meet the check on deposit to the credit of the drawer thereof. It has gone further, and declared to be unlawful the certification of a check before the amount thereof has been regularly entered to the credit of the maker of the check. The purpose of this prohibition is to compel full compliance with the requirements of safe banking methods, and to make it necessary, in order that the law may not be violated, that a check drawn against an account be not certified until, in the usual and regular way, the account of the drawer of the check has been credited with an amount equal, at least, to the amount of the check so drawn.

Now, these two offenses, in the nature of things, can be committed only by the officers of the bank. No certification of a check can be made, except by some official of the bank whose signature, attached to the certificate, implies to the holder of the check that the bank itself is back of the certificate; and it follows, from what I have said, that the defendant in this case could not be guilty of the penal offense of certifying a check under either of the two conditions which in this indictment make such certification of a check unlawful. But she is indicted, as I have before stated to you, under section 5440, which provides that if two or more persons conspire to commit an offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all of the parties to such conspiracy shall be liable. I say to you that although the defendant could not, as I have heretofore indicated, be indicted or successfully prosecuted for unlawfully certifying a check, she can be indicted and successfully prosecuted, if the facts warrant, for a violation of section 5440, in conspiring with a person who may, under the law, be capable of committing the offense of unlawfully certifying a check. But I say to you, in this connection, that the defendant could not be found guilty under any count in this indictment, except upon proof of such a state of facts as would justify you in finding guilty, on such count, the person with whom she is charged with conspiring, if such person were also made a party defendant in this indictment.

It becomes important now for me to define a conspiracy, as that word must

be defined under section 5440. A conspiracy, in criminal law, as applied to the charge in this case, is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose. To constitute a conspiracy, it is not necessary that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, in words or in writing, state what the unlawful scheme is to be, and the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, passively or tacitly, come to a mutual understanding to accomplish the combination and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by a common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, such persons become conspirators. In this case it is enough if, as the result of separate negotiations, at the same or different times and places, an arrangement was made such as is set out in any one of the counts of the indictment, and some act in furtherance of such arrangement, and specified in that count, was done by one of the parties to such arrangement. If, therefore, you find from the evidence such facts as warrant the inference that such arrangement as I have defined was made by the defendant with either of the parties with whom she is charged with conspiring, and that the act charged as being done in furtherance of such arrangement was performed by either one of the parties so charged with conspiring, it will be your duty to return a verdict of guilty against the defendant as to such count or counts of the indictment in respect to which you find such facts, if you should so find them.

I am requested by the government to charge, and I do charge, as follows: The jury is instructed that a conspiracy can seldom be proved by direct testimony. Persons combining for the execution of a crime do not ordinarily expose themselves to public observation, and the fact of combination can, therefore, as a general rule, be established only by proof of the acts of the several parties in such combination, the relation of these acts to each other, and their tendency, by united effect, to produce the common result. In other words, where the jury finds that the acts of the several parties charged with conspiracy are the co-ordinates of each other, and are for the consummation of the criminal purpose charged in the indictment as the object of the conspiracy, they are at liberty to find that the various parties performing these several and respective acts were engaged in a conspiracy to commit the offense, although there may be no direct evidence whatever before the jury to show that such parties ever entered into any agreement to commit such offense.

And I am asked by the defendant to charge on this subject, and do charge, that it is incumbent on the government to prove the conspiracy which it claims to have existed between the defendant and the person or persons named in the respective counts of the indictment beyond a reasonable doubt, and if, on careful consideration of all of the competent evidence which has been received in this case, you have any such doubt, it is your duty to resolve such doubt in favor of the defendant.

I am asked by the government to charge, and I do charge, in this connection, that the jury is instructed, on the question of intent on the part of the defendant, that the law presumes that every person intends the natural and ordinary consequences of his acts. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent. Ordinarily the intent with which a man does a criminal act is not proclaimed by him, and ordinarily there is no direct evidence from which the jury may be satisfied, from declarations of the criminal himself as to what he intended when he did a certain act. And this question of intent, like all other questions of fact, is solely for the jury to determine from the evidence in the case. Generally, upon this subject of conspiracy, I instruct you that it is competent for you to consider all of the facts developed in the case for the purpose of answering the question as to whether or not a conspiracy was in fact entered into between the parties named in the indictment.

I am asked by the defendant to charge, and I do charge, that the defendant is to be tried on the indictment in this case, and on that alone. It would make

no difference if she had committed a multitude of other crimes. If she had not committed the crime of conspiracy, as set forth in this indictment, it will be your duty to acquit her in this case.

The claim is made by counsel for the defendant that there is no proof that the defendant had knowledge that the act of certifying the check, if done as claimed in the indictment, was in violation of the law. On this point, I say to you, gentlemen, that a conspiracy cannot exist without a guilty intent being then present in the minds of the conspirators; but this does not mean that the parties must know that they are violating the statutes of the United States. The government is not required to prove, in order to sustain a verdict of guilty, that the parties knew that some statute forbade the acts they were performing. If these acts of certifying checks, or any of them, as charged in the indictment, were in fact violations of the law, the defendant is to be held guilty if she, as charged in the indictment, conspired with Beckwith or Spear in bringing about their certification; and the question of her knowledge or her ignorance of such acts being contrary to law is not a fact which you have a right to consider. The only question for you to pass upon is whether the defendant violated the law; not whether she had any knowledge that she was violating the law.

Applying the definition of conspiracy to this case, I say to you that, in order to convict the defendant on any of the counts of the indictment, it must be shown by the evidence, beyond a reasonable doubt, that she conspired with either Beckwith or Spear to procure the certification of her check by one or the other at a time when both he and she knew that she had not funds to her credit in the Citizens' National Bank of Oberlin, at least equal to the amount of the check so certified; and, of course, if Beckwith and the defendant did so conspire, and the check described in the first count was so certified by him, and if Spear and the defendant did so conspire and the checks described in the third, fifth, seventh, ninth, eleventh, and fifteenth counts were so certified by Spear, then the defendant would be guilty on all seven of the counts just referred to; that is, the seven odd-numbered counts now before you for consideration. Now, in order for the defendant and Beckwith or the defendant and Spear to be guilty of such conspiracy, two things must have occurred: First, they must have agreed that Beckwith or Spear should do the unlawful thing charged in the indictment, to wit, certify her check when she did not have on deposit to her credit in the bank funds equal to the amount of the check so to be certified; and, second, one of them must have done some act in furtherance of the conspiracy—in this case the act charged as having been so done in furtherance of the conspiracy was the certification of the check. In order to enter into such unlawful conspiracy, it is not necessary that you should find that the parties, in set words or in any formal way, made a plan which either or both recognized was in violation of the law. It will be enough if you find that, by mutual concert of purpose, the plan came into existence, by which it was understood by both of them that the act of certifying the check was to be done when the defendant had not funds on deposit equal to the amount of the check. I have eliminated, you will recall, the thirteenth count of the indictment—that was the check which was dated in February, and marked at the bottom "payable March 1st," so that there are seven of the odd-numbered counts only, referred to by me in this charge.

Two facts are admitted, or at least they are not denied: First, that the seven checks were drawn by the defendant on the Citizens' National Bank of Oberlin; and, second, that they were certified, one by Beckwith and six by Spear. So, that, if the conspiracies charged in the indictment were entered into, the act which completed the crime was committed, if that act itself was a crime; and, if it was a crime committed by Beckwith or Spear, then the defendant was guilty of conspiracy as charged in the indictment, although she, not being an officer of the bank, could not herself commit the crime of unlawfully certifying a check. This question as to whether or not there was such a conspiracy as charged in the indictment, and as defined by me, you are to answer under all the evidence in the case. You should consider the relations between the parties, their acquaintance, whether intimate or otherwise, the opportunities for such acquaintance, and the reasons, if any there were, for

the manner in which they transacted their business together. If there was any secrecy about their transactions, you should consider whether that secrecy was such as persons engaged in large business transactions are likely to maintain, or naturally and rightfully adopt. Persons have a right to keep their business affairs to themselves. Whether the conduct of the parties to these transactions was such as is naturally referrable to such rightful secrecy is for you to say.

The government claims that at the several times these several checks, respectively, were certified, the defendant did not have to her credit in the bank funds equal to the amount of the checks so certified. I say to you that, so far as this particular branch of the case is concerned, if the defendant, at the time when any of these checks were certified, had a deposit, or had an actual credit, in the bank in an amount equal to the check, whether regularly entered as a deposit to the credit of her account or not, she would not be guilty as to the count of the indictment which was predicated on that check. Now, if you are satisfied that the conspiracy was formed, as charged in the indictment or in any of the counts thereof, and in answering this question you are, as I have said, to consider all of the evidence in the case bearing on it, you will further say whether or not any or all of these checks were unlawfully certified by Beckwith or Spear. The government claims that it has proved that, at the time when the checks were certified, there were not funds sufficient in the bank to the credit of the defendant to meet them. Whether this claim is or is not sustained is for you to say.

The defendant insists that the proof does not support the claim of the government in this respect. You have heard the evidence, the books of the bank have been presented before you, the witnesses for the government have testified as to what they did and what they did not find in them respecting the defendant's credits and deposits at the times when the checks were drawn, the defendant has had access to these books, and her accountant has examined them and has testified concerning them. It is for you to say whether the books do or do not show that she had such credits. It is fair to presume, under all the circumstances disclosed to you, that both sides have presented to you all that the books contain favoring their respective contentions, and it is for you to say what the facts and just inferences are. In respect to proof of the claim of the government that the defendant, at certain times, had not sufficient funds to meet her several checks, the evidence must necessarily be of a negative character. That is, the witnesses cannot point to some particular entry to support their statements. They can only declare how careful was their search, and that they did not find evidence of such funds being, at the times in question, in the bank to the credit of the defendant.

Evidence was introduced showing that the defendant executed a number of notes, aggregating $104,000, to the Citizens' National Bank of Oberlin, all dated August 24, 1903, and payable on demand, and that of these notes, two, aggregating $15,000, were first entered on the journal of the bank under date of November 3, 1903, and were given the proper serial numbers as of that date. The evidence does not disclose that the residue of the notes were ever entered on the books of the bank, unless they were so entered January 29, 1904, the date of the cancellation stamp on the face of the notes. Nor did these notes, other than the two for $15,000, have any serial or discount number such as appears on the notes for $15,000. The evidence also shows that on August 24, 1903, the bank issued to the defendant two New York drafts, aggregating $80,000, and a certified check for $12,500, which is the certified check upon which the third and fourth counts of the indictment are based, and that no entry of these drafts for $80,000 was made on the books of the bank until September 29th. These are all facts proper for you to consider in determining what your duty is in this case, and determining whether or not Mrs. Chadwick had credit to her account in the bank on August 24, 1903; and it is proper for you to consider them, in connection with all the other circumstances in the case, for the purpose of throwing light on the question as to whether or not a conspiracy was entered into between Mrs. Chadwick and Beckwith and Spear.

The first and second counts in the indictment relate to the check certified

by Beckwith; and the evidence concerning that check differs somewhat, at least in the details of the certification, from that touching the other checks referred to in the indictment. Doubtless you remember the substance of all of it. It is for you to say, considering that evidence and construing it in the light of this charge, whether or not the defendant and Beckwith formed the intention, and by mutual concert arranged, to have that check certified, knowing that there were not, at that time, funds in the bank to her credit in an amount equal to the amount of the check. If they did so, then the defendant was guilty of the charge made in the first count. Two papers, purporting on their face to be letters from the defendant, one to Spear and Beckwith and one to Spear, have been offered in evidence; a witness having testified that they are in the defendant's handwriting. The direct evidence is silent as to whether they were ever received by Beckwith or Spear; but, if you find that they are in the handwriting of the defendant, you will give to them such interpretation and force as, under all the surrounding circumstances, you think them fairly entitled to. They may, if in your judgment they are entitled to such an interpretation, furnish some information as to the kind of transactions carried on between the defendant and Beckwith and Spear, and whether the relation which she and they sustained to the bank were such as to tend to support the contention of the government that the defendant and Spear and Beckwith were engaged in a conspiracy to violate the law respecting the certification of checks. I have thus far, in my reference to the charges and the evidence, referred chiefly to the odd-numbered counts. The even-numbered counts relate, as I have already said, to the certification of checks when the amount to the credit of the drawer of the check was not regularly entered to the credit of the person making the check. This, you will note, is a very different charge from the other, and may be made, although as a matter of fact the drawer of the check has to his credit funds sufficient to meet the check. It may well be doubted whether, in any but very exceptional cases, the drawer of the check, if he be not an officer of the bank, could know whether the books of the bank were properly kept, however full his knowledge might be that he was entitled to credit in the bank. I am unable to discern any testimony in this case tending to show that the defendant conspired with either Beckwith or Spear to have her checks certified when the amount to her credit was not regularly entered on the books of the bank. It is true that if she had no funds to her credit, and, in that state of her account, she conspired with Beckwith or Spear to have her checks certified, she must have known that no regular entry could be made on the books of the bank of that which had no existence at all. Yet I do not think that the statute was meant to meet such a case. You will therefore disregard the even-numbered counts; or, rather, as I have already, during the course of the trial, instructed you respecting counts 13 and 14, you will return a verdict of not guilty as to counts 2, 4, 6, 8, 10, 12, 13, 14, and 16. You will consider in your juryroom counts 1, 3, 5, 7, 9, 11, and 15, and determine whether, under any or all of them, the defendant is guilty; and that you will not do, unless you are satisfied of her guilt beyond a reasonable doubt.

Gentlemen of the jury, it is not for you to consider the consequences of your verdict, whether it be guilty or otherwise. You are here solely to try the case which has been presented to you from the witness stand, under the direction of the court. It is proper for counsel to present to you their reasons, on the one side or the other, advising and urging the return by you of a certain verdict. This is a wise and proper method of instructing the jury and aiding it in arriving at a conclusion; but you will not consider statements of counsel as facts bearing upon the case, except in so far as the testimony given from the witness stand supports such statements. Reference has been made, especially by counsel for the defendant, to what is called popular clamor or public demand. The court has no fear that you gentlemen will be moved by any consideration, except a determination to do justice between the government on the one side and the defendant on the other, according to the law and the evidence and according to them alone. The court does not fear that public clamor, either one way or the other, will move you to your conclusion. Yet I ought to say to you that it is well, since the subject has been adverted to, that you should guard yourselves against the danger of being moved to bring in a

certain verdict because popular clamor or public sentiment may be thought to be favoring it, or, on the other hand, because of such public clamor for one verdict, to undertake to bring in another verdict. You are not to be influenced by such a thing either way. The defendant is entitled to the best consideration you can give to the testimony in the case. You must appreciate, as intelligent and conscientious men, that the only commendation worth having is that which comes when a satisfied conscience and an intelligent self-respect proclaim that you have done right.

You may find the defendant guilty as to each of the seven counts in the indictment which I have submitted to you, if, under the proof, you are satisfied, beyond a reasonable doubt, that she is so guilty; or you may convict her as to one or some of the counts, according as the testimony may satisfy you, beyond a reasonable doubt; or, if the evidence does not satisfy you, beyond a reasonable doubt, that she is guilty of any one of the charges set out in the indictment, then you should return a verdict of not guilty. So you will observe, gentlemen, that your verdict may be one of three forms: either guilty as she stands charged in the first, third, fifth, seventh, ninth, eleventh, and fifteenth counts of the indictment; or guilty as she stands charged in one or more of those seven counts of the indictment, naming them, and not guilty as to the remaining counts; or not guilty.

Francis J. Wing, S. Q. Kerruish, and Jay P. Dawley, for plaintiff in error.

John J. Sullivan, U. S. Atty., and Thos. H. Garry, Asst. U. S. Atty.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The plaintiff in error, Mrs. Cassie L. Chadwick, was indicted under section 5400, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3656], for conspiring with other persons to violate section 5208, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3497]. Excluding the counts withdrawn from the consideration of the jury, she was indicted and convicted upon seven separate counts. One of these charged her with conspiring with C. T. Beckwith, president of the Citizens' National Bank of Oberlin, Ohio, a national banking association, organized under the laws of the United States and then carrying on a banking business at Oberlin, Ohio, to commit an offense against the United States, to wit, to violate section 5208 of the Revised Statutes of the United States, by unlawfully and willfully certifying a certain check, drawn upon the said bank by the said Cassie L. Chadwick for the sum of $15,000 at a time when the said Cassie L. Chadwick would not have on deposit with the said bank an amount of money equal to the amount so to be specified in such check. The other counts charged separate conspiracies with A. T. Spear, cashier of the same bank, to violate the same section of the Revised Statutes by the unlawful certification of six other checks to be drawn against the same bank and certified at a time when the drawer had no funds on deposit. The judgment of the court was upon each of the seven counts, and that the term of imprisonment under each should be successive and cumulative, the punishment under one count to begin when that under the preceeding count should end. Many errors have been assigned. These will be taken up in groups rather than singly, and in such order as shall seem most convenient.

1. A motion to quash the indictment upon the ground of the admission before the grand jury of a statement made by C. T. Beckwith,

one of the persons with whom the plaintiff is charged to have conspired, the statement, as recited in the motion, consisting in a narration or confession made by Beckwith, in absence of Mrs. Chadwick and after her arrest, upon the charges embraced in the indictment and not in furtherance of any alleged conspiracy. The motion itself was reduced to writing, and recites, in a general way, the nature of the alleged illegal evidence so alleged to have been submitted to the grand jury as evidence for their consideration upon the indictment sought against Mrs. Chadwick, and is sworn to by her. This motion and affidavit is insufficient upon its face. It does not aver that the grand jury had before it no other evidence than that alleged to have been incompetent; but only that the grand jury heard and received the alleged hearsay declarations of C. T. Beckwith. We are aware of no rule of law which would nullify the action of a grand jury merely because as a part of the case they received improper or incompetent evidence. We are not prepared to say that an indictment found wholly upon illegal evidence would not be as invalid as one based upon no evidence at all, the matter not being one which may be found exclusively upon the knowledge of the grand jurors. 10 Ency. Pl. & Pr. 395; People v. Brickner (O. & T.) 15 N. Y. Supp. 528; U. S. v. Coolidge, 2 Gall. 364, Fed. Cas. No. 14,858. But an inquiry into the weight of the evidence upon which a grand jury acted is quite irrelevant and incompatible with the secrecy which should protect the ordinary conduct of such an inquisitorial body. The mere fact that illegal evidence was heard, if there was any substantial competent evidence upon which that body might lawfully base their indictment and a motion and affidavit based upon an allegation that the grand jury received and considered an alleged statement, narrative, or confession which was in the nature of hearsay evidence, is not enough to justify the setting aside of an indictment in the absence of averment or evidence that the objectionable evidence was the only evidence material to the subject. Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460; Bloomer v. State, 3 Sneed, 69; State v. Tucker, 20 Iowa, 508; State v. Logan, 1 Nev. 509; People v. Lauder, 82 Mich. 115, 46 N. W. 956; Jones v. State, 81 Ala. 79, 1 South, 32; State v. Bunger, 14 La. Ann. 465.

But another and equally fatal objection is that in general a motion to quash is addressed to the sound discretion of the trial judge, and is not the subject of exception. U. S. v. Rosenberg, 7 Wall, 580, 19 L. Ed. 263; Logan v. U. S., 144 U. S. 268, 282, 12 Sup. Ct. 617, 36 L. Ed. 429. This motion, it appears from a journal entry, came on to be heard upon affidavits, and upon a consideration thereof this entry recites that the court found and decided that the alleged confession of C. T. Beckwith was not used by the grand jury while considering the indictment preferred against Mrs. Chadwick, nor treated or received as evidence upon which they might act, but was read to the members of the jury after the finding of the indictment by one of their number as a matter of curiosity. The evidence thus submitted to the court upon this motion has not been made a part of the bill of exceptions, and we must accept the ruling of the court as not reviewable.

2. In many ways it was insisted that the indictment charged no

offense because it was said Mrs. Chadwick was not an agent or officer of the Oberlin bank, and was therefore legally incapable of certifying the check of a drawer when there was no money on deposit to meet such check. Upon this assumption it is insisted that she could not be legally punished for conspiring with another who was capable of doing the act which she could not do. Subject to the limitation that the object of the conspiracy must be to violate some law of the United States, and that some overt act must be done "by one or more of such parties" to carry out the agreement, we can discover no distinction between a conspiracy indictable at the common law and one cognizable under section 5400, Rev. St. There are certain offenses in which a concert of action between two persons is logically necessary to the completion of the crime; that is, crime which cannot take place without concert. Among such kind of offenses Mr. Wharton mentions adultery, bigamy, incest, and dueling. "Therefore," says Mr. Wharton, "when to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character as that it is aggravated by a plurality of agents, cannot be maintained. * * * We have," he says, "the well-known distinction between concursus necessarius and concursus facultativus—in the latter of which the accession of a second agent to the offense is an element added to its conception; in the former of which the participation of two agents is essential to its conception; and from this it follows that conspiracy, the gist of which is combination, added to crime, does not lie for concursus necessarius." 2 Wharton Crim. Law, § 1339.

The case of United States v. Deitrich (C. C.) 126 Fed. 664, has been much cited and relied upon by the counsel for Mrs. Chadwick.

The case affords an illustration of the proper application of the principle referred to by Mr. Wharton, and is broadly distinguishable from that now under consideration. Senator Deitrich, of Nebraska, and Jacob Fisher, were indicted under section 5400 for conspiring to violate section 1781, Rev. St. by the said Dietrich, being a senator in the Congress, agreeing, corruptly and unlawfully, to receive a bribe for aiding and procuring the appointment of the said Fisher as Postmaster, and the said Jacob Fisher by corruptly and unlawfully agreeing to give to Dietrich a bribe for procuring and aiding to procure his appointment to said office of Postmaster. The concurrent acts of two persons were essential to the offense which it was the object of the conspiracy to commit. Dietrich could not agree to receive a bribe unless some other should agree to give him one. Under section 1781, Rev. St. [U. S. Comp. St. 1901, p. 1212], the act of "agreeing" to receive such a bribe was a substantive offense, and the act of agreeing to give such a bribe another. Concert of action was, therefore, essential to the violation of section 1781, charged as the purpose of the conspiracy.

To violate section 5208, a plurality of guilty agents is not necessary. A check may be certified when the drawer has no funds upon deposit, and the officer certifying it be guilty of violating the law which forbids that act without the guilty complicity of the drawer or any other

person. In short, the very fact that Mrs. Chadwick could not be guilty of any violation of section 5208, as contended by her counsel, takes the case outside of the rule which forbids an indictment for conspiracy where a plurality of agents is logically necessary to complete the crime which it was the object of the conspiracy to commit. It is sufficient if any one of the parties to a conspiracy is legally capable of committing the offense, although the other parties may not have been. Scott v. U. S., 130 Fed. 429, 64 C. C. A. 631; 2 Wharton, Cr. Law, §§ 1340a and 1388; 1 Bishop, Cr. Law, 627–629, and § 432; U. S. v. Bayer, 4 Dill. 407, Fed. Cas. No. 14,547; State v. Sprague, 4 R. I. 257; Boggus v. State, 34 Ga. 275. In Scott v. U. S. cited above, the conspiracy was to violate section 5209 [U. S. Comp. St. 1901, p. 3497] by causing certain false entries to be made upon the books of the bank. Only one of the conspirators was an officer of the bank. The overt act charged was the making of the false entries by the hand of the defendant, who was not an agent, servant, employé, or officer of the bank. But it was also averred that both defendants participated in the act and that the entries were in law made by the bank officer through the hand of another—his co-conspirator. This court held the indictment good. The errors assigned to the present indictment based upon the objection we have been considering are not well taken.

3. Where two or more criminal acts are connected together, or are transactions of the same class of crime or offense, they may be joined in one indictment in separate counts, instead of having several indictments. Rev. St. § 1024 [U. S. Comp. St. 1901, p. 720]. When this is done, the court, if it sees that the defense of the accused may be seriously embarrassed, may require the government to elect upon which of the counts it will proceed. But, even when there is a joinder of felonies, the court is not under any absolute duty to require an election upon motion of the defendant. This question of election must depend upon the circumstances of the particular case, and is one requiring the exercise of a considerable degree of discretion by the trial judge. If it does not appear that any substantial right of the defendant may be prejudiced by the submission to the same jury of more than one distinct accusation according to the orderly methods of a court of justice, it should not compel an election and thus cause repeated trials of offenses of the same class. Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208. There was no error in the joinder of the several offenses charged in this indictment. They were crimes of the same class, and the evidence relating to each substantially the same.

We do not see from anything which appears in this case that the plaintiff in error was prejudiced or embarrassed by the trial of the several counts before the same jury. There was no error in denying the motion to elect.

4. Mrs. Chadwick's letters. Two letters were offered in evidence by the district attorney upon evidence that they were in the handwriting of Mrs. Chadwick. They were received over the objection of the defendant. Subsequently a motion to take them from the jury was denied. These letters were as follows:

"Cleveland, October 2, 1903.

"My Dear Mr. Spear and Beckwith: I must again thank you and Mr. B. for your great kindness to—I gave the check to Mr. Fay, and he said he would go and see his people to-morrow morning, and if they would extend the paper he would give me my note. I just said, a deal that would go through your bank in connection with the college. The check was given in that connection. So you need only to listen to him. I don't think he will ask any questions. I don't want him to be in possession of any facts, rather I don't want Mr. Wurst to be. I think best not to. It will only be necessary for you to say that you will renew the paper. He said he was going to take the check up and show it to you, and ask you to renew their paper on the strength of the check not being payable before November 1st. Hoping this will pass of all safe, and with many thanks to you both.

"Very gratefully, C. L. Chadwick."

"P. S. He is going first thing in the a. m. He remarked that you would be surprised to see the check in his hands, so you better be surprised; if you do not say it, look it."

"My Dear Mr. Spear: Could we arrange this matter of Mr. W. and F. in this way: They don't even know that I have ever met you or done any business with you. I think I might say I was going to make a loan through your bank in connection with the college. Now, this he would not repeat because he wants to act for me in every way he can in the future. I would not tell him anything that would ever show that we had ever done any business. I would ask you to certify my check dated October 10th, and this would get the matter out of their hands. I could then get the funds on the goods in the East to meet the check and you would not be anything out, so if you will draw the check for $15,000 and certify it on your checks I can sign it, and he will be none the wiser. Now I will pay you and Mr. B. well for this favor, and am sure it will be safe, and you need not let them know anything about our matters. There will be nothing for your folks to say, only that the check will be good on that date. And if they ask you for extension for ten days, you can agree to it, and do hope you can do this. Please do not be afraid to do this, because I will be most careful over this. I think by advice of my attorney I am myself going to be able to do something which will be of great interest to us all. He will prepare the papers to-day. I was sick and did not get it arranged yesterday. I send you also my note dated to cover certified check for the 10th, and a small commission, for your kindness. Please phone me if you can do this, it is important. If you do this I save, what I save I give you.

"Very truly, C. L. C.

"Postscript. I mean that I will tell them that I had a deed with the college that will pass through your bank, which is true for I have had, and if they help me further then it will be through you.

"Yours, B."

There was no direct evidence that these letters were ever sent to or received by either Beckwith or Spear. Beckwith was president, and Spear cashier, of the Citizens' National Bank at Oberlin, Ohio, and are the same persons with whom Mrs. Chadwick is charged to have conspired to violate section 5208, Rev. St., by certifying her checks drawn upon that bank at a time when she should have no money upon deposit to meet same. It is now very earnestly insisted that, in the absence of evidence of transmission or delivery, such documents are not competent as either confessions or admissions, not being declarations made to another. Soliloquy, say counsel, cannot prejudice the speaker, because there is no vilification of one's self when not said or written to another. But a self-charging admission does not lose all of its evidential force because it is not transmitted or delivered to another. Books of account afford evidence against all who

are instrumental in their being kept or have right of access to them, although intended only for the inspection of those who make them. It is true that in respect of such books of account the case is somewhat different from that presented by an admission in a private diary or an unsent letter or a memorandum intended only for the personal use of the maker. The custom and usage of merchants has made the keeping of correct books of account a matter of business necessity, and the presumption of correctness of entries perhaps extends beyond those which are self-charging. The bottom principle is, however, the same in each instance, namely, that one will not write or say that which is contrary to one's interest, unless it be true. To put it in another form, that which one admits to be true, whether in the privacy of his private journal or by a memorandum intended to aid his own memory only or in a letter which he keeps, instead of transmitting to the one addressed, may reasonably be presumed to be true until explained or rebutted. That this kind of an admission would not be conclusive, not being intended to influence the conduct of another, but subject to explanation, does not affect its admissibility as evidence of the truth of any admissions made by the author of the document or utterance.

In Toner v. Taggart, 5 Bin. (Pa.) 490, a memorandum in handwriting of deceased and found upon his person after death was held admissible as an admission of the indebtedness of the deceased to the plaintiff. In Medway v. U. S., 6 C. Cl. (U. S.) 421, the issue was as to the loyalty of Mrs. Medway. A letter written by her and addressed to Mr. Davis, president of the Southern Confederacy, but never sent, was held admissible. The letter, never having been transmitted, was held not to be an overt act of aid and comfort to the cause of the Confederacy. But it contained an admission that the writer had theretofore written and transmitted a similar letter tendering aid and comfort to Mr. Davis in his official character, and this admission was regarded as an admission that Mrs. Medway had theretofore, by the writing and transmission of such letter, aided, comforted, and abetted the Rebellion. In People v. Robinson, 19 Cal. 40, the talk of a person in his sleep was held very properly to be inadmissible as evidence against him upon the ground of unconsciousness. But in State v. Morgan, 35 W. Va. 260, 266, 13 S. E. 385, the ejaculations or soliloquy of a woman charged with murder, made in the nighttime while upon her couch, were held competent as admissions. The question as to their value was left to the jury.

Upon this subject Brannon, J., said:

"It is with them to say whether it was made in sleep and was therefore worthless, or whether, though in sleep, it was but the divulgence of truth, springing from guilt which rested heavy upon the soul and broke forth through voice and lips, the half conscious man revealing secrets indelibly impressed on the memory, which if fully awake, he would fain have suppressed. It was with the jury to say whether she was fully awake, and forgot herself, and in this soliloquy spoke out the truth. The operation of the human mind is an enigma, and its expressions in the unconsciousness of sleep are frequently vagaries and fictions, but sometimes born of reality."

If from other evidence the jury should be satisfied that there was a conspiracy to which either Beckwith or Spear were parties to bring about the violation of section 5208, Rev. St., by the unlawful certification of Mrs. Chadwick's checks, these letters would tend to show that she was a party to such conspiracy. A general objection to their competency or evidence or a general motion to withdraw them from the jury would be manifestly bad. The extent to which they were competent will now be considered under an exception taken to the charge of the court relating to the matter. Upon the evidential character of these letters the court said in its charge:

"Two papers, purporting to their face to be letters from the defendant, one to Spear and Beckwith, and one to Spear, have been offered in evidence; a witness having testified that they are in the defendant's handwriting. The direct evidence is silent as to whether they were ever received by Beckwith or Spear; but, if you find that they are in the handwriting of the defendant, you will give to them such interpretation and force, as under all the surrounding circumstances, you think them fairly entitled to. They may, if in your judgment they are entitled to such an interpretation, furnish some information as to the kinds of transactions carried on between the defendant and Beckwith and Spear, and whether the relation which she and they sustained to the bank were such as to tend to support the contention of the government that the defendant and Spear and Beckwith were engaged in a conspiracy to violate the law respecting the certification of checks."

This was duly excepted to, but no request for any charge in respect of these letters was made, except a request that the letters should be withdrawn from the jury as incompetent for any purpose. The undated letter addressed to Mr. Spear was inferably written before the one dated October 2, 1903. That it refers to a check of October 10th, which she wishes certified, is not significant that its date was after October 10th, for her reference is most likely to a check dated ahead or to be dated ahead. A check for $15,000, dated November 1, 1903, payable to order of Henry Wurst and indorsed to W. L. Fay, is in evidence. This check was certified October 2, 1903, and is stamped paid November 1, 1903. This is evidently one of the checks referred to in both letters; that of October 2d acknowledging receipt of the certified check and showing that she had given it to Mr. Fay. There was also in evidence other checks bearing dates prior to October 2d, and some of later date which were also certified by either Beckwith or Spear. There was also evidence from which the jury might infer that neither at the time of the writing of these letters or at the time of the certification of the check dated November 1st, and certified October 2d, nor at the time of the certification of any of the other checks in evidence, the subject of one or other of the several counts upon which the defendant was convicted, did she have upon deposit in the Oberlin bank the funds to meet any one of such checks. That these letters tend to show Mrs. Chadwick's purpose to bring about an unlawful violation of section 5208, Rev. St. through an arrangement or agreement with either Beckwith or Spear, or both, and that their consent to her scheme was to be induced by her assurances of safety and promises of reward, there can be no doubt. If, therefore, there was any conspiracy between either Spear or Beckwith and some other person to violate the certification statute in respect of checks to be drawn or which had been drawn by Mrs. Chadwick, the admis-

sions found in these letters point to Mrs. Chadwick herself as the other party to the conspiracy and establish her unlawful intent. The letters are also an admission of the nature of her relations to the persons to whom the letters are addressed. That an unreceived letter is not evidence against the person addressed is, of course, elementary

These letters by themselves would be of no weight as against either Beckwith or Spear. Upon the other hand, if independently of the letters the fact of a conspiracy is established as existing at the time they were penned, there could be no doubt of the admissibility of these documents as declarations or admissions by one in furtherance of the conspiracy, and therefore competent against all. In general terms the jury were so instructed. The fact of the existence of a conspiracy is a fact which is seldom capable of express or direct proof. But evidence of an express agreement to violate the certification statute was not necessary. Evidence of facts and circumstances from which the existence of a preconcerted plan might be inferred is enough. And so, too, the facts and circumstances from which a conspiracy is to be inferred may be and often must be shown singly. Their collocation is for the jury, and the order in which they may be shown is generally one in the discretion of the court.

In Wharton upon Criminal Law (10th Ed.) 1398, it is said:

"The actual fact of conspiring may be inferred, as has been said, from circumstances, and the concurring conduct of the defendants need not be directly proved. Any joint action on a material point, or collocation of independent but co-operative acts, by persons closely associated with each other, is held to be sufficient to enable the jury to infer concurrence of sentiment; and one competent witness will suffice to prove the co-operation of any individual conspirator. If, therefore, it appear that two or more persons, acting in concert, are apparently pursuing the same object, often by the same means, one performing part of an act, and the other completing it, for the attainment of the object, the jury may draw the conclusion that there is a conspiracy."

In Reilley v. U. S., 106 Fed. 896, 46 C. C. A. 25, 35, this court said:

"It is also urged that the evidence did not justify the verdict, in that there was no proof of conspiracy to do what was done. As has been often remarked, it is not necessary that direct evidence of a formal agreement should be given in such cases. If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconcerted plan and purpose, that is sufficient; and we think the evidence was such as to warrant the verdict."

The fact of the accession of Spear and Beckwith to the scheme entertained by Mrs. Chadwick, as indicated in these letters, was, like all other facts needed to complete the evidence of a conspiracy, a fact which might be shown by indirect or circumstantial evidence. The business or social relation of the parties before and after the date of these letters; other acts of a similar character to that which Mrs. Chadwick had in mind to procure as shown by these documents; the state of her account with the bank of which Spear and Beckwith were officers; the fact, if it be so, that a check answering the description of the one which these letters show she intended to have certified or acknowledged having received—were all circumstances from which the jury might infer the accession of Beckwith and Spear to a scheme for the violation of section 5208, Rev. St., similar to that divulged by

these written admissions of the defendant. Thus the "interpretation and force" of the admissions in these letters would depend in large part upon the other facts and circumstances or as the court said to the jury "upon the surrounding circumstances." These might be such as to justify an inference that these letters had in fact been received and acted upon by Beckwith and Spear, or that a concert of action similar to that admitted by these letters and for the purposes there shown, was inferable irrespective of the receipt of these particular communications between the parties. The scope and evidential value of these documents was, therefore, dependent upon their being read in the light of all of the evidence in the case. This is what the learned court meant and what the jury as reasonable men of affairs must be regarded as having understood, when the court said that:

"You will give them such interpretation and force as, under all the circumstances, you think them fairly entitled to."

It would be a most unjustifiable and forced inference to interpret this instruction as giving a free rein to the jury. Indeed, the following sentence seems to place a somewhat narrow limitation of their evidential value, as only furnishing "some information as to the kinds of transactions carried on between the defendant and Beckwith and Spear," and "as throwing light upon the question of the relation which she and they sustained to the bank." A limitation of the inferences to be drawn from these letters, when read in the light of all of the other facts and circumstances of the case as affording "some information" upon the kinds of transactions she and Beckwith and Spear were engaged in, and as to the relations which she and they sustained to the bank, is at least a limitation of which the plaintiff in error cannot complain.

5. We have carefully examined the charge of the court in connection with the other assignments of error based upon exceptions reserved. None of these are well taken, and none are of sufficient importance to require special attention. A number of special requests for further direction were denied. One of these was the seventh, and reads as follows:

"The defendant was not bound to know the rules of the bank or the law governing the officers of the bank with reference to certifying checks, and in the absence of such knowledge she could not be held to have conspired with the officers of the bank, if what she did was done in good faith, and without any criminal intention to do the unlawful act complained of."

Upon this matter of intent, the court said:

"I am asked by the government to charge, and I do charge in this connection, that the jury is instructed, on the question of intent on the part of the defendant, that the law presumes that every person intends the natural and ordinary consequences of his acts. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent. Ordinarily the intent with which a man does a criminal act is not proclaimed by him, and ordinarily there is no direct evidence from which the jury may be satisfied, from declarations of the criminal himself, as to what he intended when he did a certain act. And this question of intent, like all other questions of fact, is solely for the jury to determine from the evidence in the case."

In reference to the defendant's knowledge of the statute forbidding certification when the drawer had no funds upon deposit, the court said:

"The claim is made by counsel for the defendant that there is no proof that the defendant had knowledge that the act of certifying the check, if done as claimed in the indictment, was in violation of the law. On this point, I say to you, gentlemen, that a conspiracy cannot exist without a guilty intent being then present in the minds of the conspirators; but this does not mean that the parties must know that they are violating the statutes of the United States. The government is not required to prove, in order to sustain a verdict of guilty, that the parties knew that some statute forbade the acts they were performing. If these acts of certifying checks, or any of them as charged in the indictment, were in fact violations of the law, the defendant is to be held guilty if she, as charged in the indictment, conspired with Beckwith or Spear in bringing about their certification; and the question of her knowledge or her ignorance of such acts being contrary to law is not a fact which you have a right to consider. The only question for you to pass upon is whether the defendant violated the law; not whether she had any knowledge that she was violating the law."

We think there was no error in the denial of the request as preferred nor in the charge as given. The indictment is for a statutory conspiracy to violate a penal statute of the United States. Knowledge that the act which it was the object of the conspiracy to do would be in violation of the law is imputed and need not be proven. Neither do we understand that in courts of the United States the fact that the object of the conspiracy was to do an act which is only mala prohibita requires evidence of knowledge of the unlawfulness of the act purposed by the conspirators. The conspiracy itself is one created by statute and is made out by evidence that its object was to perpetrate some offense against the United States. Undoubtedly something more than a mere certification in excess of a deposit is necessary to make the offense punishable under section 5440 [U. S. Comp. St. 1901, p. 3676] and Act July 12, 1882, c. 290, 22 Stat. 166 [U. S. Comp. St. 1901, p. 3497]. A wrongful intent is of the essence of the matter, and the act of certification must be willful and charged as such. There must be an evil design, a wrongful purpose. Therefore willful ignorance as to whether the drawer had money on deposit or not or knowledge that she did not must be shown. Potter v. U. S., 155 U. S. 438, 446, 15 Sup. Ct. 144, 39 L. Ed. 214; Spurr v. U. S., 174 U. S. 728, 735, 19 Sup. Ct. 812, 43 L. Ed. 1150. But knowledge of the statute forbidding a certification in excess of a deposit is imputed. An unlawful or wrongful intent may be implied from the intentional doing of an unlawful act. Agnew v. U. S., 165 U. S. 36, 49, 50, 53, 17 Sup. Ct. 235, 41 L. Ed. 624. In Spurr v. U. S., cited above, the court said:

"If an officer certifies a check with the intent that the drawer shall obtain so much money out of the bank when he has none there, such officer not only certifies unlawfully, but the special intent to violate the statute may be imputed. And so evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not."

6. Among the names duly drawn from the box as one of the venire from which a jury was to be selected was that of Butler Crane. In answer to this name, when called by the clerk, one Bentley F. Crane

appeared, and upon examination as to his qualifications was accepted as a juror and served as such. Upon the ground that Bentley F. Crane had not been drawn as a juror in the mode required by law, but had appeared and answered to the name of Butler Crane, the defendant, after verdict, moved for a new trial, and the refusal of the court to grant a new trial upon this ground is now assigned as error. The bill of exceptions includes the exhibits and affidavits bearing upon this matter, and from this evidence we are satisfied that the juror intended to be summoned and who was actually notified to appear was Bentley F. Crane. There was no such person as Butler Crane, and when Bentley F. Crane was notified to appear he assumed that he was the person intended and acted in perfect good faith in assuming that it was simply a case of misnomer. He was a farmer in good repute residing at Shalersville, Portage county, which was the address of the "Butler Crane" drawn from the jury box, and knew that there was no Butler Crane in that township or county. He answered to the name of Butler Crane when called as one of the venire tendered the defendant, but says that as Mr. Dawley, one of the defendant's counsel, was from his neighborhood and known to him, he assumed that Mr. Dawley knew that his right name was "Bentley" and not "Butler." The name was one of a number furnished the clerk of the court, at his request, by Judge Robertson, a state judge, residing in Portage county. Judge Robertson personally knew Bentley Crane and undertook to furnish his name. By either the clerical mistake of the judge's stenographer or of the deputy clerk who transcribed the name from Judge Robertson's list the name "Bentley" was written "Butler" upon the card which went into the jury box. In sound and appearance there is so much similarity as to easily account for the mistake. Bentley Crane was qualified as a juror, was disinterested, and the only irregularity consists in this misnomer. It was not a case of the wrongful impersonation of a juror duly summoned by a stranger as in McGill v. State, 34 Ohio St. 228.

There is no evidence of willful misconduct upon the part of any one in this matter. If counsel had examined the juror as to his name, the misnomer would have been discovered. This they did not do. It is said that counsel did not know that his name was Bentley Crane and had a right to presume his name was correctly transcribed upon the list of jurors furnished them. We may assume this to be so, and also assume that, if there had been in fact a Butler Crane competent for jury service in this case, a serious question might arise if the defendant was misled into accepting one juror when they had reasonable ground for supposing she was securing another. But that is not this case. It affirmatively appears that there was no such person as Butler Crane, and that the juror intended to be summoned and actually summoned was the juror Bentley Crane. The defendant secured the juror she elected to accept, although his name was Bentley Crane, and not Butler Crane. Under such circumstances the question, arising only upon a motion for a new trial, was one for the exercise of the sound discretion of the trial judge. If he was satisfied that no fraud was intended and no substantial right of the defendant

had been prejudiced or embarrassed, he might well deny a new trial upon such a case. There is nothing better settled than that the denial of a new trial upon any ground which appeals to the discretion of the trial judge is not the subject of an exception nor assignable as error here. Moore v. U. S., 150 U. S. 57, 61, 14 Sup. Ct. 26, 37 L. Ed. 996; Blitz v. U. S., 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725.

The question as presented upon this record seems to be quite within the range of the sound discretion of the trial judge, and in the absence of evidence of grave abuse is not the subject of review when presented only under an assignment of error in refusing a new trial.

7. The district attorney in his closing argument said, among other things:

"Bedortha is dead; Beckwith is dead; two other directors are sick. A suspended bank—and do you know what that means? The widows, the orphans whose hopes of peace and prosperity in old age have been robbed from them. Have you thought of what that means? The ambitions of youth whose all was there. The absolute necessity of the lives of men and comforts of men and women and children. All swept away. Death, sickness, and destruction in your path!"

To this the defendant at the time objected, and then excepted. No ruling was made. The passage is severed from its context, but we can infer that the district attorney was endeavoring to impress the jury with the evil results which had followed from the unlawful conspiracy charged by the indictment. There was evidence that Bedortha, a director of the Oberlin bank, was dead; that Beckwith, its president, was dead; that two other directors were sick; and that the bank had suspended. The inferences drawn from these facts may have been extravagant. But we do not understand it to be the province of a court to limit the arguments of counsel when they are based upon any evidence in the case. There is a degree of liberty allowable to counsel, whether for the government or the accused, in respect to the line of argument they shall pursue and the inferences to be drawn from the evidence which a trial judge should respect until the facts of the case are overstepped or arguments used which plainly abuse the privilege. But when facts not in evidence are stated to the jury, or arguments advanced plainly not justified by the evidence, and calculated to arouse prejudices incompatible with even-handed justice or an orderly course of procedure, it is the right and privilege of the counsel for the accused to object and ask the interference of the court and to except when the court denies the appeal. But to entitle the accused to a reversal when objection is made and the language not withdrawn it must appear that the matter objected to was plainly unwarranted and so improper as to be clearly injurious to the accused. Kellogg v. U. S., 103 Fed. 200, 43 C. C. A. 179; Dunlop v. U S., 165 U. S. 498, 17 Sup. Ct. 375, 41 L. Ed. 799. There was enough in the facts proven for one purpose or another to warrant the counsel in referring to the facts stated as facts in the language complained of. The rest of the paragraph consists of inferences by which the counsel accounted for the facts or in a picture of the sorrow, distress, and ruin which are the ordinary consequences of a broken bank. It cannot be seriously claimed that the argument and influence of counsel

complained of were so grossly unwarranted and improper as to be palpably injurious to the accused. Unless this does appear, a reviewing court should not reverse upon such an assignment of error. People v. Ward, 105 Cal. 335, 340, 38 Pac. 945; Dimmick v. U. S. (C. C. A.) 135 Fed. 257, 270.

Upon the motion for a new trial, objection was urged to certain other paragraphs in the closing argument of the district attorney. A sample of one of the paragraphs complained of is the following:

"Gentlemen, I say to you in my closing argument, in my closing words, as a final appeal to your judgment, your intelligence, your courage, that the evidence in this case conclusively proves, beyond the existence of a reasonable doubt, the truth of the allegations in this indictment. Proves that you have before you what 12 men may, in this country, have never had before them in all criminal history—a criminal of such conspicuous note—notorious and dangerous a character—from the evidence in the case—the fate of whom never was determined before by any jury in any court. You have the opportunity to do right to-day. You have also the opportunity to-day to do wrong. What you shall do rests with you, under the charge of the court, your conscience and your God. That is where it rests with me. Whatever you may do, I feel that I have done, in my humble way, the best that I know, from the evidence in the case, to convict the most dangerous criminal known to human society to-day."

No objection or exception was taken to this or any other part of the district attorney's address to the jury, at the time or prior to the verdict, except a single paragraph heretofore set out in a foregoing part of this opinion. In the heat of argument counsel are sometimes led to make observations not justified by evidence and calculated to prejudice the accused. But when this is the case it is the duty of opposing counsel to promptly call the attention of the court to the matter and of the court to rule upon the objection and caution the jury and reprove counsel. In Dunlop v. U. S., 165 U. S. 487, 498, 17 Sup. Ct. 375, 41 L. Ed. 799, when objection was made promptly to the language of counsel for the government in addressing the jury, the court ruled that it was improper and the language immediately withdrawn by counsel, which the court held to be a condonation of his error in making it. "In such cases," said the court, "however, if the court interfere and counsel promptly withdraw the remark, the error will generally be deemed cured. If every remark made by counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy and in the excitement of trial even the most experienced of counsel are occasionally carried away by this temptation." To same effect is case of Kellogg v. U. S., 103 Fed. 200, 43 C. C. A. 179, decided by this court. But here no objection was made and no complaint urged until upon motion for a new trial. Nothing is better settled than that the defendant who deems himself prejudiced by the language of counsel should promptly and publicly object and point out the language deemed improper and then take exception if the trial judge fail to condemn it. It is too late to predicate error upon the refusal of the trial judge to grant a new trial on account of a complaint made only after verdict and upon a motion for a new trial. Crumpton v. U. S., 138 U. S. 361, 11 Sup. Ct. 355, 34 L. Ed. 958; King v. State, 91 Tenn. 620, 642, 644,

20 S. W. 169; State v. Ward, 61 Vt. 153, 17 Atl. 483; Shelp v. U. S., 81 Fed. 694, 26 C. C. A. 570; 12 Cyc. 585.

In Crumpton v. U. S., cited above, the court said:

"When the defendant's counsel in a criminal case fails to at once call the attention of the court to remarks made by the prosecuting officer, which are supposed to be objectionable, and to request its interposition, and in case of refusal, to note an exception, an assignment of error in regard to them is untenable."

8. Finally, it is urged that the court had no power to pronounce cumulative sentences. The defendant was tried and convicted upon seven distinct counts. The crimes charged were of the same character, although each count charged a distinct and separate conspiracy to violate section 5208 by the unlawful certification of distinct checks drawn by the defendant against the same bank. Separate indictments might have been returned and seven distinct trials might have been had or all of the indictments might have been tried before the same jury. Under convictions upon separate counts for distinct offenses of the same character sentence may be passed and judgment entered for a specified term of imprisonment upon each count, and each term may be consecutive and cumulative. It is not error to make one term of imprisonment to begin when another terminates. If this is not so, there is no other mode in which an accused may be sentenced upon several convictions under several indictments or one indictment with two or more counts upon distinct offenses. The question has heretofore been before us and the power to impose cumulative sentences affirmed unanimously, the opinion of the court being by District Judge Clark. Howard v. United States, 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509. Cumulative sentences were affirmed, though the objection does not seem to have been distinctly considered by the Supreme Court, in Blitz v. U. S., 153 U. S. 308, 317, 14 Sup. Ct. 924, 38 L. Ed. 725, in Re Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174, in Re Mills, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107, and in Re De Bara, 179 U. S. 316, 21 Sup. Ct. 110, 45 L. Ed. 207.

The conclusion we reach is that there is no reversible error, and the judgment of the court below is accordingly affirmed.

DENVER & R. G. R. CO. v. NORGATE.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1905.)

No. 2,110.

1. MASTER AND SERVANT—EMPLOYERS' LIABILITY STATUTE—SCOPE.

The Colorado employers' liability act (Laws 1893, p. 129, c. 77) applies only in cases founded on rights created thereby, and the provision requiring notice of an injury to be given by an employé within 60 days as a condition precedent to suit has no application to a suit upon a right of action given by the common law.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 806.]

2. SAME—FROG BLOCKING ACT—ASSUMPTION OF RISK.

Laws Colo. 1897, p. 258, c. 69, requiring all railroad companies to securely block all frogs and switch rails, does not deprive a railroad company, when sued for injury to an employé resulting from its failure to observe such law, of the right to defend on the ground of assumption of risk.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 545.

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

Duty of railroad company to block switches, see note to Hauss v. Lake Erie & W. R. Co., 46 C. C. A. 98.]

3. TRIAL—INSTRUCTIONS—REFUSAL OF REQUEST TO DEFINE ORDINARY CARE.

Where an issue of ordinary care or reasonable care is submitted to the jury for determination, it is error for the court to refuse a requested instruction correctly defining such terms.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 489.]

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

Norgate sued the railroad company to recover damages for injuries to his person, caused as he alleges by the negligence of the company. He stated his cause of action as follows: "That at the times hereinafter mentioned the defendant was the owner and operator of a certain line of railroad in the state of Colorado, and was also the owner of certain railroad yards containing a large number of switches, frogs, and guard rails in the city of Pueblo, in the state of Colorado, at which place said defendant was at all times hereinafter mentioned switching cars and trains in the said yard. That on the 12th day of May, 1903, plaintiff was in the employ of the defendant in its yards in Pueblo, Colo., as yard conductor or foreman of a switch crew, and it then and there became and was the duty of the defendant to take all reasonable precautions to keep the frogs and the space between the guard rails and main rails in said yard blocked, and to take all reasonable precautions to keep its cars and the couplings and other appliances connected therewith which plaintiff was required to use in the performance of his duties in good repair and in a reasonably safe condition for plaintiff in the performance of his duties. But said defendant disregarded its duty in that behalf, and conducted itself so carelessly, negligently, and unskillfully that by and through its carelessness, negligence, and default it received on its tracks and into its yards at Pueblo, Colo., and caused to be handled and moved about therein, a certain freight car of the Chicago, Rock Island & Pacific Railroad Company, which said car was equipped with an automatic coupler which was defective and out of repair, in this: That the lever connected with said coupler for the purpose of raising the pin, in order to permit said couplers to open and separate when uncoupling cars, either because the chain connecting said lever with the coupling pin was too long, or because the said lever was twisted out of its proper shape, would not, when raised up and hooked on an iron provided for that purpose, hold the said pin high enough to permit said coupler to open and separate, as it was designed and intended to do when so hooked, in order to avoid the necessity of walking along the side of the car and holding the lever up until the couplers opened and the cars separated, which said defective condition might have been easily discovered by an ordinary inspection, and might by the exercise of reasonable care have been known to the defendant, but which was unknown to plaintiff; and said defendant negligently, knowingly, and willfully permitted its frogs and the space between its guard rails and main or other adjacent rails of its tracks in its yards at Pueblo, Colo., to be and remain unblocked, and the said plaintiff, on the 12th day of May, 1903, in the performance of his duties as employé of the defendant, undertook to uncouple said above-mentioned car of the Chicago, Rock Island & Pacific Railroad Company from another car in a train then being moved in the said yards of the defendant, for the purpose of switching it and other cars on to another

track, and he then and there discovered that said coupling apparatus was out of repair, as aforesaid, making it necessary for plaintiff to hold said lever while said cars were moving until said couplers would separate, and while so doing plaintiff's left foot was, because of said defective condition of said coupler and of the failure of defendant to keep blocked the space between the guard rail and the main rail of what is known as 'track number 2,' connecting the lead track in said yards, which was unknown to plaintiff, caught between said guard rail and main rail, and he was then and there, by reason of being so caught, thrown to the ground in such a manner that the moving cars which he was attempting to uncouple passed over his right leg, bruising, wounding, and crushing the same between the ankle and knee in such manner that it became and was necessary to have the same amputated above the knee."

The railroad company answered the complaint of Norgate, and among other defenses pleaded the following: "For a second and further defense to the matters and things alleged in the plaintiff's complaint, this defendant denies that the plaintiff herein did, within 60 days after the alleged sustaining by said plaintiff of the personal injuries in said complaint described, serve upon this defendant any notice thereof as required by the statutes of the state of Colorado in such case made and provided. * * * For a fifth and further defense, the company pleaded such facts as, if true, would tend to show that Norgate had assumed the risk of injury from the unblocked guard rail."

Norgate demurred to the second and fifth defenses pleaded in the answer of the railroad company, and the demurrer was sustained. No exception, however, seems to have been taken to this ruling. The action was subsequently tried and resulted in a verdict for Norgate.

At the trial counsel for the railroad company requested the court to charge the jury as follows: "(1) The jury are instructed that if the plaintiff knew, or in the exercise of reasonable care might have known, that the frogs and guard rails in the defendant's yards at Pueblo were generally unblocked, but that notwithstanding such knowledge or means of knowledge, the plaintiff continued to work in and about said yards, then the plaintiff assumed the risk of the accident complained of herein, and your verdict must be for the defendant. (2) You are further instructed that ordinary or reasonable care, as used throughout these instructions, is such care as a reasonably prudent man would exercise under like circumstances and conditions to those shown in evidence."

Each of these requests was refused, and an exception taken to such refusal. At the close of the evidence counsel for the railroad company moved the court to direct the jury to return a verdict in favor of the company, for the following, among other, reasons: "That the plaintiff has failed to allege or prove that any written notice of the time, place, and cause of the injury complained of herein was given by him or in his behalf to the employer within 60 days from the occurrence of the accident causing the injury complained of." The motion for a directed verdict was denied, and an exception taken.

William P. Cooney, a witness for the railroad company, testified as follows: "Q. What is your business? A. Roadmaster. Q. For what company are you working? A. The Denver & Rio Grande Railroad Company. Q. How long have you been employed with that company? A. Since the 28th of March, 1879. Q. Are you acquainted with the condition of the yards of the Denver & Rio Grande Railroad Company at Pueblo, with reference to whether or not the guard rails and frogs are blocked? A. Yes, sir, I am. * * * Q. Are there any blocks in them there? A. No, sir. Q. Have there ever been, to your knowledge? A. Never. Q. How long have you worked for the company? A. Since 1879. Q. Is that true with reference to the entire system? A. The entire system, I have worked over all the system and never saw one blocked. Q. Were any of the guard rails and frogs in the yards of this defendant company at Pueblo, in May, 1903, blocked? A. No, sir. Q. Nor had they ever been blocked prior to that time? A. No, sir. Q. Are you acquainted with the plaintiff in this case, Mr. Norgate? A. I have heard of him. Q. You know about when the accident happened? A. Yes, sir. Q. Were any of the guard rails or frogs of the Denver & Rio Grande Railroad Company, at Pueblo, blocked at that time? A. No, sir. Q. Or any time prior thereto? A. No, sir."

At the time Norgate received his injuries there existed in Colorado a statute found in chapter 69, pp. 258, 259, of the Session Laws of 1897, which reads as follows:

"Section 1. Where, after the passage of this act, personal injury is caused of all corporations, companies and persons using, maintaining, operating or controlling any railroad or railroad track to safely and securely block between the switch rails going into each of the head-chairs for a distance of six feet from each and every head-block, and to safely and securely block between the rails from the point where the iron filling which extends from the point of each frog ends, for the distance of four feet from the end of said filling, and to safely and securely block between each and every guard rail and the main, or other adjacent rail, for the entire distance of the curve or curves, in all guard rails, at both ends of each and every guard rail, and to safely and securely block between the rails in each and every wedge of all frogs, and to separate and securely block for a distance of five feet from the end of each and every split rail between said split rail and the adjacent rail of all split switches.

"Sec. 2. In all trials in all courts in this state to recover for personal injury, and in all cases of personal injury to employés or other persons, occasioned by or in any manner directly or indirectly, resulting from being caught between any of the aforesaid rails, testimony relative to the compliance with the requirements of this act shall be admitted, and where a failure is shown on the part of any such corporation, company or person, to have safely and securely blocked such rails, in accordance with the provisions of this act, such failure to have complied with any of the provisions of this act shall be prima facie evidence of the negligence of any such corporation, company or person so failing to comply with any of the provisions of this act, where any such employé or other person may be caught between such rails not blocked in accordance with the provisions of this act."

At the same time there existed what is known as the "Colorado Employers' Liability Act," Laws 1893, p. 129, c. 77. Sections 1 and 4 of this last-mentioned act read as follows:

"Section 1. Where, after the passage of this act, personal injury is caused to an employé who is himself in the exercise of due care and diligence at the time, first, by reason of any defect in the condition of the ways, works or machinery connected with, or used in the business of the employer, which arose from, or had not been discovered or remedied owing to the negligence of the employer, or of any person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works and machinery were in proper condition; or, second, by reason of the negligence of any person in the service of the employer entrusted with exercising superintendence, whose sole or principal duty is that of superintendence."

"Sec. 4. An employé, or those entitled by law to sue and recover under the provisions of this act, shall not be entitled under this act to any right to compensation or remedy against his employer in any case where such employé knew of the defect or negligence which caused the injury, and failed within a reasonable time to give or cause to be given, information thereof to the employer, or to some person superior to himself in the service of his employer, who had entrusted to him some general superintendence."

Henry A. Dubbs (Thomas H. Devine, Wolcott, Vaile & Waterman, and J. W. Preston, on the brief), for plaintiff in error.

T. M. Morrow (William T. Skelton, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

CARLAND, District Judge, after starting the case as above, delivered the opinion of the court.

An examination of the evidence contained in the record has satisfied us that the question as to whether Norgate contributed by his own want of ordinary care to his injuries, was properly left by the court to the jury. Whether the coupler on the freight car was defective and out of repair, or not, seems to be of little consequence, as the condition of the coupler does not seem to have been in any sense the proximate cause of Norgate's injuries. He was not injured by any defect in the coupler. The business in which Norgate was engaged when he was injured was properly shown as part of the res gestæ and as evidence relevant to the question as to whether Norgate, at the time he received his injuries, was in the exercise of ordinary care. But laying aside the question of contributory negligence—and upon this point we intimate no opinion—Norgate, when injured as described in the evidence, was in the lawful performance of his duty, and was injured by having his foot caught between the guard rail and the main rail, as he testifies.

The other questions arising on the record are these: First. Did the trial court err in holding that section 4, of the Colorado employers' liability act did not apply to this case? Second. Did the trial court err in holding that the defense of assumption of risk was not available to the railroad company, by reason of the frog blocking act of 1897? Third. Did the court err in refusing to define in its charge to the jury, when requested by counsel for the company, "ordinary care" as applied to the case on trial? These questions will be discussed in the order in which they are stated.

Conceding that section 4 of the act of 1893 has been in no way impaired by any subsequent statute of the state of Colorado, we are of the opinion that this action cannot be said to arise under it, or under the act of 1901, mentioned in the opinion of this court in Lange v. Union Pacific Railroad Company, 126 Fed. 338, 62 C. C. A. 48. The right of Norgate to institute the present action against the railroad company existed at common law, and in regard to such action we do not understand that said section 4 of the act of 1893 applies. No mention is made in the complaint in this action of a statute of Colorado, and it ought not to be held that a statute enacted to enlarge the liability of the master has resulted in restricting it, unless such a result is unavoidable. In Ryalls v. Mechanics Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667, the Supreme Court of Massachusetts had occasion to construe a similar law of that state, and held that in those cases within the words of the statute in which the common law gives an employé a remedy, he still has a right to sue under the same conditions, and to recover damages to the same extent as if the statute had not been passed, and that the requirement in regard to notice only applied to those cases laying outside the common-law rule. We do not feel sure that the question as to the proper construction of the act of 1893 with reference to the point under discussion is an open one, as the Supreme Court of Colorado in Colorado M. & E. Co. v. Mitchell, 26 Colo. 285, 58 Pac. 28, construed said act, and held that it in no manner prejudiced the common-law rights of employés, or interfered with the enforcement of any right that the

statute itself did not create. Massachusetts copied the statute from England, and Colorado from Massachusetts. At the place of its origin and adoption it has received the same construction.

The decision of the second question might, under the rule of stare decisis, be controlled by the cases of St. Louis Cordage Company v. Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551, and Glenmont Lumber Co. v. Roy, 126 Fed. 524, 61 C. C. A. 506. But it is claimed by counsel for Norgate that the question at issue was not the principal question discussed in those cases, and that the present case can be clearly distinguished from them, for the reason that the statutes of Missouri and Minnesota, which were considered in the cases cited, did not attempt to impose the performance of any specific duty by the master. Hence the question of reasonable care is not eliminated by the provisions of those statutes. Again, it is urged that, so far as the statute of Minnesota is concerned, it had been construed by the Supreme Court of that state in Anderson v. Nelson Lumber Co., 69 N. W. 630, and in Swenson v. Osgood, Blodgett Mfg. Co., 98 N. W. 645, prior to the decision in Glenmont Lumber Co. v. Roy, supra, and that this court of necessity followed the construction given to the statute by the Supreme Court of Minnesota.

We are clearly of the opinion that the frog blocking act of Colorado, quoted in the statement of facts preceding this opinion, did not take away from the railroad company the defense of assumption of risk in this case, and as our opinion is apparently opposed to the opinion of courts of learning and ability, we will state briefly the reasons for our judgment. It is conceded that the common law declares that Norgate, when he entered the employ of the railroad company, assumed all the risks and dangers of his occupation which were known to him, and all of which a reasonably prudent man in his situation would have known. By the ruling of the trial court this old and well-established rule of the common law was held to have been repealed by the statute of Colorado, providing for the blocking of frogs and guard rails. We first naturally turn to the law itself to find the repeal. We find the law expressed in clear, unambiguous terms, and, this being so, we are not permitted to go elsewhere to find the meaning and intention of the lawmaking power. Nothing whatever is said in the law as to assumption of risk. The Legislature could have easily repealed this principle of the common law above quoted, as other Legislatures have done. Code Iowa 1888, § 2002; Acts Tex. 1891, p. 25, c. 24; Acts Fla. 1891, p. 113, c. 4071; Acts Wyo. 1890–91, p. 350, c. 80, § 17; Burns' Ann. St. Ind. 1901, § 708. But, instead thereof, the Legislature simply imposed the duty upon railroad companies of blocking their frogs and guard rails, and further provided that a failure to do so should be prima facie evidence of negligence.

It is, however, conceded that there is nothing in the terms of the law which expressly repeals the law of assumption of risk; but it is contended that, if the defense of assumption of risk is allowed in actions like the one at bar, then the servant can contract the master out of the statute, and thereby render the statute of no force or ef-

fect. In other words, it is contended that, as the law of assumption of risk is a term of the contract between the master and servant, to allow the master the defense of assumption of risk in the case at bar would be to allow private parties to render nugatory by their contracts a public statute of the state of Colorado. The error in this contention is in assuming that the law of assumption of risk is created by the contract between master and servant. This error, we believe, has led some courts to enunciate a false doctrine in regard to the question under discussion. A representative case among those which hold that statutes imposing a positive duty upon the master by implication repeal the law of the assumption of risk, is the case of Narramore v. Cleveland, C., C. & St. L. Ry. Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68. As this case has been followed by at least one of the state Supreme Courts (Green v. Western American Co., 30 Wash. 87, 70 Pac. 310), we propose to show wherein we think the reasoning of the learned court in the Narramore Case is not only faulty, but that, so far as the decision is based upon the decisions in England, a wrong conclusion was drawn as to what those decisions hold the law to be. The court in the Narramore Case, in our opinion, fell into error when it declared the law to be as follows:

"An assumption of risk is a term of the contract of employment, expressed or implied, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty, shall be at the servant's risk."

Is it possible that an old, established principle of the common law depends for its existence in each case of employment upon the agreement of the parties? The law regarding the assumption of risk is the law which governs the relation of master and servant, and is independent of the will of either. It is not a term of the contract of employment. If it were, then the master and servant could retain it or abolish it in each contract of employment. But they can do neither. It is a principle of the common law, and must be repealed, if at all, by the lawmaking power. It is the law of the land governing all persons who assume the relation of master and servant. It is over and above the contract, and depends in no manner for its existence upon the agreement of the parties. It is founded upon public policy, the status assumed by master and servant, and upon the maxim, "Volenti non fit injuria." The law establishing the reciprocal duties and obligations of master and servant never originated out of contract, in the sense that the master and servant ever expressly agreed to them. But the common law imposed these duties and obligations as a regulation of those who assumed this relation, regardless of the desires of the master or the servant. So, in our opinion, to say that the servant may contract the master out of the statute is a misuse of terms. If the master escapes liability on invoking the law in regard to the assumption of risk, he escapes because of the law, not because of any contract. If the law is a bad law, let the Legislature repeal it. We take the position that an old and well-established rule of the common law cannot be lawfully repealed, except by the lawmaking power, and that any attempt of the courts

to do so is a plain usurpation of a legislative function. All the reasons urged upon us why we should hold the law of assumption of risk repealed by the Colorado statute might appeal to the Legislature, but are wholly out of place in this court. The statute of Colorado imposes no penalty for its violation, and therefore may be classed with those laws known as "Employers' Acts," rather than with the law considered in the Narramore Case. But the contention that the law of assumption of risk is created by the contract between master and servant, if sound, applies to both, and, if it is unsound as to one, it is unsound as to the other. The decision of the court in the Narramore Case, so far as it is based on the decisions in England, follows Baddely v. Granville, 19 Q. B. Div. 423.

We are not satisfied that the excerpt quoted in the opinion in the Narramore Case correctly reflects the opinion of the court as a whole in the case quoted from. The Supreme Court of Alabama in the cases of Railroad Company v. Holborn, 84 Ala. 133, 4 South. 146, and Railroad Company v. Walters, 91 Ala. 435, 8 South. 357, held that the employers' act of that state, which was a substantial copy of the English act of 1880, abolished the law of assumption of risk, and based their decision on Weblin v. Ballard, 17 Q. B. Div. 122. In Birmingham Railway & Electric Co. v. Allen, 99 Ala. 359, 13 South. 8, 20 L. R. A. 457, the question again came before the Supreme Court of Alabama, and after a careful review of the English authorities and the case of Ryalls v. Mechanics Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667, overruled the cases of Railroad Company v. Holborn and Railroad Company v. Walters, supra, and decided Weblin v. Ballard, 17 Q. B. Div. 122, had been virtually overruled by the case of Thomas v. Quartermaine, 18 Q. B. Div. 685, and that the rule "Volenti non fit injuria" had not been modified by the English courts. We think that a careful examination of the following English cases will show that the Supreme Court of Alabama was right in its conclusion: Thomas v. Quartermaine, 18 Q. B. Div. 685; Yarmouth v. France, 19 Q. B. Div. 647; Smith v. Baker, App. Cas. [1891] p. 325; Osborn v. London & N. W. Ry. Co., 21 Q. B. Div. 220; Walsh v. Whiley, 21 Q. B. Div. 371; Briton v. Great Western Cotton Co., L. R. 7 Ex. 130.

In addition to the reasoning of this court in St. Louis Cordage Co. v. Miller, 126 Fed. 509, 61 C. C. A. 477, 63 L. R. A. 551, and Glenmont Lumber Co. v. Roy, 126 Fed. 525, 61 C. C. A. 506, it will be instructive to notice what other courts and text-writers have said upon the subject.

The Supreme Court of Rhode Island, in Langlois v. Dunn Worsted Mills, 57 Atl. 910, 911, said:

"The question whether a plaintiff can recover for a breach of statutory duty, notwithstanding an assumption of risk or contributory negligence on his part, is one on which there is some difference of opinion, but we think the clear weight of reason and authority is against such recovery. A statutory duty is no more imperative in law than a common-law duty. A penalty may be imposed upon the offender for a breach of statute, but it does not change the relations between the parties, except to the extent that one entering the employ of another may assume, in absence of knowledge, that the terms of the statute

have been complied with. * * * It is also well settled that a court will not presume that a statute intended to change a rule of common law unless such an intent appears. * * * It has been common practice here and elsewhere to construe statutory duties in connection with assumed risks and contributory negligence. For example, ever since the advent of railroads, statutes have required the sounding of a bell or whistle in approaching a highway crossing. Yet, though the statute should be negligently disregarded, it has never been held that a plaintiff seeing the approach of a train, and injured while attempting to cross ahead of it, could recover. He would be held to have assumed the risk of so crossing, or to have been guilty of contributory negligence. The mere fact that the railroad company had violated the statute would not warrant a recovery."

In the case of Martin v. C. R. I. & P. R. Co., 118 Iowa, 148, 91 N. W. 1034, 59 L. R. A. 698, 96 Am. St. Rep. 371, the court discusses and disapproves of the Narramore Case, using the following language:

"We think the learned judge, in writing that opinion, assumed too much, in treating the assumption of risk as purely a matter of contract. True, the books speak of it as resting on an implied agreement between the employer and employé. It is more accurate to say that the services of the one are engaged by the other, and from the relationship the law implies certain duties, obligations, and disabilities. No mention is made of these, but they pertain to the relationship of the parties and the status then assumed. * * * Nor can we approve of the distinction attempted to be drawn between employment under conditions condemned as dangerous at the common law and those prohibited by a city ordinance. In the absence of an assumption of the risk, an omission of a duty implied by law is precisely as effective in fixing liability as though enjoined by statute. The obligation of the employer to the servant is no greater in the one case than in the other, and we can discover no sound reason for the discrimination which declares the danger in the one case may be assumed, and in the other may not. * * * Our study of the subject has led to the conclusion that, in the matter of assumption of risks, it is immaterial whether they arise from the violation of a common-law duty, or an obligation imposed by statute. * * * And it can make no difference whether the statute relates to the condition of the place where the work is to be done, or the method to be pursued in performing it. If the employé, with full knowledge of either, undertakes to accomplish the task assigned at the place or in the method proposed, he ought not to be permitted to complain when conditions and methods were precisely as he knew they would be, and to which he has assented."

The Supreme Court of Massachusetts, in O'Maley v. South Boston Gaslight Co., 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161, speaks as follows:

"The doctrine of assumption of risk of his employment by an employé has usually been considered from the point of view of a contract, express or implied; but, as applied to actions of tort or negligence against an employer, it leads up to the broader principle expressed by the maxim, 'Volenti non fit injuria.' One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. * * * The statute does not attempt to take away the right of the parties to make such contracts as they choose, which will establish their respective rights and duties. * * * It would be an unwarranted construction of the statute, which would tend to defeat its object, to hold that laborers are no longer permitted to contract to take the risk of working where there are peculiar dangers from the arrangement of the place, and from the kind or quality of the machinery used. Noth-

ing but the plainest expression of intention on the part of the Legislature would warrant giving the statute such an interpretaion."

In Swenson v. Osgood, etc., Mfg. Co., 91 Minn. 509, 98 N. W. 645, decided in 1904, the Supreme Court of Minnesota employed this language:

"Very much stress was laid upon the fact that by the laws of this state (Laws 1893, p. 99, c. 7, § 1) the employer's obligation to properly protect and guard these cogwheels in a practicable manner had been made a statutory duty; but we have held, upon a previous consideration of this statute, that it does not change the general or common-law rule as to contributory negligence or as to the assumption of risks by the employé."

The Court of Appeals of New York, in Knisley v. Pratt, 148 N. Y. 377, 42 N. E. 987, 32 L. R. A. 367, uses the following language:

"In order to sustain the judgment in favor of plaintiff, it is necessary to hold that where the statute imposes a duty upon the employer, the performance of which will afford greater protection to the employé, it is not possible for the latter to waive the protection of the statute under the common-law doctrine of obvious risks. We regard this as a new and startling doctrine, calculated to establish a measure of liability unknown to the common law, and which is contrary to the decisions of Massachusetts and England under similar statutes. * * * We think this proposition is essentially unsound, and proceeds upon theories that cannot be maintained. It is difficult to perceive any difference in the quality and character of a cause of action, whether it has its origin in the ancient principles of the common law, in the formulated rules of modern decisions, or in the declared will of the Legislature. Public policy in such case requires its rigid enforcement, and it was never urged in the common-law action for negligence that the rule requiring the employé to assume the obvious risks of the business was in contravention of that policy. * * * We are of opinion that there is no reason in principle or authority why an employé should not be allowed to assume the obvious risks of the business as well under the factory act as otherwise. There is no rule of public policy which prevents an employé from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks. The statute does, indeed, contemplate the protection of a certain class of laborers, but it does not deprive them of their free agency and the right to manage their own affairs."

In Powell v. Ashland, etc., Co., 98 Wis. 35, 41, 73 N. W. 573, 575, the Supreme Court of that state said:

"In such a case it is immaterial that the danger might be guarded against by the employer, even if failure in that respect be a violation of some statutory requirement on the subject. The responsibilities which by the rules of the common law the servant must assume and discharge for his own safety are not affected thereby unless the statute expressly so provides."

The same court, in the case of Helmke v. Thilmany, 107 Wis. 216, 221, 83 N. W. 360, 362, spoke as follows:

"They cite the statute requiring the owner or manager of any factory, workshop, or other place where labor is performed to keep all belting, shafting, gearing, hoists, flywheels, elevators, and drums therein, which are so located as to be dangerous to employés in the discharge of their duty, 'securely guarded or fenced.' Section 1636j, Rev. St. 1898. There is no claim, nor ground for claiming, that such statute precludes the defense of contributory negligence, nor the assumption of risk. Thompson v. Edward P. Allis Co., 89 Wis. 523, 530, 62 N. W. 527. Similar statutes have been construed the same way. Curry v. C. & N. W. R. Co., 43 Wis. 665, 683; Holum v. C., M. & St. P. R. Co., 80 Wis. 299, 50 N. W. 99; Dugan v. C., St. P., M. & O. R. Co., 85 Wis.

614, 55 N. W. 894; Schneider v. C., M. & St. P. R. Co., 99 Wis. 387, 75 N. W. 169."

Dresser on Employers' Liability, § 82, says:

"When a person engages to work for another, both a contract and a status are created. * * * Although the contract of hiring depends upon the same principles as other contracts, yet it has one peculiarity, in that it creates a status or relationship between the parties to which the policy of the law has affixed certain rights, duties, and disabilities to be observed by each, irrespective of any understanding or supposed agreement between them. . These duties and disabilities arise when the relation is created, and continue until it ends, and, for the most part, are determined by the condition of affairs when the contract of hiring is made. It is usual and convenient to treat them as terms of an implied contract, but it is a contract implied from the relationship, and not from the agreement of the parties, and has none of the incidents of a technical contract."

2 Labatt on Master and Servant, §§ 649, 650, says:

"The general theory upon which the courts have proceeded is that, in the absence of language evincing a contrary intention on the part of the Legislature, a statute which so far changes the common law as to impose upon a master duties to which he had not been before subject, or to render him liable for the negligence of certain classes of servants, resulting in injury to other servants, whose right of action would, if common-law doctrines were applied, be barred by the rule as to fellow employés, should not be construed in such sense as to preclude the master from availing himself of any of those defenses which, as explained in section 255, ante, are based upon the fact that the injured person adopted a certain course of conduct with a full appreciation, actual or constructive, of the risks from which his injury eventually resulted. * * * In some instances the statutory provisions which are considered in this and the following chapters operate so as to convert what would be an ordinary risk under the common law into an extraordinary one. But unless this be their effect, they are not deemed to change in any way the rule that a servant assumed all the ordinary risks which are manifestly incident to the employment."

Endlich, Interpretation of Statutes, § 5, says:

"What is called the 'policy' of the government with reference to any particular legislation is said to be too unstable a foundation for the construction of a statute. The clear language of a statute can be neither restrained nor extended by any consideration of supposed wisdom or policy. So long as a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety, and policy of its passage. The language of Mr. Justice Story concerning constitutional construction applies almost equally to that of statutes: 'Arguments drawn from impolicy or inconvenience ought here to be of no weight.' The only sound principle is to declare, 'Ita lex, scripta est,' to follow and to obey; nor, if a principle so just could be overlooked, could there be well found a more unsafe guide or practice than mere policy and convenience."

And in section 7 the author continues:

"In short, when the words admit of but one meaning, a court is not at liberty to speculate on the intention of the Legislature, or to construe an act according to its own notions of what ought to have been enacted. Nothing could be more dangerous than to make such considerations the ground of construing an enactment that is quite complete and unambiguous in itself. 'The moment we depart from the plain words of the statute, according to their ordinary and grammatical meaning, in a hunt for some intention founded on the general policy of the law, we find ourselves involved in a "sea of troubles." Difficulties and contradictions meet us at every turn.' Indeed, to depart from the meaning on account of such views is, in truth, not to construe the act, but

to alter it. But the business of the interpreter is not to improve the statute. It is to expound it."

Black on Interpretation of Laws, § 4, says:

"The wisdom, policy, or expediency of legislation is a matter with which the courts have nothing whatever to do. Whether or not a given law is the best that could have been enacted on the subject, whether or not it is calculated to accomplish its avowed object, whether or not it accords with what is understood to be the general policy of legislation in the particular jurisdiction, these are questions which do not fall within the province of the courts. And hence a court exceeds its proper office and authority if it attempts, under the guise of construction, to mold the expression of the legislative will into the shape which the court thinks it ought to bear. The sole function of the judiciary is to expound and apply the law. To enact the law is the prerogative of the legislative department of government. Nor can the courts correct what they may deem excesses or omissions in legislation, or relieve against the occasionally harsh operation of statutory provisions, without danger of doing more mischief than good."

It has been confidently claimed that the Supreme Court of Illinois, in certain cases, had decided the rule to be as held by the trial court. But in the late case of Browne v. Siegel Cooper & Co., 191 Ill. 226, 60 N. E. 815, the Supreme Court of Illinois uses this language:

"Whether injuries which occur because of the violation by the master of municipal regulations enacted for the preservation of life or limb, should be regarded as lawful and not subject to the defense of contributory negligence, or to the defense of the implied assumption of the servant of the risks and dangers caused by such violation, is a question of public policy for the Legislature, and not one for the courts. We can only apply the law as it is."

The Supreme Court of Illinois by the use of this language does not indicate that it believes that the rule contended for by counsel for Norgate is the correct one. We think the examination of the following cases will show that the weight of authority and the better reasoning is in favor of the views herein expressed: Nottage v. Sawmill Phœnix (C. C.) 133 Fed. 979; St. Louis, etc., Co. v. Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551; Cleveland, etc., Ry. Co. v. Baker, 91 Fed. 224, 33 C. C. A. 468; Martin v. Chicago St. Ry. Co., 118 Iowa, 148, 91 N. W. 1034, 59 L. R. A. 698, 96 Am. St. Rep. 371; Knisley v. Pratt, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367; O'Maley v. Gaslight Co., 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161; Birmingham Elec. Co. v. Allen, 99 Ala. 359, 13 South. 8, 20 L. R. A. 457; Browne v. Siegel, 191 Ill. 226, 60 N. E. 815; Mulhern v. Lehigh Co., 161 Pa. 270, 28 Atl. 1087; Swenson v. Osgood Mfg. Co., 91 Minn. 509, 98 N. W. 645; Williams v. Wagner Co., 110 Wis. 456, 86 N. W. 157; Helmke v. Thilmany, 107 Wis. 216, 83 N. W. 360; Langlois v. Dunn (R. I.) 57 Atl. 910; Victor Coal Co. v. Muir, 20 Colo. 320, 38 Pac. 378, 26 L. R. A. 435, 48 Am. St. Rep. 299; Grand v. Mich. Cent. Ry. Co., 83 Mich. 564, 47 N. W. 837, 11 L. R. A. 402; McGinty v. Waterman (Minn.) 101 N. W. 300; McRickard v. Flint, 114 N. Y. 222, 21 N. E. 153; White v. Wittemann L. Co., 131 N. Y. 631, 30 N. E. 236; Honor v. Albrighton, 93 Pa. 475; Anderson v. Lumber Co., 67 Minn. 79, 69 N. W. 630; Fleming v. St. Paul, etc., R. Co., 27 Minn. 111, 6 N. W. 448; Chicago Pack. Co. v. Rohan, 47 Ill. App. 654; Munn v. Wolff, 94 Ill. App. 122; Keenan v.

Edison Illum. Co., 159 Mass. 379, 34 N. E. 366; Goodridge v. Washington, 160 Mass. 234, 35 N. E. 484; 2 Labatt, Master and Servant, 649, 650; 3 Elliott, R. R. § 1315; 20 Am. & Eng. Enc. of Law (2d Ed.) 127; Dresser, Employers' Liability, §§ 82, 116; Bailey, Master's Liability, p. 480; Duty and Liability of Employers, by Roberts & Wallace, 136, 146, 160, 161, 260; Buswell's Law Personal Injuries, §§ 207–209; Endlich, Interpretation of Statutes, §§ 5, 7; Black on Interpretation of Statutes, pp. 4, 234; Abbott v. McCadden, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. Rep. 910; American Rolling Mill Co. v. Hullinger, 161 Ind. 673, 67 N. E. 986.

We conclude, therefore, that upon reason and authority the trial court erred in not permitting the railroad company to avail itself of the defense of assumption of risk. We think that the trial court also erred in refusing to instruct the jury as requested by counsel for the railroad company upon the question of ordinary care. Counsel for the railroad company requested the court to charge the jury as follows:

"You are further instructed that ordinary or reasonable care, as used throughout these instructions, is such care as a reasonably prudent man would exercise under like circumstances and conditions to those shown in evidence."

The court in its charge used the terms "reasonable care" and "ordinary care," when speaking of the relative duties of the railroad company and Norgate; but the court nowhere defined for the jury what the law means by "reasonable" or "ordinary care" as applied to the case on trial. The issue being tried was one of negligence. To simply say that it was the duty of the railroad company under certain conditions to use ordinary care, and that it was also the duty of the defendant under certain circumstances to also use ordinary or reasonable care, could have been no aid to the jury in determining the question of negligence. The court might as well say to the jury that it was the duty of the railroad company not to be negligent, and it was the duty also of the defendant on his part not to be negligent. The jury would have had as much information to aid them in determining the question at issue if the latter language had been used. The law in cases like the one at bar fixes the standard of duty. This standard remains the same through all the changing conditions and surroundings which may accompany any case of this kind. When the jury know, by being told by the court, what the standard is that the law fixes, then they may determine under all the circumstances and conditions surrounding the case on trial, whether the conduct of either party measured up or fell short of this standard. But with no standard to guide them, they were left so that each juror was at liberty to adopt his own notion of what would be ordinary or reasonable care, under the conditions existing in the case on trial. There might be twelve very careful men in the jury box, or there might be twelve very careless men in the box, or there might be some careful men and some reckless men, and their standards of reasonable or ordinary care would not be the same, or if the same, might be above or below the standard fixed by the law.

We think that when a court is requested in proper language to define "ordinary care," or "reasonable care," it is its duty to do so, because the finding of the jury upon this question in this class of cases determines whether either party has been guilty of negligence or not. It is claimed on the part of counsel for Norgate that there was no error in the refusal to give the instruction asked, for the reason that the railroad company was negligent in any event, by failing to block the frogs and guard rails in the yard at Pueblo, and that the instruction upon ordinary care, or reasonable care, could only have applied to the alleged contributory negligence of Norgate, and that the evidence showed beyond question that he was not negligent. We are not called upon to determine all the questions in this case, both of fact and law. There were other issues submitted to the jury besides the negligence of the company in failing to block the frogs and guard rails. The court submitted to the jury the question as to the negligence of the company in regard to the coupler on the freight car. We simply hold that where an issue of ordinary care or reasonable care is submitted to the jury for their determination, the court ought, when requested, to tell the jury what is meant by those terms.

It is, of course, urged that the question of reasonable care and ordinary care is always one for the jury, and it was for them to say whether the parties used ordinary care or reasonable care, but the jury cannot certainly pass intelligently upon the issue of negligence, without they are informed as to what constitutes negligence. To tell the jury that negligence was the want of ordinary care under certain conditions does not help them to determine the question, without they are further informed as to what is meant by ordinary care.

We are clearly of the opinion that for the error in not allowing the railroad company to urge the assumption of risk in defense of the action of Norgate, and also for the error in not defining ordinary and reasonable care, as requested by counsel for the railroad company, the judgment of the trial court must be reversed, and a new trial granted; and it is so ordered.

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

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

(Circuit Court of Appeals, Ninth Circuit. October 16, 1905.)

No. 1,167.

1. SHIPPING—DAMAGE TO CARGO—HARTER ACT.

A ship bound from Antwerp to San Francisco with a cargo of cement encountered such rough weather in attempting to round Cape Horn and was subjected to such strain that her deck seams opened and a part of the cargo was damaged by water. She finally abandoned the attempt and completed the voyage by way of the Cape of Good Hope and Australia. At the time of her change of course she was 370 miles distant from Port Stanley, where she could have been repaired; but she did not put in for repairs, and before she reached Australia the cargo received further damage by reason of the open seams. *Held*, that the

change of course and also the determination of the master to proceed without putting in for repairs were matters pertaining to the "navigation and management of the vessel," within Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], and not to the custody, care, or proper delivery of the cargo, within the meaning of section 2, and that, assuming the vessel to have been in all respects seaworthy, and properly manned, equipped, and supplied at the beginning of the voyage, she was exempted by the act from liability for the damage caused or contributed to by the failure to repair.

[Ed. Note.—Statutory exemption of shipowners from liability, see note to Nord-Deutscher Lloyd v. Insurance Co. of North America, 49 C. C. A. 11.]

2. SAME—LIABILITY OF SHIP.

If the jettison of cargo or damage thereto is rendered necessary by or due to any fault or breach of contract on the part of the owner or master of the vessel, the loss must be attributed to that cause, rather than to the sea peril, although that may enter into the case.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 445.]

3. SAME—SEAWORTHINESS—STOWAGE OF CARGO.

The requirement of seaworthiness at the beginning of a voyage includes, not only seaworthiness in hull and equipment, but also in the stowage of the cargo.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 449.]

4. SAME.

Evidence considered, and *held* to sustain a claim that a cargo of cement, to be carried from Antwerp to San Francisco by way of Cape Horn, was improperly stowed, which rendered the ship unseaworthy for the voyage and liable for loss and damage to cargo, a part of which was jettisoned and the remainder damaged by water.

5. SAME—RESPONSIBILITY FOR STOWAGE.

A ship is responsible for the proper stowage of her cargo, although the charter party gives the charterer the option of appointing the stevedores, to be paid by the owners, where it also provides that they shall be under the direction of the master and the owners responsible for all risks of loading and stowage.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 179.]

Gilbert, Circuit Judge, dissenting.

Appeal and Cross-Appeal from the District Court of the United States for the Northern District of California.

See 125 Fed. 786.

Page, McCutchen & Knight, for appellant.

Nathan H. Frank, for appellee.

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

ROSS, Circuit Judge. The ship Musselcrag, owned by C. W. Corsar, sailed from Antwerp on the 19th day of July, 1899, laden with a cargo of cement, and bound for San Francisco, which place was reached 315 days thereafter, whereas her voyage under ordinary conditions should not have exceeded 140 days. A part of the cargo was jettisoned on the way, and a part of it was badly damaged, resulting in this libel by its consignee, J. D. Spreckels & Bros. Company, by which the libelant seeks to recover $1,233 for the cement totally lost, and $11,500 for that damaged; the averments of the libel being that such loss and damage were occasioned by the unseaworthy condition of the vessel and the carelessness and negligence of her master. It appears that the

ship encountered such severe weather off Cape Horn that her master deemed it best to abandon his effort to round that cape and to shape his course for the Cape of Good Hope, which he did. At the time of doing so the ship was about 60 miles from Staten Island, and about 370 miles from Port Stanley, in the Falkland Islands.

On the trial it was contended on behalf of the libelant that the ship was unseaworthy for the voyage, because of the improper stowage of the cargo; that the primary cause of the loss complained of was such defective stowage; and, further, that when the master of the ship determined to abandon his effort to round Cape Horn, he was guilty of fault in not going, for the protection of the cargo, to Port Stanley, where it is conceded his vessel could have been repaired. The court below held that the ship was properly stowed and in every way seaworthy, from which decision the libelant appeals, but further held that it was liable in damages for the failure of the master to seek repairs at Port Stanley, and gave the libelant damages for such of the injury to the cement as it found was sustained by the failure of the master to seek refuge and repairs at Port Stanley, from which ruling the claimant appeals.

The conclusion of the court below in the latter respect was based upon the theory that there was a failure of duty on the part of the ship in the "custody, care, or proper delivery" of the cargo, as defined in section 2 of the Act of Congress of February 13, 1893, known as the "Harter Act" (27 Stat. 445, c. 105 [U. S. Comp. St. 1901, p. 2946]). The first section of that act provides that it shall be unlawful to insert in any bill of lading any agreement relieving the vessel or her owner from liability "for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge," and declaring all words and clauses of such import to be "null and void, and of no effect." The second section of the act makes it unlawful to insert in a bill of lading any agreement whereby the obligations of the owner of a vessel "to exercise due diligence, properly equip, * * * and to make said vessel seaworthy, * * * or whereby the obligations of the master, officers, agents, or servants, to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided." Section 3 of the same act provides that if the owner "shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel." It will be thus seen that by virtue of the Harter act the ship is still held, as theretofore, responsible for loss or damage arising from negligence, fault, or failure in the proper custody, care, or delivery of the cargo, and at the same time is exonerated from damage or loss resulting from faults or errors in navigation or in the management of the vessel, where due diligence has been exercised to properly man, equip, and supply it, and to make it in all respects seaworthy. It will not do to so construe these provisions as to make them

nullify each other. On the contrary, they must be so read as to give effect to each, if possible.

Undoubtedly a fault or error in the navigation or management of a vessel carrying cargo may, and often does, result in injury to the "custody, care and delivery" of the cargo. And the very object of the act was, as said by the Supreme Court in the case of The Delaware, 161 U. S. 471, 16 Sup. Ct. 522, 40 L. Ed. 771, "to modify the relations previously existing between the vessel and her cargo." But, if the owner of the vessel has performed his duty by making the vessel in all respects seaworthy for the voyage it undertakes, it is plain that neither he nor the vessel can be held responsible for any merely incidental damage resulting to the cargo from a fault or error in its subsequent navigation or management, if section 3 of the act is to be given any force. So in the case of The Silvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241, where the portholes of the ship between decks were fitted with the usual glass covers and the usual iron shutters, with no cargo stowed against them, and capable of being speedily got at and closed if occasion should require, the Supreme Court held that the ship was not unseaworthy by reason of beginning her voyage in fair weather with the iron shutters left open for the admission of light—the glass covers being tightly closed—and that any subsequent neglect in not closing the iron shutters was a fault or error in navigation or in the management of the vessel, within the meaning of section 3 of the Harter act; the court sayng:

"This case does not require a comprehensive definition of the words 'navigation' and 'management' of a vessel, within the meaning of the act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words."

In the case in hand, the record shows that for about seven weeks the ship in question struggled with wind and wave in the effort to round Cape Horn, resulting in the carrying away of her sails, a part of her rigging, and the battering and exhausting of a number of her crew, in view of which conditions, and the continuation of the tempestuous weather, the master deemed it best to abandon the effort to round that cape, and to change his course for the Cape of Good Hope. The question confronting him was primarily and essentially one of navigation —how best, in view of the trying circumstances in which he was placed, to deal with the elements and get his ship, with her crew and cargo, to the place of destination. That his action in determining that question was primarily and essentially one of navigation, does not, in our opinion, admit of the slightest doubt; and, being such, neither the ship nor her owner is responsible for any incidental damage sustained by the cargo, because of the provision of the third section of the act of Congress above referred to. The Germanic, 196 U. S. 597, 598, 25 Sup. Ct. 317, 49 L. Ed. 610. See, also, The Merida, 107 Fed. 146, 46 C. C. A. 208;

The Viola (D. C.) 59 Fed. 632; Knott v. Botany Mills (D. C.) 76 Fed. 584; The Glenochil (1896) Prob. Div 10 Asp. N. S. 218.

There is nothing to the contrary in the decision of the Supreme Court in the case of Knott v. Botany Mills, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90. On the contrary, the court in that case, as in the case of The Sylvia, supra, recognized the correctness of the construction put upon the first and third sections of the Harter act by Sir Francis Jeune, in The Glenochil, supra, to wit, that those sections may be reconciled by holding:

"First, that the act prevents exemptions in the case of direct want of care in respect to the cargo; and, secondly, the exemption permitted is in respect to a fault primarily connected with the navigation and management of the vessel, and not with the cargo."

We are, therefore, of opinion that if it be true, as the court below held, that the Musselcrag was in all respects seaworthy for the voyage she undertook at the time of entering upon it, neither the ship nor her owner was responsible for any part of the damage sustained by the cargo by reason of the action of the master in shaping his course for the Cape of Good Hope instead of going to Port Stanley. But, if the ship in question was not seaworthy for the voyage she undertook at the time of entering upon it, then, clearly, the libelant is entitled to recover for all of the loss and damage sustained. We therefore proceed to the consideration of that question.

The obligation upon the part of the ship to deliver the cement to the consignee at San Francisco in good order and well conditioned, excepted, among other things, "the perils of the sea." "Perils of the sea" was undoubtedly one of the causes for the jettison of the cement that was totally lost and for the wetting and consequent damage of the balance. But it is well settled, as said by the Supreme Court in the case of The Portsmouth, 9 Wall. 682, 19 L. Ed. 754, that:

"If a jettison of a cargo, or a part of it (and, as matter of course, damage thereto), is rendered necessary by any fault or breach of contract of the master or owners of the vessel, the jettison must be attributed to that fault, or breach of contract, rather than to the sea peril, though that may also be present and enter into the case. This is a principle alike applicable to exceptions in bills of lading and in policies of insurance. Though the peril of the sea may be nearer in time to the disaster, the efficient cause, without which the peril would not have been incurred, is regarded as the proximate cause of the loss. And there is, perhaps, greater reason for applying the rule to exceptions in contracts of common carriers than to those in policies of insurance; for, in general, negligence of the insured does not relieve an underwriter, while a common carrier may not, even by stipulation, relieve himself from the consequences of his own fault."

Now, the contract on the part of the ship required her to be in all respects seaworthy for the voyage she undertook. Indeed, unless otherwise expressly stipulated, an implied warranty of seaworthiness of the ship at the time of commencing the voyage accompanies every contract of affreightment. The Caledonia, 157 U. S. 130, 131, 15 Sup. Ct. 537, 39 L. Ed. 644. And this includes, not only a ship seaworthy in hull and equipment, which conditions it is conceded the Musselcrag met, but also seaworthy in respect to the stowage of the cargo. The Edwin I. Morrison, 153 U. S. 211, 14 Sup. Ct. 823, 38 L. Ed. 688; Carver on

Carriage by Sea, § 18; Sumner v. Caswell, (D. C.) 20 Fed. 219; The Colima (D. C.) 82 Fed. 665; The Whitlieburn (D. C.) 89 Fed. 526; The Oneida (D. C.) 108 Fed. 886; Id., 128 Fed. 687, 63 C. C. A. 239; The William Power (D. C.) 131 Fed. 136; The G. B. Boren (D. C.) 132 Fed. 887.

Was the Musselcrag seaworthy in respect to her stowage for the voyage undertaken at the time of entering upon it? We are of the opinion that the decided weight of the evidence is against the conclusion reached by the court below in respect to that question. It was admitted by the master that the Musselcrag was "naturally a very stiff ship." It is also shown, as well as commonly known, that cement is a heavy, compact cargo, and, unless properly distributed, will make the vessel in which it is stowed too stiff for safe navigation in severe weather, which, as a matter of course, is always to be anticipated off Cape Horn. Now, turning to the testimony, all of which that tended to show proper stowage was taken by deposition, we find that the testimony on the part of the ship, tending to show that the cargo was properly stowed, consists of that of two stevedores who assisted in the loading at Antwerp, and the testimony of the master, corroborated to some extent by that of the ship's carpenter. The testimony of the stevedores is very general in character, and is to the effect that, as they remember, the cargo was properly stowed. The master also testifies that it was properly stowed, gives (approximately) the number of tons put in the hold, the number placed between-decks, and goes somewhat into the details of the stowage. We extract from his testimony:

"Q. In stowing the cargo, was any precaution, and, if so, what precaution, taken for the purpose of making an allowance for a heavy, deadweight cargo? A. Yes, sir; the cargo was raised from the sixth tier up. Q. Will you explain what the difference is between raising a cargo in the hold, as you say, and not raising it? A. If we did not raise it, the barrels would be stowed bilge and cuntling. When you raise the cargo, you put inch pieces of board over the sixth tier, which would raise the next tier, and so on. Q. That is, when you begin raising at the sixth tier, do you lay the same scantling between each successive tiers? A. Yes, sir. Q. Up to the beams? A. Yes, sir. Q. What effect would that have in diminishing the occupied space in the hold? A. I should say by nearly a barrel when it got to the between-decks. Q. That is, the diameter of a barrel? A. Yes, sir. Q. Ordinarily, in stowing cargoes at Antwerp, where is this raising begun? A. At the eighth tier. Q. In the case of your ship, why did you begin at the sixth tier? A. I think the owners wished to keep the ship as lively as possible. The ship was naturally a beamy ship and a stiff ship. Q. What do you mean by a 'beamy' ship? A. A large beam. Q. Was the lower hold full? A. There was room for another cask between the beams. The ends of her were empty. Q. Were the between-decks full up to the beams? A. There was room for another tier. Q. How much did you have in the lower hold in weight? A. About 2,350. Q. How much did you have in the between-decks? A. We had 928 tons in the between-decks, as near as I could guess. Q. Under whose superintendence was the cargo loaded? A. Under mine. Q. In your judgment as a shipmaster, was that cargo properly stowed? A. Yes, sir. Q. With reference to the ship's carrying capacity, was the cargo a small cargo, or a large cargo, or a suitable cargo, or what? A. A suitable cargo. The ship was loaded to her marks. Q. When you say she was loaded to her marks, what do you mean? A. Light-water draught. Q. At the time that the ship was loaded, where was she laying? A. In the Scheldt, fresh water. Q. The effect of leaving the fresh water and going into the salt water would be what on raising or lowering those marks? A. It would raise

it six inches. Q. She would be lying six inches out of the water after leaving the fresh water than she was at that time? A. Yes, sir; six inches more free board. Q. In your judgment, what was the condition of the vessel then with reference to seaworthiness? A. Good condition; excellent condition."

On the part of the libelant one Burke, the head stevedore, who unloaded the cargo at San Francisco, testified as follows:

"Q. Do you remember the ship Musselcrag when she came into this harbor in June or July, 1900, with a damaged cargo of cement? A. Yes, sir. Q. Were you engaged at that time in the discharge of that cargo? A. Yes, sir. Q. What did her cargo consist of? A. It consisted of 100 tons of general merchandise, and the rest cement. Q. Do you remember how that cargo of cement was stowed in the lower hold, with reference to whether it was stowed bilge and cuntline or raised? A. It was set bilge and cuntline, raised on the bottom, I suppose, about a foot from the bottom of the ship. Q. I mean so far as the cargo itself is concerned, was it set solid? A. A solid bulk of cement. From the between-decks down there were a few boards scattered along the main hatch, and barrels were set on top of them; but from there aft, to both ends of the ship, there was nothing but cement, and it was set bilge and cuntline. Q. Did those boards have any tendency to raise the heads of the barrels so as to increase the liveliness of the ship? A. No, sir; I don't think so. The fourth tier below the between-decks was where the boards were. Q. What was the size of the boards? A. Old pieces of lining boards that they line ships with, perhaps 1 by 10 or 1 by 12, and perhaps 20 feet long. Q. Were those boards of sufficient strength to have ordinarily sustained the weight of three or four tiers of cement? A. I don't hardly think so. Q. Well, do you know? A. I think it is too much weight for an inch board to stand four tiers of cement. Q. What is the weight of a barrel of cement? A. Four hundred pounds, on an average. Q. So four tiers of it would be about 1,600 pounds? A. Yes, sir. Q. From what you saw of that cargo, could you tell whether or not it had been originally tiered up or raised from the sixth tier? A. No, sir; nothing raised that I saw. I think those few boards were on top of the sixth tier. Q. What would that indicate to you? Could you tell, from your experience, whether it had been originally raised, or whether it had been set solid? A. I could not tell whether they set it that way or threw those boards there. They were not all the way from the hatch that way. They were just in the body of the ship in the main hatch. Q. None of those boards were found anywhere, except around the main hatch? A. Around the main hatch; that is all I could find. Q. And how were the barrels stowed away there? Were they stowed as if they had been raised, or bilge and cuntline? A. They were set on those boards, and over those boards they were set bilge and cuntline again above. Q. What was the area of the main hatch compared with the spread of the cargo? A. About the size of the hatch, you mean? Q. Yes. A. I could not exactly say. It might have been four beams in length, and it might have been about 12 or 14 feet wide, and it might have been 16 feet long in the main hatch. Q. And it was stowed in what points? A. Stowed from the bulkhead forward to the foremast two tier high, and from the foremast half barrel shingle to the between-decks shingle from behind the mizzenmast to the between-decks below the mizzenmast in the lower hold. Nothing outside of cement, but a few crates of bottles and barrels of pulverized sulphur in the lower hold among the cement. Q. And in that cargo there was no indication of any raising of the cargo, except in this square around the main hatch? A. That is all that I know. Q. If it had been there, would you have seen it? A. I would, because I was looking down there all the time. I blowed a whistle for the engineer to go ahead. I have to look down to see that the load is slung right. * * * I took all her cargo out of her before I left. The last thing I took out of the ship was a load of firewood the captain gave me. That was the last thing that came out of the ship; some dunnage wood."

The latter witness was corroborated by the testimony of the stevedore Wilson, who was also employed in discharging the cargo at San Francisco. Besides which, two British shipmasters of long experience —Quayle and Steele—testified that in their opinion the cargo was not properly stowed; that too much of the cement was put in the lower hold as compared with that put between-decks, the direct consequence of which was to add to the natural stiffness of the ship, thereby causing her to roll and strain more than she should or would have done, had the proper amount of the cargo been stowed between-decks. All of these witnesses, so far as the record shows, were without interest in the controversy. Moreover, their testimony to the effect that the cargo was improperly stowed is sustained by, what the record shows actually happened on the voyage. The ship's log, as well as the testimony of some members of the crew, shows that no severe weather was encountered until the vicinity of the Horn was reached; yet it appears that the ship rolled and strained so badly on the way to the Horn that her seams started, causing leaks, and necessitating calking of the main decks, and, according to the log, "securing cargo lower, fore, and 'tween-decks." When the Horn was reached and the heavy gales were met, the seams gradually opened, letting in the water in large quantities. On October 12th, the log shows, the crew was "employed shifting cargo from fore part of forehold, and raising part into between-decks, and shifting cement further aft and higher in the ship, to ease the pitching and straining," the object and effect of which, according to the evidence, was to make the ship livelier and to ease her straining. That could and should have been done before sailing; for it is the duty of the carrier, as has been said, to provide a vessel not only seaworthy for the voyage undertaken in respect to hull and equipment, but also as regards the stowage of the cargo.

The suggestion on the part of the claimant that the stevedores employed at Antwerp were of the charterer's selection is without force, for the reason that while the charter party provided that the charterers should "have the option of appointing the lumpers and stevedores who are to take in and stow the cargo, who are to be paid by the owners one shilling per ton, weight measurement," it is by the same instrument "especially agreed that the lumpers and stevedores shall be under the direction of the master, and the owners responsible for all risks of loading and stowage." Under such circumstances, the ship is responsible for the bad stowage. The Sloga, 22 Fed. Cas. 346; The Whitlieburn (D. C.) 89 Fed. 527.

Upon the ground that the cargo was insufficiently stowed for the voyage undertaken, we are of the opinion that the libelant is entitled to recover the full amount of the loss and damage sustained, and the judgment must be modified accordingly.

Cause remanded to the court below, with directions to so modify the judgment as to award the libelant the full amount sued for, with costs.

GILBERT, Circuit Judge (dissenting). From that part of the opinion which holds that, upon the ground that the cargo was insufficiently stowed the libelant is entitled to recover the full amount of the loss and

damage sustained, I am compelled to dissent. In the first place, I find in the record no evidence sufficient to sustain a finding that improper stowage was the cause of or contributed to the damage to the cargo. The only witnesses who testified as experts upon that subject were the master mariners Quayle and Steele. Quayle said that in his opinion, taking the weather to be as described in the log book, "if the ship had been stowed with less cargo in the lower hold, she would not have come to so much damage as she did get." And he added:

"I do not put that forth as an opinion but what a ship might be damaged off the Horn; but, so far as I can see in this log book, she had no unusual weather off the Horn."

In brief, this witness inferred from reading the log book that the ship met no unusual weather off the Horn, and he was therefore of the opinion that improper stowage must have been the cause of a portion of the damage to her cargo. Steele, master mariner, from reading the log, testified that the weather was not unusual; "it is the ordinary course of the weather; * * * what is to be expected in coming around the Horn"; and that if, under those conditions, a vessel labored very heavily and strained herself, the conclusion he would come to was that she had too much cargo in her lower hold, and that he would attribute her injuries to her stowage, rather than to the weather.

But the evidence is convincing that the weather encountered off the Horn was unusual. For a period of about 50 days there were unusual gales. A large portion of that time the ship lay to the wind. Milne, an experienced seaman, said that the gales were very hard—as hard as he ever experienced. Lawson, the sail maker, testified that he had been 20 times around the Horn, and that on this occasion it was blowing the hardest he ever saw down there. Faraday, the second mate, testified that three or four different times he thought the ship would founder, the sea was so bad. Johnson, the master, testified that he had never seen such heavy weather off the Horn; that he thought on one or two occasions the ship would in all probability go down before morning. The evidence shows that the decks were almost continually flooded. Faraday said, "We were shipping tons of water all the time." It is not disputed that the ship lost a spanker boom; had her wheel smashed and steering gear boxes; lost two boats, three topsails, and two mizzen staysails; that her bulwarks were twisted, and her bulwark stanchions started, on both sides; that she lost a considerable amount of running gear, blocks, and that all the galley furnishings were washed completely out of the galley; that in order to protect the crew from accidents life lines were stretched fore and aft the decks and across the poop, and ladders from the amidship house to the mainmast; that at different times four or five of the men at a time were incapacitated from injuries received; and that about 450 barrels of cement were jettisoned. This weather would seem to be sufficient in itself to account for the straining of the decks and the injury to the cargo, and I submit that the evidence ought to be more convincing than it is before the court should say that improper stowage contributed to the damage.

In the second place, it must be remembered that the evidence of the witnesses who testified that the cargo was improperly stowed was all

taken in open court, and therefore the rule is applicable that the finding of the district judge upon the conflicting evidence must be taken to be conclusive upon that question of fact, unless it clearly appears to be against the evidence. Whitney v. Olsen, 108 Fed. 292, 47 C. C. A. 331; Jacobsen v. Lewis Klondike Expedition Co., 112 Fed. 73, 50 C. C. A. 121; The Newport News, 105 Fed. 389, 44 C. C. A. 541; Alaska Packers' Ass'n v. Domenico, 117 Fed. 99, 54 C. C. A. 485; Elphicke v. White Line Towing Co., 106 Fed. 945, 46 C. C. A. 56. The district judge may well have failed to give full credence to the testimony of Burke, the stevedore, who testified as to the stowage of a cargo which he had helped unload more than four years prior to the time of giving his testimony. His testimony as to the absence of boards interlining the barrels of cement above the sixth tier, and tending to contradict the explicit testimony of the captain, is as follows:

> He said that the cargo was a solid bulk of cement. "From the between-decks down there were a few boards scattered along the main hatch, and barrels were set on top of them, but from there aft and to both ends of the ship, there was nothing but cement, and it was set bilge and cuntline. Q. From what you saw of that cargo, could you tell whether or not it had been originally tiered up or raised from the sixth tier? A. No, sir; nothing raised that I saw. I think those few boards were on top of the sixth tier. Q. None of those boards were found anywhere, except around the main hatch? A. Around the main hatch; that is all I could find. Q. And in that cargo there was no indication of any raising of the cargo, except in this square around the main hatch? A. That is all that I know. Q. If it had been there, would you have seen it? A. I would, because I was looking down there all the time. I blowed a whistle for the engineer to go ahead. I have to look down to see that the load is slung right."

But it does not appear that his attention was at the time particularly directed to the subject of the boards. He said that he was down below several times to look after the men, but his place was on deck as hatch tender, and it was his duty to blow the whistle for the engineer to go ahead. This testimony was not very direct, positive, or satisfactory, and is clearly insufficient, I think, to justify the court in reversing the finding of the district judge before whom the witness appeared and testified.

Similar criticism is applicable to the evidence furnished by the expert witnesses, who testified after the result and from an inspection of the log. That Quayle did not read the log very closely is amply shown by his cross-examination. The ship carried 2,350 tons in the lower hold, and 928 tons in the between-decks; or, in other words, 71½ per cent. was in the lower hold. Quayle said that she should have had no more than 64 per cent. in the lower hold. Wilson, the stevedore, differed from this estimate, and said that she had only about 150 or 200 tons too much in the lower hold. I submit that such evidence is not sufficient to show that the master of the ship committed an error of judgment in causing the cargo to be loaded as it was. A ship should not be pronounced unseaworthy as to her cargo from a consideration of the result alone. If, upon all the evidence, no negligence is discoverable, the damage should be set down to the perils of the sea, when, as in this case, perils are proven which are sufficient to account for it. In The Frey, 106 Fed. 319, 45 C. C. A. 309, the contention was made that the excessive roll-

ing of the vessel was ascribable to the method of the distribution of the cargo in loading, and that certain drums of glycerine ought not to have been laden in the between-decks, or, if laden there, more weight of cargo or of ballast should have been laden above it, to make the vessel easy. The Circuit Court of Appeals for the Second Circuit, said:

"The judgment of the master and officers as to the proper trim of the ship and the proper distribution of the cargo and weights is much more valuable than that of the witnesses who expressed opinions in answer to hypothetical questions. The former were acquainted by experience with the characteristics of the ship, and, as is well known, two ships built on the same lines act differently under similar conditions of wind and sea. * * * The case for the libelants rests almost wholly on the theory that the weather was not extraordinary, and the consequent inference either that the drums were not properly stowed to resist the rolling of the vessel, or that the weights were not distributed as they should have been to prevent unnecessary rolling of the vessel. We think the seas were sufficiently violent to account for the disaster to a vessel in seaworthy trim with her cargo sufficiently secured. There is no rule by which it can be defined with accuracy what degree of violence of the wind or waves is necessary to constitute a peril of the sea. Different cases must be determined according to their special circumstances. The term, of course, refers only to such forces of the elements as cannot be resisted by the ordinary exertions of human skill and prudence."

THE SAN RAFAEL. THE SAUSALITO. In re NORTH PAC. COAST R. CO. NORTH PAC. COAST R. CO. v. HALL et al. (two cases). NORTH SHORE R. CO. v. McCUE.

(Circuit Court of Appeals, Ninth Circuit. October 16, 1905.)

Nos. 1,175, 1,176, 1,177.

1. ADMIRALTY—APPEAL—MATTERS REVIEWABLE.

An appeal in admiralty by either party from the District Court to the Circuit Court of Appeals vacates altogether the decree of the District Court and opens the whole case for trial anew in the appellate court.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, §§ 748, 759.

New proofs in admiralty, see notes to The Venezuela, 3 C. C. A. 322.]

2. SHIPPING—PROCEEDINGS FOR LIMITATION OF LIABILITY—SCOPE.

The purpose of proceedings for limitation of liability for a collision is to exempt the petitioner from all personal liability on account of the collision, on whatever ground it may rest; and where the petition is for the limitation of liability as owner of a vessel sunk, but it is found on the hearing, on appropriate allegations in the answer, that petitioner was also owner of the other vessel concerned, and that both were in fault for the collision, it is a condition precedent to the granting of the relief sought that both vessels and their pending freight be surrendered.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 654.

Limitation of shipowner's liability, see note to The Longfellow, 45 C. C. A. 387.]

3. COLLISION—STEAM VESSELS MEETING IN FOG—ERRONEOUS SIGNALS.

Two meeting ferry steamers both *held* in fault for a collision in the Bay of San Francisco; one on the ground that she gave a passing signal which required the vessels to cross each other's course in a fog so dense that they could not see each other, and the other for assenting to such signal and attempting to carry it into effect.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 40.]

4. DEATH—EVIDENCE TO ESTABLISH.
Libelants, consisting of an insane woman and her seven minor children, by their guardian ad litem, sued to recover damages for the death of the husband and father. At the time of the alleged death the mother was confined in an asylum, and the children, the oldest of whom was 17 and the youngest 3 years of age, resided with their father, who supported them and was uniformly kind and affectionate toward them. He was also a man of good habits. He left home, expressing the intention of going to San Francisco, and from there, on a boat which left at a certain hour, to San Rafael, where he intended to stay overnight with his brother-in-law, and to go the next day to visit his wife. He rode as far as Oakland with an acquaintance, who saw him leave there on a ferry-boat which reached San Francisco in time to make the expected connection; but he was never seen or heard from afterwards by any one who knew him. The San Rafael boat which he intended to take was sunk on the trip in a collision in a fog. A man answering his description was seen by other passengers on such boat immediately before the collision, seated in the restaurant at a place from which it was doubtful if he could have escaped after the collision. *Held*, that such evidence was sufficient to warrant a finding of his death and that it was due to the collision, although but three years had elapsed at the time of the trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 5, 6.]

5. SAME—DAMAGES.
An award of $5,000 damages in a suit in admiralty for the death of a man who left an insane wife and seven minor children, all of whom were dependent on him for support, the oldest child being 17 and the youngest 3 years of age, *held* too small, and increased to $7,500.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 120–124.]

6. EVIDENCE—DECLARATIONS—STATEMENTS SHOWING INTENTION.
Whenever the intention of a person is of itself a distinct and material fact in a chain of circumstances, as where it is sought to prove by circumstantial evidence that a person who has not since been seen or heard from was a passenger on a vessel when she was sunk in collision, and so lost his life, and as one of the circumstances that he intended to take such vessel, such intention may be proved by his oral declarations made contemporaneously.

[Ed. Note.— For cases in point, see vol. 15, Cent. Dig. Death, § 4; vol. 20, Cent. Dig. Evidence, §§ 1063, 1064.]

7. ADMIRALTY—MISJOINDER OF DEFENDANTS—AMENDMENT OF LIBEL.
Where exceptions to a libel against a vessel and its owner were sustained, on the ground that they could not be sued jointly, it was not error to permit the libel to be so amended as to declare against the vessel alone.

[Ed. Note.—For cases in point, see vol. 1 Cent. Dig. Admiralty, §§ 289, 295, 524.]

8. MARITIME LIENS—ENFORCEMENT—LIMITATION BY STATE STATUTE.
A state statute limiting the time within which liens on vessels given thereby must be enforced does not restrict or affect the jurisdiction of a court of admiralty to enforce a lien given by the general maritime law.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Maritime Liens, § 99.]

9. SAME—TORTS—SALE OF VESSEL TO BONA FIDE PURCHASER.
A lien for a maritime tort follows the vessel into the hands of even a bona fide purchaser.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Maritime Liens, § 86.]

10. COLLISION—PERSONAL INJURIES—DAMAGES.
An award of $1,000 damages for personal injuries received in a collision by which libelant's arm was broken and his hands mutilated and

partially disabled, a part of one of his ears was cut off, and he was rendered permanently deaf in one ear, besides receiving other injuries, *held* too small, and increased to $4,500.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 372.]

Appeals from the District Court of the United States for the Northern District of California.

For opinion below, see 134 Fed. 749.

These appeals grew out of the same accident, and were argued and submitted together; the cause being a collision in the Bay of San Francisco between the ferry steamers Sausalito and San Rafael, by which the latter was sent to the bottom of the bay, where she has ever since remained a total wreck. Both steamers were owned and operated at the time by the North Pacific Coast Railroad Company, in connection with its railroad, for the transportation of its passengers and freight between the city of San Francisco and the Sausalito terminus of its road. The accident occurred on the 30th day of November, 1901. On the 17th day of September, 1903, that company filed in the court below its verified petition, by which it sought, not only to obtain a limitation of its liability, under and pursuant to the provisions of Act Cong. March 3, 1851, c. 43, 9 Stat. 635, subsequently substantially incorporated into Rev. St. §§ 4282–4290 [U. S. Comp. St. 1901, pp. 2943–2948], but to obtain a decree relieving it of any liability by reason of the matters and things alleged in its petition. It was therein alleged, among other things, that most of the passengers upon the San Rafael were rescued and saved; that "all or most" of the merchandise, personal property, baggage, and effects were lost, and that nothing remained of the steamer San Rafael but four of her iron boats, the aggregate value of which did not exceed $400; that at the time of the collision and of the wrecking of the San Rafael the amount of her "freight pending was $40.98, that is, $3.48 prepaid freight, and $37.50 prepaid passage money," and no more; that the value of the San Rafael and her freight pending "immediately upon, at, and after the happening of the misfortune aforesaid, did not and does not exceed the sum of $440.98." The petition also alleged that one J. S. McCue had commenced an action in the superior court of the city and county of San Francisco against the petitioner to recover from it damages in the sum of $300,000 for injuries alleged to have been sustained by him while a passenger on the San Rafael at the time of the collision, and had also commenced an action in the superior court of Marin county, Cal., against the petitioner to recover damages in the sum of $500 for merchandise alleged to have been lost by him by reason of the collision, and that various other persons, claiming to be similarly injured and damaged, will or may bring similar demands against the petitioner. The petition contained the usual prayer, and on the 21st day of December, 1903, a bond for the appraised value of the San Rafael and her freight pending was filed, and on the same day an injunction and monition were issued, the latter of which was returned into court showing due publication.

On the 5th day of April, 1904, the widow and children of one Alexander Hall, by Patrick Cassidy, their guardian ad litem, appeared as claimants; and, without waiving their right to contest the sufficiency of the petition in point of law as well as fact, alleged, among other things, that Alexander Hall was one of the petitioner's passengers on board the San Rafael at the time of the collision in question, which collision they alleged was caused by the gross carelessness of the petitioner, its servants and employés, in so navigating the two steamers as to bring them together, resulting in the sinking of the San Rafael and the death of Hall, for which damages were asked in behalf of his widow and children in the sum of $50,000.

On the 6th day of April, 1904, J. S. McCue filed in the court below a paper entitled "Exceptions and Objections of J. S. McCue," concluding with a prayer that the court deny and dismiss the petition, which paper the court treated as an answer thereto. At the same time McCue filed a claim against the petitioner for the sum of $300,000 as damages alleged to have been sustained by him in the collision, in which he alleged, in substance, that he was a passenger of the petitioner on board its steamer San Rafael at the time in

question, on one of her trips from San Francisco to Sausalito, during which time the petitioner's other steamer Sausalito, was making one of her trips from Sausalito to San Francisco, when, near Alcatraz Island, the San Rafael was run into by the Sausalito, through the gross carelessness of the officers of each of the boats, by which collision the San Rafael was sunk, and the claimant seriously injured in the particulars therein specifically set forth, for which injuries he demanded damages in the sum of $300,000. In his "Exceptions and Objections" to the petition McCue alleged, among other things, substantially the same facts, and also set up in defense of the petition that, inasmuch as the collision which inflicted his injuries was brought about by the fault of both steamers and their respective masters, the petitioner was not entitled to any limitation of its liability without the surrender of both steamers, and accordingly prayed that the petition be denied and dismissed. This point on the part of McCue was overruled by the court below, the court saying, in its opinion: "It is a sufficient answer to this to say that the petitioner does not seek to limit any liability which it may be under as owner of the steamer Sausalito, and in my opinion the right of the respondent, or any other person injured by the collision referred to, to proceed against the steamer Sausalito, or the petitioner, in so far as that vessel is liable for damages growing out of such collision, is not affected by this proceeding. The petitioner does not allege that it is the owner or has ever been the owner of the steamer Sausalito, and the decree in this case will be restricted to its liability as owner of the steamer San Rafael. There was no evidence given upon the trial bearing upon the allegation of the petition that the collision was the result of inevitable accident. The claim of the petitioner for exemption from all liability must therefore be denied, and a decree entered limiting its liability to the appraised value of the San Rafael and freight pending. Further hearing of the case upon the question of the amount of damages may be brought on by either party, upon notice to the other." In accordance with this conclusion, the court below entered a decree, on the 2d day of November, 1904, adjudging and decreeing "that the default of each person and all persons who may claim to have suffered damages or loss on said voyage or resulting from said collision, and who have not heretofore presented his or their claims herein pursuant to said monition aforesaid, be, and are hereby, adjudged herein to be forever barred; that the petitioner North Pacific Coast Railroad Company, a corporation, is entitled to limit its liability as owner of the steamer San Rafael, if any liability there be, for and on account of the matters and things in its said petition alleged; and that the claim of petitioner for exemption from all liability is denied, and its liability as owner of the steamer San Rafael be, and the same is hereby, limited to the appraised value of the said steamer San Rafael, with its freight pending, hereby adjudged to be the sum of $425.23, together with interest thereon, from December 21, 1903; and that the further hearing as to the amount of damages may be brought on upon notice by either party; and that such matters as are not herein specifically adjudged, be and are reserved for further hearing and consideration."

Further hearing in respect to the matter of damages was subsequently brought on, resulting in findings by the court below made and entered December 16, 1904, to the effect that the collision in question was caused by the fault of both steamers and their respective officers, and that McCue had sustained damages by the collision to the extent of $1,500, and that the widow and children of Alexander Hall had been damaged by the death of the latter in the sum of $5,000, upon which findings there was entered, on the 5th day of January, 1905, a decree in favor of McCue against the petitioner in the sum of $1,500, with costs, but with a limitation to the effect that satisfaction of the decree should "be limited to such portion of the sum of four hundred twenty-five and twenty-three one-hundredths (425 23-100) dollars, together with interest thereon from December 21, 1903, as may be on the further proceedings herein apportioned to said J. S. McCue, upon a consideration of all judgments or decrees rendered against said petitioner herein," and further adjudging "that the full limit of the liability of said petitioner, as owner of said steamer San Rafael, for or on account of any matter or thing alleged

in said petition, is hereby limited to the said sum and value of four hundred twenty-five and twenty-three one-hundredths (425 23-100) dollars, together with interest thereon from December 21, 1903, until the said sum and interest shall, upon the proper order of this court therefor, be paid into the register of this court." A similar decree, with similar limitations and provisions, was at the same time entered by the court below in favor of Cassidy, as guardian ad litem of the widow and children of Alexander Hall, against the petitioner North Pacific Coast Railroad Company, for $5,000. Meanwhile, to wit, on the 21st day of November, 1903, McCue brought in the same court a libel against the steamer Sausalito and the North Shore Railroad Company, which had then become the owner of the steamer, having acquired the same from the North Pacific Coast Railroad Company, in which libel McCue set up substantially the same matters which he alleged in his former pleadings, exceptions to which, upon the ground that the libelant could not proceed against the steamer and its owner jointly, were sustained by the court on January 13, 1904, with leave to the libelant to amend.

Accordingly, on the 18th day of January, 1904, McCue filed an amended libel against the steamer Sausalito, alleging the same facts previously set up, and praying damages in the sum of $300,000 against that steamer, and that she be sold to pay the same, etc. The answer of the North Shore Railroad Company, then claimant of the Sausalito, to the amended libel of McCue, besides putting in issue the averments with respect to negligence on the part of the steamer Sausalito, and with respect to his injuries and damages, set up, in bar thereof, the limited liability proceedings heretofore referred to, and the decrees entered therein. On the 30th of November, 1903, Cassidy, as guardian ad litem of the widow and children of Alexander Hall, also brought in the court below a libel against the steamer Sausalito and the North Pacific Coast Railroad Company, as the owner thereof, to recover damages for the alleged death of Alexander Hall, alleging therein the same facts he had theretofore set up as grounds for such recovery, in which proceeding the North Shore Railroad Company intervened as claimant of the steamer Sausalito. Exceptions were filed by both of the railroad companies to that libel, which were, by the court below, sustained, on the ground that the steamer and its owner could not be so proceeded against jointly, whereupon an amended libel was, by leave of the court, filed by Cassidy, as such guardian, against the North Pacific Coast Railroad Company alone, based upon substantially the same averments as he had made in his former pleadings herein referred to.

The libels of McCue and of Cassidy, as guardian ad litem of the widow and children of Alexander Hall, were tried together and submitted upon the same evidence, resulting in findings by the court below to the effect that both Hall and McCue were passengers of the North Pacific Coast Railroad Company, on board the steamer San Rafael at the time of the collision between her and the steamer Sausalito, that Hall lost his life by reason of it, and that McCue lost, from the same cause, personal effects of the value of about $400, and suffered personal injuries to such an extent as to make his damages aggregate $1,500, and further finding that the collision was brought about by the fault and carelessness on the part of both steamers and of their respective masters, the court gave judgment in favor of McCue for $1,500 and costs, but further adjudged that the decree "be satisfied upon the payment of said sums, less any amount paid to the libelant upon a decree heretofore rendered in his favor in the matter of the petition of the North Pacific Coast Railroad Company for limitation of its liability, filed in this court and numbered 13,112," and further adjudging "that unless this decree be satisfied as above provided, or proceedings thereon be stayed by an appeal from said decree within the time limited and prescribed by the rules and practice of this court, that then the libelant may have execution against said claimant and against its surety, upon the admiralty stipulation given in the above-entitled proceeding for the release of said steamer Sausalito," from which decree the claimant appealed. And the court gave judgment in the case of Cassidy, as guardian ad litem of the widow and children of Alexander Hall, against the North Pacific Coast Railroad Company for $5,000 and costs, but further adjudged that the decree "be satisfied upon payment of the sum so

awarded, less any amount which may be paid to the libelants, upon the decree heretofore rendered in their favor in the matter of the petition of the North Pacific Coast Railroad Company for a limitation of its liability, filed in this court, and numbered 13,112," and that "each of said libelants, to wit, Catherine Hall, Robert A. Hall, Maggie J. Hall, Mary C. Hall, Lillie A. Hall, Alexander M. Hall, Teresa R. Hall, and Cecelia L. Hall, shall share equally in said sum so decreed," and further adjudged "that unless this decree be satisfied as above provided, or proceedings thereon be stayed, on an appeal taken from this decree, within the time therefor limited and prescribed by the rules and practice of this court, that then the libelants may have execution against said respondent, the North Pacific Coast Railroad Company, to enforce satisfaction of this decree, or so much thereof as shall remain unsatisfied," from which decree the North Pacific Coast Railroad Company appealed.

George W. Towle and William W. Deamer, for appellants.
H. V. Morehouse, for appellees.

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

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

It is well settled, said the Supreme Court in Irvine v. The Hesper, 122 U. S. 256, 266, 7 Sup. Ct. 1177, 30 L. Ed. 1175, "that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried de novo in the Circuit Court. Yeaton v. United States, 5 Cranch, 281, 3 L. Ed. 101; Anonymous, 1 Gall. 22, Fed. Cas. No. 444; The Roarer, 1 Blatchf. 1, Fed. Cas. No. 11,876; The Saratoga v. 438 Bales of Cotton, 1 Woods, 75, Fed. Cas. No. 12,356; The Lucille, 19 Wall. 73, 22 L. Ed. 64; The Charles Morgan, 115 U. S. 69, 75, 5 Sup. Ct. 1172, 29 L. Ed. 316. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libelants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case de novo. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants." The same rule applies here, since this court now has the jurisdiction of appeals in admiralty from the District Court that formerly appertained to the Circuit Court. The Sirius, 54 Fed. 188, 194, 4 C. C. A. 273. The whole of the cases in hand, therefore, were opened by the appeals taken by the petitioner and claimants. It is unimportant that no appeal was taken by McCue, or by the guardian of the widow and children of Alexander Hall, and we must make such disposition of the cases as the records before us show to be proper.

First, then, as to the petition filed by the North Pacific Coast Railroad Company for the limitation of its liability, in the event any should be found to exist. McCue set up in defense of that proceeding, that the collision that inflicted the injuries upon him was caused by negligence on the part of each of the steamers San Rafael and Sausalito; and the court below so found from the evidence. Yet that court overruled the point thus made on behalf of McCue, holding then, as later upon the trial, that as the steamer Sausalito was not mentioned in the petition,

the petitioner was entitled to a limitation of its liability in respect to the steamer that was mentioned therein, namely, the San Rafael. In this there was clear error, for, as said by the appellant's own proctor:

"The purpose of the limitation proceeding was to limit the liability of the North Pacific Coast Railroad Company—alleged by libelant to be the owner of both steamers—as to any and all of its liabilities resulting from a collision between the steamers San Rafael and Sausalito."

And it is for that very reason that it is a condition precedent to the granting of such relief that the party seeking it surrender each and every vessel participating in the tort. It was so distinctly adjudged by this court in the case of The Columbia, 73 Fed. 226, 19 C. C. A. 436. And if it be true, as the court below held, that the evidence shows the fact to be that the collision in question was caused by negligence on the part of each of the steamers, it follows, as a matter of course, that the petition should be denied and dismissed; from which it must further follow that there can be no bar or limitation to whatever rights the libelants may have, by reason of those proceedings, or of any judgment entered therein. All parties concede that there was fault on the part of the San Rafael. And in respect to the question of negligence on the part of the Sausalito, we agree with what was said by the court below in one of its opinions, to wit:

"The facts relating to the collision between the San Rafael and Sausalito, and which the libelant insists show negligence upon the part of the servants of the defendant, in the navigation of both steamers, may be very briefly stated: The San Rafael left San Francisco for Sausalito about the hour of 6:15, on the evening of November 30, 1901, and the Sausalito left the town of Sausalito for San Francisco at about the same time. The night was dark, and the fog very thick. Just after passing Alcatraz Island, the master of the Sausalito heard the fog whistle of the San Rafael, from ½ to 1 point off his port bow, and shortly thereafter the San Rafael sounded two whistles, indicating that she was going to port. The Sausalito answered with two whistles, and the wheel of the Sausalito was immediately put hard astarboard, for the purpose of changing her course to port. The master of the Sausalito testified in substance that he knew the San Rafael was in error in giving the passing signal to port, and that, after answering the same, he at once gave orders to his engineer to stop, and back his vessel, and, at the same time, gave three blasts of his whistle to notify the other steamer that his engines were reversed. The engines of the San Rafael were also reversed about the same time, and within a very short time thereafter, not more than 2 minutes, the collision occurred, the bow of the Sausalito striking the San Rafael an angling blow on her starboard side, and injuring her to such an extent that she sank in 20 minutes, and became a total loss. The evidence also shows that, just prior to the collision, the Sausalito had swung to port one point. There was a strong ebb tide pressing against the side of the San Rafael at the time, and the defendant claims that the Sausalito was not under headway, and the collision was caused solely by the drifting of the San Rafael upon the Sausalito. In the view I take of the case, it is not necessary to determine whether this claim is sustained by the evidence or not. My conclusion from all of the evidence is that the collision was caused by the mutual fault of the steamers, in attempting to cross courses in a dense fog, when neither could see the other in time to avoid a collision. It is true the first error was committed by the San Rafael, but it was certainly an error upon the part of the Sausalito to assent to the San Rafael's proposed change of course, and to starboard her wheel for the purpose of passing to port; and the evidence does not satisfy me that the effect of this error was rendered harmless by the subsequent action of the Sausalito, in topping and reversing her engines. She had swung to port one point, and

her wheel was still hard astarboard at the time of the collision; and in my opinion, in thus changing her course, she contributed to the cause of the collision."

It results, from what has been said, that neither the libel of McCue against the steamer Sausalito, nor that of Cassidy, as guardian of the widow and children of Alexander Hall, against the North Pacific Coast Railroad Company, can be in any way affected by the limitation proceedings, nor by any judgment entered therein.

There remain for consideration and determination, in respect to the libel brought on behalf of the widow and children of Alexander Hall, only the questions of the sufficiency of the evidence to show that the latter lost his life by reason of the collision, while a passenger on board the steamer San Rafael, whether the sum of $5,000 awarded by the court below was a just compensation for such loss, and the propriety of the distribution of that award made by the court below between the widow and children. In respect to the libel brought by McCue against the steamer Sausalito, there remain for consideration and determination: (1) The point made on behalf of the claimant of the steamer to the effect that the court below erred in allowing the libelant to so amend his libel as to proceed against that steamer alone; (2) that it erred in not holding McCue's cause of action barred by the provisions of section 813 of the Code of Civil Procedure of California, and by the laches of the libelant; and (3) the question of the amount of damages to which the libelant McCue is justly entitled.

As regards Alexander Hall, it is true that there is no direct and positive evidence that he lost his life by reason of the collision in question, nor that he was a passenger on the San Rafael at the time. The case, in that respect, rests upon certain facts and circumstances from which the court below drew the inference that he was such passenger, and went down with that vessel. The evidence shows that Hall resided near Sacramento with his family of seven minor children, the oldest of whom was then but 17, and the youngest but 3 years of age. His wife was insane, and was then confined in a sanitarium at Livermore. A brother of hers, the guardian ad litem here, was residing at San Rafael. The oldest child, a boy then about 17 years of age, and about 20 at the time of the trial, when asked about his father's habits, testified:

"He was a good father, as far as he treated all of us children. He was always home with us. We were without a mother, and he was always at home, treated us well, and was always with us. He was not a man of bad habits, staying out, or nothing like that—always affectionate to his family."

There is nothing to the contrary in any of the testimony. It appears that on November 30, 1901 (the day of the accident), Alexander Hall left Sacramento for the purpose of first going to San Rafael, to spend the night with his brother-in-law, Cassidy, and of going the next day to Livermore, to see his unfortunate wife—having taken care to see that the train on which he left Sacramento was scheduled to connect with the Oakland boat that would bring him to San Francisco in time to take the 6:20 boat to San Rafael. There is testimony to the effect that, before leaving Sacramento, Hall stated, not only to his son Robert, but to an acquaintance, Hallorn, whom he had known for many years,

that he was going to San Rafael that night to see his brother-in-law, and the next morning to Livermore to see his wife. From Sacramento to Oakland he rode in the same seat with another acquaintance by the name of Kenny, to whom he told the same thing, and when the train reached the Oakland Mole, which it appears that it did a little after 5 p. m., Hall and Kenny went together upon the ferry steamer Berkeley, bound for San Francisco, but it was so foggy that Kenny concluded to get off, that witness saying:

"It being so foggy, I got off the boat and got to the cars as fast as I could, and got on the cars; and just as I got off, the boat pulled away, to make the trip to San Francisco."

The witness, being further asked if he saw Hall go aboard the Berkeley, answered:

"Yes, sir; I shook hands with him. I said, 'Sandy, I will not go along; it is too foggy,' and I got off, just as the boys got the rope off."

This was in ample time for Hall to have reached San Francisco and taken the steamer San Rafael on her 6:20 trip, which was the fatal one.

By several witnesses, Hall was described as being from 5 feet 10½ inches to 6 feet tall, stoop-shouldered, with sandy complexion, and a heavy sandy mustache. Hallorn testified that he wore "a black soft hat, with a brown overcoat, tending to be turning a little bit white; that is, the material was brown, but it had faded, and was turning white. It was an overcoat that I had known him to have for three or four years." On the trial, it was admitted that Judge Lennon, of the superior court of Marin county, would, if present, testify that he "was on the San Rafael at the time of this collision; that he was in the restaurant just immediately preceding the collision, where he saw Mr. McCue, and at another table were sitting two gentlemen, one of whom was quite a tall man, with a soft Stetson hat, sandy complected, with a sandy mustache, and, to the best of his recollection, a light appearing overcoat." McCue testified that he saw two men sitting in the restaurant on the boat, "over at this counter near the stove—near the cook's range," and that "one of whom was a tall man, sandy complected; the other appeared to be a stout-built man." Being asked to state the position of these men "as to their ability to get out of there after the accident," the witness answered:

"From the way the boat laid on the other boat, there was only one place for them. If they were not knocked out in front of the boat when the accident occurred, they must have been under the boat."

The evidence shows that Hall has never been seen or heard of or from since the accident, and although at the time of the trial seven years had not elapsed, but only about three—from which fact no presumption of his death could be indulged in, but on the contrary, the presumption that he was still alive—yet, "if it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years." Davie v. Briggs, 97 U. S. 628, 634, 24 L. Ed. 1086.

The question is one of fact to be determined on all relevant facts and circumstances disclosed by the evidence, and the inference of death may arise from disappearance under circumstances inconsistent with a continuation of life. Fidelity Mutual Life Ass'n v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922, which case will be found an instructive one on the subject. It is certainly highly inconsistent with the continuation of the life of Alexander Hall that he should have suddenly deserted, and thereafter kept in utter ignorance of his existence, his family of minor children, all of whom were dependent upon him, and to whom, the evidence shows, without conflict, he had been habitually kind and affectionate. He was, according to the evidence, a man of good habits, staying closely at home, and not only looking carefully after the welfare of his young and dependent children, but also after the needs of his unfortunate wife. The sudden and continued disappearance of such a man, under such circumstances, is entirely inconsistent with the continuation of his life; and the inference of his death therefrom is greatly strengthened by the facts that he left his home with the declared intention of going to San Rafael to spend the night with his brother-in-law, on his way to see his wife; that, when last identified, he was carrying out that intention by going from Sacramento to the Oakland Mole and there getting on the ferryboat bound for San Francisco, in ample time to have taken the steamer San Rafael for the city of San Rafael on her fatal trip; and by the further fact that a man answering his description quite closely was seen on board that steamer just prior to the collision, and was never seen at any time after she sank. We are of the opinion that the court below was right in its conclusion that Alexander Hall was a passenger on the steamer San Rafael, and met his death by reason of the collision between her and the steamer Sausalito. To do so is not, as contended by the proctor for the appellant, basing presumption upon presumption, but it is the drawing of the proper and logical inference from all the facts and circumstances disclosed by the evidence in the case.

The objections on the part of the appellant to the declarations of Hall in respect to his intention to go to San Rafael, are not well taken. "Whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party. The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it." Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706. See, also, Insurance Co. v. Mosley, 8 Wall. 397, 19 L. Ed. 437; Shailer v. Bumstead, 99 Mass. 120.

We therefore not only think that the court below was right in awarding the libelant Cassidy, as guardian, judgment for the death of Alexander Hall, but are of the opinion that the amount of damages allowed by the court below therefor—$5,000—is too small. That amount should and must be increased to $7,500, which sum should, in view of the circumstances and condition of the widow, and the condition and ages of the

children, be, in our opinion, distributed as follows: To the widow, Catherine Hall, $2,500; to Robert A. Hall, $419; to Maggie J. Hall, $503; to Mary C. Hall, $588; to Lillie A. Hall, $672; to Alexander M. Hall, $789; to Teresa R. Hall, $926; and to Cecelia L. Hall, $1,103.

There is no merit in the suggestion that the court below erred in allowing the libelant McCue to so amend his libel as to proceed against the steamer Sausalito alone. Newell v. Norton, 70 U. S. 257, 18 L. Ed. 271; The Mabey, 77 U. S. 420, 19 L. Ed. 963; O'Connell v. 1002 Bales of Hemp (D. C.) 75 Fed. 408; Benedict's Admiralty (3d Ed.) §§ 483-485, 488.

Nor is there any merit in the point that the court erred in not holding McCue's libel barred by the provisions of section 813 of the Code of Civil Procedure of California, and by laches. Section 813 of the California Code of Procedure declares that "all steamers, vessels, and boats are liable" for certain specified services, supplies, etc., and "(5) for nonperformance or malperformance of any contract for the transportation of persons or property between places within this state, made by their respective owners, masters, agents, or consignees; (6) for injuries committed by them to persons or property in this state," and further declares that "demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued."

Courts of admiralty do not get their jurisdiction from state statutes. Roach v. Chapman, 63 U. S. 129, 16 L. Ed. 291; 19 Am. & Eng. Enc. Law, p. 1084. That state Legislatures cannot restrict or extend the admiralty jurisdiction exclusively vested in the federal courts, said the court in the case of The H. E. Willard (D. C.) 53 Fed. 600, "has been often decided and conclusively settled. * * * It follows, necessarily, that a lien given by a state statute is not the test of jurisdiction. If it were, a state Legislature might at pleasure modify the jurisdiction of the courts of admiralty by creating or abrogating liens not given by the maritime law." The lien sought to be enforced in the present case is one given by the general maritime law, and is within the exclusive jurisdiction of the federal court, and to be governed by the rules and principles here applicable. The Moses Taylor, 71 U. S. 411, 18 L. Ed. 397.

It is true that when there is nothing exceptional in the case, courts of admiralty govern themselves by the analogies of common-law limitation. The Queen (D. C.) 78 Fed. 155. In the present case, the injury out of which the lien sought to be enforced arose did not accrue until November 30, 1901, and McCue's libel was filed January 21, 1903—within two years thereafter. If, therefore, by way of analogy, we look to the California statute, we find a period of two years there prescribed within which an action for damages for such injuries as were suffered by the libelant may be brought. Code Civ. Proc. Cal. § 339. But the case shows that McCue was prompt in bringing suit for the damages sustained by him. Before the filing of the petition by the North Pacific Coast Railroad Company in the court below for the limitation of its

liability, he had commenced two suits in the courts of the state to recover such damages—one for the personal injuries sustained by him, and the other for the loss of his property. Indeed, the existence of those suits was made the basis, in part, of the petitioner's application for the limitation of its liability; and the prosecution of those suits in the state courts was stayed by the court below by process issued in those proceedings. And in those proceedings McCue was also prompt to assert his claim for the damages sustained by him. There is, therefore, no just ground for the assertion of laches against this libelant.

Equally without merit is the suggestion that the enforcement of the lien against the steamer Sausalito would work a wrong upon an innocent purchaser. In the first place, the lien for a maritime tort, according to the maritime law, accompanies the vessel into the hands of even a bona fide purchaser. Vandewater v. Mills, 60 U. S. 89, 15 L. Ed. 554; The Rock Island Bridge, 73 U. S. 215, 18 L. Ed. 753; The Avon, Fed. Cas. No. 680; Bruce v. The American, Fed. Cas. No. 2,046; 19 Am. & Eng. Enc. Law, pp. 1082–1117. In the next place, the claimant North Shore Railroad Company was not an innocent purchaser of the steamer Sausalito, for the record shows it purchased during the pendency of the limited liability proceedings, which proceedings disclose the libelant's demands.

The court below allowed the libelant McCue the sum of $1,500 only for the damages sustained by him. The case shows that he lost $400 in money, a suit of clothes estimated by him to be of the value of $50, a watch valued at $20, and that he paid $30 for medical attendance; so that the court below awarded him only $1,000 for his personal injuries. We are of the opinion that such allowance was altogether too low. It is not denied that one of his arms was broken, one of his hands mutilated and partially disabled, and that a part of one of his ears was cut off. He also testified that he was rendered permanently deaf in one ear by reason of the collision, and that he suffered other serious personal injury. Considering all of the facts and circumstances of the case, including the age of the libelant, we are of the opinion that his damages should be, and hereby are, fixed at the aggregate sum of $5,000.

It results from what has been said that in case No. 1,175 the judgment must be and hereby is reversed, and the cause remanded, with directions to the court below to dismiss the petition at the petitioner's cost; case No. 1,176 is remanded, with directions to the court below to so modify the decree therein as to award the libelant McCue damages in the sum of $5,000 and costs, and to strike from the decree the provision that the same may be satisfied upon the payment of any less sum than the full amount so awarded; and case No. 1,177 is remanded, with directions to the court below to so modify the decree therein as to award the libelant Cassidy, as guardian ad litem of the widow and children of Alexander Hall, damages in the sum of $7,500 and costs, apportioned as hereinbefore indicated, and to strike from the decree the provision that the same may be satisfied, upon the payment of any less sum than the full amount so awarded.

SLAUGHTER v. MALLET LAND & CATTLE CO.

(Circuit Court of Appeals, Fifth Circuit. October 2, 1905.)
No. 1,415.

1. COURTS—JURISDICTION OF FEDERAL COURTS—TRANSFER OF RIGHT OF ACTION —COLLUSION.

The conveyance of all of the property of a partnership to a corporation organized for the purpose by the partners and the division between them of the stock of the corporation, a small part of such property consisting of lands in controversy in a subsequent action brought by the corporation in a federal court, cannot be *held* a simulated or sham transfer which will oust such court of jurisdiction because the partnership could not have sued therein, where the conveyance was bona fide and no reconveyance was contemplated.

2. QUIETING TITLE—DEFENSES—POSSESSION.

Where complainant and its predecessors in interest had been in the peaceable possession and occupancy of lands in controversy for a number of years, at first under leases and later under a conveyance from the lessor made pursuant to an option to purchase contained in the leases, defendant could acquire no lawful possession by a forcible entry on the lands which would deprive complainant of the right to maintain a suit in a court of equity to quiet its title and for an injunction against further trespasses by defendant as incidental thereto.

3. ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING—FEDERAL AND STATE COURTS.

The pendency in a state court of an action of trespass to try title to land and to remove a cloud from the title does not place the land in the exclusive possession of that court, in such sense that it is a ground for abatement of a subsequent suit in a federal court between the same parties to quiet title to the same land.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, § 87.]

4. COUNTIES—ORDER OF COMMISSIONERS' COURT—VALIDITY.

The failure to enter an order made by a commissioners' court of a county in Texas on the minutes, where it was duly made and a copy filed with the clerk for entry, does not affect the validity of acts done thereunder.

5. SAME—CONTRACT—RATIFICATION.

The recognition of a lease of lands made in behalf of a county by the county commissioners, by receiving the rentals thereunder and by making subsequent contracts expressly subject thereto, is a ratification of such lease, which cures any informality in its original execution.

6. LANDLORD AND TENANT—OPTION TO PURCHASE IN LEASE—VALIDITY.

A provision in a lease of land by a county that, in case the county should desire to sell the land at the expiration of the term of the lease, "the lessees herein shall have the preference right to purchase said land at any bona fide offer made and acceptable to Edwards county by any responsible party," is not void for uncertainty, but gives the lessees a valid option.

7. SAME—EXECUTION OF CONTRACT.

In a lease by a county the lessees were given an option to purchase the land at the end of the term, should the county desire to sell. Subsequently the county entered into a contract with defendant with respect to the land, expressly subject, however, to the rights of the lessees. At the expiration of the term the county sold the land to the lessees. *Held*, that so far as the rights of defendant were concerned it was immaterial that by agreement the terms of the final contract of sale were varied somewhat from those specified in the lease.

8. PUBLIC LANDS—SCHOOL LANDS—LEASE BY COUNTY COMMISSIONERS.

County commissioners' courts of Texas counties, which under the law of the state are general trustees for the leasing and sale of county school lands, have power in leasing such lands to contract that the lessee shall have a preference right to purchase should the county desire to sell, and such a contract is not void as contrary to public policy.

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

This suit was brought in the United States Circuit Court on December 25, 1903, by the Mallet Land & Cattle Company, a corporation duly incorporated under the laws of the state of Missouri, for an injunction to restrain the defendant, C. C. Slaughter, from trespassing upon the plaintiff's land, known as the Edwards county school lands, consisting of 17,712 acres situated in Hockley county, Texas, and to remove cloud from title to said lands.

The substantial facts set forth in the plaintiff's bill and amendment thereto, in connection with the exhibits thereto attached and filed, in the order of their happening, are as follows: That previous to June 1, 1898, D. M. De Vitt and one Scharbauer held the possession of said land under a lease contract from Edwards county, containing the stipulation that "lessees herein shall have the preference right over all others to purchase said lands during the continuance of this or any subsequent lease contract entered into by them, they paying the highest price that can be obtained," which lease was duly authorized by order of the commissioners' court of Edwards county June 9, 1896, to be made by James M. Hunter, county judge of Edwards county. That the firm of De Vitt & Scharbauer was dissolved, one Flato succeeding to said Scharbauer's interest in the lease and in the business, and the same was continued by De Vitt & Flato. That on June 1, 1898, De Vitt & Flato, a partnership composed of D. M. De Vitt and F. W. Flato, then engaged in the ranching and cattle business, with this land as a part of their ranch, obtained a lease from Edwards county of said lands for five years from that date at the price of 2½ cents per acre per annum, payable semiannually, with a stipulation in the lease contract as follows: "It is also agreed and understood that the lessees herein shall have the privilege of re-leasing the said land again at the expiration of this lease at any rental price and on terms offered and acceptable to Edwards county that may be made bona fide by any responsible party, but in the event that Edwards county should desire to sell the said land herein mentioned at the expiration of this lease, then in that event the lessees herein shall have the preference right to purchase said land at any bona fide offer made and acceptable to Edwards county by any responsible party; and the said lessees shall have a written notice giving them ninety (90) days in which to purchase the said land after the expiration of the lease." While there was no order entered upon the minutes of the commissioners' court of Edwards county authorizing said lease to De Vitt & Flato, the same was fully ratified and confirmed by Edwards county, because with full knowledge of the facts it accepted the rental, and that at the inception of the attempted title of C. C. Slaughter, and in the contract between Edwards county and W. E. Kaye, the title to be granted was made subject to the rights of De Vitt & Flato, as herein set forth. It is appropriate to further state at this point that it was proven by the testimony of James M. Hunter that he executed the lease contract to De Vitt & Flato with the stipulation contained, acting on behalf of the commissioners' court of Edwards county, and by its authority under the order of said court, which by oversight was not entered upon the record, and that the lease contract was read to the court in open session and approved by all of the commissioners. That he was directed by unanimous vote of all of them to execute that contract on behalf of Edwards county, duplicate of which was filed with the county clerk of said county for record upon the minutes, but by some oversight was not there recorded. That De Vitt & Flato, being in possession of said land, continued to use and occupy it as an inclosed pasture, and conducted the business of raising and grazing cattle thereon, having a large amount of other land also inclosed in said pasture, and that that possession

continued uninterrupted until the trespasses against that possession committed by C. C. Slaughter, as hereafter stated, which constituted the disturbance of the possession against which the injunction herein was sought and obtained, and that said possession likewise continued, notwithstanding the attempts in the part of C. C. Slaughter, to forcibly dispossess the plaintiff's predecessors in title up to the time of the plaintiff's purchase of the land, and thereafter the plaintiff, of the possession thereof; such trespasses being continuous from October 17, 1903, to the date of filing the plaintiff's bill, to wit, December 25, 1903. That on March 9, 1899, the commissioners' court of Edwards county made a contract with W. E. Kaye, appointing him as agent of Edwards county to sell this land at the net price of 85 cents per acre, he to receive as a commission all over that sum which he could obtain; but the sale to be made subject to all of the rights of the lease contract of De Vitt & Flato of date June 1, 1898. That previous to that date and the 3d day of January, 1898, said Slaughter had made a contract with F. G. Oxsheer, whereby said Oxsheer was to purchase for said Slaughter the Edwards county school lands under a contract, and Slaughter advanced the part of the purchase money paid to Edwards county in the purchase in the name of R. S. Ferrell through W. E. Kaye, and that said Kaye was in truth and in fact but the agent of C. C. Slaughter in the procuring of the transfer from Edwards county to R. S. Ferrell under which C. C. Slaughter claimed title. In pursuance of the arrangement made with F. G. Oxsheer by C. C. Slaughter, and the arrangement made by F. G. Oxsheer with W. E. Kaye, and between W. E. Kaye and R. S. Ferrell, said Kaye entered into a contract with Edwards county, whereby in lieu of the contract of March 9th said W. E. Kaye, as agent of Edwards county, bound himself to sell said land at 85 cents net, on or before August 1, 1899, in consideration of $5,055.20 cash and the additional sum of $10,000 payable in certain installments as set forth, and, in the order of the commissioners' court evidencing the contract, the said lease contract of June 1, 1898, between Edwards county and De Vitt & Flato, recited to be recorded in Hockley county, Tex., was made a part of the contract with W. E. Kaye, and the county judge of Edwards county was authorized to complete such sale as W. E. Kaye might make in accordance with that order, subject to the terms and rights of De Vitt & Flato under the said contract of June 1, 1898, and Kaye was to receive as his compensation for making such sale any sum above the amount of $15,055.20. That as part of the same transaction, on the said 8th of May, 1899, said Kaye, acting as agent for said Edwards county, in the name of R. S. Ferrell, made and procured a contract of sale to R. S. Ferrell, whereby James M. Hunter, county judge of Edwards county, acting under the authority of the said order of the commissioners' court of May 8, 1899, for the purported consideration of $17,712, but for the consideration received by the county of $15,055.20, conveyed said land to R. S. Ferrell. That under date of May 24, 1899, said R. S. Ferrell, without consideration, transferred all of his right, title, and interest in said land to C. C. Slaughter, and in the deed stipulated that "the said C. C. Slaughter hereby accepting the contract of sale as made to me by said Edwards county, Texas, under all of the conditions and specifications therein contained." But this transaction, it is alleged, was but the carrying out of a previous contract between said C. C. Slaughter and F. G. Oxsheer to purchase said land, as well as other lands embraced in that contract, whereby said Slaughter, through Oxsheer, and Oxsheer by using Kaye, and Kaye by using Ferrell's name completed the transaction as contemplated in the contract between Slaughter and Oxsheer, said Ferrell being merely a man of straw; and it is alleged said Slaughter had notice of the fact that said Kaye was to receive and keep as a part of the consideration for said sale as commission to him $2,656.80, which rendered the contract null and void, all of which is fully set forth in paragraph 5 of plaintiff's bill. That on the 13th day of February, 1902, Edwards county, through its commissioners, recognizing the rights of De Vitt & Flato to purchase said lands under the terms of their said lease contract, authorized its county judge, S. A. Hough, to execute a contract for the purchase by De Vitt & Flato, and sale by Edwards county of said land, at the price of 90 cents per acre. And Edwards county thereby bound itself to sell said land at the expiration of its lease of June 1,

1903, for said consideration, which contract was fully complied with by De Vitt & Flato, same having been made in order to grant them full rights that they had under their preference right of purchase, which right the said C. C. Slaughter had through the means aforesaid undertaken to destroy, but that the commissioners' court, having preserved said right by the stipulations in the contract with W. E. Kaye and R. S. Ferrell, were acting within their perfect lawful authority, in making such contract of February 13, 1902, with De Vitt & Flato, for the purpose and intent of preserving intact their said preference right to purchase said land at the expiration of said lease, and that said Edwards county thereby rescinded and revoked the pretended sale to R. S. Ferrell, as it had the right to do, for the purpose of so preserving the said right of De Vitt & Flato to purchase said land. That immediately after the expiration of the lease contract of June 1, 1903, De Vitt & Flato tendered said purchase money and notes, as stipulated in the contract of February 13, 1902, to Edwards county and demanded a conveyance of the land, which Edwards county postponed making from time to time, being threatened with litigation, and, recognizing that De Vitt & Flato had fully performed their contract, said Edwards county, through its commissioners' court, on November 14, 1903, for valuable consideration, to wit, $1 per acre, executed and delivered to De Vitt & Flato a general warranty deed conveying the land in controversy to them in fee, and in doing so were but carrying out and performing the legal obligations of the county arising through the preference right to purchase contained in the lease contract of June 1, 1898, and the subsequent contract of sale of date of February 13, 1902, and the other facts hereinbefore stated.

The lands involved in this suit were patented to Edwards county by the state of Texas as the amount of lands awarded to the Permanent Public Free School Fund of that county. The constitutional provision affecting the same is section 6, art. 7, which provides in part as follows: "Said lands and the proceeds thereof when sold shall be held by said counties alone as a trust for the benefit of the public schools therein; said proceeds to be invested in bonds of the United States, the state of Texas, or counties in said state, or in such other securities and under such restrictions as may be prescribed by law; and the counties shall be responsible for all investments; the interest thereon, and other revenues, except the principal, shall be available fund." The same article also provides: "Each county may sell or dispose of these lands in whole or in part in manner to be provided by the commissioners' court of the county."

An answer to a rule to show cause why an injunction should not issue was by consent taken as an answer to the bill, and presents defenses, to wit: No jurisdiction, because of colorable transfer from De Vitt & Flato to complainant; no jurisdiction in equity, because of adequate remedy at law; plea in abatement based on action between De Vitt & Flato v. Defendant Slaughter, pending in the district court of Lubbock county, Tex., involving the same subject-matter; the validity of title in Slaughter to the lands in controversy under Kaye's contracts, and the deed of Edwards county of May 17, 1899, to R. S. Ferrell; and the good faith of Slaughter.

The Circuit Court overruled the demurrers and the pleas in abatement to the jurisdiction, and decreed in favor of the plaintiff as prayed for in the bill. Other facts are given in the opinion of the court.

K. R. Craig, for appellant.

Sam. H. Cowan and Henry Sayles, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). The jurisdiction of the Circuit Court was attacked on the charge that the transfer of the property from De Vitt & Flato to the complainant was colorable and collusive, for the purpose of bringing suit in the United States court for the Northern District of Texas. The appellant states his conten-

tion in this court in the second and third assignments of error as follows:

"Second. The trial court erred by overruling respondent's plea to the jurisdiction filed and presented in said cause, for the reason that it was made to appear by the proof taken and introduced on said plea that this cause did not involve a controversy substantially between citizens of different states; it appearing that complainant corporation was organized, and the property involved transferred to it by De Vitt & Flato for the sole purpose of giving the United States Circuit Court jurisdiction, which it otherwise did not have, and that this suit is being prosecuted substantially and in effect for the use and benefit of De Vitt & Flato, complainant's vendors, who, on account of the residence of one of the partners in Texas, were not entitled to prosecute this suit in the United States Circuit Court.

"Third. The court erred by retaining jurisdiction of this cause and not dismissing the same after it was made to appear on the trial that the complainant corporation was organized by De Vitt & Flato, and the conveyance of the property in controversy made by them to complainant corporation for the sole purpose of giving jurisdiction to the United States Circuit Court; the said court not having jurisdiction while the property was in the name of De Vitt & Flato. That said conveyance was wholly without consideration and was colorable only, the said De Vitt & Flato by their ownership of the stock of the corporation retaining substantially the same ownership in and dominion over the property, they therefore had the power to reconvey the same at their option."

The transfer by De Vitt & Flato to the complainant was an unconditional and apparently valid transfer of the title and ownership of the land in controversy, and, according to the evidence, the transfer was made under the following state of facts:

De Vitt and Flato became partners in the cattle business in the fall of 1898, having their ranch in Hockley county, Tex., consisting of lands in Hockley and adjoining counties, cattle, horses, fences, and ranch equipment. De Vitt lived in Texas and Flato in Kansas City, Mo. In the course of time, up to 1903, the firm became indebted to a Kansas City bank in the sum of $43,000, and Flato became indebted to the same bank on his individual account. De Vitt and Flato had been contemplating the formation of a corporation for some time, to guard against trouble in the courts in case of the death of either of the members, and to facilitate the use of their assets not only in firm matters but in individual matters as well. The Kansas City bank, creditor of the firm and of Flato, desired the formation of a corporation that Flato's stock might be placed with the bank as security. Some delay occurred in the formation of the proposed corporation, but finally on the 18th day of December, 1903, articles of incorporation of the Mallet Land & Cattle Company in the state of Missouri were acknowledged with a capital stock of the company of $100,000, consisting of 1,000 shares of $100 each, of which 544 shares were assigned to De Vitt and 452 shares to Flato, and the other four shares assigned to O. G. Young and D. F. Deatherage, Oland Young and S. R. Hansell for legal services. On the 21st day of December the certificate of incorporation was issued by the Secretary of State of Missouri, and on the same day a deed was executed by De Vitt at Ft. Worth, Tex., in the partnership name of De Vitt & Flato, conveying to the Mallet Land & Cattle Company all the lands owned or held under lease by the firm of De Vitt & Flato, including the lands in controversy. This deed was

mailed the same day to Flato at Kansas City. On the same date a bill of sale was executed by De Vitt for the partnership, conveying to the Mallet Land & Cattle Company all the cattle, horses, ranch and other personal property belonging to the firm. The property thus conveyed constituted the entire assets of the Mallet Land & Cattle Company. The Mallet Land & Cattle Company assumed all the indebtedness of De Vitt & Flato, and this constituted all the liabilities of the Mallet Land & Cattle Company.

On the hearing De Vitt testified that the main reason for organizing a Missouri corporation and transferring to it all the partnership property was so that they, the partners, could get their interests in the business in the form of collateral and so use them in their private transactions. The matter was discussed at various times for over a year and they had decided to incorporate. Another reason was that one of the partners might die and that that might get the partnership property in the courts. Being asked if it is not a fact that the said charter was obtained in great haste about the time it was obtained in order that a suit might be brought in the United States court against C. C. Slaughter for the Edwards county school lands, he answered: "No, sir; it is not a fact that that was the purpose of it." And, on renewal of the question, reiterated his answer. He, further, answered that he was acquainted with the circumstances connected with the litigation between De Vitt & Flato and C. C. Slaughter over the Edwards county school lands, but he denied that the defeat of De Vitt & Flato in that litigation on or about the 18th of December, 1903, prompted the acquisition of the charter of the Mallet Land & Cattle Company at the time it was obtained. Being further inquired of as to the object of, and what led to, the agreement to incorporate at that time, he answered, "Our principal object was so that each one of us could get in a tangible form and separate our interest in the business in the form of collateral, that we could use it for private matters." Further, that the taking out of the charter was delayed for want of settlements between the parties as to their individual interests, and because they had a contract of purchase from Edwards county of their school land and they did not know what effect it might have to incorporate and transfer their claims to the new corporation without having first secured a deed from the county. He says the charter was written up the latter part of September, 1903, in Kansas City. The evidence of De Vitt is fully corroborated by that of Flato, and is not disputed or contradicted by any witness nor by any circumstances proved in the case.

On this state of facts, we conclude that the transfer of De Vitt & Flato to the complainant of the title and ownership of the lands in controversy was in good faith and for a valid consideration, was unconditional, and passed full title for all lawful purposes.

The appellant relies upon Lehigh Manufacturing Co. v. Kelly, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444, but we find the case inapplicable because the facts and circumstances are different from those in the present case. In no just sense can we say that the organization of the Mallet Land & Cattle Company, and the transfer thereto for stock of all the property of De Vitt & Flato, including incidentally, and as

only a small part thereof, the lands in controversy, was all a sham transaction. If it was not a simulation—a sham—then, so far as jurisdiction is concerned, the purposes of De Witt and Flato in the transaction are immaterial. See Lehigh Manufacturing Co. v. Kelly, supra, for authorities.

Irvine Co. v. Bond et al. (C. C.) 74 Fed. 849, was a case very similar in many respects to the present case, and it was there held that as the transaction was real and no reconveyance contemplated, the jurisdiction of the court properly attached, citing Lehigh Manufacturing Co. v. Kelly and authorities there cited.

In his fourth, thirteenth, eighteenth, and twentieth assignments of error, the appellant raises, in different aspects, the question of jurisdiction in equity to grant the complainant relief, insisting that the complainant has a full, complete, and adequate remedy at law. The bill seems to be one to prevent trespass and to remove cloud from title, and the turning question as to jurisdiction is whether the complainant was, at the institution of the suit, in possession of the lands in controversy. The case shows that originally De Vitt & Scharbauer entered into lawful possession under a lease from Edwards county; that De Vitt & Flato succeeded to the rights and possession of De Vitt & Scharbauer, and from that time on held possession under that and a subsequent lease, which expired June 1, 1903; from which time they continued to hold under contract of sale and actual sale from Edwards county; that in the fall of 1903 their possession was disturbed by the claims of Slaughter, who, with more or less violence, undertook to take possession of the said land, resulting at best in a disputed joint occupancy. The attempts of Slaughter, no matter how successful, to take forcible possession of the land, cannot be recognized as giving him actual and lawful possession, nor be made the foundation of any right between him and complainant, nor deprive the complainant from proceeding with a bill to remove cloud, with preventive relief against the attempted disturbances of title and possession. See Thomas v. Nantahala Marble & Talc Co., 58 Fed. 485, 7 C. C. A. 330; Pokegama S. P. Lumber Co. v. Klamath Lumber & Imp. Co. (C. C.) 86 Fed. 528; Pittsburg Railroad Co. v. Fiske, 123 Fed. 760, 60 C. C. A. 621. We conclude, therefore, that there was no error in overruling the demurrer and pleas to the equitable jurisdiction of the Circuit Court.

The appellant, as respondent in the Circuit Court, filed a plea in abatement based on a former suit pending between complainant's vendors and the defendant, and introduced in evidence in support thereof the original petition filed by De Vitt & Flato in the district court of Lubbock county, Tex., on the 24th day of October, 1903, and also an amended petition presented in vacation on hearing of the motion to dissolve the injunction granted upon the original petition, which amended petition was presented without filing under an agreement between counsel for the plaintiff and defendant in that cause. The original petition was for an injunction against the defendant, Slaughter, and three of his employés, to restrain them from digging a well on the land and building a fence on the lands herein in controversy. The amended petition, in addition to the prayer for injunction in the

original, prayed for enlargement of the injunction so as to require the defendant, Slaughter, to remove a fence that he had been erecting upon said lands. The writ of injunction issued on the original petition on the 24th day of October, 1903, served on the defendant in that case, was in evidence, as also the answer of the defendant, which consisted of a plea in abatement setting up the pendency in the county court of Lubbock county, Tex., of a suit against the defendants to restrain them from the same trespass which the injunction in the suit of the district court was sued out to restrain, exceptions to the petition, an answer under oath, and an amended answer setting up more fully the facts in relation to the title and trespass complained of by the plaintiff.

There was also in evidence a motion by the defendant to dissolve the injunction issued out of the district court of Lubbock county, Tex., in above-styled case, presented to Judge Morgan in vacation, which motion was presented without filing, as were the amendments in the case, under the agreement before mentioned, also the order of the judge of the Fiftieth judicial district court, made on the hearing of said motion in vacation on the 18th day of December, 1903, by which said writ of injunction was dissolved and the case continued on the docket for trial. This order of the judge made in vacation was filed in the district clerk's office of Lubbock county on the 23d day of December, 1903, and entered in the minutes of the court. The pleadings presented to the judge on hearing of said motion, referred to in the agreement aforesaid, were subsequently filed in the office of the clerk of the district court of Lubbock county January 6, 1904. The defendant also put in evidence a cross-bill filed by defendant in the said cause, De Vitt & Flato v. C. C. Slaughter, in the district court of Lubbock county, on the 31st day of December, 1903, praying for affirmative relief by removing cloud from title to the lands in controversy. The plaintiff put in evidence in the same connection what is styled "plaintiff's first amended original petition in lieu of original petition filed the 21st day of December, 1903." This amendment purports to be filed in vacation, and is practically a copy of original petition filed in the case, except that it recites at the conclusion that:

"The plaintiffs had sold the land to the Mallet Land & Cattle Company, and that said Mallet Land & Cattle Company are now and were on the 21st day of December, 1903, the legal and equitable owners of all of said property, and that plaintiffs disclaim any right or title or ownership in or to said property in any manner whatever."

As we understand the pleadings and proof, the suit in the state court was, at its inception, one for an injunction to prevent trespass, and by the first amended original petition was converted into a suit to recover damages for trespass; the plaintiff entering a disclaimer as to the ownership and title to the lands in controversy. Whether the answer and cross-bill of Slaughter operated to convert the case into one of trespass to try title and to remove cloud from title is strongly argued by counsel on both sides, citing very pertinent authorities to sustain the propositions advanced. As we view the matter, however, the pendency of the proceedings in the state court, even if proved to the fullest extent, pleaded by the appellant, and conceding that the complainant here-

in is bound thereby as though a party by name and process, constitutes no sufficient ground to abate the present suit. Where property is in possession of a state court, suits thereafter brought in the United States courts to recover or affect the same should be stayed, but not necessarily abated. See Weaver v. Field (C. C.) 16 Fed. 22; Gates v. Bucki, 53 Fed. 961, 4 C. C. A. 116. The pendency of a suit in the state court is not necessarily a bar to a suit in the United States court between the same parties involving the same issues. Hyde v. Stone, 20 How. 173, 15 L. Ed. 874; Stanton v. Embey, 93 U. S. 548, 23 L. Ed. 983; Insurance Co. v. Brune's Assignee, 96 U. S. 588, 24 L. Ed. 737; Short v. Hepburn, 75 Fed. 113, 21 C. C. A. 252.

In Gordon v. Gilfoil, 99 U. S. 168–178, 25 L. Ed. 383, Mr. Justice Bradley, for the Supreme Court, said:

"It has been frequently held that the pendency of a suit in the state court is no ground even for a plea in abatement to a suit upon the same matter in the federal court."

For the converse rule, see International & G. N. R. R. Co. v. Barton (Tex. Civ. App.) 57 S. W. 292, containing an extended citation of adjudged cases basing the rule on the different sovereignties from which the courts derive their powers.

Under the pleadings and proof made in this case, there is no reasonable ground to contend that the lands in controversy herein are in any wise in the exclusive possession of the state court, nor can it be pretended that the proceedings herein will in any wise clash with any regular proceedings had in the state court. There was no error in overruling the defendants' plea in abatement.

Having disposed of the questions affecting the jurisdiction of the court, we pass to the merits of the case. Under the evidence, we find that the relations existing between the defendant and Kaye, Ferrell, and Oxsheer were such that Kaye should be treated as a subagent of the defendant, and that the defendant and Ferrell are to be charged with notice of all the recitals relating to the lease and option contained in the contracts between Edwards county and Kaye in relation to the sale of the property. In fact, the recitals in the deed of Edwards county to Ferrell and in the deed of Ferrell to defendant are such that the defendant was by his title papers charged with full notice of the rights and claims of De Vitt & Flato.

The appellants' fourteenth assignment of error is as follows:

"Fourteenth. The decree of the Circuit Court, if based on any preference right or vested interest claimed by complainant as arising out of the alleged option contained in lease from the county judge to De Vitt & Flato, was erroneous for the reason: (a) The county judge was without authority from the commissioners' court to grant the option. (b) There was no ratification of said grant by the commissioners' court, or no sufficient ratification thereof to make it binding on Edwards county. (c) The alleged option was void for uncertainty. (d) The alleged option was not performed in accordance with its terms. (e) The alleged option was abandoned and rescinded by new contract between De Vitt & Flato and the commissioners' court in order of date February 12, 1902. (f) Complainant's claim of title is not under the option and was not acquired in accordance with the terms of the option, but under contract with the commissioners' court of date November 14, 1903."

(a) The judge of the county court testified that there was an order of the commissioners' court of Edwards county authorizing the county judge to make the lease contract with the preference right to buy, but through some oversight this order was not entered on the minutes of the court, and there is no evidence to the contrary. The failure to enter the order upon the minutes did not, in our opinion, affect the validity of the acts thereunder. See Waggoner v. Wise Co. (Tex. Civ. App.) 43 S. W. 836.

(b) The county commissioners recognized the lease and received rentals thereunder, and specifically ratified the same in the very first contract made with Kaye, under whom appellant claims title. See American Waterworks Co. v. Farmers' Loan & Trust Co. 73 Fed. 956-964, 20 C. C. A. 133; Corzine v. Williams, 85 Tex. 506, 22 S. W. 399; Boydston v. Rockwall Co., 86 Tex. 234, 24 S. W. 272.

(c) The option given to De Vitt & Flato is not void for uncertainty. Willard v. Tayloe, 8 Wall. 564, 19 L. Ed. 501; Hayes v. O'Brien (Ill.) 37 N. E. 65-77; Hitchcock v. Page, 14 Cal. 331-444; Marske v. Willard, 169 Ill. 277, 48 N. E. 290.

Hayes v. O'Brien, supra, was a suit for the specific performance of a contract of lease, in which an option was granted and the price was to be determined by subsequent offers to buy. The court held that:

"Where no price is fixed in a lease contract, a provision is valid which gives the lessee a preference right to buy at a price offered by another."

In Marske v. Willard, supra, it was held:

"A contract giving one party the privilege of purchasing lands upon certain conditions is not void for want of mutuality, on the ground that though the seller is bound upon those conditions the other party is not bound to purchase unless he desires."

"A written contract giving one party the first opportunity to purchase land, 'provided he will pay as much as any other person,' is not invalid as being partly in writing and partly in parol, on the ground that the written contract does not specify the price to be paid or the terms and time of payment."

(d, e, f,) There is no evidence of any intention at any time on the part of De Vitt & Flato to abandon their option nor of any act of abandonment, nor is there shown any intention on the part of Edwards county to rescind the same; on the contrary, in the contracts with Kaye March 19, 1899, and May 8, 1899, and in the deed to Ferrell May 17, 1899, as well as in subsequent contracts with De Vitt & Flato, the original contract containing the option agreement is fully recognized as an existing obligation. That the terms of sale were somewhat changed in the final contracts between the county and De Vitt & Flato on February 13, 1902, and November 14, 1903, seems to be immaterial. If the obligations of the county to convey to De Vitt & Flato existed, the modification of terms by special agreement is of no interest to parties whose rights, if any, had already attached.

The appellant further contends that the option to purchase granted De Vitt & Flato by the commissioners of Edwards county was void, because the commissioners were without authority in law to execute such contract, and the same was contrary to public policy. In Falls County v. De Laney, 73 Tex. 464, 11 S. W. 492, the Supreme Court

of the state holds that the commissioners' courts have the authority to lease the county school lands; and, in Waggoner v. Wise County, supra, it was held that the county commissioners' courts are general trustees for selling or otherwise disposing of the county school lands, upon such contracts, terms, and conditions as they may deem proper to adopt or provide.

We are cited to no prohibition in any Texas laws against giving to a lessee the preference right to buy. On the contrary, we find that it has long been the public policy of the state of Texas to encourage the settlement and development of the public free school lands by suitable provisions giving the lessee the preference right to buy. See article 4218w, Rev. St. Tex. 1895; Gen. Laws Tex. 1901, p. 292, c. 125. We notice that, prior to the time the lessees were given the preference right to purchase, they were given the preference right to re-lease. Gen. Laws Tex. 1887, p. 87, c. 99, § 14; Gen. Laws 1889, p. 50, c. 56. It is plain that a lessee having the legal right to re-lease or to buy is induced to make fences and buildings, dig wells, plant trees, and make other improvements—all inuring to the interest of the owner and the public. The object of these laws being to bring about the sale, development, and general improvement of the public lands belonging to the state, we see no reason why the same policy should not prevail with regard to the public lands awarded to counties for school purposes. We therefore conclude that the option granted De Vitt & Flato of the right to purchase at the expiration of their lease was fully within the authority of the commissioners' court of Edwards county, and the option as granted was not void as contrary to public policy.

The appellee contends with great force that the conveyance by the commissioners' court of Edwards county to R. S. Ferrell of its public school lands is null and void, and that the appellant Slaughter has no rights thereunder. The commissioners' court of Edwards county on May 8, 1899, executed an agreement with W. E. Kaye whereby Kaye, as the agent of Edwards county, was to sell the lands in controversy at the net rate of 85 cents per acre under certain conditions of sale and within a certain time, and therein it was especially agreed and understood that the said Kaye was to have as his compensation and commission any sum realized over and above the price of 85 cents per acre. To secure the performance of the said contract, said Kaye deposited the sum of $1,000 as evidence of good faith and to guaranty that he would sell and complete the sale of said lands on or before the 1st day of August, 1899, and in the contract it was provided that, if said Kaye refused or failed to make said contemplated sale on or before the said date, the said $1,000 deposited should be forfeited. The conveyance to Ferrell on May 17, 1899, was under and in pursuance of this contract, and the record shows that Kaye retained for himself for his services from the price paid by Ferrell the sum of $2,656.80, the difference between the amount at 85 cents per acre stipulated in the Kaye contract, and the amount paid by Ferrell.

The Supreme Court of the state has repeatedly held that the commissioners' courts were without authority to sell or convey the public school lands except for money, the gross proceeds of which were to

go to the public school fund of the county. Dallas County v. Club Land & Cattle Co., 66 S. W. 296; Tomlinson v. Hopkins, 57 Tex. 574; Cassin v. La Salle Co. (Tex. Civ. App.) 21 S. W. 124; Pulliam v. Runnels Co., 79 Tex. 369, 15 S. W. 277. Upon these authorities it would seem to be clear that, if the contract with Kaye was one giving him commissions as agent to be paid out of the price of the lands, the contract was void. On the other hand, if the contract with Kaye was practically and substantially a conditional sale to Kaye of the school lands at 85 cents per acre, the full amount of which was to be paid over to the county, then the contract cannot be said to be void by reason of the above cited authorities. If the contract with Kaye was void, then it would seem to be immaterial whether Slaughter was or not an innocent purchaser. See Sampeyreac v. United States, 7 Pet. 241, 8 L. Ed. 665; Bryan v. Crump, 55 Tex. 13; League v. Rogan, 59 Tex. 430.

From the view we have taken of the case above we do not feel called upon to pass further upon this issue. There are other assignments of error raising minor issues not necessary to consider, as their decision would not materially affect the conclusion we have reached; which is, that under all the facts and circumstances of the case, and for the reasons herein given, the decree of the Circuit Court was substantially correct, and should be affirmed. And it is so ordered.

HUNTT v. McNAMEE.

(Circuit Court of Appeals, Fourth Circuit. November 9, 1905.)

No. 525.

1. NONSUIT—CONDITION OF CAUSE—FINAL ADJUDICATION.

Where a voluntary nonsuit was permitted by the state practice, it was within the discretion of a federal court to refuse to allow a nonsuit after plaintiff had concluded his evidence, and a motion by defendant for direction of a verdict had been submitted and sustained, on the grounds both of the insufficiency of the complaint and of the evidence to sustain it.

2. MASTER AND SERVANT—INJURY TO THIRD PERSONS—TRIAL—DIRECTION OF VERDICT.

It was not error to direct a verdict for defendant in an action for a personal injury, where the complaint charged defendant with liability because of the negligence of his agent, and the evidence showed without contradiction that the alleged agent was an independent contractor for doing the work in which the negligence occurred.

3. SAME—NEGLIGENCE OF INDEPENDENT CONTRACTOR.

The owner of a lot in a city, who let the work of making an excavation thereon to an independent contractor, can only be held liable for an injury to a third person caused by blasting in the performance of the work by the contractor on proof of his own negligence, either in employing a contractor known, or who should have been known, to him to be incompetent or negligent, or because the work was known to him to be necessarily dangerous to persons in the vicinity, and he neglected to provide in the contract that preventive measures for their protection should be taken by the contractor.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1260, 1263.]

4. TRIAL—DIRECTION OF VERDICT—INSUFFICIENCY OF EVIDENCE.
The action of the trial court in an action for a personal injury in directing a verdict for defendant, on the ground that the evidence of plaintiff did not sustain the allegations of his complaint, affirmed.
Morris, District Judge, dissenting.

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

Alf. S. Barnard and Charles A. Moore (Merrick & Barnard and Moore & Rollins, on the briefs), for plaintiff in error.
J. H. Merrimon, for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and MORRIS, District Judge.

GOFF, Circuit Judge. The plaintiff in error on May 28, 1902, while standing on a street in Asheville, N. C., was injured by a rock which struck his leg. He alleges in his complaint that the rock was thrown by a blast discharged on a lot owned by the defendant, Charles McNamee, under whose directions the blasting was negligently, unskillfully, and improperly done. The case was tried in the court below before a jury, and at the close of the plaintiff's testimony, the defendant moved the court to instruct the jury that a verdict be entered for the defendant upon the evidence that had been offered. The trial judge, proceeding to instruct the jury as requested, stated that in his opinion the allegations of the complaint were not sufficient to sustain the verdict, when the plaintiff suggested to the court that he be permitted to take a nonsuit. This request was refused. The judge below then proceeding with his instructions to the jury stated that in his opinion the evidence offered by the plaintiff did not sustain the allegations set forth in his complaint, when the plaintiff again requested the court for permission to take a nonsuit and an appeal. This request the court also refused. The jury then, under the instructions of the court, found a verdict for the defendant, on which a judgment was entered, and the writ of error now under consideration was prayed for and allowed.

The refusal of the court below to permit a nonsuit, and a nonsuit and an appeal are assigned as error. The courts of the United States have always exercised the right to control the disposition of causes pending before them, when either the allegations of the plaintiff or the evidence introduced in support thereof has failed to make out a case. Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008; Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780. For a number of years the Supreme Court of the United States declined to entertain writs of error upon nonsuits. That court has held that the Circuit Courts of the United States have no authority to order a nonsuit in invitum. Elmore v. Grymes, 1 Pet. 468, 471, 7 L. Ed. 224; Crane v. Morris, 6 Pet. 598, 8 L. Ed. 514; Castle et al. v. Bullard, 23 How. 172, 183, 16 L. Ed. 424; Schuchardt v. Allens, 1 Wall. 359, 370, 17 L. Ed. 642; Coughran v. Bigelow, 164 U. S. 301, 307, 17 Sup. Ct. 117, 41 L. Ed. 442. Where the record disclosed that the plaintiff had voluntarily become nonsuited, a writ of error was refused him.

Evans v. Phillips, 4 Wheat. 73, 4 L. Ed. 516; Cossar v. Read, 17 Q. B. 540; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 39, 11 Sup. Ct. 478, 35 L. Ed. 55. These cases cited are instructive as they relate to the questions involved in the assignments of error pertaining to the request for a nonsuit.

While the general rule is as above indicated, still the Supreme Court has by means of exceptions taken during the trial, in states where statutes authorize nonsuits, passed upon the questions here involved, and has discussed the matter of ordering a nonsuit. Mr. Justice Field, in the case of Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539, says, in substance, that the difference between a motion to direct a nonsuit and a motion to direct a verdict for defendant, is rather a matter of form than of substance, except that the latter ends the litigation if a new trial be not granted. The rule is undoubtedly well established that it is within the authority of the presiding judge to direct a verdict, and to enter judgment thereon. The court below having no doubt that the plaintiff had failed to make out a case, properly gave the directions it did. It would have been a waste of time to have permitted the case to proceed further, if the result was as the court indicated an inevitable one. In Pleasants v. Fant, supra, Mr. Justice Miller said:

"Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of the plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly, we hold the true principles to be, that if the court is satisfied that conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury."

It appears from the record that the plaintiff below had, prior to the institution of this suit, submitted the merits of this controversy to the determination of an issue tried in the state courts of North Carolina. See Hunt v. Vanderbilt et al., 115 N. C. 559, 20 S. E. 168. It likewise appears that this case has been pending for years in the court below, and that it has been tried to a jury several times; the judgment in one case having heretofore been reviewed by this court. McNamee v. Hunt, 87 Fed. 298, 30 C. C. A. 653. All the facts, under the supervision of the trial judge, had been submitted to the jury, and the interest of the parties as well as of the public required that if consistent with the due administration of justice there should be an end of the litigation. We are unable to see that the plaintiff below was injured by the action of the trial judge. Had a nonsuit been allowed, the plaintiff on another hearing would have been compelled under the pleadings to have confined himself to a certain line of testimony, and it is quite apparent that all the facts relating thereto had been after years of research found and submitted, and therefore had another trial been allowed, the result would necessarily have been the same. Again, had a nonsuit for the purpose of an appeal been allowed, the plaintiff would have simply brought the action of the trial judge to this court for review, and that has in fact been done by this writ of error. Even if it be admitted that the

plaintiff below had the right to demand a nonsuit during the progress of his cause (it is at least questionable after a trial has begun, see Johnson v. Bailey et al. [C. C.] 59 Fed. 670), certainly it must also be admitted that such right must be reasonably exercised. A nonsuit cannot be demanded after a full adjudication. In this case the defendant had submitted his motion that the jury be instructed to find for him. This motion, similar to a demurrer to the evidence, presented a question of law for the court to decide. Louisville, etc., Railroad Co. v. Woodson, 134 U. S. 614, 621, 10 Sup. Ct. 628, 33 L. Ed. 1032. The court in deciding said motion reached the conclusion that the plaintiff could not recover because the allegations of his complaint would not support a verdict. This judgment of the court disposed of the controversy, and it was only after such disposition that the plaintiff asked for a nonsuit. The trial judge also in disposing of said motion announced his conclusion that the evidence introduced by the plaintiff did not sustain his contention. It was after this that the plaintiff asked permission to enter a nonsuit, with permission to appeal. We think that his request, in each instance, was submitted too late. After the trial judge had decided these questions, the plaintiff had no more right to withdraw his case, than he would have had if the case had been submitted to the jury on the facts, and a verdict had been returned.

As pertinent to this situation we refer to the case of Cahill v. Chicago, M. & St. P. Ry. Co., 74 Fed. 285, 290, 20 C. C. A. 184, 189, where Judge Woods, speaking for the Circuit Court of Appeals of the Seventh Circuit, says:

"We deem it proper to observe here that it is not essential that there be a written verdict signed by jurors or by a foreman, and we have no doubt that, in cases where the court thinks it right to do so, it may announce its conclusion in the presence of the jury and of the parties or their representatives, and direct the entry of a verdict without asking the formal assent of the jury. Until a case has been submitted to the jury for its decision upon disputed facts, the authority of the court, for all the purposes of the trial, is, at every step, necessarily absolute; and its ruling upon every proposition, including the question whether, upon the evidence, the case is one for the jury, must be conclusive until, upon writ of error, it shall be set aside."

The other assignments of error relate to the instruction of the court below to find a verdict for the defendant. In effect, the trial judge held that the allegations of the complaint could not under the evidence offered support a verdict for the plaintiff. The complaint as originally filed contained two counts. The first alleged that the defendant was responsible and liable for the negligence of one C. H. Britt, who it was set forth had been employed by the defendant to blast and excavate a certain lot in the city of Asheville, under his, the defendant's supervision; the second charged the defendant with the negligence of the said Britt, whom said defendant, it was alleged, had employed to blast and excavate said lot, the allegation being that by said negligence the plaintiff was injured. The testimony in the case demonstrated that Britt was an independent contractor, doing the work under his own contract and not under the supervision of the defendant. At the first trial of the case, the jury being unable to

reach a verdict were discharged. After said trial, on the plaintiff's motion permission was given him to amend his complaint, it being set forth in the order giving such leave that the amendment was not to constitute a new cause of action, but was to state the case so as to set up the responsibility of the defendant for the negligence of his contractor, in failing to use the requisite preventative precautions against the effects of blasting, and was to change the form of other allegations in regard to the negligent employment of a contractor. The plaintiff thereupon filed an amended complaint, in which he set out in full the contract between defendant and Britt for the excavation of said lot, and then alleged in substance, that at the time said Britt was so employed by the defendant, it was apparent to and in the contemplation of the defendant that the excavation of said lot so contracted for with said Britt, could and would only be done by blasting with gunpowder or dynamite, or other dangerous agency; and although it was apparent and in the contemplation of the defendant that such blasting would be done by the said Britt in the performance of the said contract, and although such blasting as the plaintiff averred, at the point where such excavation was to be made was intrinsically dangerous, and was, in the ordinary mode of doing it, from its nature liable, unless precautions and preventative measures were taken, to do injury to others, the defendant did not, as it was his duty to do, require of Britt, by contract or otherwise, that he use precautions or preventative measures, or see to it himself that such precautions or preventative measures were taken, to obviate injury to the plaintiff and others passing to and fro on said streets, and being in the neighborhood where said blasting was to be done, nor were such precautions or preventative measures used by said Britt in said blasting, nor did the defendant see that said precautions or preventative measures were used by the said Britt in doing said blasting.

The second cause of action in the amended complaint recited the contract in the same words as were used in the first, and contained also a paragraph like that last described, except that instead of the word "contracted" in the sentence reading, "that the excavation of the lot so contracted with said Britt to be done" the word "contributed" is used. The defendant excepted to this amended complaint, alleging as ground therefor, that it had not been drawn in compliance with the court's order authorizing said amendment, which exception was sustained by the court in these words:

"That the said amended complaint be, and the same is, hereby stricken out in so far as it sets up that the work which the defendant employed the said Britt to perform, was inherently dangerous, and one in which the defendant, McNamee, owed a duty to the plaintiff to see that the said Britt took precautions and preventative measures for the protection of the plaintiff and others against danger, and that said defendant failed to see that said precautions and preventative measures were taken by Britt, on account whereof the plaintiff suffered injury, and the said amended complaint was permitted to stand only in so far as it was authorized by order of the court, to wit, in so far as it sets up responsibility of the defendant for the negligence of the defendant's contractor to use requisite preventative precautions against the effects of blasting, and changes the form of the allegations in regard to negligent employment of contractor."

The trial judge was of the opinion that the portions of the amended complaint so held to be good made a case against the defendant for the negligence of his act. He was also of the opinion that the testimony disclosed—as we doubt not it did—the fact that Britt was an independent contractor, responsible for his own acts, and that the defendant could not be held for any negligence of his. It will be remembered that the original complaint sought to hold defendant responsible for the act of Britt, because he (Britt) was the defendant's agent. The amended complaint seeks to go further, and to hold the defendant liable because he did not require of Britt, by contract or otherwise, that he use such precautions as were necessary to prevent injury to the plaintiff, and to others passing to and fro, in the neighborhood where said blasting was being done. By the amended complaint the plaintiff charges the defendant, not with the negligence of his agent, but with his own individual acts of negligence. He thereby introduces a new cause of action, and it was this that he was forbidden to do under the court's order authorizing the amendment; and this also under the practice in North Carolina he was not permitted to do. Martin v. The Bank, 131 N. C. 121, 42 S. E. 558. The same rule is applicable in the courts of the United States. Shields v. Barrow, 17 How. 130, 15 L. Ed. 158. It follows that as Britt was shown by the testimony to be an independent contractor, and not the agent of the defendant, the trial judge did not err in the ruling we have been considering.

The court below further held that the plaintiff by his testimony failed to maintain the case alleged in his complaint; thus in effect taking the case from the jury and directing a verdict. There is no doubt but that in the courts of the United States the trial judge may withdraw a case from the jury, and direct a verdict for either the plaintiff or the defendant, as may under the evidence be proper. This may be done where the evidence is undisputed, or when it is of that character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict should one be returned in opposition to the court's views. Delaware, Lackawanna & Western Railway Company v. Converse, 139 U. S. 469, 472, 11 Sup. Ct. 569, 35 L. Ed. 213. The exercise of this judicial discretion is, as a matter of course, reviewable in an appellate court, and such review would necessitate an examination of the evidence. This court, in discussing this case when it was before it on other questions (McNamee v. Hunt, 87 Fed. 298, 300, 30 C. C. A. 653, 654), said:

"The gist of this action is that Britt was a negligent and careless man, within the knowledge, or means of knowledge, of McNamee; that no provision was made in the contract for the observance of proper precautions in doing a piece of work which necessarily required blasting with explosive substances in the heart of a city; that in fact the contractor did this work without taking such precautions, and so negligently that a piece of rock was thrown out by the blast, and struck the leg of the plaintiff below, who was at the door of a hotel on a public street, out of sight of the blasting. The suit proceeded upon the principle of the exception to the rule that employers are not generally liable for the acts of contractors."

The law applicable to the facts disclosed in this record is thus stated in Water Company v. Ware, 16 Wall. 566, 576, 21 L. Ed. 485:

"Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable: but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agreed, and was authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party."

The plaintiff below should have shown by competent evidence, first, that Britt was a negligent and careless man, within the knowledge or means of knowledge of McNamee; second, that Britt was employed in a work which necessarily required blasting with explosive substances in the heart of a city, and that no provision was made in the contract for the observance of proper precautions; third, that Britt did this work without taking proper precautions, and that he did it so negligently that the plaintiff as a result was injured. We have read carefully all the testimony submitted to the jury. We find that the trial judge was not called upon to discuss disputed facts, or to solve doubts arising from the conflict of testimony; nor was he required to weigh the credibility of witnesses. It was incumbent upon him to determine, on the motion submitted for his disposal, whether by the testimony offered he was compelled to submit the case to the jury for a verdict. Quite a number of witnesses were examined on questions relating to the blasting, the accident, and to Britt's reputation as a contractor, and also to his carelessness in the performance of his work, but we are unable to find from the testimony anything which shows negligence on the part of McNamee, nor anything which brings home to him knowledge of carelessness on the part of his contractor. Nor is there any positive evidence that Britt was especially engaged to do any work requiring the blasting of rock. On the contrary, McNamee himself, having been called as a witness by the plaintiff, testified that he did not know that blasting was necessary. Therefore the trial judge held, and we are unable to say that he erred in his conclusion, that there was not sufficient evidence to show that McNamee was guilty of such negligence as would bring him within the exception to the general rule.

The plaintiff sought to show the reputation of Britt as an incompetent contractor. The general reputation of incompetency cannot be given in evidence until the fact of incompetency has been established, and this with the view of showing that it was of such a character as would imply notice to the employer. Monahan v. Worcester, 150 Mass. 439, 23 N. E. 228, 15 Am. St. Rep. 226. It is incumbent upon the party charging negligence to show it by proper evidence. This may be done by showing specific acts of incompetency, and by bringing them home to the knowledge of the master, or by showing them to be of such a nature and frequency that the master in the exercise of due care must have had them brought to his notice.

The language of the Supreme Court of the United States, in Patton v. Texas & Pacific Railway Co., 179 U. S. 658, 660, 21 Sup. Ct. 275, 276 (45 L. Ed. 361) is appropriate to the circumstances

surrounding this case, as now presented for our judgment. We quote from the opinion as delivered by Mr. Justice Brewer:

"At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator at a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

We find no reversible error, and therefore the judgment complained of will be affirmed.

MORRIS, District Judge (dissenting). I am unable to concur in the judgment of the majority of the court. I think that as to all matters which were ruled upon when the case was in this court on writ of error in 1898 (87 Fed. 298, 30 C. C. A. 653) those matters were finally settled, and when the case was sent back for a new trial, the trial was to be proceeded with in accordance with those rulings. The amended complaint was filed August 3, 1896, and on the former trial the case went to the jury at the April term, 1897, on the issues raised by the amended complaint as restricted by the court's order of June 23, 1897, and a verdict was rendered for the plaintiff. In that trial this issue, among others, was offered for submission to the jury:

"(7) Was the said Britt (the contractor) so employed with the knowledge or in contemplation of his (defendant's) part that blasting with gunpowder, dynamite or other dangerous agency would be necessary, or would be used in making the excavation?"

The answer to this issue appeared to the trial judge in that trial so clearly concluded by the testimony that he took it from the jury and answered it "Yes." This court, on the writ of error, speaking by Judge Simonton, said:

"It therefore becomes a question of fact whether the condition of the soil where the foundation was to be dug was such that McNamee (the defendant) must have known that blasting was necessary, and also whether he did not acquire this knowledge during the performance of the contract. He denies any such knowledge. These questions of fact were for the jury to answer, but his honor, the presiding judge, in submitting the issues to the jury, took from them the seventh issue. * * * In this, we are of opinion that there was reversible error."

In another part of the opinion, the court, speaking of the issues raised by the pleadings, said:

"The gist of the action is that Britt was a negligent and careless man within the knowledge or means of knowledge of McNamee; that no provision was made in the contract for the observance of proper precautions in doing a piece of work which necessarily required blasting with explosive substances in the heart of the city; that in fact the contractor did this work without taking such precautions, and so negligently that a piece of rock was thrown out by the blast and struck the leg of the plaintiff, who was at the door of an hotel on a public street out of sight of the blasting. The suit proceeds upon the principle of the exception to the rule that employers are not generally liable for the acts of contractors. It rests upon the exception which is that

'when a person is engaged in a work in the ordinary doing of which a nuisance necessarily occurs, the person is liable for any injury which may occur to third persons from carelessness or negligence, though the work may be done by a contractor.' Ware v. St. Paul Water Co., Fed. Cas. No. 17,172."

The opinion then quotes from other cases to the effect that where the damage results directly from the acts which the contractor agreed and was authorized to do, and the person who employs the contractor authorizes him to do these acts, he is equally liable to the injured party. The opinion then proceeds:

"This being so, a decisive question in the case is whether when McNamee made this contract he authorized the blasting to be done in order to complete it; or, in other words, whether in order to fulfill his contract the contractor necessarily had to blast, and McNamee knew this."

The court then proceeds to say that as the contract is silent as to blasting, the question whether or not blasting must have been by reason of the known character of the ground to be excavated within the contemplation of McNamee, should have been left to the jury upon the facts and circumstances and the inferences of the fact to be drawn from them. It follows, it appears to me, that this court finally settled, as between these parties, what were the issues raised by the pleadings and what was the law binding upon the parties, and finally settled that the seventh issue was a proper one to submit to the jury. At the trial in November, 1903, which gave rise to the present writ of error, the judge then presiding directed a verdict for the defendant, taking, as it would appear, quite a different view of the proper construction of the pleadings, and held that the plaintiff by the terms of his complaint had restricted the cause of action to one growing out of the relation of master and servant, and as the proof had established the relation of owner and independent contractor, he held for that reason the plaintiff could not recover.

I am unable to appreciate the criticism of the amended complaint to the effect that it sets up a new cause of action to which the plea of limitations would be a bar. In the original complaint the cause of action was based upon the same occurrences, but it alleged that Britt was employed by the defendant to perform the work, and with the knowledge and permission of the defendant, did the work negligently and injured the plaintiff. In the amended complaint the actual contract is set out, and it is alleged that at the time when Britt was so employed it was in the contemplation of the defendant that the excavation so contracted for could only be done by blasting, and was inherently dangerous unless preventive precautions were taken to prevent injury and that no preventive precautions were taken, and that the defendant did not require Britt to use any in doing this blasting. The defendant did employ Britt to do the excavating. In the first complaint it is alleged simply that he employed him, and in the amended complaint it is alleged that he employed him under such a contract as in law makes him an independent contractor. The occurrences are precisely the same, the injury is the same, and as to the exact contract between McNamee, the owner of the land, and Britt, its effect when established was to narrow the ground of the de-

fendant's liability, but not, as it appears to me, to change the cause of action. Texas Pac. Ry. Co. v. Cox, 145 U. S. 593-604, 12 Sup. Ct. 905, 36 L. Ed. 829.

I think the ruling of this court had determined that a recovery could be had under the amended complaint, although the relation was that of owner and independent contractor. The trial judge further ruled that there was no sufficient testimony to show that McNamee knew he was employing Britt to make an excavation which would necessarily require blasting, and which, being in the heart of the city, would be necessarily dangerous if done without proper precautions to prevent injury. He further said, even if McNamee knew that the excavation contracted for would require blasting, there was no evidence upon which the jury could find that McNamee failed in his duty to employ a person competent to properly do the work, and, on the whole case, ruled that the plaintiff was not entitled to recover. In my opinion, the right of the plaintiff to recover under the amended complaint, if he could make out a case which came within the exceptions to the rule that relieves an owner from liability for the negligence of an independent contractor, had been settled in favor of the plaintiff. I think it was also settled that there was evidence from which the jury might infer that McNamee was aware that there was hard rock to be removed which would require blasting. I think it was also settled that if McNamee was aware, or became aware during the performance of the contract, that there was hard rock to be taken out and blasting was required in the ordinary mode of removing the hard rock, he was liable to the same extent as the contractor would be liable, because that was the work he had authorized the contractor to do; so that if the contractor was incompetent and negligent, and did not observe the proper precautions which should be observed in doing such a dangerous work in a city, then McNamee was also liable. The ruling of this court became for these parties the law of this case. I think, moreover, that the ruling is amply sustained by a great many well-considered cases. In 65 L. R. A., in the note to Jacobs v. Fuller & Hutsinpiller Co., on page 833, and also in the note on page 753 (Thomas v. Harrington), the cases are fully cited which establish the doctrine. This case, as reported in 87 Federal Reporter, is cited on page 756. It does not seem to me open to controversy that to blast hard rock with explosives in a city is an act which is inherently dangerous and subjects persons and property in the neighborhood to peril, unless the peril is specially guarded against, and if in this case there was evidence upon which the jury might have found that McNamee was aware that blasting was required, and that he failed to require Britt to use proper precautions to prevent injury, then the case should have been submitted to the jury.

That there was evidence tending to support the above contentions which the plaintiff was entitled to have submitted, I am satisfied from the record. In this dissent it would be of no avail to analyze the statements of the witnesses, but I am satisfied that there was testimony tending to support all the issues essential to the plaintiff's case. The weight of the evidence it was not the province of the trial judge to

determine. It should, as I think, have been left to the jury. I do not think that it was a proper conclusion of law that no recovery could be had upon any view which could properly be taken of the facts the evidence tended to establish. Dunlap v. Northern R. R. Co., 130 U. S. 649–652, 9 Sup. Ct. 647, 32 L. Ed. 1058; Kane v. Northern Central Railway, 128 U. S. 91–94, 9 Sup. Ct. 16, 32 L. Ed. 339.

DILLARD v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 23, 1905.)

No. 1,182.

1. INDICTMENT—JOINDER OF COUNTS—FEDERAL STATUTE.
   Counts charging a defendant with the forgery of Chinese duplicate certificates, with the uttering of such forged certificates, and with violating Rev. St. § 3169 [U. S. Comp. St. 1901, p. 2059], as an officer in the revenue service, by negligently and designedly permitting the commission of such offenses, may properly be joined in the same indictment, under Rev. St. § 1024 [U. S. Comp. St. 1901, p. 720], since they cover "acts or transactions connected together."

2. CRIMINAL LAW—WRIT OF ERROR—REVIEW—DISCRETION OF COURT.
   The ruling on a motion to quash an indictment is discretionary, and ordinarily not assignable for error.

3. FORGERY—INDICTMENT—DESCRIPTION OF OFFENSE.
   An indictment for forging and uttering Chinese duplicate certificates of residence, such as a collector is authorized to issue on proof of loss of the originals, need not aver that originals were issued or lost, nor to whom the duplicates were issued, where the certificates are described and the names of the Chinese persons to whom they purport to have been issued are given, and it is alleged that the persons to whom they were uttered were to the jurors unknown.

4. CRIMINAL LAW—CONDUCT OF TRIAL—DISCRETION OF COURT.
   The refusal of the court, during the taking of testimony in a criminal case, to permit the presenting at that time of a motion to dismiss as to certain counts of the indictment, was a matter within its discretion, and is not ground for reversal, unless it is shown that prejudice resulted to defendant.

5. SAME—REVIEW OF INSTRUCTIONS—FAILURE TO EXCEPT.
   Assignments of error in a criminal case, based on instructions given and the refusal to give instructions requested, cannot be considered, where the record fails to show that any exceptions were taken to the charge or the refusal to charge.

6. FORGERY—EVIDENCE.
   Evidence admitted on the trial of a defendant for the forgery of Chinese duplicate certificates of residence *held* competent and material as tending to connect defendant with the offense charged.

7. CRIMINAL LAW—EVIDENCE—OTHER OFFENSES.
   On the trial of a defendant for the forgery of Chinese duplicate certificates of residence, other forged and fraudulent certificates not mentioned in the indictment, but shown to be in the handwriting of defendant, were admissible on the question of intent.
   [Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 826, 830–832.]

8. WITNESSES—IMPEACHMENT—CONTRADICTORY STATEMENTS.
   A witness cannot be impeached by showing contradictory statements made by him which are not relevant to any issue in the case.
   [Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1224.]

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

The plaintiff in error was charged with forging duplicate certificates of residence issued by the government of the United States, through a collector of internal revenue, to Chinese laborers entitled to be and remain in the United States, in place of original certificates lost or destroyed. Counts 1 to 5, inclusive, of the indictment, charge the forging of five of such official documents on five specified dates. Counts 6 to 10, inclusive, charge the uttering of the said five documents on the dates on which they were alleged to have been forged. Counts 11 to 15, inclusive, charge the plaintiff in error, as an officer of the United States, with negligently and designedly permitting five acts of violation of the law on said dates, against the provisions of section 3169 of the Revised Statutes. Counts 16 to 24, inclusive, charge the uttering of nine other forged and fraudulent duplicate certificates on nine specified dates. Counts 25 to 33, inclusive, charge nine offenses against section 3169, Rev. St. [U. S. Comp. St. 1901, p. 2059], in permitting these nine violations of the law on the dates on which the said nine documents were uttered. Plaintiff in error moved to quash the indictment, on the ground of misjoinder of counts. At the same time he demurred to the indictment, on the ground that none of the acts charged were offenses against the United States, and upon other grounds, including that of misjoinder. The motion to quash was overruled by the court. The demurrer was sustained as to counts 11 to 15, inclusive, and counts 25 to 33, inclusive. The plaintiff in error was convicted on counts 10, 17, 19, and 21, and was acquitted on the other counts which remained in the indictment.

Samuel M. Shortridge and T. C. West, for plaintiff in error.

Robert T. Devlin, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty.

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

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

It is assigned as error that the court overruled the motion to quash the indictment. Section 1024, Rev. St. [U. S. Comp. St. 1901, p. 720], defines the circumstances under which counts may be joined in one indictment. It is:

"Where there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined."

The plaintiff in error, having submitted with his motion to quash his demurrer to the indictment for misjoinder, which demurrer was sustained as to certain counts, cannot now be heard to complain that the indictment was not quashed, upon the ground that those charges were originally included in it. There can be no doubt that the five counts charging forgery of Chinese duplicate certificates may be properly joined with the five counts charging their utterance. Nor is there ground for saying that the five counts charging plaintiff in error with committing the five acts of violation of the law on the same dates may not be joined with them. They are all "acts or transactions connected together" and are "acts of the same class of crimes or offenses." The trial court had the power to exercise its discretion concerning the motion to quash, or to require the prosecutor to elect as to which of the charges the defendant should be tried upon. Its ruling on a motion to

quash is ordinarily not assignable for error. Durland v. United States, 161 U. S. 306, 314, 16 Sup. Ct. 508, 40 L. Ed. 709; Logan v. United States, 144 U. S. 263, 282, 12 Sup. Ct. 617, 36 L. Ed. 429; United States v. Rosenberg, 7 Wall. 580, 19 L. Ed. 263.

As to the ruling of the court upon the demurrer on the ground of misjoinder, it is sufficient to point out that the indictment charges cognate crimes, and presents parts and phases of the same transactions. It is no objection to the joinder of charges in one indictment that the charges set forth offenses of different grades, and are framed under different sections of the statutes, and are attended with different penalties and different procedure. Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; Dolan v. United States (C. C. A.) 133 Fed. 440, 446; McGregor v. United States (C. C. A.) 134 Fed. 187.

It is urged that the demurrers to all the counts in the indictment should have been sustained, for the reason that they do not specify to whom the duplicate certificates were issued, or wherein the certificates were false and fraudulent, nor allege that original certificates of residence had been issued, in lieu of which the duplicates were issued, nor that the originals had been proven to be lost. The counts in each case charged that at the time and place specified the plaintiff in error did "unlawfully, wrongfully, knowingly, designedly, feloniously, and corruptly, and with intent to defraud, * * * utter, publish, and pass as true and genuine, to some person or persons to the grand jurors aforesaid unknown," and then described the instrument, and proceeded:

"And which said false and fraudulent duplicate certificate of residence was numbered (giving the number), and which said false and fraudulent duplicate certificate of residence then and there purported to have been issued by said John C. Lynch, as collector of internal revenue of the United States, in and for the First district of California, to one (naming the Chinaman), who was therein described as a Chinese laborer; and which said false and fraudulent duplicate certificate of residence, then and there purported to have been issued in lieu of original certificate of residence numbered (stating the number), on proof of loss of said original certificate of residence being filed with the collector of internal revenue of the United States in and for the First district of California."

Then followed a description of the certificate, in words and figures.

In order to charge the offense defined by the statute, it was not necessary to charge that there had been in fact an original certificate issued to the Chinese person named in the fraudulent duplicate, nor to allege that such original had been proven to be lost. The evil intended to be prevented by the statute might be accomplished as well where there had been no loss or proof of loss of an original certificate. Nor was it essential that the grand jury should have known to whom the plaintiff in error delivered the false certificate. It was sufficient to say that the actual delivery was to persons unknown to the grand jury (Durland v. United States, 161 U. S. 314, 16 Sup. Ct. 508, 40 L. Ed. 709), coupled with the averment that it purported to have been issued to a certain Chinese person named therein. We find no error in the ruling of the court on the demurrer.

The point is made that the trial court denied the plaintiff in error an opportunity to submit, at the close of the testimony for the government, his motion to dismiss as to certain counts. The record

shows that, when the prosecution rested, counsel for the plaintiff in error announced their desire to make a motion to dismiss as to certain counts, but stated that at that time they were not ready to present the motion, for the reason that they were not able to segregate the vast number of exhibits introduced in evidence. They then proceeded to submit testimony for the defense. A day later they asked leave to make the motion. The court ruled that the motion should be made at the conclusion of the testimony, and remarked:

"If there is any matter as to which you think there is no evidence at all in, you need introduce no evidence in regard to it."

At the conclusion of the testimony the motion was made to dismiss as to all the counts, on the ground that there was no evidence in the record to show that the certificates contemplated by Exclusion Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], had ever been issued by the plaintiff in error. This motion was overruled. We discern no ground for saying that the court erred in denying permission to present the motion at the time when the offer was made. At that time a considerable portion of the evidence for the defense had been taken. It is argued that the refusal of the court to entertain the motion when it was first proposed to be made forced the plaintiff in error to go into his defense as to all the counts and permitted the defendant in error in rebuttal to fortify its case. It is a sufficient answer to this to say that the trial court was vested with discretion as to the order of proof and the conduct of the trial, and no prejudice to the plaintiff in error can be seen to have resulted from the refusal to entertain the motion at the time when it was first proposed.

The plaintiff in error presents numerous assignments of error as to portions of the charge to the jury and the refusal of the court to give certain requested instructions. We are without power to enter into a consideration of these questions, for the reason that the record shows that no exception whatever was taken either to the charge given or to the refusal of the court to give the requested instructions.

It is said that the court erred in admitting in evidence certain testimony of the witness Sam Bat Sam. He testified that he first came to the United States by way of Mexico; that at Deming he had three photographs taken and gave them to a white man, and a month later received from Toy Man Sing, of San Francisco, a duplicate certificate of residence, and he identified that certificate as the one which was presented to him by the district attorney. To the question whether Toy Man Sing sent him a letter, objection was made, and was overruled. The answer was:

"Yes, sir; he did, but I did not retain this letter. I cast it aside."

He further testified that he paid $100 for the certificate. He was then asked what were the instructions in Toy Man Sing's letter. The court permitted the question to be asked on the promise of the district attorney to connect the plaintiff in error with Toy Man Sing. But, when the witness said that the white man showed him a letter from Toy Man Sing "saying there was a black man," the court interposed, and the witness proceeded no further. It is urged that the evidence so admitted was incompetent and hurtful, and that no con-

nection was ever shown between the plaintiff in error and Toy Man Sing or Sam Bat Sam. But the evidence shows that the plaintiff in error was a deputy collector of internal revenue at San Francisco, and had the exclusive charge of the issuance of duplicate certificates of residence to Chinese, and that every forged or fraudulent certificate introduced in the case was in his handwriting and attested by his signature. One witness testified that shortly before the plaintiff in error left San Francisco Toy Man Sing came almost daily to the office of the collector, where he had conversations with the plaintiff in error; that he came there so often that it became suspicious; that he had seen the plaintiff in error at Toy Man Sing's place of business on three occasions during business hours of the day; and that one of these occasions was but a day or two before the plaintiff in error left. In view of that evidence we can see no error in the ruling of the court as to Sam Bat Sam's testimony. Three Chinese testified that they were not entitled to certificates, not having been within the United States at the time of registration; that they paid $100 each for the fraudulent certificates, all of which were shown to be in the handwriting of the plaintiff in error; and two of these witnesses dealt with Toy Man Sing, and sent him money in payment for the certificates. It was clearly proper to show that Toy Man Sing frequently visited the office of the plaintiff in error, and that the latter had visited his store in Chinatown. The testimony as to the contents of the letters of instructions from Toy Man Sing to Sam Bat Sam and Yee To You was by the court excluded from the evidence, and all the evidence concerning declarations and acts of Toy Man Sing with reference to Sam Bat Sam was struck out by the court.

Complaint is made that the departure of Toy Man Sing from San Francisco to China was termed flight by the prosecution, but the record does not justify that criticism. A witness was asked when was the last time he saw Toy Man Sing in the city, and answered that:

"It was in the month of June, 1902. I have never seen him since. He is not here. He is in China."

The point is made that there was error in admitting the testimony of the witness Thomas that Toy Man Sing called on several occasions at the office of the collector of internal revenue for the certificate of one Lung Duck, and in admitting documents in evidence relating to that certificate. If there were error in the admission of this evidence, it was cured at the close of the testimony in the case, when the court specifically struck it all out.

It is contended that the Ho Quang photograph found in the store of Toy Man Sing was improperly admitted in evidence, for the reason that it was evidence of an act of a co-conspirator after the conspiracy had come to an end. This contention cannot be sustained. The Ho Quang certificate was the subject of the twenty-fourth count of the indictment. That certificate, like the others, was in the handwriting of the plaintiff in error. The photograph on the certificate, which was the same as the photograph found in the store of Toy Man Sing, did not agree with the original photograph on the

certificate in lieu of which it purported to have been issued, and was not the photograph of the person described therein. Evidence had been adduced tending to connect Toy Man Sing with the plaintiff in error, and the fact that the photograph of Ho Quang was found in the store of Toy Man Sing, where the plaintiff in error had been seen shortly before the departure of Toy Man Sing from San Francisco, made the evidence competent and material. It was not in any sense evidence of an act of a co-conspirator after the termination of the conspiracy. It was an act which must have been done at the same time with other acts with which the plaintiff in error was charged.

Error is assigned to the admission of 27 other alleged forged and fraudulent certificates not mentioned in the indictment, and counsel for the plaintiff in error cite authorities which state the rule to be that evidence of the commission of other offenses not connected with the offense charged may not be admitted against the defendant. It is true that the prosecution cannot prove against a defendant any crime not alleged in the indictment, in aid of proof that he is guilty of the crime charged. But there are certain well-recognized exceptions to the rule, and one is that evidence of other crimes is competent to prove the specific crime charged, when it tends to show the intent. It is well settled that, in cases of alleged forgery of checks and other instruments, evidence is admissible to show that, at or near the time of the execution of the instrument alleged to have been forged or uttered, the defendant forged or uttered or had in his possession similar forged instruments. Wood v. United States, 16 Pet. 342, 10 L. Ed. 987; United States v. Snyder (C. C.) 14 Fed. 554; United States v. Kenney (C. C.) 90 Fed. 257; Packer v. United States, 106 Fed. 906, 46 C. C. A. 35; Commonwealth v. Russell, 156 Mass. 196, 30 N. E. 763. There was no error, therefore, in the admission of the other forged and fraudulent duplicate certificates.

It is contended that the court erred in admitting evidence to show that the signatures "John C. Lynch" in red ink and black ink on the duplicate certificates mentioned in counts 16 to 24, inclusive, were forgeries, for the reason that the indictment charges that said certificates are false and fraudulent, and sets out wherein they are false and fraudulent, and therefore the proof should have been limited to the allegations of the indictment. It is argued that, since the indictment did not charge that the certificates were forged, the plaintiff in error was not notified that the government would undertake to prove that they were forged by him. It is contended, further, that the duplicate certificates of residence admitted in evidence are not the duplicates contemplated by the statute, and are therefore incompetent to prove a violation of the act of May 5, 1892, for the reason that the original certificates are signed by O. M. Welburn, then the collector, or by one of his deputies, while the so-called duplicates are signed in the name of John C. Lynch. In other words, the argument is that the word "duplicate" in the statute is used as synonymous with the words "a true copy." Turning to the language of the indictment, we find that it charges in the several counts that the plaintiff in error did, with intent to defraud, unlawfully utter, publish, and

pass as true and genuine, a certain false and fraudulent duplicate certificate of residence, purporting to be what is commonly known and described as a duplicate certificate of residence, etc., and that the plaintiff in error well knew that said false and fraudulent certificate of residence was not a certificate of residence issued by the collector of internal revenue of the United States in and for the First district of California. The plaintiff in error being thus charged with knowledge that the fraudulent certificate was not issued by the collector, there can be no doubt that evidence was properly admitted to show that the signature attached to the same was not the true and genuine signature of the then collector, but was forged by himself; and this, irrespective of the fact that the indictment did not directly charge him with the forgery. Nor does the law require that the duplicate certificate shall be an exact copy of the original as to the signature of the collector. Act May 5, 1892, c. 60, § 7, 27 Stat. 26 [U. S. Comp. St. 1901, p. 1321], provides that the Secretary of the Treasury shall make such rules and regulations as may be necessary for the efficient execution of the act, and that he shall make such provisions that certificates may be procured in localities convenient to the applicants. Act May 5, 1892, c. 60, § 6, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], prescribes the manner of procuring duplicates by those who have lost the originals. The forms of the certificates were prescribed by the Secretary, and the duplicate certificates, under the rules and regulations, were properly signed by the collector, who was authorized to issue the same. They could not be signed by any other. They are none the less the duplicate certificates contemplated by the statute, notwithstanding the fact that the name of the collector on the duplicates may not be the name of the collector whose name appeared upon the original certificate and whose term of office had expired.

Error is assigned to the admission in evidence of certain correspondence which passed between the collector's office and certain officers of the government at El Paso, Texas, in regard to some of the duplicate certificates which were alleged to have been forged. There was, first, a letter to the collector from a Chinese inspector, inquiring as to the genuineness of the signature of John C. Lynch to the duplicate certificate issued to Yee To You. A photographic copy of the signature accompanied the letter. The letter was not brought to the attention of the collector, but the plaintiff in error answered it, signed the name of John C. Lynch to the answer, and stated therein that the signature inquired about was genuine. Following this was a letter from the assistant United States district attorney at El Paso to the collector, requesting him to send there the volume containing the original certificate. This letter was received by the collector, and he testified that he directed the plaintiff in error to answer it and comply with the request. This answer was prepared by the plaintiff in error, signed by the collector, and mailed. The collector testified that he directed the plaintiff in error to send the volume to El Paso, but that two weeks later he found it hidden away in the file room. This evidence was clearly competent to show

the guilty knowledge and purpose of the plaintiff in error, and there can be no question that it was properly admitted.

Error is assigned to what is designated improper conduct on the part of the district attorney, by which the plaintiff in error was deprived of a fair and impartial trial. This assignment refers in part to several offers of improper evidence on the part of the district attorney, which evidence was excluded by the court, and in part to certain language addressed by the district attorney to the plaintiff in error while the latter was upon the witness stand. It is not every proffer of improper testimony that will justify a charge of misconduct on the part of counsel. The only instance of improper conduct on the part of the district attorney which we find in the record occurred when the plaintiff in error had testified that the district attorney had taken good care that he should not have a chance to inspect certain documents concerning which he was being interrogated. To this the district attorney replied that the witness had deliberately falsified matters. The court very properly interposed, and said:

"You have no right to say that to a witness upon the stand, no matter whether he is the defendant or not."

No exception was taken to the language of the district attorney on this occasion, and no request was made to the court to instruct the jury in regard to the same. We think that the remarks of the court at the time sufficiently cured the error.

It is urged that the trial court erred in excluding testimony offered to impeach B. M. Thomas and John C. Lynch, witnesses for the government. On the cross-examination of Thomas he was asked the following question as to declarations made by him to the wife of the plaintiff in error: "And you said to her that you knew, and that Lynch knew, he (Lynch) had signed every one of these certificates, didn't you?" to which the witness replied, "I did not." When counsel for the plaintiff in error thereafter inquired of the wife of the plaintiff in error whether Thomas had made such declaration, an objection to the evidence was sustained by the court, on the ground that it was an attempt to impeach the witness Thomas on a collateral matter. He had not testified as to the signatures to the certificates or the handwriting thereof. He had testified that the body of the certificates was in the handwriting of the plaintiff in error, and that fact is not disputed. The evidence as to which the said witness was sought to be impeached was not relevant to any testimony of his as to any issue in the case; nor was the fact which was so sought to be proven a fact which would tend to discredit the witness by showing bias, hostile feeling, or corrupt motive. The general rule was therefore applicable. The test question is:

"Could the fact as to which the prior self-contradiction is predicated have been shown in evidence for any purpose independently of the self-contradiction?" Wigmore on Evidence, § 1020, and cases there cited.

These observations concerning the attempt to impeach the witness Thomas are applicable to the attempt to impeach Lynch, and we find no error in the rulings of the trial court in excluding the offered impeaching testimony.

Error is assigned to the language of the court concerning the examination of the witness Lynch after he had testified that the signatures of his name to the certificate were forgeries. He was asked by the district attorney to state what chief mark or feature of the signatures led him to so testify. No objection was made to the question, but the court said:

"I don't think, in a matter of that kind, you have any right to cross-examine your own witness. * * * A person knows his own signature, and he may not be able to describe the different characteristics of it."

We are precluded from reviewing these remarks of the court, for the reason that no objection was made, and no exception was reserved to them.

There are other assignments of error which we have carefully considered. We find no reversible error in any of them.

The judgment is affirmed.

DALTON et al. v. MOORE et al.

(Circuit Court of Appeals, Ninth Circuit. October 16, 1905.)

No. 1,116.

1. WRIT OF ERROR—INCOMPLETE RECORD.
It is the duty of counsel for a plaintiff in error to furnish the Circuit Court of Appeals with a full and complete transcript of the record as described in the certificate to the bill of exceptions, including exhibits, or with the stipulation of opposing counsel waiving any part which is omitted.

2. TRIAL—INSTRUCTIONS—TIME FOR OBJECTIONS AND EXCEPTIONS.
Where a case was submitted to the jury but two hours before the expiration of the term by limitation, and the court refused to detain the jury to give a party time to reduce his objections to the instructions to writing and present the same, but gave him permission to present them within a reasonable time after the jury had retired, which was done, the fact that the objections were not taken before the jury retired does not deprive such party of the benefit thereof.

3. PARTIES—REINSTATEMENT—WAIVER OF OBJECTION.
Where a plaintiff, who had been stricken from the complaint on demurrer for misjoinder, was permitted to be reinstated on the trial, and his name appeared in the title of the action in the verdict, the failure of defendant to object at the time of such reinstatement was a waiver of any objection to such action, and cannot be urged as ground for reversal of the judgment.

4. MINES AND MINERALS—FLOODING OF MINING CLAIM—MEASURE OF DAMAGES.
The measure of damages recoverable for the flooding of a mining claim, preventing work thereon by plaintiffs, who were lessees engaged in working the same, is not the amount expended by them for machinery and other equipment for prosecuting the work, but the value of the use of the claim during the time the work was prevented.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 247.]

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

This action was brought by the defendants in error (plaintiffs below) on November 7, 1903, to recover damages in the sum of $53,000 from the plain-

tiffs in error (defendants below), alleged to have resulted from the flooding of the mining ground of the plaintiffs by the unlawful erection of a dam by the defendants. It appears from the pleadings that W. A. Mix and T. D. Stewart were the owners of two placer mining claims, known as the "Jenks Fraction" and "No. 1 Above Discovery," on Porcupine creek, in Alaska, and on September 8, 1900, leased the Jenks Fraction claim, and so much of the adjoining No. 1 Above Discovery claim as was necessary to make a total length of 600 feet along the creek, to F. F. Clark and John Biglow, for a period of a little over three years, until December 31, 1903. By the terms of this lease Clark and Biglow were to commence mining work upon the creek bed and low bars as soon as practicable, and continue such work during the mining season, in such manner as they should deem best. They were to make proper clean-ups, and to give notice of the same to the lessors when the gold was taken from the upper 400 feet of the ground leased, 30 per cent. of the gross proceeds of this portion to be paid as royalty to the lessors, while the gold taken from the lower 200 feet was to be entirely retained by the lessees. The lessees were also to deliver water, by ditch or flume, to the lessors at a designated point, in sufficient quantity to supply a No. 2 Giant. The lessors reserved the right to dump tailings in the flume or creek running through the mining claims, but in such manner as that they would be fully carried off by the water, and would in no way interfere with the working of the claims by the lessees. On October 5, 1900, the lessees, Clark and Biglow, entered into a contract with the plaintiffs I. H. Moore and L. S. Kellar, by which the plaintiffs agreed to advance money to install a mining plant on said leased ground to the extent of $12,000, and to become responsible to Clark and Biglow for the performance of their covenants and agreements under their lease aforesaid, and in consideration therefor were to receive one-third of the net profits from the working of the property under the terms of the lease, the first money received over and above the running expenses to be turned over to the plaintiffs until they should be reimbursed for the moneys advanced by them. If the cost of installing the plant should exceed $12,000, one-third of the excess was to be paid by the plaintiffs and two-thirds by Clark and Biglow. In this contract it was stipulated that certain specified machinery should be installed, and a flume, not less than four feet in width and three feet in depth, should be constructed to convey the water from McKinley creek to the leased ground, and that said flume and other property pertaining to the contract should become the joint property of the parties to the contract. This contract was thereafter ratified by the lessors, Mix and Stewart. In October, 1901, Biglow assigned all his rights under the said lease to the plaintiffs, and in June, 1902, Clark did the same. Between October 5, 1900, and June 1, 1902, the plaintiffs placed upon said leased ground the necessary mining machinery, buildings, elevators, etc., for operation thereof, at an alleged expense of $27,000.

The defendants were the owners of and operating a mining claim immediately below the Jenks Fraction claim, known as Discovery claim, on Porcupine creek, which creek ran through and across the property leased by the plaintiffs and the property of the defendants. After the water of this creek was diverted by the mines, flumes, and water pipes of the plaintiffs, it was returned to the bed of said creek for the use of the defendants in the operation of their mining properties. In May, 1902, the defendants built a dam in said creek on their claim, just below the lower boundary of the Jenks Fraction claim. It is alleged that this dam crossed the creek from bank to bank, and was constructed so carelessly that it served as an obstruction in the stream, and prevented the water from flowing through the channel thereof, and that this dam was placed in the creek against the plaintiffs' protest, and that defendants knew it would cause damage to plaintiffs. It is alleged that the dam caused the water to back up and inundate the premises of the plaintiffs, filling with water a pit which plaintiffs had dug; that plaintiffs notified defendants of these facts, and defendants promised that, as soon as plaintiffs were ready to begin operations, they would remove the dam or alter its construction so that it would not inundate or submerge plaintiffs' property; that by reason of these promises the plaintiffs finished their plant, and on June 10, 1902, commenced operations and proceeded to pump the water out

of the pit, using their pumps and elevators and a large number of men, until June 22, 1902, but found that nothing beneficial could be accomplished, because of the time and attention needed in keeping the premises clear of water; that on said June 22, 1902, tthe dam was partially removed and the obstruction to the water overcome by reason thereof, and defendants promised to leave the same out. It is alleged that plaintiffs then proceeded to put their premises into condition for mining, removing débris and deposit caused by the backing up of the water, and continued their work until July 8, 1902, when the defendants again caused the water to be backed up upon and to submerge the premises of the plaintiffs, and fill the pit in which plaintiffs were working; that between July 8 and August 5, 1902, plaintiffs continued their efforts to mine, relying upon the assurances of defendants that they would remove the dam, but that such efforts were unavailing on account of the water, and the labor and amount paid therefor was a loss to plaintiffs; that on August 10, 1902, defendants caused a portion of the dam to be removed, whereby the water lowered to some extent, but not enough for plaintiffs to operate their mine, owing to the débris that had gathered above the dam; and that between August 10th and 23d the plaintiffs worked at pumping out the water and clearing away débris, and on the last-mentioned date were able to resume mining operations, continuing the same until September 23, 1902, when they were obliged to close down their plant by reason of the submerging of their premises by the backing up of the water, caused by an embankment which had formed of the refuse matter coming down the creek and lodging against the remaining portion of the dam. It is alleged that these obstructions have ever since remained in said creek, causing the water to back up over the plaintiffs' premises in such manner as to entirely render the same valueless as mining property, and submerging the machinery and improvements thereon; that the plaintiffs have, by the wrongful and negligent acts of the defendants, been prevented from operating the mining property for the season of 1903; and that their lease thereof expires on the 31st day of December, 1903. It is alleged that the leased premises were rich in gold, and could have been very profitably worked by the plaintiffs, had they not been prevented from so doing by the wrongful acts of the defendants.

A motion to strike out certain paragraphs of the complaint was denied, and a demurrer to the complaint on the ground of misjoinder of parties plaintiff was overruled by the court below.

The defendants, in their answer, admit their ownership of Discovery claim, and the building of the dam in May, 1902, but deny generally the other allegations of the complaint. As matter of defense, they aver that tne dam built by them in no manner caused the water of the creek to flood any ground claimed by plaintiffs, and that it was so built as to raise the level of the water of the creek only about one foot above the ordinary level, with the object of causing the water to flow into a flume to be used by the defendants in mining operations. It is averred that the flooding of the pit which plaintiffs had sunk in the bed of the said creek, and all the damage resulting to plaintiffs by reason of the rise of the waters of the creek, were caused by the plaintiffs' own negligence during the prosecution of their work, by discharging their tailings into said creek onto defendants' claim at a point immediately below the upper boundary thereof and about 10 feet below plaintiffs' pit, and that said tailings accumulated in the channel of the stream, causing the water to accumulate above such point, and said backwater, together with the natural underground flow or seepage water beneath the bed of the stream, caused the flooding of the pit. It is alleged that the flooding was further contributed to by the fact that the large flumes carrying water over the plaintiffs' premises were so negligently constructed as to fail to hold the waters, but the same were released into the channel of the stream above the pit, and by natural flow entered the same. It is further alleged that after plaintiffs' complaints to defendants, about August 10, 1902, an agreement was had between them, for the purpose of amicably settling their differences, permitting plaintiffs to continue to dump their tailings on Discovery claim, the defendants promising to destroy the dam so as to restore the flow of the stream to its natural level, in consideration of which it is alleged that plaintiffs agreed to and did release defendants from any and all claims for

damages by reason of having erected said dam. It is alleged that defendants did then destroy the said dam so as to restore the flow of the waters to their natural level, and have never since rebuilt or repaired the same, and that plaintiffs continued their efforts to successfully work the ground claimed by them until some time in the month of September, 1902, when they abandoned the venture, and have not since attempted to work the ground.

The trial of the case resulted in a verdict in favor of the plaintiffs in the sum of $13,083.06. Judgment was entered thereupon, and the case brought to this court upon writ of error.

Malony & Cobb (Alfred Sutro, of counsel), for plaintiffs in error.

John R. Winn, L. R. Gillette, and Lewis P. Shackleford (Charles B. Marks, of counsel), for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts). The defendants in error interpose a preliminary objection to the transcript of record in this case, on the ground that certain exhibits introduced in evidence in the court below, and made a part of the bill of exceptions, have not been transmitted to this court. It appears from the evidence that these exhibits were two plats or charts showing the general location of the claims owned by the parties to the action on Porcupine creek, and the flume and dam referred to in the evidence, and a number of photographs of the premises taken at different times, showing the improvements on the grounds and the different stages of the water backed up by the dam. The failure of counsel for the plaintiffs in error to have these exhibits attached to the record is not satisfactorily explained; and, while we do not find that they would be of any assistance to the court in determining the questions of law involved in the assignments of error, this fact is no excuse. It was the duty of counsel for the plaintiffs in error to furnish this court with a full and complete transcript of the record as described in the certificate to the bill of exceptions or the stipulation of opposing counsel waiving the production of the exhibits, and his failure in this respect is a sufficient cause for censure. But we do not consider it sufficient, under the circumstances of this case, to justify a dismissal of the writ of error.

It is further objected by the defendants in error that this court cannot consider the exceptions taken by the plaintiffs in error to the instructions given to the jury by the lower court, for the reason that the exceptions were not taken until after the jury had retired to consider their verdict; citing the cases of Western Union Tel. Co. v. Baker, 85 Fed. 690, 29 C. C. A. 392; Yates v. United States, 90 Fed. 57, 32 C. C. A. 507, and Thiede v. Utah, 159 U. S. 522, 16 Sup. Ct. 62, 40 L. Ed. 237.

The following proceedings were had with respect to the instructions of the court given to the jury:

"The above and foregoing instructions were given to the jury at about 10 o'clock at night on the last day of the court, which necessarily expired at 12 o'clock at night. After the instructions were read counsel for the defendants came to the court and asked for time in which to present his objections to the instructions and to reduce the same to writing. The court, being of the opinion that to detain the jury until such objections were made would be practically to make the result of the case abortive, permitted counsel to make

his objections and take his exceptions to the instructions after the jury retired to consider of their verdict and within a reasonable time. The verdict of the jury was returned shortly before 12 o'clock, and defendants filed their motion for a new trial, which was continued for hearing until the next term, and court thereupon adjourned. Under the statement of the court as above made counsel now presents his objections and exceptions to the several instructions as above set forth as his bill of exceptions in that behalf, and the same is allowed on this 10th day of December, 1903, and ordered filed and made a part of the record herein, over objections of plaintiff."

The verdict of the jury was returned and entered of record November 28, 1903. The objections and exceptions were allowed on December 10, 1903, and filed December 18, 1903. A motion for a new trial was made immediately upon the entry of the verdict, and was denied on July 22, 1904. The instructions to the jury were given near the close of the term, and it appears to have been the opinion of the court that the case should be concluded before the end of the term at midnight, in order that the regularity of the proceedings should be preserved. To accomplish this purpose, the court, before the case was closed, permitted counsel to take his exceptions afterwards that the jury might take the case without delay. The questions involved in the instructions were well understood by court and counsel, and there was no misunderstanding as to the instructions that were given and refused, or the exceptions that counsel desired to take thereto. We think the plaintiffs in error cannot be deprived of their exceptions to the charge to the jury by the action of the court. Ah Lep v. Gong Choy, 13 Or. 211, 9 Pac. 483.

It is assigned as error that in the complaint there was a misjoinder of parties plaintiff—that Stewart, the lessor, was joined with Moore and Kellar, lessees, in an action that charged no injury to the freehold estate. The objection was taken by demurrer, and was sustained by the court. Subsequently, upon the trial and after the conclusion of plaintiffs' testimony, counsel for plaintiffs asked the court for the reinstatement of Stewart as a party to the cause. This motion was probably based upon the terms of the original lease of Mix and Stewart to Clark and Biglow, under which the lessors were to receive a royalty of 30 per cent. of the gross proceeds of gold taken or washed from the upper or south 400 feet of the creek bed and low bars thereof. But, however that may be, the court said in reply to this motion: "Well, if you want to put him in, and there is no objection, put him in." There was no objection, and while there was no order made making him a party to the action, his name appears in the title to the action in the verdict of the jury. The failure of the defendants to interpose an objection to the reinstatement of Stewart as a party plaintiff was a waiver of all objection to such action by the court, and cannot now be made a ground for the reversal of the judgment.

The next question relates to the measure of damages. In the complaint plaintiffs alleged, as one of the elements of damages sustained by the plaintiffs, that between October 5, 1900, and June 1, 1902, they expended for improvements, machinery, and for labor performed and done upon the leased premises the sum of $27,000, and that by reason of the wrongful, careless, negligent and malicious acts of the defend-

ants the machinery and improvements placed upon the premises became an entire loss. The defendants moved to strike out this paragraph of the complaint, on the ground that the matters and things therein set out were irrelevant, immaterial, and redundant, and that the expenditures therein set out were made before the alleged tort by the defendants, and the alleged tort in no wise caused or contributed to the alleged expenditures, and was not shown to have been connected therewith. The motion to strike out was denied. This part of the complaint was also demurred to, and the demurrer overruled. In support of the allegation, the plaintiffs introduced the evidence of Dr. L. S. Kellar, one of the plaintiffs, whose evidence tended to show that up to June 10, 1902, the cost of the machinery laid down upon the ground was $12,997.22, and the cost of the labor in putting up the machinery was $1,509. This witness also testified that the cost of labor in 1901 in excavating and in putting in elevator and machinery was $8,091.23, and that the cost of labor from June 10 to August 23, 1902, was $1,361.25. The aggregate of these several items was $26,958.70. The witness also testified that at the time of the trial the machinery could not be sold for anything, and that it could not be moved to any other place so as to realize anything out of it. This evidence was admitted over the objections of the defendants. The court instructed the jury upon this feature of the case as follows:

"If you are satisfied by the weight and preponderance of the evidence that the plaintiff entered upon this mining enterprise in good faith and necessarily expended in preparing to work their ground the sum of $27,000.00, and that this money was necessarily expended in order that the plaintiff might work his ground successfully and get his plant in position for mining, and if you are further satisfied by the preponderance of the evidence that the defendants were fully informed of the nature and duration of the mining license or lease upon which the plaintiff has entered, and you are further satisfied by a preponderance of the evidence that the defendants, by the construction of the dam across the creek, and as the immediate consequence of the construction of said dam, flooded out the plaintiffs, and made it reasonably impossible for them to continue their work of mining, and that they were absolutely prevented therefrom up to the determination of their lease or license by such acts of defendant, then you should find for the plaintiff in this cause. And, if absolutely prevented by the defendants from mining the ground the plaintiffs had entered upon throughout the whole term of their lease, the measure of the plaintiffs' damages is the necessary expenditure made in preparing for such work, less the value of the machinery and appliances after the wrong of which they complain was committed. You are further instructed, gentlemen of the jury, that this claim of damages and this measure of damages can only be resorted to if you find by the preponderance of the evidence that the plaintiff has been absolutely prevented by the defendants from doing any work upon their claim after the wrong complained of, and that their expenditure has become wholly lost."

To this instruction the defendants interposed the following objections:

"(1) The measure of damages given the jury is not the measure of damages under the law and the evidence in this case. (2) The evidence conclusively showed that plaintiffs were not absolutely prevented from working their lease during the whole term of their lease, but did in fact work out 135 feet of the 600 feet claimed under the lease. (3) The evidence conclusively showed that the dam complained of was entirely removed in August, 1902, and did not prevent or hinder plaintiffs from working thereafter. (4) The term of the lease mentioned did not expire till long after this suit

was brought, and until after the trial hereof. (5) The evidence was undisputed that the plaintiffs had extracted $2,100 in gold from the 135 feet of ground worked, and the measure of damages given allowed the plaintiffs to recover the expenses of extracting said gold and the value of the gold as a net profit."

It is manifest that the measure of damages here stated was erroneous. It does not appear from the evidence that the backing up of the water onto plaintiffs' premises injured the machinery placed upon the premises. The fact that the machinery could not be sold for anything at the time of the trial, and could not be moved to any other place so as to realize anything, had relation to the situation of the property, and not to the action of defendants' dam. Its lack of value at that place to others than the plaintiffs would have been the same if there had been no dam. Its lack of value to the plaintiffs was by reason of the fact that for a certain time defendants' dam backed up the water upon plaintiffs' claim, and during that time they could not use the property. Suppose that the machinery, by reason of its location and the difficulty of getting other machinery into that place, had increased in value in an amount equal to any damages sustained by the plaintiffs, would that circumstance have deprived the plaintiffs of their right to recover damages from the defendants for their acts causing the loss of the use of this claim? The law stated by the court would have that effect. Again, suppose the claim itself was of so little value that the plaintiffs, even with their costly machinery, could not work it at any profit at all, under the instructions complained of the act of the defendants in preventing plaintiffs from working the ground would render the former liable for the cost of the machinery. This manifestly would be grossly unjust, and goes to show that neither the cost nor the value of the machinery was the proper test of the plaintiffs' damages. On the contrary, the true measure of damages was the rental value of the property during the time plaintiffs were deprived of its enjoyment. The measure of damages is the direct pecuniary loss sustained by the party. The damages to be recovered must always be the natural and proximate consequence of the act complained of. The fact that this rule may be difficult of application in a given case is not a sufficient objection. But it does not appear to be difficult of application in this case. The plaintiffs held a lease of the claim dated September 8, 1900, which expired on December 31, 1903. The term was a little over three years. The evidence shows that plaintiffs were ready to go to work on the claim on June 10, 1902, but by reason of the water on the claim, backed up by defendants' dam, they did not get to work until August 23, 1902. They worked the claim for one month, or until September 23, 1902, taking out $2,100 in gold, at an expense of about $1,500, mining 135 feet of the 600 feet of leased ground. Had such property no rental value that could be determined by evidence? We think it had, and that upon proper allegations in the complaint the fact might have been established by evidence. For this erroneous ruling with respect to the complaint and in the instructions to the jury, the judgment must be reversed. The other errors assigned do not call for discussion.

Judgment reversed, with instructions to grant a new trial.

BRUMBY v. JONES et al.

(Circuit Court of Appeals, Fifth Circuit. October 2, 1905.)

No. 1,402.

BANKRUPTCY—EQUITY JURISDICTION OF DISTRICT COURTS—PLENARY SUITS.

The equity jurisdiction conferred on district courts by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], is limited to matters connected with the administration of bankrupt estates, and such court is without general equity jurisdiction to entertain a plenary suit by a third person to cancel the satisfaction of a mortgage and declare a trust in mortgaged property of a bankrupt which is not in the possession of his trustee, nor a part of the estate for distribution, and in which his general creditors have no interest.

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

Mrs. M. C. Jones, in her own behalf, and as the next friend of Annie L. Jones and J. P. Jones, filed a petition of intervention against John H. Wykle, as trustee in bankruptcy of T. R. Jones and L. S. Mumford, in the District Court of the United States for the Northern District of Georgia. The allegations of the petition are, in substance, that on October 8, 1890, J. P. Jones died, leaving a will; that T. R. Jones, the bankrupt, accepted the nomination and appointment of executor under said will; and that the petitioners are the only legatees and beneficiaries under the will. On December 14, 1896, T. R. Jones made and executed unto T. R. Jones, executor of the estate of J. P. Jones, deceased, a mortgage on a certain parcel of land owned and occupied by said T. R. Jones and family as a homestead, situated in Bartow county, Ga., to secure a debt owed by him to T. R. Jones, executor as aforesaid; he having used the property of the estate. On October 4, 1901, said T. R. Jones, as executor of the will of J. P. Jones, deceased, caused to be entered across the face of said mortgage, in the record book of mortgages in the Clerk's office of the superior court of Bartow county, Ga., "Satisfied and canceled"; that on April 2d, 1902, said T. R. Jones made and executed to one J. G. Lowry a mortgage on the same piece of land, which mortgage was subsequently, in 1902, transferred to L. S. Mumford; that the sum for which the said mortgage to T. R. Jones, executor, was given was not paid at the time said entry of satisfaction and cancellation was made, nor has any part thereof been paid since; that at the time of the cancellation of said mortgage on October 4, 1901, and at the time of making the mortgage to said Lowry, T. R. Jones was insolvent; that he was adjudicated a voluntary bankrupt on January 31, 1903, and that on February 27, 1903, John H. Wykle was duly appointed trustee for the estate of said bankrupt. The prayer of the petition is that the cancellation of the mortgage by T. R. Jones, as executor, be annulled; that the mortgage be declared and decreed a first and superior lien on said property; and that the property be sold by the trustee, and the proceeds of said sale be devoted to the payment of the claims of the petitioners.

On June 24, 1903, John H. Wykle, trustee of T. R. Jones, bankrupt, filed an answer to the said petition of intervention, neither admitting nor denying the material statements contained therein, having no personal knowledge of the same, and stating that the property described in the said petition was then occupied by the family of said T. R. Jones, the bankrupt; and he prayed that the same be turned over to him to be administered as part of the estate of said bankrupt, and that he be instructed to hold the proceeds thereof until the further order of the court. On January 28, 1904, Mrs. S. O. Brumby was allowed to be made a party defendant to said petition, instead of L. S. Mumford. On January 29, 1904, said S. O. Brumby filed a plea to the jurisdiction of the court, which plea was overruled. She then filed general and special demurrers to the petition, which were likewise overruled. Whereupon said defendant, Brumby, filed an answer to the petition, averring that, for want of sufficient information, she could neither admit nor deny the

allegations thereof, and prayed that the petitioners be held to strict proof of the same. Further answering, she alleged that the mortgage referred to in the petition as having been transferred to L. S. Mumford was on October 9, 1903, transferred by said Mumford to J. G. Lowry, and on the same date was transferred by said Lowry to her. Subsequent to the filing of the answer of John H. Wykle of June 24, 1903, and some time subsequent to December 14, 1903, said John H. Wykle, trustee, filed a further answer, stating that, as trustee and representing the unsecured creditors, he disclaimed any interest in the matters involved in the contentions of the parties as contained in said petition, further than to carry out the direction and order of the court in the premises.

It appears from the record that T. R. Jones was named and appointed as executor of the will of J. P. Jones, deceased, to act without bond, and to settle with the beneficiaries under the will when the youngest child reached the age of 21 years, which, it appears, would be in October, 1909. It also appears that on December 14, 1896, the date of the mortgage made by T. R. Jones to T. R. Jones, executor, there was a balance on hand due the estate of J. P. Jones, deceased, of $7,097.76, and that on February 17, 1903, about 15 days before the filing of the original petition herein, the balance on hand due said estate had been reduced to $5,794, as shown by the returns of said T. R. Jones, as executor, to the ordinary of the county, and that during the interim said executor provided for the maintenance and support of the family of the deceased out of the funds of the estate. The returns made by said executor to the ordinary, from time to time, show that he charged himself, in his accounts, with interest on the amount of the balance in his hands due the estate. It further appears that at the time T. R. Jones made the mortgage to himself, as executor of the estate of J. P. Jones, deceased, there were judgments coming against him, and he made the mortgage to enable him to go on and make money to pay off the judgments and not have his home sold; that he subsequently paid off the judgments and canceled said mortgage; that said Jones deposited the mortgage in the proper office for record, and the same was duly recorded, after which he repossessed himself of it, and has since retained it in his possession.

On May 13, 1904, the following order was made and entered by the District Court: "First. That the cancellation by T. R. Jones, executor, dated October 14, 1901, of the mortgage dated December 14, 1896, given by T. R. Jones to T. R. Jones, executor, be and the same is hereby, annulled. Second. It is further ordered, adjudged, and decreed that the said mortgage given by T. R. Jones to T. R. Jones, executor, dated December 14, 1896, recorded in Book M of Mortgages, p. 233, in the office of the clerk of the superior court of Bartow county, Ga., is hereby held, declared, and decreed to be the best, first, and superior lien and mortgage on and covering the property in said mortgage described. And it is decreed that the above-described mortgage be, and the same is, superior to the mortgage now held by Mrs. S. O. Brumby, defendant, in this intervention, and covering this same property. Third. It is furthermore ordered, adjudged, and decreed that the amount of said mortgage is $5,794, principal, and $557.58, interest to date, at the rate of 7 per cent. per annum. Fourth. It is furthermore ordered, adjudged, and decreed that the property by said mortgage covered be sold to the highest bidder, free from incumbrance, on the first Tuesday in July, 1904, by John H. Wykle, trustee, at public sale, after notice published once a week for four weeks in the newspaper in which the notice of sheriff's sales in Bartow county are published. Sixth. It is furthermore ordered, adjudged, and decreed that the proceeds of said sale be applied to the payment of, first, taxes due on said property; second, to the cost and expense of this litigation, and the sale of the property, as aforesaid; third, to the satisfaction of the mortgage hereinbefore established; fourth, the balance, if any, to be applied as by law directed. Seventh. It is furthermore ordered, adjudged, and decreed that this case, including exceptions and objections to all rulings made on demurrers and pleas since November 17, 1903, be open for appeal or petition for review for 20 days from the date of this decree, and all appeals or other motions for review must be filed and signed within that time."

The several rulings of the District Court on the questions raised in the case are brought here for review.

John T. Morris, for petitioner.

Barry Wright, for respondents.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

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

In effect, there are only two questions in this case, either of which, if decided in favor of the appellant, will control its decision and require a reversal of the case. These are the questions of jurisdiction, and of the validity of the mortgage of T. R. Jones to T. R. Jones, executor of the estate of J. P. Jones, deceased. The primary object of the petition (which is in the nature of a bill in equity) filed in the case is the annulment of the cancellation of said mortgage.

1. The first question presented for our consideration is as to the jurisdiction of the bankrupt court to hear and determine the controversy between the real parties to this cause. The subject-matter of the suit is one of equitable cognizance purely. The District Court does not possess the general power to entertain a suit in equity, and, unless the bankrupt act has conferred upon it jurisdiction to entertain a plenary suit in equity, such a suit cannot be maintained. Havens & Geddes v. Pierek, 120 Fed. 244. 57 C. C. A. 37; Bardes v. Bank, 178 U. S. 535, 20 Sup. Ct. 1000, 44 L. Ed. 261; First National Bank v. Chicago T. & T. Co., 198 U. S. 280, 25 Sup. Ct. 693; 49 L. Ed. 1051. The bankrupt act confers on the district courts, as courts of bankruptcy, such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings. As courts of bankruptcy, they are vested with power to collect, reduce to money, and distribute the estates of bankrupts, and to determine controversies in relation thereto. Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545, 546 [U. S. Comp. 1901, pp. 3420, 3421]. We think it clear that the controversies referred to relate to the collection, sale, and distribution of such estates. The jurisdiction of the district court, as granted by the bankruptcy act, is unquestionable bankrupt jurisdiction, and not general jurisdiction to hear and determine controversies between adverse third parties, which are not strictly and properly a part of the bankruptcy proceedings. In re Whitener, 105 Fed. 180, 44 C. C. A. 434; Bardes v. Bank, supra; First National Bank v. Chicago T. & T. Co., supra; Real Estate Trust Co. v. Thompson (D. C.) 112 Fed. 945.

The controversy involved in this suit is not one relating to the collection and distribution of the bankrupt's estate. It is not a controversy with reference to property in the actual possession of the bankruptcy court, or where it has been taken from the possession of its trustee or receiver without its authority. It is not one arising in the bankruptcy proceedings in reference to property subject to distribution to the general creditors of the bankrupt, or one where, by the nature of the controversy, power is conferred on the court to determine conflicting liens, or the validity and priority of liens between secured creditors.

This is an independent controversy between third parties who claim equities, as between themselves, in certain property of the bankrupt, which is not in the possession of the trustee, or a part of a fund for distribution among the general creditors of the bankrupt.

The complainants, M. C. Jones, Annie L. Jones and J. P. Jones, are not creditors of T. R. Jones, the bankrupt, and they do not claim to be such. Their claim is not a provable debt against the bankrupt's estate. It is not a fixed liability against said T. R. Jones, but contingent upon a settlement of his administration as executor of the estate of J. P. Jones, deceased, and an ascertainment thereon of his indebtedness, if any, to said estate. Moreover, this controversy is one in which the trustee in bankruptcy and the unsecured creditors have no interest. The trustee states that, as trustee and representing the unsecured creditors, he disclaims any interest in the matter involved in the contentions of the parties, and it was admitted at the hearing of this cause that the indebtedness of T. R. Jones to the estate of J. P. Jones, deceased, and the claim of Mrs. S. O. Brumby, each exceeds in amount the value of the property covered by the mortgages in controversy. It is clear that the creditors of the bankrupt's estate represented by the trustee have no interest in this controversy, for, under the admitted facts of the case, the property in question cannot be subjected to the payment of their debts. While the trustee would be entitled to any excess arising from a foreclosure sale of the property, after payment of the mortgage debt and cost of foreclosure he is not entitled to the mortgaged property. Carling v. Seymour Lbr. Co., 113 Fed. 483, 51 C. C. A. 1. "A court of bankruptcy will not order a sale of a bankrupt's real estate discharged of liens, unless the court is satisfied that the interest of the general creditors would thus be advanced." In re Styer (D. C.) 98 Fed. 290.

There is no issue between the parties to this controversy as to conflicting liens or the validity and priority of liens, and can be none until there has been an annulment of the cancellation of the mortgage made by T. R. Jones to T. R. Jones, executor, by a court of competent jurisdiction. This suit is in substance and effect a bill in equity to set aside and annul the cancellation of the mortgage made by T. R. Jones to T. R. Jones, executor, etc.; to declare a trust in favor of complainants in the property covered by said mortgage; to decree the same a first and superior lien on said property, and to have the property sold by the trustee in bankruptcy, and the proceeds of the sale devoted to the payment of the claims of the complainants. They are the legatees and beneficiaries under the will of J. P. Jones, deceased, of which T. R. Jones is the executor. They may have a claim—a moneyed demand—against said T. R. Jones personally at some future time, but they do not now seek to recover any sum of money out of his bankrupt estate. They seek only to have declared in their favor, as such legatees and beneficiaries, a trust in certain of his property as security for their contingent claim against said T. R. Jones, to be subjected to its payment when the same shall have been ascertained and become due.

If the mortgage by T. R. Jones, individually to himself as executor, to secure a debt which he owed to the estate of which he was executor,

is valid and effective, and charged the property covered thereby with a valid trust, such property will be followed in equity into whosesoever hands it comes, and he will be charged with the execution of the trust, unless he is a purchaser for value and without notice. 20 Am. & Eng. Encyc. of Law (2d Ed.) p. 1072. The proceeding to declare and enforce such trust must be had in a court of equity, whose peculiar jurisdiction and province it is to determine such questions. Perry on Trusts (5th Ed.) § 38. A court of equity has original and inherent jurisdiction to declare and enforce trusts, and will interfere in cases of fraud to set aside acts done which involve a breach of a legal or an equitable duty or trust, which are injurious to another. Fraud, as understood and defined in a court of equity, includes all acts which involve such breach of duty. 1 Brickell's Digest, p. 662; 1 Hill, on Mortg. p. 525, § 58. In such proceeding in equity, we think that T. R. Jones, individually, and as executor of the will of J. P. Jones, deceased, as well as Mrs. S. O. Brumby, would be necessary parties, while the trustee of T. R. Jones, the bankrupt, might be a proper, but not a necessary, party. Perry on Trusts, §§ 875, 877; 15 Encyc. of Pl. & Prac. pp. 584–587.

The District Court has no such original and inherent jurisdiction as that above referred to. The bankrupt court has jurisdiction, as an ordinary court, of suits at law and in equity brought by and against a trustee in bankruptcy in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him, but it has no jurisdiction of suits at law or in equity between private parties. Bardes v. Bank, supra; First Nat. Bank v. Chicago T. & T. Co., supra; In re Whitener, supra; Real Estate Trust Co. v. Thompson (D. C.) 112 Fed. 945.

The latest decision on this subject by the Supreme Court that has come to our attention is in the case of Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157. While that case would seem to somewhat modify the decision in Bardes v. Bank, it does not overrule it. It, however, is clearly distinguishable from the case at bar. The bill in the case cited was filed by the trustee in bankruptcy against third persons who had possession of goods and accounts alleged to belong to the bankrupt, which had been in the actual possession of the bankruptcy court through its receivers, and which were delivered by them to the defendants without an order or authority of the court; the defendants claiming the right of possession as owners or lienors under alleged transfers to them by the bankrupt. The property in question was personal property alleged to have been fraudulently transferred by the bankrupt to the defendants by certain security instruments for debts claimed to be due them. The actual possession of the property had not been delivered by the bankrupt to the defendants, but such possession was acquired after the bankruptcy proceedings had been commenced; and was so acquired by collusion between the said receivers and the defendants. The purpose and prayer of the bill was that said security instruments be declared invalid, fraudulent, and void, and that the complainant be decreed the owner of the goods and accounts. The court held that, under the allegations of the bill, the District Court

had the right, in a proceeding in the nature of a plenary action, to determine the rights of the parties, and to grant full relief in the premises, if the allegations of the bill should be sustained. In the course of the opinion, the court said:

"The court had possession of the property, and jurisdiction to hear and determine the interests of those claiming a lien therein or ownership thereof." Whitney v. Wenman, supra.

In the case at bar the court did not have possession of the property, and the complainants in their bill do not claim ownership thereof or a lien thereon; but, as we have said, they seek to have a trust declared in the property, and a superior lien thereon decreed in their favor.

2. Was the mortgage from T. R. Jones, individually, to T. R. Jones, as executor, ever valid and effective? The contention of appellant is that it is invalid for want of contracting parties. Requisites of a valid deed of conveyance are, among other things, contracting parties—a person able to contract, and a person able to be contracted with—and delivery. 9 A. & Eng. Encyc. of Law (2d Ed.) 107, 108, and note. The Supreme Court of Vermont, in Burditt, Adm'r, v. Colburn, Adm'r, 63 Vt. 231, 22 Atl. 572, 13 L. R. A. 676, holds that such a mortgage as that in question here "is invalid for want of contracting parties."

It is further claimed by the appellant that said mortgage is invalid and ineffective because never delivered. Delivery is an essential part to the due execution of a mortgage as of a deed. Parmalee v. Simpson, 5 Wall. 81, 18 L. Ed. 542; Younge v. Guilbeau, 3 Wall. 636, 18 L. Ed. 262; 9 Am. & Eng. Encyc. of Law (2d Ed.) 152. "The real test of delivery is this: Did the grantor by his acts, or words, or both, intend to divest himself of title? If so, the deed is delivered." 9 Am. & Eng. Encyc. of Law (2d Ed.) 154. To constitute delivery of a deed, it must clearly appear that "it was the intention of the grantor that the deed should pass the title at the time, and that he should lose all control over it. This intention may be established by his acts." Gould v. Day, 94 U. S. 405, 24 L. Ed. 232. If he leaves it for record, some authorities hold that the law presumes that he intends to divest himself of title, and, consequently, that the deed is delivered. Other authorities hold that further evidence is necessary. 9 Am. & Eng. Encyc. of Law, supra, 159, 160, and note. But it is well settled that such presumption of delivery may be rebutted; and, if it appears that the grantor did not intend to divest himself of title, the deed will not be delivered. The fact that the grantor takes control of the instrument after it is recorded, and retains actual dominion over it, and also continues in the possession of the property covered by the instrument, are circumstances to be considered in determining the intention of the grantor. Authorities, supra. "The books abound with rulings which declare that the question of delivery vel non, when the testimony is indeterminate or ambiguous, is and must be a question of intention with which the ambiguous or disputable act or acts were done or performed." Alexander v. Alexander, 71 Ala. 298; Goodlett v. Kelly, 74 Ala. 220.

In the case at bar the mortgagor, T. R. Jones, took control of the mortgage after he had it recorded, retained control and dominion over it, and, after the lapse of a few years, caused to be entered of record on

the mortgage, "Satisfied and canceled." Whether he took control and dominion of the mortgage after its registration in his individual capacity and right, or in that of executor of the will of J. P. Jones, is left to inference only. It is a question of fact to be determined by the circumstances. He executed the mortgage, and placed it on record without the knowledge or assent of those who are the legatees under the will of J. P. Jones, and who claim to be the beneficiaries of the mortgage. The evidence tends to show that he made the mortgage and had it recorded with the intent to hinder, delay, or defraud certain of his creditors. He testified that, when he executed the mortgage, he did it because there were judgments coming against him; and that he did it to hinder and delay those judgment creditors from "worrying him about that time," and until he could get into a position to pay them. He further testified as follows:

"At the time I gave the estate this mortgage, there were a lot of judgments coming against me. * * * I thought it was the proper thing for me to do, in order to enable me to go on and make money to clear up these things, not to have the home and all sold, and I was fortunate enough to make money to pay off those judgments."

He testified that he had this idea after he went to Atlanta in 1901, and that he paid off the judgments. He said:

"I felt this way, that the debt for which I gave the mortgage or obligation to these other parties had been removed, and, if I had the power to make it, I had the power to cancel it after these debts had been paid for which I gave it, and that was the reason I did it."

We understand this to mean that he made the mortgage to the estate to save the property covered by it from being taken by his creditors under their judgments, and, when they were paid off, he felt he had the power to cancel the mortgage, if he had the power to make it, and especially so, as the debts on account of which he gave it had been paid, all of which shows the motive and intent with which he made the mortgage, and, in our opinion, clearly shows that he had no intention of delivering the mortgage, by its registration, for the benefit of the estate of J. P. Jones; and further tends strongly to show that he had the possession and control of the mortgage after its registration, individually, and not as the executor and representative of said estate. But it is unnecessary to further discuss this aspect of the case, for we are of opinion that this proceeding cannot be considered one for the administration and distribution of the property of the bankrupt, and is in no proper sense a bankruptcy proceeding, and that the district court was without jurisdiction in the cause.

The decree is reversed, and cause remanded, with directions to dismiss the bill, provided the parties, as is suggested by counsel, do not agree for an order to be passed by the District Court finally determining their rights as to the property in dispute.

NATIONAL CONTRACTING CO. v. SEWERAGE & WATER BOARD OF NEW ORLEANS et al.

(Circuit Court of Appeals, Fifth Circuit. October 2, 1905.)

No. 1,393.

CONTRACTS—BREACH—FORM OF ACTION.

Where a contract for the construction of a public work for a city required the contractor to use a certain kind and quality of cement in the masonry and concrete work, but no particular quantity was specified, nor the price to be paid therefor, the contract having been let on a bid for the completed work, the fact that the contractor used an inferior and cheaper cement does not give the city, after paying for the work without knowledge of the substitution, a right of action ex quasi contractu or in repetition, under Rev. Civ. Code La. art. 2293 et seq., to recover the difference in the cost of the two kinds of cement or the profit made by the contractor by the substitution as money paid which was not due; but the remedy is by action on the contract, as provided for in Rev. Civ. Code La. arts. 1930, 2769, and the measure of recovery is the amount of damages sustained by the city by reason of its breach.

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

This action was begun in the civil district court for the parish of Orleans, by the Drainage Commission of New Orleans against the National Contracting Company of New York and the Fidelity & Deposit Company of Maryland, and was removed by the defendants into the United States Circuit Court for the Eastern District of Louisiana.

The averments of the petition may be summarized as follows: That the council of the city of New Orleans in 1896 approved certain plans and specifications for the drainage of the city, which were prepared by the city engineer and approved by an advisory board, and were drawn and prepared in pursuance of Ordinance No. 10,091, C. S., approved July 12, 1893. That for the purpose of carrying out the plans in question the Legislature, by Act No. 114 of 1896 (Acts 1896, p. 162), organized the plaintiff board. That the board, acting under said statute, advertised for bids for certain work known as contracts A and C, to be let under the general specifications aforesaid and certain special specifications prepared by its chief engineer. That on August 9, 1897, the National Contracting Company, as the lowest bidder, was adjudicated said contracts, and both contracts were merged into one notarial contract. Both the notarial contract and the general and special specifications for contracts A and C are annexed to and made part of the petition. That the terms and conditions of the adjudication of said contract could not be varied or altered subsequently, without impairing the just claims of the parties to it, and the guaranties and equal opportunities on the faith of which other bidders participated. That the powers of the Drainage Commission are limited to those bestowed upon it in the acts of the Legislature, and that the chief engineer and his assistants are only employés of the commission, and as such confined within their several lines of duty, and that any contrary acts done by the commission or its employés are ultra vires and void. That the substitution hereinafter recited of Pozzolan cement for imported Portland cement impairs the system of drainage projected for New Orleans. That, some time after the acceptance of the bid of the National Contracting Company, the chief engineer of the commission drew up supplemental specifications, changing and altering the original specifications proposed by the commission for bidders. That the general specifications of said contract provided that the cement used, whether American or imported, must be of certain prescribed strength and fineness, and that imported Portland cement must be used in certain named portions of the work, and wherever else the engineer might designate, and that the mortar used in laying brickwork and concrete was to be compounded as directed, both where Amer-

ican natural cement was used, and where imported Portland cement was used. That the plaintiff has paid for imported Portland cement, whereas the cement furnished by the National Contracting Company was a far cheaper product, and in point of fact not at all a Portland cement. That the contract of August 9th required of the contractor the use of the "best quality of imported Portland hydraulic cement," and under clause 12 of the contract this was a guaranty by the contractor. That the contracting company, being bound by said contract and guaranty to furnish imported Portland cement of the first grade, and having substituted slag, or Pozzolan, cement, improperly called steel Portland cement, the domestic manufacture of the Illinois Steel Company of Chicago, a less valuable product, and having been paid for said Pozzolan as if it had been imported Portland cement, cannot withhold the difference in price unlawfully received by them. That all bidders on the contracts for drainage work, including the adjudicatee, the contracting company, were advised to base and did base their bids on imported Portland cement, but that after the adjudication the engineer, in violation of the terms and conditions of the bids, and the essence of the sale by sealed proposals to the contracting company as the lowest bidders, allowed the contractor to use steel, improperly called Portland cement, an American product of much lower price, wherever the bid had been for imported Portland cement. That the chief engineer was never authorized to make this substitution, and that he never referred or reported the same to the commission, and that the commission remained uninformed on the subject until the Picayune newspaper in February, 1902, made charges that the contracting company had used the cheaper American steel Portland instead of the dearer imported Portland, but had actually been paid at the higher price bid by them originally for imported Portland cement, and that on investigation the engineer admitted the facts fully. That the price at which the American product, known at that time as steel Portland cement, was bought and used by the National Contracting Company, gave them much larger profits than could have been had if they had used the far more valuable product of imported Portland, required by the original specifications. That not less than 75,000 barrels of such substituted cement was used. That by the alterations of the original specifications on which the adjudications were based, the contractor was overpaid in error, and the commission was "deprived of all benefit that might have resulted from the substitution of a cheaper product in the work of drainage for a dearer one." That the National Contracting Company wrongfully procured for itself the issue by the chief engineer of certificates of work laid in American steel cement, just as if the work had been laid in imported Portland, and proceeded to collect on the certificates the same amount which would have been payable upon them if the work had been done acording to contract and in imported Portland; and that the engineer by his said action contributed knowingly to this result. That consequently the National Contracting Company has been overpaid; that said payment was without cause, or the National Contracting Company has received it without giving any consideration; and that the amount so overpaid amounted to at least $60,000, which is recoverable by the action of repetition. That petitioner has the right to have restoration made of said sum, or of as much more as petitioner may make proof of on the trial; that said company is forbidden by law to despoil the public funds and cannot enrich itself at the public expense; and that by the act of receiving the money it became obligated by a quasi contract to return it with interest and costs. The petition then averred that the National Contracting Company had given the Fidelity & Deposit Company of Maryland as surety for the faithful performance of its contract in the sum of $35,000, and prayed for judgment against the principal for $60,000 and the surety for $35,000.

A few days after this petition was filed a supplemental petition was filed with leave of the court. This petition avers: "That the National Contracting Company, under their contract with petitioner of August 9, 1897, which contract is made part of the original petition herein and of this petition likewise, bound and obligated themselves to use for certain work on the drainage system of New Orleans the best quality of imported hydraulic Portland cement, as in the original petition herein and the document thereunto an-

nexed is set forth at length; and that the Fidelity & Deposit Company of Maryland, as surety, bound themselves to petitioner, with said National Contracting Company, in solido, without benefit of discussion or division, for the faithful performance by said National Contracting Company of their said contractual obligations; and petitioner represents that, notwithstanding said National Contracting Company were under their contract bound to use on the work of the drainage system of New Orleans, as recited in the original petition, the best quality of imported hydraulic Portland cement, the said National Contracting Company, unlawfully and without the authority or knowledge of petitioner, substituted for said imported cement not less than seventy-five thousand (75,000) barrels of a different cement of less value, viz.: Pozzulana or Pozzolan cement, a domestic product made by the Illinois Steel Company of Chicago, and not at all a Portland cement, as has hereinbefore been set forth in the original petition. And petitioner represents that for this breach of contract the said National Contracting Company and the said Fidelity & Deposit Company of Maryland are liable in solido unto petitioner, for the difference between the price of the best quality of imported hydraulic Portland cement and said Pozzolan cement, being the sum of sixty thousand dollars ($60,000), with interest according to law. And petitioner further represents that said National Contracting Company furnished bond August 9, 1897, with the said Fidelity & Deposit Company of Maryland, as surety, in the sum of two hundred and thirty-five thousand dollars ($235,000) in favor of petitioner, for the faithful compliance by said National Contracting Company with their contractual obligations under the contract hereinbefore referred to and also referred to in, and made part of, the original petition herein; but that the said National Contracting Company has violated the obligations arising from said bond, by failing to do and perform the several matters and things contained and stipulated in said contract hereinbefore referred to and the documents thereto annexed, and especially in this, that the said National Contracting Company unlawfully and without authority or knowledge of petitioner substituted for the imported hydraulic Portland cement of the best quality not less than seventy-five thousand (75,000) barrels of said Pozzolan cement, as has heretofore been stated in this supplemental petition and as has been more full [fully] set forth in the original petition herein. And petitioner represents that, for the breach of condition of said bond, the said National Contracting Company and the said Fidelity & Deposit Company of Maryland are liable in solido unto petitioner in the said sum of not less than sixty thousand dollars ($60,000), being the difference between the price of the best quality of imported hydraulic Portland cement and said Pozzolan cement, loss and damage to petitioner. And petitioner annexes said bond and makes it part of this supplemental petition. And petitioner represents that it desires to correct a clerical error in the original petition herein; that petitioner in said original petition describes the bond of the Fidelity & Deposit Company of Maryland as being a bond of thirty-five thousand dollars ($35,000), whereas the bond is one for two hundred and thirty-five thousand dollars ($235,000). The said misdescription is in law corrected by annexing the bond itself, but that petitioner has prayed for judgment against said Fidelity & Deposit Company of Maryland for thirty-five thousand dollars ($35,000), while petitioner is entitled to have said misdescription corrected in fact wherever it occurs, and to have the prayer amended to correspond with the correction, and to pray for the recovery of sixty thousand dolars ($60,000). Wherefore, not waiving, but, on the contrary, insisting upon, the allegations of its original petition, petitioner prays for leave to file this supplemental petition and to amend said original petition accordingly, through their local manager and agent, William Mayo Venable, and the said Fidelity & Deposit Company of Maryland, through their local director and agent, P. M. Miller, be cited to answer hereto; that the misdescription of the bond as contained in the text of the original petition be changed so as to read two hundred and thirty-five thousand dollars ($235,000) instead of thirty-five thousand dollars ($35,000); and the prayer in the said petition be otherwise maintained, and that petitioner have and recover judgment of the said National Contracting Company and of the said Fidelity & Deposit Company of Maryland in solido, in the sum of sixty

thousand dollars ($60,000) with interest from ——— according to law. and costs, and for such further relief as equity, law, and the nature of the case may require."

The exhibits attached to the petition show that the National Contracting Company agreed with the drainage commission of the city of New Orleans to build certain foundations composed of brick, mortar, concrete, steel, and stone, and certain canals and sewers of brick, mortar, concrete, and steel, furnishing all materials, apparatus, machinery, and labor required for the same. The contracting company was to be paid per cubic yard for brick work, and per cubic yard for concrete; the prices to vary according to the proportions of sand specified to be used in the mortar or in the concrete, and as imported Portland cement or American natural cement was specified to be used in making the mortar or concrete. There is no provision in the contract fixing the number of barrels of cement to be used in each cubic yard of concrete or in each cubic yard of brickwork, nor is there established in the contract any standard by which any estimate can be made of the number of barrels of imported Portland cement or American natural cement required to be used by the contractor in laying the brickwork or concrete.

When the cause reached the United States Circuit Court, by removal proceedings taken by both defendants jointly, they both filed a plea of no legal cause of action. This plea, under the Louisiana practice, was equivalent to a demurrer. These pleas were overruled, and the defendants answered. Thereafter, by consent of the National Contracting Company, by proper order in the premises, the Sewerage and Water Board of the city of New Orleans was substituted as the plaintiff in lieu of the Drainage Commission of New Orleans. On trial in the court below a judgment was given in favor of the Sewerage and Water Board against the National Contracting Company in the sum of $28,390, with interest from judicial demand. Thereupon this writ of error was sued out, and the case brought to this court for review.

E. H. Farrar, B. F. Jonas, and E. B. Kruttschnitt, for plaintiff in error.

P. M. Milner and Omer Villere, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). The basis of this action is a contract to construct certain foundations, covered canals, and sewers, of brick, mortar, concrete, steel, and stone; the contractor to furnish the materials and perform the work, and to be paid therefor certain prices (not given in the pleadings) per cubic yard of brickwork or concrete, varying with the cement used, and all in accordance with certain specifications. According to the specifications, certain portions of the brickwork and of the concrete were to be laid in imported Portland cement. Though the fact is not averred, the inference to be drawn from the petition is that the contract has been fully executed and the contractor settled with and paid. The substance of the plaintiff's claim is that in executing the contract in lieu of using imported Portland cement, as required in the specifications, the contractor, with the authorization of the plaintiff's engineer, used a slag or Pozzolan cement for which it had paid less money than it would have had to pay for the imported Portland cement if the latter had been used. The pleadings fail entirely to aver any damages sustained by the plaintiff beyond the suggestion that the substitution complained of impairs the drainage system of the city of New Orleans.

In the lower court it was ruled, and the ruling is concurred in and asserted here by counsel for the defendant in error, that the petition

and supplemental petition do not state sufficient facts to constitute an action for damages under the contract, but do state facts sufficient to constitute an action ex quasi contractu, or in repetition, under the following articles of the Civil Code of Louisiana, to wit:

"Art. 2293. Quasi contracts are the lawful and purely voluntary act of a man from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties.

"Art. 2294. All acts from which there results an obligation without any agreement in the manner expressed in the preceding article from quasi contracts. But there are two principal kinds which give rise to them, to wit: The transaction of another's business, and the payment of a thing not due."

"Art. 2301. He who receives what is not due to him, whether he receives it through error, or knowingly, obliges himself to restore it to him from whom he has unduly received it.

"Art. 2302. He who has paid through mistake believing himself a debtor, may reclaim what he has paid.

"Art. 2303. To require this right it is necessary that the thing paid be not due in any manner, either civilly or naturally. A natural obligation to pay will be sufficient to prevent recovery.

"Art. 2304. A thing not due is that which is paid in the supposition of an obligation which did not exist, or from which a person has been released.

"Art. 2305. That which has been paid in virtue of a void title is also considered as not due.

"Art. 2306. The payment from which we might have been relieved by an exception that would extinguish the debt, affords grounds for claiming restitution.

"Art. 2307. But this exception must be such that it shall extinguish even all natural obligations. Thus, he who having the power to plead prescription shall have made payment cannot claim restitution."

The same principle is stated in the Code of Practice (article 18), which says:

"He who pays through error what he does not owe, has an action for the repetition of what he has paid, unless there was a natural obligation to make such payment; but he must prove that he paid through error, otherwise it shall be presumed that he intended to give."

The principles thus declared are all found in the common law and are based on the maxim that no one shall enrich himself at the expense of another. See Addison on Contracts, vol. 2, pp. 1039, 1040.

The whole case as presented by the petition and supplemental petition arises out of a violation of contract without which violation there would be no vestige of a right of action. And this, taken in connection with the facts that the defendant in error bought and paid for no cement as such, had no contract that any specific quantity of imported Portland cement should be used in the works contracted for, or that the cement should be furnished or paid for at any certain price, shows that the defendant in error cannot maintain on the facts stated an action in repetition to recover the difference between what the contractor would have had to pay for the cement contracted to be used and what he paid for the cement actually used, nor for the profits the contractor may have made by the alleged substitution. What the defendant in error paid to the contractor was paid under the contract, and for so many cubic yards of brickwork, and so many cubic yards of concrete; and, if too much was paid because the work was not in accordance with the contract, it can only be recovered in an action for damages on

allegations of fact suitable to such action, for the Louisiana Civil Code expressly provides for the action.

The contract, classified under the Louisiana Civil Code, was one of "letting and hiring" in which the National Contracting Company was the undertaker. In regard to such contracts, article 2756, Rev. Civ. Code La., provides:

"To build by a plat or to work by the job is to undertake a building or a work for a certain stipulated price."

And the next article provides:

"A person who undertakes to make a work, may agree either to furnish his work and industry alone or to furnish also the materials necessary for such a work."

And article 2769 provides:

"If an undertaker fails to do the work he has contracted to do, or if he does not execute it in the manner and time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his noncompliance with his contract."

Article 1930, Rev. Civ. Code La., dealing with the question of damages resulting from the inexecution of obligations, provides:

"The obligations of contracts extending to whatever is incident to such contracts, the party who violates them is liable, as one of the incidents of his obligations to the payment of the damages which the other party has sustained by his default."

These articles are practically written in and form part of the contract between the parties, and to do justice between them, if the contract has been violated, it is neither proper nor necessary to ignore the plain provisions of the Code applicable to the case, and resort to an action in repetition based on an implied contract to refund money said to have been paid in error, because the brand of cement specified in the contract was not used as an ingredient in the brickwork and concrete actually paid for.

The question of pleading is not a mere matter of form; substantial rights are involved. If the action for repetition can be maintained, it may be, as claimed by counsel and ruled on the trial, that the only question for the court and jury was the difference in prices between the cement specified in the contract and the cement substituted, or the amount of profits the contractor made by the substitution; in which case the action could only be defeated by showing that the contractor paid as much for the substituted cement as for the cement specified in the contract. Such a rule of damages could only be justified on the assumption contrary to the fact that there was a contract express or implied that a cement of specified price was to be furnished regardless of quality. The contract between the parties provided as to the strength and quality of the cement to be used in the brickwork and concrete, but there was no provision as to the price of cement, and it seems to us immaterial what the contractor paid for the cement actually used, or would have had to pay for the cement specified in the contract. If the action is one for damages under articles 1930 and 2760 of the Code, supra, the defendant can show how and why and by what authority and to what effect the substitution of cement was made, and the rule of dam-

ages will be what the plaintiff has actually lost or been damaged, and not what profits or losses the contractor may have made.

We have given careful attention to the cases and authorities cited and illustrated in the opinion of the learned trial judge, and in the brief of the counsel for the defendant in error, but we find nothing in any of them really conflicting with the views herein expressed. A review is not necessary, and we notice only those adjudged cases, apparently all well decided, from which counsel have quoted general remarks and dicta indulged in by the judges announcing the opinions of the respective courts, which remarks and dicta are cited to show that, whenever a person has paid more than he owed, he may always recover it back by an action ex quasi contractu.

United States v. Barlow, 132 U. S. 271, 10 Sup. Ct. 77, 33 L. Ed. 346, was an action brought by the government, under sections 3960, 3961, and 4057 of the Revised Statutes [U. S. Comp. St. 1901, pp. 2702, 2756], to recover from the defendants' subcontractors, for carrying the mail, moneys paid them under a mistake of fact caused by their false representations as to the services. Appleton Bank v. McGilvray, 4 Gray, 522, 64 Am. Dec. 92, was an action for money had and received to recover money paid by mistake. Marsh, Respondent, v. Richards. Appellant, 29 Mo. 99, was an action on a special contract to recover compensation alleged to be due on its performance. The defense was that the contract had not been executed in the manner and with the materials required by the contract. Johnson County v. Lowe et al., 72 Mo. 637, was an action upon a bond to recover damages, because a certain bridge was not built according to contract, and therein it was held that the fact that the bridge had been accepted was not "a waiver by the county of any defects in the bridge of which its agents were ignorant at the time of such acceptance and payment." Barnes et al. v. District of Columbia, 22 Ct. Cl. 366, from which counsel quoted liberally, seems to have been a suit brought to recover a balance alleged to be due upon contracts for public works in the District of Columbia, in which the defense was made that the works had not been constructed according to contract. We quote as follows:

"The question here involved, however, is not necessarily whether or not the defendant, in an independent suit against the claimant, could recover back the amount of overpayments credited or paid. The claimant has of his own motion brought these contracts and extensions before the court and has invited the issues which the defendant tenders. If he seeks a settlement of parts of his several contracts, he cannot complain if the defendant asks to have the whole accounts under the same revised and restated. The subject in that view has heretofore been considered by this court and the Supreme Court, and the law so declared. McElrath's Case, 102 U. S. 441, 26 L. Ed. 186, affirming the judgment of this court, 12 Ct. Cl. 312; Brown's Case, 17 Ct. Cl. 421; McKee's Case, 12 Ct. Cl. 560."

Calkins v. Griswold, 11 Hun (N. Y.) 208, was an action to recover overpayment for a lot of grapes, in which there was a mutual mistake of fact as to the weight of the grapes delivered, and it was held that the plaintiff was entitled to recover back the money paid in consequence thereof. Wheaton v. Lund, 61 Minn. 94, 63 N. W. 251, was an action to recover balance due on a contract, in which the defense was that the contract had not been complied with. Duval, Receiver, v.

United States, 25 Ct. Cl. 46, was an action against the government for carrying the mail, in which overpayments under a mistake of fact were set up as counterclaims and allowed by the court. Blaudot v. Lemaire Liege, 27 Avril, 1876, Pasicrisie Belge 1876, seems to have been a plain case for the recovery of amount of overpayment for work and material. In our opinion, no one of these cases, nor any case cited, is authority for the present action.

The first assignment of error is as follows:

"That the court erred in overruling the defendant's plea of no cause of action in this cause."

As we are satisfied that the plaintiff below does not allege facts sufficient to entitle him to recover ex contractu or ex quasi contractu, we think this assignment of error is well taken, and necessitates the reversal of the case. The other assignments of error need not be considered.

The judgment of the Circuit Court is reversed, and this cause is remanded with instructions to sustain the exceptions of no cause of action, and otherwise proceed according to good practice and the views herein expressed.

MICHIGAN HOME COLONY CO. v. TABOR.

(Circuit Court of Appeals, Eighth Circuit. November 17, 1905.)

No. 2,174.

1. WRIT OF ERROR—PRACTICE—ASSIGNMENTS OF ERROR.
   The practice of filing a large number of assignments of error defeats the purpose of the rule requiring such assignments, and is not to be approved.

2. SAME—REVIEW—EFFECT OF MOTIONS FOR DIRECTED VERDICTS.
   The effect of motions by both parties for direction of a verdict is to submit all issues of fact to the court, and the law impresses upon its finding so made all the incidents of a general finding by the court in a case submitted to it after waiver of a jury by the parties. In such case the only questions reviewable by an appellate court, besides the sufficiency of the pleadings to support the judgment, are whether there is any substantial evidence to support the finding and whether there was reversible error committed in the admission or rejection of evidence.

   [Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial § 400.]

3. VENDOR AND PURCHASER—CONTRACT FOR SALE OF LAND—DEPENDENT COVENANTS.
   Where a written contract for the sale of land recited the payment of a sum down by the purchaser and required him to pay the remainder of the purchase money on a specified date, and further provided that on such payment being made the vendor should "on demand thereafter" cause to be executed to the purchaser "a good and sufficient deed in fee simple of the premises above described, free and clear of all legal liens and incumbrances," the covenants for payment of the purchase money and for the delivery of the deed conveying a good title were mutual and dependent, and a tender of performance by the vendor in accordance with the contract was a condition precedent to his right to maintain an action to recover the purchase money from the purchaser.

   [Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 851-861.]

4. CONTRACT—CONSTRUCTION—PRACTICAL CONSTRUCTION BY PARTIES.
If the literal terms of a written contract are in doubt, the practical construction placed on them by the parties will prevail.
[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 753.]

5. APPEAL—REVIEW—HARMLESS ERROR—PLEADING—AMENDMENT.
Under the settled rule that after verdict and judgment it will be presumed that facts necessary to support the judgment were proved, and in all formal and technical matters the complaint will be treated as amended to conform to the facts, granting permission to a defendant to amend a cross-petition in matter of form after a verdict in his favor thereon clearly authorized by the evidence was not prejudicial error.

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

The Michigan Home Colony Company, the plaintiff in error, brought this suit in the Circuit Court of the Eastern Division of the Northern District of Iowa against George W. Tabor, the defendant in error, to recover the agreed price of a tract of land situated in the state of Michigan, which plaintiff avers the defendant agreed to purchase from it. The defense was that the obligation to pay the purchase price depended upon plaintiff giving to defendant a good and sufficient deed conveying title to him in fee simple, free and clear of all legal liens and incumbrances, and that plaintiff did not have such title and could not and did not tender a deed of such title to him. The defendant, with his answer, filed a cross-petition to recover from plaintiff the sum of $400 paid to it as part of the purchase price by him at the time the preliminary agreement to purchase was made. The case was tried to a jury, and at the conclusion of all the evidence plaintiff moved the court to direct a verdict in its favor for the balance of the purchase price due, and defendant moved the court to direct a verdict in his favor for $400, the amount paid in advance for the land. The court overruled plaintiff's motion, sustained defendant's motion, and directed a verdict in favor of the defendant. A judgment was rendered accordingly. To reverse this judgment a writ of error was sued out of this court.

A. Kanneberg and F. M. Fort, for plaintiff in error.

William Graham, B. F. Thomas, and Charles M. Thomas, for defendant in error.

Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

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

There are 78 assignments of error in this case, but, in our opinion, very few questions presented on the record for consideration. The practice of filing such a large number of assignments cannot be approved. It thwarts the purpose sought to be subserved by the rule requiring any assignments. It points to nothing. It leaves opposing counsel and the court as much in the dark concerning what is relied on for error as if no assignments were filed.

Mr. Justice Miller, in Phillips, etc., Const. Co. v. Seymour, 91 U. S. 646, 648, 23 L. Ed. 341, says:

"The object of the rule requiring an assignment of errors is to enable the court and opposing counsel to see on what points the plaintiff's counsel intend to ask a reversal of the judgment, and to limit the discussion to those points. This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which

of the latter are really relied on. We can only try to respond to such points made by counsel as seem to be material to the judgment which we must render."

Following the practice suggested in that case, we shall endeavor to consider the questions which, in our opinion, must control the judgment in this case.

From the argument of counsel and a general consideration of the assignment of errors and the record, we believe the case turns upon three questions: (1) Is there substantial evidence to sustain the verdict as rendered? (2) Are the covenants in the preliminary agreement relating to the payment of the purchase price and the delivery of the deed dependent or independent? (3) Was the action of the trial court in permitting defendant to amend his answer after the verdict so as to conform to the proof erroneous? The agreement for the sale and purchase of the land in question was made and signed by the parties on July 10, 1902. It obligated defendant to pay $8 per acre for the tract of land described in the agreement, $400 at the date of the agreement, and the balance on March 1, 1903. The agreement then proceeds as follows:

"Second. The said party of the first part hereby agrees and binds itself, its successors and assigns, that in case the aforesaid sum of eight dollars ($8.00) per acre with interest, shall be fully paid, at the times and in the manner above specified, it will on demand, thereafter cause to be executed and delivered to the said party of the second part, or its heirs or legal representatives, a good and sufficient deed, in fee simple, of the premises above described, free and clear of all legal liens and encumbrances, except the taxes herein agreed to be paid by the party of the second part."

There is evidence tending to show that plaintiff and defendant, subsequent to the making of preliminary agreement to sell, orally agreed to consummate it by the payment of the balance of the purchase money and delivery of the deed at the city of Maquoketa, Iowa, instead of Milwaukee, as specified in the written agreement, and that plaintiff should furnish to defendant an abstract showing good title to the land, and that pursuant to this agreement the president of plaintiff corporation and the defendant met at Maquoketa on March 1, 1903; the president having with him a deed to the land and an abstract which he exhibited to the defendant as evidence of good title in plaintiff, and the defendant having with him the balance of the purchase money ready to pay over to plaintiff's president on receipt of the deed.

The rule is firmly established that when each party to a cause on trial before a jury requests a peremptory instruction in his favor, he thereby consents that the court shall find the facts on the issues joined. The law impresses upon the finding so made all the incidents of a general finding by the court in a case submitted to it after waiver of a jury by the parties. In such case the appellate court does not consider the weight of evidence. The only questions for review, besides the sufficiency of the pleadings to support the judgment, are whether there is any substantial evidence to support the finding and whether there was reversible error committed in the admission or rejection of evidence. Beuttell v. Magone, 157 U. S. 154, 157, 15 Sup. Ct. 566, 39 L. Ed. 654; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct.

481, 37 L. Ed. 373; Phenix Ins. Co. v. Kerr, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569, and cases cited.

Application of this rule to the present case dispenses with any critical consideration of the weight of evidence. All we are required to do, and all which, with due regard to orderly procedure, we ought to do, is to ascertain whether there is any substantial evidence to sustain the issue joined in the pleadings and found by the verdict that plaintiff did not on March 1, 1903, have or tender to defendant a deed conveying a good and sufficient title to the land in question.

In reaching a conclusion on this issue, we have not regarded the failure to furnish an abstract showing good title as in itself, a breach of the contract of sale. The agreement to furnish the abstract was made orally some time after the written contract of sale was entered into. It was, therefore, within the statute of frauds, section 9511, Comp. Laws Mich. and possibly without consideration to support it as an enforcible agreement.

An obligation was imposed upon the plaintiff by the contract to execute and deliver to the defendant a good and sufficient deed, conveying a clear and unincumbered title in fee simple to him. In recognition of this obligation plaintiff undertook to show defendant its title, and for this purpose the abstract referred to was employed and exhibited to defendant and his counsel. Its statements are at least admissions by plaintiff touching the condition of its title, and as such was available to the defendant. There is much evidence in the record as to what the abstract disclosed, and whether what was disclosed constitutes a defect in title or an incumbrance upon the land. The evidence of witnesses and the argument of counsel present different views of this question; one that the abstract disclosed, and the other that it did not disclose, defects. Moreover, there is evidence of direct and positive admissions made by plaintiff's president on March 1, 1903, at the time and place fixed for the delivery of the deed and the payment of the purchase money, and while he was engaged in behalf of his company in performing the contract of sale in question, that he knew the title was defective and that he requested defendant to give him additional 60 or 90 days within which to clear up the title. The request, it appears, was not acceded to by defendant. The defendant was there ready and willing to close the trade and pay for the land according to the agreement if plaintiff could convey a good title. In this condition of things, plaintiff's president on March 1, 1903, tendered a deed to the defendant which the defendant refused to take or pay for. From the foregoing general résumé of the proof we satisfactorily reach the conclusion that the finding that plaintiff's title was not good, necessarily involved in the verdict as rendered, is well supported by substantial evidence.

Are the covenants of the preliminary agreement dependent or independent? The parties made a written agreement under seal, binding one of them to convey real estate to the other, and the other to pay the agreed price for it. It bound the defendant to pay a certain part of the price down and the balance on a given day, March 1, 1903; fixed the place of such payments at the home office of plaintiff at

Milwaukee and obligated the plaintiff, in consideration of defendant making the payment at the times and in the manner specified, thereafter, on demand, to execute and deliver to him a deed conveying a good, unincumbered title in fee simple to the land. We do not doubt that the obligations created by these covenants were mutual and dependent. The failure to pay the purchase money relieved plaintiff from the necessity of conveying a good title, or any title, and the failure to have a good title to convey relieved the defendant from the necessity of paying for it. The time fixed for the final performance was of the essence of the contract. Bank of Columbia v. Hagner, 1 Pet. 464, 7 L. Ed. 219.

In the last cited case the Supreme Court also declared, that courts should strongly favor that construction of contracts which makes the covenants dependent rather than independent. In dealing with facts similar to those now before us, it says:

"Admitting, then, that a contract was entered into between the parties, the inquiry arises, whether the plaintiffs have shown such a performance on their part, as will entitle them in a court of law, to sustain an action for the recovery of the purchase money. In contracts of this description, the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction would, in many cases, lead to the greatest injustice, and a purchaser might have payment of the consideration money enforced upon him, and yet be disabled from procuring the property for which he paid it. * * * The seller ought not to be compelled to part with his property, without receiving the consideration; nor the purchaser to part with his money, without an equivalent in return. Hence, in such cases, if either a vendor or vendee wish to compel the other to fulfill his contract, he must make his part of the agreement precedent, and cannot proceed against the other, without an actual performance of the agreement, on his part, or a tender and refusal."

To the same effect are Phillips, etc., Const. Co. v. Seymour, 91 U. S. 647, 650, 23 L. Ed. 341; Telfener v. Russ, 162 U. S. 170, 180, 16 Sup. Ct. 695, 40 L. Ed. 930; Kelsey v. Crowther, 162 U. S. 405, 409, 16 Sup. Ct. 808, 40 L. Ed. 1017; Coughran v. Bigelow, 164 U. S. 301, 310, 17 Sup. Ct. 117, 41 L. Ed. 442; Glenn v. Rossler, 156 N. Y. 161, 50 N. E. 785; Ewing v. Wightman, 167 N. Y. 107, 60 N. E. 322; Hill v. Grigsby, 35 Cal. 656; Englander v. Rogers, 41 Cal. 420; Martin v. Roberts (Iowa) 102 N. W. 1126; Webb v. Hancher (Iowa) 102 N. W. 1127.

Counsel for plaintiff, in support of their contention, rely upon Loud v. Pomona Water Co., 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822; but that case, when carefully considered, is found to be an application of the familiar rule that the intention of the parties, when properly ascertained, must govern in determining the character of their covenants, whether they be dependent or independent. The court there held that the agreement of the parties clearly evinced an intention that the purchaser should first pay the purchase price of the lands before he would be entitled to demand a conveyance thereof. That case involved no question of the sufficiency of the title. The only obligation imposed by the preliminary contract upon the seller was that after the several installments of purchase price should be paid, and after the other covenants of the agreement should be performed,

he, the seller, should convey the real estate therein described "by deed of grant, bargain and sale" to the purchaser. In that case the purchaser agreed to take a deed of grant, bargain, and sale; that is, to take the seller's warranty of title, as his protection. In this case the seller agreed that the deed executed by it should be one which would convey a fee simple title free and clear of all incumbrances. Here is found no reliance upon the seller's warranty, if indeed any is fairly contemplated by the agreement; but the purchaser's protection rests upon the actual performance of the condition upon which the agreement to purchase was made. In this case, for the purposes of the present question, it must be assumed that the seller did not have a good title and was not able to deliver the deed called for by the contract on the day fixed for performance. We cannot, in the light of reason or authority, require a purchaser of a good title to land to pay the agreed purchase price when it turns out that the seller has no title and cannot make a deed according to the requirements of the contract of sale. Reliance upon the courts for legal redress would be an unsatisfactory substitute for a good and sufficient deed in hand.

There is another strong argument in support of the view we take of this case, and that is the practical construction which the parties put upon the terms of their contract. The evidence shows, without contradiction, that the parties, by mutual agreement, after having substituted Maquoketa, Iowa, for Milwaukee, as the place of performance, met there on March 1, 1903, the day fixed for performance; that the president of plaintiff corporation had with him, and tendered to defendant, a deed and abstract of title to the land in controversy; and that the defendant had with him the money, ready to pay in the event title was shown. It obviously did not occur to either of them that any view of the contract required defendant to pay the purchase price unless plaintiff could and did simultaneously give him a deed to the land. These facts, without more, show that the parties construed the covenants of their contract to be mutual and dependent. If the literal meaning of the covenants in question were in doubt, the practical construction which was put upon them by the parties must prevail. District of Columbia v. Gallaher, 124 U. S. 505, 510, 8 Sup. Ct. 585, 31 L. Ed. 526; Long-Bell Lumber Co. v. Stump, 30 C. C. A. 266, 86 Fed. 574, and cases cited.

There are many assignments of error predicated on the action of the trial court in overruling plaintiff's motion for a new trial and in arrest of judgment, in permitting the defendant to amend his cross-petition to conform to the proof, and in overruling plaintiff's demurrer and motion to strike out the amended cross-petition. We have given them all sufficient consideration to get at the substance of the difficulty suggested. It seems that defendant, in his original answer, embodied as a "second division," so called, a cross-petition to recover back from plaintiff the $400 paid to it at the date of the execution and delivery of the contract of purchase as a part of the purchase price. Without entering into a detailed consideration of the original cross-petition, it may be admitted that it was technically de-

fective in not setting forth, with sufficient syllogistic accuracy, the right of the defendant to recover back the $400; but the substance of the right clearly appeared. In fact, the right followed as a necessary consequence from the plaintiff's failure to recover the balance of the purchase price sued for by it. It has been repeatedly held by this court that after verdict and judgment it will be presumed that facts necessary to support the judgment were proved, and in all formal and technical matters the complaint will be treated as amended to conform to the facts. Keener v. Baker, 93 Fed. 377, 35 C. C. A. 350; Haley v. Kilpatrick, 104 Fed. 647, 44 C. C. A. 102; Mine and Smelter Supply Co. v. Parke & Lacy Co., 107 Fed. 881, 47 C. C. A. 34.

Whether the cross-petition was properly amended or not is quite immaterial. If it were not amended, the law would treat it so, and, if it were amended, it would be but an expression of the law applicable to the situation. Moreover, dealing with the substance rather than the form of things, it is apparent that the plaintiff was not prejudicially affected by the amendment to the defendant's cross-petition. The right of such recovery conclusively appeared from the fact that the plaintiff could not recover the balance of the purchase price. The reason why complainant was not allowed to recover the balance of the purchase price, as already seen, was because it was unable to make or tender a good and sufficient deed conveying the lands to the defendant in fee simple, free and clear from incumbrances. For that very reason the payment of the $400 by the defendant to the plaintiff on account of the purchase price was without any consideration and was clearly recoverable by defendant. There was, therefore, no prejudicial error in anything which the court did in the way of overruling demurrers to the amended cross-petition, refusing to strike out the amendment, or rendering judgment on the verdict. The judgment as rendered on the cross-petition was clearly right.

As observed in the fore part of this opinion, we have not undertaken to follow and treat separately the different assignments of error filed, but we have sought, from a consideration of all of them, to arrive at the crucial questions affecting the substantial rights of the parties. While we have not, in this opinion, referred to any of them specifically, or to many of the arguments of counsel with respect to them, we believe we have considered all the substantial questions involved in the case. From this we are brought to the conclusion that no prejudicial error was committed by the trial court.

The judgment is therefore affirmed.

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

(Circuit Court of Appeals, Eighth Circuit. October 9, 1905.)

No. 2,026.

1. INSURANCE—ACTION ON LIFE POLICY—QUESTIONS FOR JURY.

In an action on a life insurance policy, it was shown that, while soliciting agents were required to settle for the net first premium on each policy written by them in cash, it was a practice recognized by the company to permit them, on their own responsibility and at their own risk, to advance such net premium, making such arrangement as they saw fit with the insured. The policy in suit was issued by the company, sent to its general state manager, and by him given to the soliciting agent who took the application, to be delivered to the insured on payment of the first premium. The agent afterwards paid in the premium, less his commission, and it was received by defendant. The insured died within the year covered by such premium. The agent testified that the application, which was made at the end of the year, was taken solely to increase the apparent amount of business done by him during the year, to enable him to obtain a prize offered by the company; that he paid the net premium, and it was agreed between him and the insured that she should pay nothing, but that he should retain the policy and at the end of the year permit it to apparently lapse. There was evidence on behalf of plaintiff tending to show that the agent had solicited the application several months previously, and that when it was made insured and her husband signed a note to the agent for the premium, due in one year, but were assured by him that, if they were not able, it need not be paid at that time, and that if they desired they could then reduce the amount of the policy. *Held*, that such evidence was sufficient to require the submission of the question of the bona fides of the contract to the jury.

2. SAME—DELIVERY OF POLICY.

Where it was a common practice recognized by a life insurance company to permit soliciting agents to advance the first premium on applications taken by them, taking notes of the insured or otherwise securing themselves for its repayment, the delivery of a policy to such an agent, who paid the premium and took a note therefor from the insured, constituted a complete delivery as between the company and the insured.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 226, 1856.]

3. BILLS AND NOTES—VALIDITY OF NOTE—VARYING CONTRACT BY PAROL AGREEMENT.

The binding obligation of a note cannot be affected by a contemporaneous parol agreement that it need not be paid.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1802.]

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

E. B. Critchlow (H. P. Henderson, Frank Pierce, and W. J. Barrette, on the brief), for plaintiff in error.

Edward M. Allison, Jr. (Geo. Sutherland and Waldemar Van Cott, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was an action on a policy of life insurance for $10,000, alleged to have been executed and delivered on December 28, 1901, by the defendant, a corporation of the state

of New York, to Harriet A. Payne, a citizen of the state of Utah, insuring her life for the benefit of her personal representatives. The execution and transmission of the policy to one Rulon S. Wells, the general manager of the company for the state of Utah; the receipt by the company from its soliciting agent of the net premium, that is to say, the premium as fixed by the policy, less the agent's commission for the first year; and the death of the insured within the year—are admitted by the company. The defense is that the policy was not a contract, but was the result of a scheme entered into between the soliciting agent and the insured to deceive the company by making it falsely appear that the soliciting agent had secured a larger amount of insurance than any other agent in the state of Utah, and for that reason would be entitled to a certain prize which the company had offered to agents in that state. Certain issues of fact were tendered by the defendant in its answer, upon which the case went to trial in the court below. These were that it was understood and agreed between the soliciting agent and the insured at the time the policy was applied for that the insured should not pay, or be in any manner liable for the payment of, either the first or subsequently maturing premiums on the policy; that the policy, when issued by the company at its home office in New York and forwarded to its general manager in Utah for delivery, should never be in fact delivered to the insured, but should be held by the agent for the ultimate purpose of securing a prize, and then allowed to lapse; and that the insured, or her estate, should never have any interest in the policy, but as to them the same should be void and of no effect. The case was tried below on these issues, and at the conclusion of all the evidence, upon motion of defendant's counsel, the learned trial judge instructed the jury to return a verdict for the defendant, which was accordingly done.

The main ground urged for a reversal of the judgment rendered on the verdict is that the court erred in not leaving the issues to the jury for determination. To this we will first give attention. It is a settled law, that:

"When the evidence given at the trial with all inferences that the jury could justifiably draw from it is insufficient to support a verdict for plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." Louisville, etc., Railroad Co. v. Woodson, 134 U. S. 614, 621, 10 Sup. Ct. 628, 33 L. Ed. 1032.

The principle last announced is fully recognized and has been expressed in various ways, such as:

"Where the evidence is undisputed or is of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it, the court may direct a verdict." Marande v. Texas & Pacific Railway Co., 184 U. S. 173, 191, 22 Sup. Ct. 340, 46 L. Ed. 487. See, also, Delaware, etc., Railroad v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213.

The general rule is clear, and it now becomes necessary to examine the record with a view of ascertaining whether there is any substantial evidence upon which the jury, in the exercise of its proper

function, might have found for the plaintiff on the issues presented in the case.

Certain facts are undisputed. The policy was issued by the company at its home office in New York and transmitted to Rulon S. Wells, the general manager of defendant, in Salt Lake City. Pursuant to an established custom of business, he delivered the policy to one E. L. Chesney, the agent who originally solicited it, with the intent and purpose that he should deliver it to the insured and collect the first year's premium. This premium, as stated in the policy, is $378.70. Of this sum the soliciting agent at the time was entitled, for his commission and some special bonus, to $284.02, leaving $94.68 as the net premium due the company on this policy. In due time after receiving the policy Chesney paid the general manager the net premium of $94.68 due the company, and this ended the transaction so far as the company was concerned. It had issued its policy and delivered it to Chesney for delivery by him to the insured and collection of the premium. The premium due the company had been paid.

In dealing with his sub or soliciting agents General Manager Wells observed a common practice of requiring the soliciting agents to do a cash business with the company, but permitted them to make such arrangements for the payment of first premiums by the insured as suited the convenience of both, whether by way of taking notes or extending time of payment of the whole or any part of the premium. The general manager in his testimony admits that it was common practice to have notes taken by soliciting agents in payment of first premiums, in his office, not for collection exactly, but as collateral security for the payment of advances made to soliciting agents. He says he frequently turned over the notes to the soliciting agent who deposited them for collection by him; that they remained the property of the agent at all times, subject to the payment of the agent's account. He further says, in substance, that the first year's premium on the policy in question was settled, so far as the company was concerned, by cash paid by Chesney, and that the note taken by Chesney was not turned in to him; that after Chesney had made the payment of $94.68, the net premium due the company on the policy in suit, the company had no further claim against anyone for the first premium. It may therefore confidently be assumed that the company was well aware of the fact that in the usual course of business Chesney might take the note of Mrs. Payne for the whole or part of her first year's premium, and might make any other arrangement with her concerning the matter which he desired to do, provided, only. he paid the company, through its general manager, the net amount due it as the first premium on the policy.

Now what did Chesney do? He testifies, in substance, that he first broached the question of Mrs. Payne taking a policy in his company, on December 28, 1901; that he made arrangement with her husband the day before to have her come from Syracuse, her home, to Salt Lake City on the next day, and when she arrived there his account of what occurred is as follows:

"I told her that there was a contest on for a prize of a gold watch, to be given to the agent writing the most business, taking in the most applications and paying for them, and up to that time I thought I was in the lead and had secured the watch, but found that I was behind and wanted to know if she would be examined, so that I could present the application and get the watch, and she was inclined not to be examined. * * * She said she did not want to, because she did not have any money to pay and did not want any insurance to pay for. I told her it would not be necessary to pay out anything, as I would pay out the money to be paid; that it was a favor from her to me, that I might win the watch; and that there would not be anything needed down. * * * Well, she argued for quite a long while. I don't remember the whole of the conversation, but finally she said she would be examined upon that basis that she did not have to pay any money."

Witness Chesney further tesified, in substance, that he then, December 28, 1901, wrote the application; that Mrs. Payne never paid anything to him for the insurance; that Mr. and Mrs. Payne never gave him any note for the premium; that he never had any conversation with her about the premium or about the cost of the policy. His testimony makes a clear showing that the taking of the policy by the insured was a mere favor to him to aid him in his contest.

But this is not all the evidence. Mr. Payne, the husband of the insured, testifies in answer to questions as follows:

"Q. What did he (Chesney) say to you and to your wife? A. Well, he wanted me to let her take insurance out. I told him I did not feel able for to take one out on her now; that I wanted to wait and see how we came out with the salt. We had not yet raised our crop of salt. Q. What answer was made to that, or what did he (Chesney) say? A. Well, it went on for a while, and he kept after us for to take a policy out—for her to take a policy out. Q. During what period of the year? A. Well, that is from about May, I should judge, last of May right along up to the time she did take one out. Q. What did you say to him, if anything, definitely about what would be done in the way of taking out insurance for her with regard to the salt crop or prospect of it? A. I told him * * * I would not take out one until I saw how we was going to come out on the salt crop, and then if we were able we would take one out on her."

Margaret Payne, a daughter of the insured, testifies to the effect that Chesney had a conversation with her in October, 1901, about the application for life insurance by her mother. She testifies that about the middle of October, 1901, Chesney said to her that he had just been up and had her mother sign an application for a policy of life insurance.

There is, therefore, a sharp conflict of evidence between Chesney on one hand, and other witnesses, as to when he first approached Mrs. Payne for insurance. He testifies emphatically that nothing of that kind was done until December 28, 1901. There is certainly some evidence that Chesney was endeavoring to secure a policy on her life in the usual course a long time before the exigency of the prize contest required it. There is also a conflict of evidence on the question of fact whether any payment of the first year's premium was made or agreed to be made by the insured. Chesney, as already observed, says Mrs. Payne paid nothing, and assumed no obligation to pay anything, but, on the contrary, that it was expressly understood that she should pay nothing. Mr. Payne, the husband, after narrating how, at the instance of Chesney, he got his wife to go from

Syracuse to Salt Lake City on December 28, 1901, and how she went into the doctor's office to be examined, gives a detailed account of his signing, with his wife, a paper for what he says was "370 something," payable to E. L. Chesney, maturing one year after date. He seems, from his evidence, to be inexperienced and unfamiliar with business affairs, and somewhat ignorant concerning the meaning of the transaction in which he was engaged. His evidence, too, impresses us as that of a witness extremely careful to say nothing more than he remembered and in no sense a willing or officious one. While he cannot remember or state the terms of the paper signed by him and his wife, except in the particular above referred to, he testifies that Chesney, when he asked him to sign the paper, said:

"It was a note that my wife had given him, and I had to sign with her, in order for her to get this policy."

This note, according to the evidence, was then delivered to Chesney and has not since made its appearance.

The following further evidence of the husband, in questions and answers, is given in detail for special reasons which will appear later:

"Well, he (Chesney) said it was a note my wife had signed, and I would have to sign in order to get this; but as far as I was concerned, if I did not feel like paying for that at the end of the year, I did not need to. Q. Pay for what? A. Pay off this note that we had signed. There would be no need to if we did not feel like it. If we did not feel able at the end of that year, that we had no need to pay for it, that he would— * * * As to the policy, he said, after this had run a year, if we did not feel able to pack this amount, we could cut it down at the end of the year, and take what we could. We was speaking about the amount that we was taking out; that we did not know whether we would be able to pay it or not. * * * Well, I told him like this: We was kind of in trouble with the Inland Salt Company. They had a suit against us, and we did not know really how we was coming out. I spoke to him about it. I did not know how we would come out on that suit, nor what we would make out of the salt crop. Q. What did he say to you in reply to that? A. He said, if we was not able to pay this, pack this much insurance, we could cut it down, take what we could."

This and other like evidence seems to us so natural, candid, and ingenuous, so expressive of the doubts and uncertainties which ignorant or poor people feel about in incurring obligations, that we have no hesitation in saying that it, with the reasonable inferences naturally arising from it, affords some substantial evidence that the insured gave a note to the soliciting agent for the full amount of the first year's premium, and thereby obligated herself and husband to the payment of the same in full. There being evidence as already seen, that the subject of insuring Mrs. Payne had been under consideration for several months before the question of securing the prize by Chesney became acute, and that a note was given by herself and husband for the payment of the first year's premiums, all in accordance with permissible practice as shown by the custom of the business conducted by defendant company in the state of Utah, we think there is substantial evidence that the transaction in question was honest, and intended in good faith by the parties as a contract of insurance, and not as a device to deceive the company as charged in defendant's answer. It is not for us to weigh the evidence pro and con on the issues

presented. It is sufficient for our present purpose to determine that there is substantial evidence which, with the fair inferences deducible therefrom, would support a verdict, had one been found in favor of the plaintiff.

The argument is made by plaintiff's counsel that, if the soliciting agent paid the first year's premium, even without the authority of the insured, the company would be liable. This we do not feel called upon, under the issues presented by the pleadings, to consider. It is a moot question only. The evidence discloses beyond question that the soliciting agent paid the defendant company all that, as between him and the company, was due the latter; in other words, that he paid the full net first year's premium to the company. He paid this sum to the company, either in execution of the fraudulent scheme set forth in the answer, or as an advance for the account of Mrs. Payne, evidenced by the note alleged to have been taken by him. These are the only two theories presented by the case. In the event first mentioned, it is conceded that no liability would attach to the company; in the event next mentioned, it must be conceded that liability would attach. The evidence discloses a common practice recognized by the company, permitting soliciting agents, upon their own responsibility and at their own risk, to make such advances, and no point is made in argument or brief against its binding the company.

It is hardly necessary to advert to the contention that there was no consummated delivery of the policy in question to the insured. If the whole transaction was a fraudulent device, participated in by the insured, as claimed by the defendant, and if it was understood and agreed that no premium should be paid or obligation assumed by the insured with respect thereto, but that Chesney should hold the policy for his own purposes, and apparently allow it to lapse after his purposes should be accomplished, in such case, his possession of the policy was clearly his own, and not that of Mrs. Payne, the insured. If, on the contrary, the parties intended a bona fide contract of insurance, and Chesney, in the usual and permissible course of business, paid the premium for Mrs. Payne pursuant to an arrangement by which he took her note, giving her a year's time to refund it to him, then his possesssion of the policy was her possession, and the delivery as between the company and herself was complete. The general manager testifies that in the usual course of business the delivery by the company of a policy to the soliciting agent was for the purpose of collecting the premium and delivering the policy to the insured. If the premium was collected from the insured, the title of the policy immediately vested in her. The last-mentioned contention will therefore depend upon the determination of the main issue of fact in this case. Was the transaction as made intended as a bona fide contract of insurance, the premium being paid by Chesney for account of Mrs Payne, as claimed by the plaintiff, or was it a scheme or device to fraudulently secure a prize as claimed by the defendant?

It is next urged that the note, if given to Chesney, as claimed, with the understanding indicated by Mr. Payne's testimony, was not an enforceable obligation, and hence has no force or effect in the case.

That testimony may admit of one or more interpretations, dependent upon the meaning of the language employed in the light of local usage. A peculiar dialect or provincialism is apparent. The statement of the witness at one time is, in substance, that Chesney told him that they need not pay the note unless they felt like it, unless at the end of the year they felt able; that, if they did not feel able to do it, "he would,"—do something. What, is left unsaid. In the same connection, witness Payne says Chesney told them, if they did not feel able to pack the full amount of insurance, they could cut it down at the end of the year. This language is probably subject to explanation, and might have been understood by the jury to mean that if, at the end of the year, they were unable to carry the full amount of $10,000 insurance, they might reduce it and make other arrangements in harmony with their circumstances, or that, if they were unable to pay their note at the end of the year, other arrangements in the nature of an extension might be made. If such is the purport and meaning of the testimony, it obviously affords no ground for impeachment of the validity of the policy. This testimony should all have been submitted to the jury for its interpretation and consideration in the light of all the other facts of the case, under proper instructions of the court. If the testimony, taken all together, means that the makers need not pay the note at all if they did not feel disposed to do so, such cotemporaneous parol contradiction of the express written obligation would be void and of no effect. Brown v. Wiley, 20 How. 442, 15 L. Ed. 965; Brown v. Spofford, 95 U. S. 474, 24 L. Ed. 508; Martin v. Cole, 104 U. S. 30, 26 L. Ed. 647; Burnes v. Scott, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991; Falk v. Moebs, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. Ed. 266.

The case of Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698, is relied upon by defendant's counsel; but a careful consideration of the facts and doctrine of that case discloses no applicability to the case before us. Defendant in that case was sued on a note which he admitted to have given plaintiff. He offered to prove as a defense that at the time of the giving of the note and prior thereto, the plaintiff (the payee) agreed with him that the note should be given to represent the price of the interest which defendant was to have in certain mining property, conditioned upon his demanding such interest after an inspection of the mining property. He further offered to prove that, after inspecting and testing the property, he notified plaintiff that he did not want it, and demanded the redelivery of the note to him. This evidence was excluded by the trial court. The court in its opinion announced the general rule already referred to concerning the involability of written contracts, and then stated that the evidence offered and rejected did not in any true sense contradict the terms of the note itself, "but tended to show that the written instrument was never in fact delivered as a present contract, unconditionally binding the obligor according to its terms from the time of such delivery, but was left in the hands of Dulaney [the payee], to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property." In other words the Supreme Court said:

"According to the evidence offered and excluded, the written instrument upon which this suit is based was not, except in a named contingency, to become a contract as a promissory note which the payee could at any time rightfully transfer."

There is, in our opinion, no evidence in this record which brings this within the doctrine of that case. The evidence of Mr. Payne, in our opinion, can be construed in one of two ways only—either that Chesney told him that they (Mr. and Mrs. Payne) would never be called upon to pay the note at all, in which case there would be a flat and ineffectual contradiction of the terms of the note itself, or that, if they were not able to meet the payment at the end of the year, other satisfactory arrangements would then be made. There is no phase of the evidence, as we understand it, warranting the conclusion or inference that the parties understood the note was conditionally delivered, or was to be obligatory only upon the happening of certain future events. If the note was given at all, it was, under the evidence as we understand it and authorities already cited, an unconditional obligation, with some friendly and personal assurance as to what might be done if the makers were unable to meet the payment when due. Inasmuch as this case must be reversed, because of the peremptory instruction to find in favor of the defendant, we have not deemed it advisable to review the action of the trial court in excluding evidence offered by plaintiff, as presented by many of the assignments of error. It is not doubted that the learned trial judge will, in the light of this opinion, be able at the next trial to make proper rulings as to the admission and rejection of evidence.

The judgment will be reversed, with a direction to the court below to grant a new trial.

SAVAGE v. SAVAGE.

(Circuit Court of Appeals, Fourth Circuit. November 9, 1905.)

No. 591.

1. BANKRUPTCY—VALIDITY OF LIEN—MORTGAGE TO SECURE ALIMONY.
   Where a decree for alimony in favor of a divorced wife was a lien upon all of the real estate of the husband, it was competent for the parties by contract, in consideration of the releasing of such lien on other property, to convert the alimony into an annuity for life secured by a trust deed on specific property duly recorded, and the validity of the lien of such deed was not affected by a subsequent remarriage of the parties, and it may be enforced by her after the husband's bankruptcy, where by the state statute the wife had the right to acquire and hold property as if she were unmarried.

2. SAME—GIFT TO WIFE.
   A deed of property, made by a husband to his wife by way of gift at a time when he was not indebted, and which was duly recorded, is valid as against his subsequent creditors in bankruptcy.

3. SAME—SALE OF REAL ESTATE—RELEASE OF DOWER RIGHT.
   It is proper, and generally desirable, to sell the real estate of a bankrupt free from his wife's inchoate right of dower, with her consent, and to compensate her for such release by a fair allowance out of the proceeds.

4. INTEREST—ARREARS OF ANNUITY.

Interest should not be allowed, on arrears of an annuity due from a bankrupt to his wife under an antenuptial contract, and secured by a lien on property, where the contract makes no provision therefor.

Pritchard, Circuit Judge, dissenting.

Petition for Revision of Proceedings in the District Court of the United States for the Western District of Virginia, at Harrisonburg, in Bankruptcy.

On February 19, 1904, Ralph Savage was adjudicated a bankrupt; his largest creditor being his brother, the petitioner, Joseph H. Savage. His wife, M. Adah Savage, formerly M. Adah Seabright, claimed to be a secured creditor. She was first married to the bankrupt in 1895. On March 13, 1897, she was divorced from him and allowed to take her maiden name of Seabright by a decree of the circuit court of Frederick county, Va. The decree required Ralph Savage to pay her $400 a year alimony, payable in monthly sums of $33.33 on the 13th of each month, and these sums were secured upon the real estate of Ralph Savage, situate in the city of Winchester, Va. On March 8, 1898, Ralph Savage executed a deed of trust, conveying to R. T. Barton, as trustee, a property on Main street, in Winchester, Va. This deed, which was also signed and acknowledged by M. Adah Seabright, recites that the decree for alimony at the rate of $400 per year was a lien upon all the grantor's real estate, and recites that by a bond that day executed by Ralph Savage to M. Adah Seabright he had bound himself to pay to her during her lifetime the sum of $400 a year in monthly payments of $33.33 each, and had agreed to secure the payment thereof by a deed of trust of the Main street property, and in consideration thereof said M. Adah Seabright had agreed to wholly release the lien of her decree, and did "unite in the deed for the purpose of wholly releasing the said Ralph Savage from the obligation of the decree to pay alimony aforesaid, and his property from the lien of the same, and the said Ralph Savage on his part, in fulfillment of his contract, doth hereby grant and convey unto R. T. Barton, trustee," etc. The deed then provides that, in case of default in payment of $33.33 per month, the trustee shall sell the property at public auction, and out of the proceeds the trustee shall invest so much of the proceeds as shall be sufficient to produce to the said M. Adah Seabright $400 a year, or else said trustee shall pay over to said M. Adah Seabright, as she may elect, and to be her absolute property out of said proceeds, a sum of money equal to the commuted value of the annuity at the date of sale. In either event, however, the residue to be paid by the said trustee to the said Ralph Savage. The deed of trust was acknowledged by Ralph Savage on March 9, and by M. Adah Seabright on March 10, and recorded March 22, 1898. On March 31, 1898, Ralph Savage was remarried to the said M. Adah Seabright. On June 19, 1899, Ralph Savage conveyed to his wife a house on Washington street, in the city of Winchester, renting for $24 per month, which rent she has since that time collected. This deed was acknowledged and duly recorded on June 26, 1899.

On March 12, 1904, Mrs. Savage, and Mr. Barton as trustee, filed their petition in the bankruptcy proceedings, reciting the foregoing facts, alleging that the annuity of $400 a year, secured to her by the deed of trust of March 8, 1898, was in arrears and unpaid, and praying that the court would permit the trustee under its supervision to sell the Main street property and pay the installments in arrear and to pay to her the commuted value of the annuity for her life, and praying, also, that she be allowed out of any other real estate of the bankrupt sold by the trustee of the bankrupt the commuted value of her contingent right of dower. Joseph H. Savage and other creditors of the bankrupt answered this petition, denying that M. Adah Savage was entitled to any lien for the payment of any sum to her, or any right of dower or any claim whatever against the estate of the bankrupt. The matter went to the referee, who gave notice to all the creditors, and, having heard the testimony offered and arguments of counsel, made his report of his findings and conclusions. The referee held, that by virtue of the deed of trust of March 8, 1898,

Mrs. M. Adah Savage had a first lien on the Main street property for the unpaid installments due her of the annuity secured to her, amounting to $2,433.33, with interest on each installment as it became due. He held that Mrs. Savage was entitled to the commuted value of the annuity according to the Virginia statute at her age of 27, amounting to $5,310, and that it was secured by the deed of trust and to be paid out of the proceeds of the sale of the Main street property. He further held that, as to the other real property owned by the bankrupt, Mrs. Savage was entitled to her contingent right of dower, but that, as she had consented by a writing filed in the proceedings that the real estate might be sold free from her right of dower, she should be allowed, when sale was made of said real estate, the commuted value of her contingent right of dower. It was ordered by the referee that she might proceed to enforce the lien given for her benefit by the deed of trust by sale of the Main street property, and the order authorized Mr. R. T. Barton, as trustee named in the deed, and Mr. M. M. Lynch, the trustee in bankruptcy, to make the sale at public auction. The referee found that at the time of making the deed of trust of the Main street property, and at the time of making the deed of gift to his wife of the Washington street property, the bankrupt owed only a few small personal debts, which had been paid, but that he had never paid to his wife any installments of the annuity. The creditor, Joseph H. Turner, desiring a review of the orders of the referee by the District Judge, duly filed his petition for review, and the referee certified to the District Judge the questions presented, with a summary of his findings and his order. The questions presented for review were whether M. Adah Savage was rightly allowed the arrears of annuity and interest thereon; whether it was proper to allow her as the commuted value of the annuity the sum of $5,310; whether it was proper to declare these sums a lien on the Main street property and to allow the lien to be enforced by sale; whether it was proper to direct the real estate of the bankrupt to be sold clear of the wife's contingent dower. The petition for review was heard by the District Judge, and the rulings of the referee were affirmed and approved. Joseph H. Savage, feeling himself aggrieved, has petitioned this court to review and revise said proceedings in matter of law.

R. E. Byrd (Holmes Conrad, on the brief), for petitioner.
R. T. Barton, for respondent.

Before PRITCHARD, Circuit Judge, and MORRIS and PURNELL, District Judges.

MORRIS, District Judge (after stating the facts). The deed of trust of March 8, 1898, between Ralph Savage, of the first part, R. T. Barton, trustee, of the second part, and M. Adah Seabright, of the third part, recites the obligation of Ralph Savage to pay to M. Adah Seabright as alimony $400 a year in monthly installments of $33.33, which had been decreed in her favor by a decree dissolving a marriage between herself and Ralph Savage and granting her alimony, and recites that the decree had been recognized as a lien on his real estate. It further recites that she had agreed to release his other property from the lien of the decree in consideration of the grant to the trustee of the specific property described in the deed as security for the payment of the said yearly sum of $400 for life. The deed provides that, upon default in payment of the debt secured by the deed of trust or of any installment, it should be the duty of the trustee to sell the property and out of the proceeds to invest so much of the proceeds as would be sufficient to produce to the said M. Adah Seabright $400 a year, or else, as she might elect, to pay to her as her absolute property the commuted value of the annuity at the date of sale. The

deed in very clear terms expresses the contract between the parties. She released the rest of his property. He secured to her $400 a year for life by a specific lien on the Main street property, or, in default of payment, at her election, the commuted value of that annuity during her life. It was a valid agreement, made upon a valuable consideration, and there were then no existing creditors. By agreement of the parties the $400 a year ceased to be alimony and subject to the control of the court which decreed it, and became a fixed annuity for life, and its payment secured by an unqualified deed of trust duly executed and placed upon record March 22, 1898.

On March 31, 1898, the parties were remarried, and it is urged, in support of the petition to revise, that the marriage invalidated this annuity and the deed to secure it, for the reason that the $400 a year had originally been alimony, and that by the remarriage the consideration for its payment failed. Obviously, when the deed was executed, the parties were competent to make any contract with respect to the $400 a year they might agree upon. If, for the sake of relieving other property from liability as recited in the deed, or for any other reason, Savage chose to agree to convert alimony into a contractual obligation to pay an annuity for life, there was nothing unlawful, or immoral, or against public policy in the transaction. The parties made the agreement and evidenced it by a formal instrument of writing, which they recorded, and by the agreement the $400 a year became an annuity subject to no contingency except duration of her life. They both testified in these proceedings that the deed of trust was made in contemplation of marriage and as a marriage settlement, and to prevent the release of the claim for alimony which would have resulted from the proposed marriage, had no such contract been made. This is not the consideration recited in the deed; but as the deed of trust was recorded on March 22d, and the parties were remarried on March 31st, it appears highly probable that it was made in contemplation of marriage. For such a settlement the marriage is a sufficient consideration to support the deed. It is regarded in law as a consideration of the very highest value. Prewit v. Wilson, 103 U. S. 22-24, 26 L. Ed. 360. In either aspect, it cannot be successfully contended that the consideration for the deed has failed, or is affected by the subsequent marriage.

By the Virginia Code it is enacted that a married woman shall have the right to acquire, hold, use, and dispose of property as if she were unmarried. Under such an enactment, if the wife is a creditor of her husband, and if the debt is bona fide and established by proof, she is to be neither postponed nor preferred to other creditors solely because of their marital relation. Bean v. Patterson, 122 U. S. 496-500, 7 Sup. Ct. 1298, 30 L. Ed. 1126. Here we have a covenant by the husband to pay, which he has not performed, and a recorded lien on land to secure performance. It follows that monthly payments were due from the grantor to the cestui que trust, and, as they were not paid, she is entitled to the arrears and entitled to resort to the land for payment. The bond mentioned in the deed was for $3,000, but the real agreement was to pay $400 a year, and the deed provides ex-

plicitly that the commuted value is to be paid to the beneficiary, if she so elects, in case of a sale after default.

With regard to the deed of June 19, 1899, conveying the Washington street property, that was a deed of gift from husband to wife, duly recorded, and also made at a time when there were no creditors to be injured by it. It is urged on behalf of the petitioner for revision that this conveyance should be regarded as having paid off and discharged the sums secured to the wife by the deed of trust, but this is a mere assumption, without a word of proof to sustain it. The testimony of both husband and wife is that it was a gift from him to her as a provision for the future comfort of herself and children, and such a gift he had an undoubted right to make to her. Wallace v. Penfield, 106 U. S. 260–262, 1 Sup. Ct. 216, 27 L. Ed. 147. And even if the testimony of the husband and wife should be held to be within the restriction of Va. Code, 1904, p. 1770, § 3346a, and should be excluded as incompetent in such a controversy as this, the case is without any testimony to show that the conveyance was a payment, and as the conveyance from husband to wife requires no consideration other than the marital relation to support it, there is no presumption that it was a payment. Jackson v. Jackson, 91 U. S. 122–125, 23 L. Ed. 258. A gift from husband to wife, not made in prejudice of creditors, evidenced by a deed duly executed and recorded, is valid, and needs no consideration other than the marital relation to support it. Sexton v. Wheaton and Wife, 8 Wheat. 229, 5 L. Ed. 603; Jones v. Clifton, 101 U. S. 225–228, 25 L. Ed. 908; Bean v. Patterson, 122 U. S. 499, 7 Sup. Ct. 1298, 30 L. Ed. 1126.

With regard to the objection urged against the order to sell the bankrupt's remaining real estate free from the wife's contingent right of dower, it is sufficient to say that it is nearly always desirable, in making sale of a bankrupt's real estate, if the wife will consent, to sell free from her inchoate right of dower, and to compensate her by a fair allowance out of the proceeds for her release of that right. It is common practice to do so when it is possible, and we think the practice is to be approved, as it gives the purchaser an unincumbered title, and ordinarily results in advantage to creditors by obtaining a better price for a clear title than can be obtained for property the title to which is clouded by such a possible incumbrance.

There remains the question whether it was proper to allow interest upon each installment of the annuity from the date it fell due, as was done by the referee. In A. & E. Encylopedia of Law, vol. 2, p. 407, this statement is found:

"The cases are somewhat conflicting upon the question of the allowance of interest on arrears of annuities. Generally the English courts seem to be inclined against it, and the courts of the United States in favor of it."

In Adams v. Adams, 10 Leigh (Va.) 527–533, it is stated to be the general rule that annuities do not bear interest. In Isenhart v. Brown, 2 Edw. Ch. (N. Y.) 341–347, it is stated that the weight of authority is against allowing interest upon arrears of annuity.

In Laura Jane v. Hagen, 10 Humph. (Tenn.) 332–336, it is stated that whether interest shall be allowed on an annuity must depend upon the circumstances of each case, and is not a matter of positive law.

In cases of annuities, where there is no express direction or contract for interest, we think it may be fairly said to be discretionary. Mower v. Sanford, 63 L. R. A. 629, note. If interest be discretionary, this is clearly a case in which that discretion should be exercised against allowing it. During the six years in which the arrears were accumulating the wife was living with her husband, and was being supported and maintained by him. It was by his default that the installments were not paid to her; but to impose the addition of interest, which the deed of trust does not provide for and which is not part of the contract, would not be to put a penalty upon him for his default, but to deplete the residue of the proceeds of the property which is to go to creditors. Wormley's Est., 137 Pa. 101–112, 20 Atl. 621.

As to all the orders of the district court, except the order allowing interest on the arrears of the annuity, the petition for revision is dismissed, and as to the said allowance of interest the petition to revise is sustained. It is so ordered, and that each party pay his and her own costs in this court.

PRITCHARD, Circuit Judge (dissenting). I am unable to concur in the conclusion of the court in regard to the effect of the deed of trust which was executed by Ralph Savage to his wife, the respondent, on the 8th day of March, 1898. It is held that this instrument constitutes a valid agreement upon a valuable consideration. In considering this question we are confronted with a proposition which is serious in its nature and one that is worthy of careful consideration. The deed of trust was based upon the consideration that the respondent should release the liens existing upon the property of Ralph Savage, which had been created by virtue of the decree of alimony, and, among other things, it was provided in the deed of trust that the husband should comply with the provisions of the decree which required him to pay annually to the respondent the sum of $400. The inquiry naturally arises as to what were the reasons that prompted Ralph Savage to execute the deed of trust in question. To this proposition there can be but one answer, and that is that such instrument was executed for the purpose of freeing his property from existing liens and also to guarantee the performance on his part of the conditions contained in the decree, to wit, the proper maintenance and support of his wife.

When one marries he assumes a moral obligation, which, among other things, involves the duty of maintaining and providing for his wife; and while this is not a contract to support the wife, in the ordinary acceptation of the term, the duty enjoined is of such a character that the courts will by fine or imprisonment enforce its requirements. This is an obligation which is never imposed, except in cases where it is made to appear that the husband is not performing the duty thus enjoined upon him. In this instance it appears that Ralph Savage was not maintaining and supporting his wife in the manner in which he was in duty bound to do, and for this and other reasons the bonds of matrimony between the parties were dissolved, and accordingly a decree was entered requiring him to pay to the respondent during her

life time the sum of $400 per annum; and subsequent thereto and in pursuance of such decree an agreement was entered into between the parties by which the husband executed a deed of trust, which provided that the property described therein should be conveyed to a trustee for the purpose of securing the payment of the annuities hereinbefore mentioned. This contract was based upon the consideration heretofore mentioned, and upon the theory that the parties were to live separate and apart and that the husband should be required to maintain and support his wife in the same manner as when they lived together.

Within a short time after the execution of the deed of trust the parties became reconciled and were remarried, and the husband again assumed the relation to his wife which he had sustained before they were divorced, and it appears from the record that he provided suitable support and maintenance for her from that time on. In other words, when the parties remarried, the husband voluntarily undertook to do that which the court had decreed he should do at a time when he was divorced from his wife. The agreement which he had entered into with his wife prior to their remarriage was in the nature of an executory contract, and, when the parties married the second time, the reasons upon which the decree and the contract were based ceased to exist. The husband, realizing that his entire real property was subject to this decree, he and his wife, who became sui juris by the decree of divorce, made a contract which, instead of being a lien on all of the husband's property to secure the payment of the annuities mentioned in the decree of the court, provided that it should be a lien only on certain portions of it, which portions should be placed in the hands of a trustee who should hold the same merely as a security. When the husband and wife remarried, the new contract to marry and its consummation constituted a waiver on the part of the wife of all annuities secured to her, and thus discharged the property placed in the hands of the trustee of any lien; for, as the annuities thus ceased to exist or be enforceable, of course the securities were no longer valid.

In the case of Boyd v. Olvey, 82 Ind. 304, it is held:

"It may be laid down as a general rule that, where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer, and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it."

When the parties remarried the wife became reinvested with the inchoate right of dower in all of the real property which the husband possessed at that time—that which was included in the deed of trust, as well as that portion of his property which had been freed from the lien created by the decree for alimony existing at the time the deed of trust was executed. While the act of remarriage resulted in reinvesting the husband with the title to the property conveyed in the deed of trust, on the other hand, it had the effect of reinvesting the wife with the right of dower in all of the real estate which the husband owned at the date of their remarriage. Inasmuch as the proposition that by the remarriage the wife was reinvested with her dower right in all property still owned by the husband and which had been owned by him at the time of the divorce, as well as invested with a dower right

in any additional property acquired by the husband since the date of the divorce, is undeniable, to hold that after the remarriage she still retained her rights under the deed of trust given in settlement of alimony would be tantamount to holding that by the remarriage the wife resumes all of her original rights in her husband's property, without any corresponding relinquishment on her part of the rights acquired by the decree for alimony. This, I think, is neither law nor equity. I take it that it will not be seriously contended that a remarriage of the parties did not render the decree for alimony inoperative. The agreement which had been entered into by the husband was to the effect that he would faithfully comply with the terms of the decree of the court, and, in order to guaranty his performance of such agreement, a certain portion of his property was pledged for that purpose. Suppose that no deed of trust had been executed prior to the date of the remarriage, could it be contended that the lien which had been created by virtue of the decree would continue to exist, notwithstanding the remarriage of the parties? Most assuredly such contention would be untenable, in view of the fact that such remarriage was sufficient within itself to render inoperative the decree by which such lien was brought into existence and upon which it was based.

For the reasons stated, I think that the property in question should be sold for the benefit of the creditors of Ralph Savage, the bankrupt, subject to a lien on the same for any annuities that may have accrued from the date of the execution of the deed of trust until the remarriage of the parties.

GENERAL FIRE EXTINGUISHER CO. v. LAMAR et al.

(Circuit Court of Appeals, Fifth Circuit. December 5, 1905.)

No. 1,476.

1. EQUITY—EXCEPTIONS TO MASTER'S REPORT.

Exceptions to the report of a master in chancery are in the nature of a special demurrer, and must point out specifically the errors relied on, and findings and parts of the report not so specifically excepted to are to be taken as admitted.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Equity, § 910.]

2. SALES—RESERVATION OF TITLE—VALIDITY UNDER GEORGIA STATUTE.

Under Code Ga. 1895, §§ 2776, 2777, which require every contract of conditional sale by which the title to property delivered is reserved in the seller until the purchase price has been paid to be executed and attested in the same manner as mortgages on personal property and recorded within 30 days, in order for such reservation to be valid as against third parties, such a contract not so executed and attested is not entitled to record, and the reservation is ineffectual as against creditors of the purchaser, at least where it is not shown that they had actual notice thereof.

3. APPEAL—EQUITY—FINDINGS OF MASTER—PRESUMPTION OF CORRECTNESS.

A finding by a master that certain appliances were attached to a factory must be taken as correct in determining whether or not such appliances became subject to a prior mortgage on the building and machin-

ery therein, where it was not excepted to, and there is no evidence showing the character of the appliances, or whether or not they were detachable.

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

The following is the opinion of Speer, Circuit Judge, in the Circuit Court:

In the early part of the year 1900 the Millen Cotton Mills undertook the erection and equipment of a cotton factory at Millen, Ga. The company purchased a tract of land, constructed mill buildings, and on various dates during that year made contracts for the purchase and installation of appropriate machinery. Among the contracts was that now before the court. This contract was made on the 29th day of August, 1900, and under it the General Fire Extinguisher Company agreed to furnish and erect a system of automatic sprinklers. It appears that the several contractors and furnishers of machinery completed the installation of the cotton mill equipment about June, 1901. The Millen Cotton Mills not being able to pay for the machinery and equipment placed in the mill buildings, certain creditors recorded mechanics' liens, aggregating $44,945.09. The General Fire Extinguisher Company, however, did not avail itself of this opportunity afforded by the law of Georgia. In January, 1902, the William Firth Company and other contractors and materialmen, who had recorded mechanics' liens as above stated, filed a bill in equity to establish and enforce them. With this bill a number of interventions were filed. Among them was that of the Commercial Bank of Augusta, substituted trustee, in behalf of the holders of bonds issued under a mortgage covering the real estate and manufacturing plant of the Millen Cotton Mills. This mortgage was made October 31, 1900, recorded November 14th of the same year, and was for $40,000. Another intervention was that of the General Fire Extinguisher Company, now under consideration. The issues arising in the cause were referred to a special master, who had reported in substance that the sum realized from the sale of the property of the defendant, to wit, $90,000, should be applied, first, to the payment of certain laborers and taxes; second, to the payment of claims secured by the mechanics' liens aggregating $44,945.09 principal; third, to the payment of the mortgage indebtedness of $40,000 principal; and, fourth, to the payment of numerous unsecured claims, among them that of the intervener. The General Fire Extinguisher Company has filed several exceptions to the master's report, but relies only on the first, namely: "The prayer of the claimant that it be permitted to retake and remove the machinery furnished by it, in case it is not allowed a special lien on said machinery, must be denied."

Said ruling is contrary to law and equity, and is error because the written contract between claimant and the Millen Cotton Mills, which was admitted in evidence without objection and which is not disputed, contains the following language: "It is agreed that space for materials and facilities for the prosecution of the work shall be accorded on the premises, and that the General Fire Extinguisher Company shall have lien upon the materials and equipment until full payment shall have been made therefor, with right to enter upon the premises and remove the same in case of any default in payment." And because said contract contains the following language: "It is also understood that any loss or damage by fire which may occur to our materials and equipment while in your premises shall be borne by you."

Claimant alleges that the special master erred in not allowing its prayer, since it appears from the evidence recited that it was the intention of the parties that the material and equipment should remain the property of claimant until paid for, and because it was also stipulated that claimants 'shall have a lien' upon said materials and equipment until full payment shall have been made, and because it was further stipulated that the claimant should have the right to enter upon the premises and remove said materials and equipment if not paid for. The above quoted language is contained in

said contract introduced in evidence which is marked "Exhibit No. 16," and is attached to an intervention filed by claimant in said cause. Said contract is referred to and made a part of the record on page 23 of the report of the special master." It is well established that exceptions should be so framed as not merely to allege error in general terms, but to enable the court to decide distinctly on each point in dispute. Adams, Equity, § 386. As stated in Sheffield, etc., Ry. Co. v. Gordon, 151 U. S. 291, 14 Sup. Ct. 343, 38 L. Ed. 164: "Proper practice in equity requires that exceptions to the report of a master should point out specifically the errors upon which the party relies." Exceptions to reports of masters in chancery are in the nature of a special demurrer, and the party objecting must point out the error, otherwise the part not excepted to, will be taken as admitted. Story v. Livingston, 13 Pet. 359, 10 L. Ed. 200, approving Wilkes v. Rogers, 6 Johns. 566.

The sole question, therefore, properly before the court is: Did the master, in view of the language and terms of the contract between the intervener and defendant, and for the reasons stated in the foregoing exception, err in finding that the intervener had no right to take and remove the equipment furnished by it to the Millen Cotton Mills? In order for the intervener to have the right to retake the equipment furnished by it, title thereto must have been reserved. Of course, as between the intervener and the defendant the language quoted from the contract and appearing in the exception is sufficient to retain the title in the intervener. But in this case the Millen Cotton Mills became insolvent and the rights of creditors intervened. Now is the reservation of title good as against such creditors? The conclusion of the master is: "The agreement was not executed and recorded as required by the laws of Georgia so as to reserve title in the claimant." The law of Georgia, applicable to conditional sales of this character is: "Whenever personal property is sold and delivered with the condition affixed to the sale, that the title thereto is to remain in the vendor of such personal property until the purchase price thereof shall have been paid, every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing, and not otherwise. And the written contract of every conditional sale shall be executed and attested in the same manner as mortgages on personal property; as between the parties themselves the contract made by them shall be valid, and may be enforced whether evidenced in writing or not." Section 2776, Code Ga. 1895. "Conditional bills of sale must be recorded within thirty days from their date, and in other respects shall be governed by the laws relating to the registration of mortgages." Section 2777, Code Ga. 1895.

Reference to the contract shows that it is not attested by any witness, official or otherwise, as required by section 2776 above quoted, and although dated August 29, 1900, was not recorded until January 9, 1902. The intervener having failed to comply with the requirements of the provisions of the Code of Georgia above quoted, the result is that as to third parties, it was an absolute sale. This being true, in the absence of proof that subsequent creditors had actual notice of such conditional contract, the master seems justified in concluding that the intervener was not entitled to retake and remove the equipment furnished by it which had become a part of the Millen Cotton Mills' manufacturing plant. Indeed, it would seem that, even if subsequent creditors had actual notice of the contract by which the intervener sought to reserve title, the sale would yet be considered absolute. The law of Georgia just quoted requires that every such condition sale "shall be executed and attested in the same manner as mortgages on personal property," and "must be recorded within thirty days from their date"; otherwise the reservation of title is not valid as against third parties. There is no qualification as to this language. Mortgages on personal property are required by section 2724 of the Code of Georgia of 1895, to be "executed in the presence of, and attested by or proved before a notary public or justice of any court in this state, or a clerk of the superior court." It has been held by the Supreme Court of Georgia that such a conditional contract may be attested by a witness, not one of the officials above named, because there being no such witness, the contract may be "proved" as provided for in section 2724, supra.

The same court has also held that such a contract so witnessed was valid as to subsequent purchasers having actual notice. Hill v. Ludden & Bates, etc., 113 Ga. 320, 38 S. E. 752. "Expressio unius exclusio alterius est." The object of the record is, of course, to give constructive notice of the contract. If such contract is not executed and attested as required by law, it cannot be properly recorded, and say the Supreme Court of this state: "Where a paper which the law requires shall be attested as a mortgage on personalty in order to admit it to record was not attested at all, the actual record of it was notice to nobody." Cunningham v. Cureton, 96 Ga. 489, 23 S. E. 420. Speaking of such a contract, the same court in Merchants v. Cottrell, 96 Ga. 168. 23 S. E. 127, hold that "the plain import of the statute is that attestation is essential to the validity of the contract as against third persons," and state that the object of the statute is to "prevent frauds and perjury which might be practiced by debtors and others in collusion with them to defeat creditors seeking to subject to their claims property apparently belonging to the debtor." But if the attempted reservation of title is not entirely void as to them, did the creditors have actual notice? If true, this fact should have been brought to the attention of the court by exception to the master's report, with proper reference to the testimony relied upon to establish it. As no such exception is made, it is presumed that the evidence of this character was not submitted to the master, and the report would seem conclusive.

In his argument, solicitor for the intervener contends that the reservation of title in its contract is good certainly as against the lien of the mortgage made on October 31, 1900, because, he states, the equipment furnished by the intervener was not placed in the plant of the defendant until after the date of the execution of the mortgage, that no credit was extended by virtue of the equipment, and that being movable personalty, would not become subject to the mortgage as after-acquired property. It will be observed in the first place that the property of the Millen Cotton Mills was sold under a foreclosure of the mortgage referred to, but was sold by virtue of the foreclosure of the special liens on the factory of the defendant, given to the materialmen and manufacturers of machinery who had recorded mechanics' liens, under section 2304 of the Code. The special liens were held by the master to be superior to the lien of the mortgage, and this ruling has not been excepted to. Then, since the master finds that the equipment furnished by the intervener was "attached to the factory," it became subject to the special liens of the materialmen and manufacturers of machinery, unless they had actual notice that title had been reserved in the seller. It is not in dispute that the equipment was in the factory building at the time these special liens attached, nor is it contended that these lienors had notice of such attempted reservation of title. It follows, then, that as to those the sale was absolute. The equipment furnished by intervener became a part of the factory on which these special liens attached. The special liens were foreclosed on the entire factory of the defendant, the entire factory was sold to satisfy said special liens, and the equipment furnished by intervener being by absolute sale a part of such factory, the intervener for all time lost its right to physically retake and remove such equipment.

Since the intervener only claims the right to retake the equipment, we might as well stop here. Since in the argument it is contended that the reservation of title in said contract is superior to the lien of the mortgage, it may be argued that in equity the intervener should be paid before the bondholders. There is no issue raised in the exceptions on this point. It, however, appears that the contract with the intervener was made on August 29, 1900, and attached to the contract is an itemized account of the equipment, which is dated October 9, 1900. The mortgage is dated October 31, 1900, and covers "the machinery now being placed in the factory building" and other machinery "to be acquired from time to time" thereafter. By reference to the evidence taken before the master, it appears also that the equipment furnished by intervener was completely installed in June, 1901. From these facts, thus informally brought to the attention of the court, the inference is sought to be made that the machinery was not being placed in the factory building at the time of the mortgage, and that the equipment being movable,

that it never became subject to the mortgage. Was the machinery actually in or being placed in the factory building at the date of the mortgage? Was credit extended by the mortgagee on account of such equipment? Did the trustee of the mortgage have actual notice of the terms of the contract made with intervener on August 29, 1900? The evidence is silent upon these important matters. Suppose the equipment was furnished after the execution of the mortgage, or suppose the trustee under that mortgage had actual notice of the contract; was the equipment of such character as to become an integral part of the factory of the defendant, and as such would it be covered by the mortgage? On this question the evidence is also silent. No evidence is referred to to sustain this contention. The master reports that such equipment became "attached to the factory," and this finding is not excepted to by the intervener.

Now, if the equipment was placed in the factory after the execution of the mortgage, did it become affixed to the manufacturing plant in such manner that it became subject to the lien of the mortgage on such plant? It appears from the specifications attached to intervener's contract that it was a system of sprinklers, composed of hydrants, valves, suction pipes, tanks, steam and exhaust connections with fire pump, etc. The master reports that this system is "attached to the factory." There is no evidence showing the precise character of this equipment or how it is attached to the plant of the defendant. In Cunningham & Co. v. Cureton, 96 Ga. 489, 23 S. E. 420, it was held that: "Machinery such as planers, molders, belting, shafting, and the like, placed in and attached to a mill in order to carry out the obvious purpose for which it was erected, or to permanently increase its value for use as a manufacturing establishment, and not intended to be moved about from place to place, but to be permanently used with the building, becomes a part of the realty, although such machinery may be removable without injury either to itself or the building." In Porter v. Pittsburg Steel Company, 122 U. S. 267, 7 Sup. Ct. 1206, 30 L. Ed. 1210, where there was an attempt to reserve title in railroad bridges, the Supreme Court held: "The bridges became a part of the permanent structure of the railroad, as much so as the rails laid upon the bridges or upon the railroad outside of the bridges." The court continues: "Whatever is the rule applicable to locomotives and cars and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company covering after-acquired property, it is well settled, in the decisions of this court, that rails and other articles which become affixed to and part of a railroad covered by a prior mortgage, will be held by the lien of such mortgage in favor of bona fide creditors as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case." A number of cases are cited, among them Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339.

Is, then, the apparatus furnished by the intervener such an integral part of the manufacturing plant as to make the attempted retention of title ineffective as against the lien of the mortgage? There is, as we have seen, no evidence as to the character of this apparatus or as to its detachability from the plant, and yet the court not only required the purchasers of this plant to give bond to secure the rights of the General Fire Extinguisher Company in case they should be established by proof, but also directed an order of re-reference to the master to take testimony so that this proof could be taken, and the claimant have the opportunity to support if it could its claim for re-caption. The special master went forward with his inquiry, had two hearings, and took much testimony. Notwithstanding this, the claimant appeared at this term of the court and applied for and obtained an order canceling the order of re-reference and all the proceedings taken thereunder. Thus it appears that the court has evinced its solicitude to afford the opportunity for a thorough investigation, and actually took order so that the costs of claimant, except for its witness fees, would not have been increased. Why claimant put aside this opportunity is apparently due to a difference between interveners' solicitors, but the result is that the court is without evidence in support of the claim. To sum up the matter, the incurable defect of the claim-

ant's case in the present condition of the record is that no evidence has been furnished in view of which it would be appropriate to make applicable the principle in Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, and Central Trust Co. v. Marietta & North Ga. R. R., 48 Fed. 874, 1 C. C. A. 133. In both cases and in other cases the property which the claimant was allowed to retake was shown to be detachable in its character.

The appeal made that the purchasers of this property should not be permitted to retain the attachment for extinguishing fires because it has not been paid for as contrary to equity cannot in this case be maintained. Equity follows the law, and the law is that, if a vendor desire to retain title to his property, that desire must be evidenced by a contract executed in a certain manner and recorded, so that all persons subsequently giving credit on the faith of it to the purchaser should have notice that his title is not good. It is also true that the claimant who excepts has not set out any evidence in support of his exceptions conformably to the rule. This is perhaps due to the fact that, although the court has given claimant every opportunity to take testimony, there was no evidence in the record on this subject which could have been set out. The court might with a strict regard for the law in the present state of the record wholly deny the claim made by the General Fire Extinguisher Company. It is, however, a high prerogative of the court of equity to do equity even when the rights of complainants have been obscured by neglect, inadvertence, or mistake. The fact is apparent that the General Fire Extinguisher Company with a claim of the value of $3,500, notwithstanding the effort of the court to afford it, has not had its claim properly presented.

This being true, the court will afford by its decree the opportunity to the claimant to make application anew for a reference in order that proper pleadings may be submitted and evidence taken in support of its claim, with equivalent opportunities to the defendant. If it does this within 10 days, such reference may be ordered. If it fails to do so, the report of the special master denying the claim will be ordered confirmed.

Henry A. Alexander and Shepard Bryan, for appellant.

W. K. Miller and E. H. Callaway, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. We find no error in the disposition of this case in the Circuit Court, and its judgment is therefore affirmed.

COTTON et al. v. ALMY.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1905.)

No. 1,171.

1. SHIPPING—LIABILITY OF LESSEE FOR LOSS OF VESSEL—NEGLIGENCE OR WANT OF SKILL—VOLUNTARY SERVICE.

Where the lessees of a houseboat at the termination of the lease undertook to deliver it to the owner at a port other than that named in the lease and where the boat then was, although at the owner's request and without charge, they remained liable until its delivery for any injury to the same through their negligence or failure to exercise such maritime skill and care in towing from one port to the other as was reasonable under the conditions and circumstances existing at the time.

2. TOWAGE—NEGLIGENCE—EVIDENCE CONSIDERED.

Evidence considered, and *held* to support a finding of negligence in undertaking to tow a houseboat from one port to another at the time and under the conditions shown, as well as in the manner of making up

the tow, which was by placing the boat between the tug and two loaded scows, all being towed tandem, subjecting it to a severe and unnecessary strain.

3. SHIPPING—LEASE OF VESSEL—DAMAGES FOR INJURY.
The rule, applied in marine insurance, that the injury of a vessel to such extent that the cost of repair would exceed half her value constitutes a total loss, is not applicable to the case of the injury of a vessel under lease, so as to entitle the owner to recover her full value as stipulated in the lease in the event of total loss, at least where there was no abandonment to the lessees.

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

Albert F. Judd, R. W. Breckons, and William R. Davis, for appellants.

J. J. Dunne and W. S. Burnett, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was a libel in personam brought against the libelees as copartners doing business under the firm name of Cotton Bros. & Co., in which was alleged, among other things, that during the times mentioned in the libel, and up to the 4th day of August, 1903, the libelant was the owner of a certain houseboat of the value of $2,500, then lying in the waters of Pearl Harbor, Oahu, which, on the 1st day of January, 1903, she leased to the libelees, together with the furniture contained therein, for the term of six months from that date, "with the privilege of an extension thereof from month to month, said extension not to exceed three months," at the rate of $75 per month, which rental the lessees covenanted to pay, and further covenanted that they would not remove the houseboat from the limits of Pearl Harbor; that they would provide proper moorings therefor, and would be liable for all damages to the houseboat from stranding or wrecking; and that, in case of the total loss of the houseboat, the lessees would pay to the lessors the sum of $2,500, and, at the end of the term or sooner termination thereof, they would return the boat in good order and condition, ordinary wear and tear excepted. The lease, which was in writing, also provided that the lessees should not be liable for any damage by fire. The libel alleged that on the 4th day of August, 1903, while the houseboat was in the exclusive possession and control of the libelees, under and pursuant to the lease, by reason of the direct carelessness and negligence of the libelees, and without any fault on the part of the libelant, the houseboat became and was wrecked, within the jurisdiction of the court below, to wit, in and upon the navigable waters near the harbor and port of Honolulu.

The facts constituting the alleged negligence of the libelees are set forth in the libel as follows:

"Prior to said August 4, 1903, said defendants and libelees, in whose sole and exclusive possession and control said houseboat then was, had moored said houseboat near the western shore of the entrance to Pearl Harbor in said Island of Oahu; and on said August 4, 1903, said defendants and libelees proceeded to remove said houseboat from said Pearl Harbor to the harbor

of Honolulu in said Island of Oahu. Said transportation was then and there attempted to be performed by said defendants and libelees by towing said houseboat in tow of the steam tug Kaena, then and there operated and controlled by said defendants and said libelees. Libelant further shows that at said time and place, and along with said houseboat, said defendants and libelees undertook to transport by towing in tow of said Kaena from said Pearl Harbor to said Honolulu harbor, and as part and parcel of the same tow of which said houseboat formed a part, two laden scows. It was then and there the duty of said defendants and libelees, in making up said tow, to see that it was then and there properly constructed, but this duty said defendants and libelees, by reason of the aforesaid carelessness and negligence, wholly failed and neglected to perform; and in this behalf this libelant shows that said tow was constructed in tandem, and was then and there so constructed that said houseboat was placed between said tug Kaena and said two laden scows hereinabove referred to. Libelant further shows that, when said tandem tow was constructed, said tug proceeded from said Pearl Harbor to said Honolulu harbor. At this time a fresh breeze was blowing; the wind being about N. E. by E., a fairly heavy sea was running, and there was a substantial swell. Libelant shows that, when said tug and tow had reached a point about one-half mile west of Kalihi entrance, said houseboat, by reason of the aforesaid carelessness and negligence of defendants and libelees, capsized and sank, and became a wreck and total loss, and in this behalf, this libelant shows that the superstructure of said houseboat contained two stories, with three rooms in the lower story and two rooms and a lanai in the upper story; and that when, as alleged, said houseboat capsized and sank and became wrecked, said entire superstructure, by reason thereof and in direct consequence of said capsizing, sinking, and wreck, became detached and broken away from said houseboat, thereby utterly ruining and destroying said houseboat, and rendering it wholly useless and valueless for the uses and purposes for which it was intended and held. And in this behalf libelant shows that said loss and damage were then and there immediately, directly, and proximately caused by the carelessness and negligence of said defendants and libelees, and in particular by the careless and negligent manner and method in which the aforesaid tug and tow were then and there operated by said defendants and libelees; and in particular by the careless and negligent manner in which said tow was constructed and made up by said defendants and libelees; and in particular by the careless and negligent selection by said defendants and libelees of the time at which said towage was attempted, having regard to the conditions of wind and sea then prevailing; and in particular by the careless and negligent attempt of said defendants and libelees to tow too much upon the occasion hereinabove alleged."

It was also alleged in the libel that the damage sustained by the libelant was occasioned wholly by reason of the carelessness and negligence of the libelees, and without any fault on the part of the libelant, by reason of which the libelant prayed a decree for the sum of $2,500.

In their answer the libelees admitted the alleged ownership by the libelant of the houseboat, and the copartnership of the libelees as alleged, and their engagement as such copartners in the business of bridge builders and general contractors. It admitted the execution of the lease as alleged in the libel, and the attempted towage of the houseboat from Pearl Harbor to Honolulu by means of the tugboat Kaena, and that the tugboat was operated and controlled by the libelees. It admitted that the tow included two laden scows in addition to the houseboat. It then alleged affirmatively that, during all of the times mentioned in the libel up to the 4th day of August, 1903, the husband of the libelant was in control of the boat, acting as the agent of the libelant in respect thereto; that the value of the house-

boat was $1,500; that the boat was delivered to the libelees under the lease by the libelant, through her said husband, at Pearl Harbor, situated some 10 miles from Honolulu, and that, under and pursuant to the terms of the lease, it became the duty of the libelees, at the termination thereof, to redeliver to the libelant the houseboat at Pearl Harbor; that the lease was, in accordance with the terms thereof, terminated on the 29th day of July, 1903, and that the libelant was notified of the termination thereof that she might take possession of her boat; and that at no time subsequent to July 29, 1903, was said houseboat in the possession of the libelees under or by virtue of the lease, and that at no time after that date were the libelees, or either of them, in the sole possession or control of the boat under or pursuant to the terms of the lease; that at the termination of the lease, as set forth in the answer, the libelant requested the libelees to remove the houseboat from Pearl Harbor to the port of Honolulu for the convenience of the libelant, and that thereupon, and solely as a favor to her, the libelees agreed to so remove the boat, under the express stipulation and agreement that they would not be in any manner responsible for any loss or damage to the boat which might occur while it was being moved to the port of Honolulu; that such removal was attempted to be performed by the libelees by towing the houseboat in tow of the steam tug Kaena, then and there operated and controlled by the libelees, and along with two laden scows; that the tow was constructed in a proper and seamanlike manner and with due care; that, when the tow was so constructed, the tug proceeded from Pearl Harbor to Honolulu Harbor, at which time a light breeze was blowing, the sea smooth, and that there was no appreciable swell; that, when the tug and tow had reached a point about one-half mile west of Kalihi entrance, the houseboat, without any carelessness or negligence on the part of the libelees "suddenly went over on one side," and that thereupon the libelees towed the houseboat into water where it could be anchored, and anchored the same, and proceeded with the tug to Honolulu with the persons who had been on board of the houseboat, and with the said laden scows; that after the arrival of the tug and the laden scows at Honolulu the tug returned to the spot where the houseboat had been anchored, and started to tow the same into the harbor of Honolulu, which was done, and a watchman left in charge thereof by the libelants; "that said houseboat turned over"; that the turning over of said houseboat was not due in any manner to the carelessness or negligence of the libelees, but was, as libelees are informed and believe, and so charge the fact to be, due to the fact that the said boat was not properly built into the scow, but, when originally constructed, was simply tacked to the scow with tenpenny nails, which became gradually loosened from the rocking of the scow; that the houseboat is not a total loss, and that the libelant had not suffered damage in the sum of $2,500.

The evidence shows without conflict that upon the conclusion of the appellees' work at Pearl Harbor they undertook to deliver the houseboat to the libelant at Honolulu, instead of Pearl Harbor, as

they might have done. It is contended on their behalf that they did so without charge, and at the request of the husband of the libelant, who, it is claimed, was acting as her agent in making the request. Let that be conceded, and still the fact remains that the appellants were in the exclusive possession and control of the houseboat at the time of its damage, and under the lease, for they had not then delivered the boat to the lessor. They were towing it to the port of Honolulu for that purpose, and were clearly liable for any tort committed by them during the towage growing out of their negligence. The Syracuse, 12 Wall. 167, 20 L. Ed. 382; Alaska Commercial Co. v. Williams, 128 Fed. 362, 63 C. C. A. 92; The American Eagle (D. C.) 54 Fed. 1010. The maritime skill and care thus called for must be such as was reasonable under the conditions existing at the time—such as may be reasonably demanded under "the peculiar circumstances and emergencies of the case." Authorities supra; The Temple Emery (D. C.) 122 Fed. 180–182; The Joseph Peene (D. C.) 130 Fed. 489. The evidence shows that the houseboat had been lying for about six months at a place called Puuloa, in Pearl Harbor, with one end resting on the sands of the beach and the other end in the water, during which time it was occupied by the captain of the tug and other employés of the appellants. It was from that position that the captain of the tug took the houseboat and put it in a tandem tow made up of, first, the houseboat, and then two laden scows—one behind the other; the houseboat being thus placed between the pull of the tug ahead and the pull of the scows behind, neither of which was provided with a rudder. Obviously, therefore, the houseboat was subjected to a severe and unnecessary strain from both ends; and such is the testimony of the witnesses Neilson and Rouse, experienced shipmasters. The houseboat should have been towed alone, the only safe method, according to the testimony of Capt. Neilson, and certainly not in the position in which it was placed and where it was subjected to a double pull—that from the tug in front, and that from the laden scows behind. This of itself constituted, in our opinion, such negligence as renders the appellants liable for the damages sustained by the appellee; for the law is that it was the duty of the tug, in making up the tow, to see that it was properly constructed. Failing in that duty, she was guilty of a maritime fault. The Quickstep, 9 Wall. 665, 19 L. Ed. 767.

We are also of the opinion that the appellants were guilty of negligence in undertaking to tow the houseboat, in its known condition, in the then condition of wind and sea. Allusion has already been made to the fact that the captain of the tug had lived on the houseboat for about six months, and knew that during that time it lay with one end resting on the sands of the beach, and with the other end in the water, the effect of which, he explained in his testimony, was that "her seams opened up from naturally lying too long on the beach." He admits in his testimony that he would not have undertaken to tow her in a swell; and, while he denies that there was any swell during the towage in question, the evidence on the part of the appellee is to the contrary, and the court below found as a fact from such conflict-

ing evidence upon the point that "there was a swell that made it obviously dangerous for the houseboat to go to sea." We think that finding correct in view of the evidence. Moreover, it appears that the tug started with its tow from Pearl Harbor about 20 or 30 minutes past 2 o'clock p. m., at a time when the trade winds prevailed, which, according to the uncontradicted testimony in the case "always blow pretty strong in the afternoon until about sundown," whereas it is, according to the uncontradicted testimony, "decidedly calmer from 12 to 5 in the morning than at any other time of the day, under ordinary conditions." The inappropriateness of the time selected for the towage emphasizes the appellants' negligence in view of the other conditions existing.

But one other question remains to be considered, and that relates to the measure of damages. It is contended on behalf of the appellee that she is entitled to the full sum of $2,500 provided in the lease to be paid by the lessees in the event of the total loss of the boat. According to the evidence, the damage to it could not be repaired without the expenditure of an amount exceeding half her value after the repairs; and hence it is contended that the houseboat was a total loss, within the doctrine applicable to cases of marine insurance. If that doctrine be applicable to cases like the present one, it is a sufficient answer to the contention to say that there was no abandonment by the appellee of what remained of the boat in question.

The judgment is affirmed.

WARD v. FOLEY.

(Circuit Court of Appeals, Eighth Circuit. October 13, 1905.)

No. 2,176.

VENDOR AND PURCHASER—CONTRACT FOR SALE OF INTEREST IN LAND—CONSTRUCTION.

A contract providing, "I, G., hereby agree to sell and convey to F. all my interest in 320 acres of land at the rate of $14 per acre," construed, and *held* to be a contract providing for the sale of an interest in the land at the rate of $14 for each acre in the entire tract.

Hook, Circuit Judge, dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court of the United States for the District of South Dakota.

On the 28th day of January, 1898, James Foley, a citizen of the state of Iowa, and Edward Gaule, a citizen of the state of Nebraska, were the equal, joint owners of two quarter sections of land in the county of Yankton, state of South Dakota. Upon that date they made and entered into the following contract, with reference to the sale by Gaule to Foley of his interest in the land, as follows:

"Stuart, Iowa, Jan'y 28th, 1898.

"I, Edward Gaule, of Georgetown, Monroe Co., Ia., hereby agree to sell and convey to James Foley, Stuart, Iowa, all my interest in three hundred and twenty (320) acres of land situated near Welchtown, Yankton County, S. Dakota, at the rate of fourteen dollars ($14.00) per acre, and agree to give and convey said James Foley, a true and perfect deed thereof, and fulfil this contract in every particular according to the laws of Iowa and South Dakota, and in agreement thereof I accept this pr'y note for $50.00 as part payment of agreement or contract. [Signed] Edward Gaule.

"I hereby accept Edward Gaule's offer. James Foley."

This contract not having been performed, and a controversy having arisen between the parties as to its true construction, this suit was brought in the Circuit Court on the 7th day of November, 1903, by James Foley to compel specific performance of the contract according to its terms. The bill of complaint sets forth the contract, and by proper averments states the contention of complainant made with reference to the construction which should be placed upon its terms; avers his readiness and ability to comply with its terms as construed by the court; prays a decree for specific performance of its terms, and that an accounting of the rents and profits accruing from the land may be taken. By way of answer to the bill defendant states the construction which he places upon the contract, and admits the right of complainant to the decree sought upon compliance with the terms of the agreement. It is conceded by both parties the two quarter sections contain but 318, instead of 320, acres of land. The case thus made was, by stipulation of parties, submitted to the court for decision upon the bill and answer alone. The stipulation embodies an account stated between the parties as to the rents and profits arising from the land, the correctness of which is conceded. A decree for specific performance was awarded complainant by the trial court, and the contract was construed to entitle defendant to demand and receive from complainant but $7 per acre for the 318 acres involved. From this decree, defendant below appeals. The assignments of error challenge alone the correctness of the decree as to the consideration to be paid under the terms of the contract. Since the pendency of the appeal in this court the appellant, Edward Gaule, has died, and the case has been duly revived in the name of his executor, Francis Ward.

Merrill C. Gilmore (E. G. Moon, Charles O. Bailey, and John H. Voorhees, on the brief), for appellant.

D. M. Reynolds and W. G. Porter (John H. King, on the brief), for appellee.

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

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

From the above statement it is seen the sole point of controversy between the parties, submitted for decision, is the amount of money which is required by the terms of the contract to be paid by Foley as a condition precedent to the enforcement of the conveyance stipulated for in the contract. In other words, the question for decision is, what did the parties mean by the language used? To what did they intend to bind themselves by the terms employed in the contract made between them? To ascertain the true intent of the parties to a contract is the fundamental rule in the construction of all agreements. Mauran v. Bullus, 16 Pet. 528, 10 L. Ed. 1056; Canal Company v. Hill, 15 Wall. 94, 21 L. Ed. 64. The language employed by the parties in the contract is not that of technical learning or ambiguous meaning. It is apparently unaffected by local usage or peculiar custom. None of the extraneous facts or attendant circumstances surrounding the making of the agreement, or the subsequent conduct of the parties with reference thereto, are before the court for consideration. Therefore the decision must rest alone upon the language of the contract itself, and by giving to that language such plain, reasonable, common-sense meaning as is thought men of ordinary intelligence would be expected to give to it in business transactions of a similar nature.

In approaching such consideration of the contract it becomes material to first inquire what were the parties considering at the time; What forms the subject-matter of the engagement they were about to enter upon? Manifestly the transfer by Gaule to Foley, not of the land itself, but of the interest of Gaule in the land. This the language of the contract makes clear beyond doubt:

"I, Edward Gaule, hereby agree to sell and convey to James Foley all my interest in 320 acres of land."

The subject-matter of the contract, the thing to be dealt with by the parties, being thus clearly ascertained and stated, the contracting parties proceeded to an ascertainment and exact statement of the consideration or purchase price to be paid on the one hand, and received on the other, for the thing to be transferred to Foley, not as is often done in such cases, in bulk or by lump sum, but by fixing a basis upon which computation would be made when the exact acreage of the land should be determined, namely, "at the rate of fourteen dollars per acre" for each and every acre of the described land in which Gaule's interest, the subject-matter of the contract, inhered; that is to say, in 318 acres as subsequently ascertained, and not 320 acres as specified in the contract. Construing this contract, standing naked and alone, unaided by

contemporaneous facts or the subsequent conduct of the parties with relation thereto, as we must do in this case, the construction given seems to our minds, not only that which is most reasonable and logical, but that alone which most clearly, naturally, and sensibly expresses the true intent and meaning of the parties, as gathered from the language they employed to perpetuate the evidence of their engagement.

Again, it is thought the construction placed upon the contract in question not only accords with the reason of the case, but will be found to be in harmony with the adjudicated cases bearing upon the subject under investigation. There is a clear distinction drawn by the authorities between a contract to convey land absolutely and a contract to convey an interest in land. In Van Rensselaer v. Kearney et al., 11 How. 297, 13 L. Ed. 703, Mr. Justice Nelson, in delivering the opinion, makes reference to a deed purporting to convey all the right, title, and interest in real estate as follows:

"A deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seized or possessed at the time; and does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view; and the consideration is regulated in conformity with it. If otherwise, and the vendee has contracted for a particular estate, or for an estate in fee, he must take the precaution to secure himself by the proper covenants of title."

The Supreme Court of Iowa, in Henderson v. Beatty, 99 N. W. 716, in commenting upon the subject, says:

"The bargain of necessity had reference to the thing to be acquired, and the consideration was in all probability regulated accordingly. When one undertakes to convey whatever right, title and interest he may have in land, this should not be enlarged upon, so as to require a transfer of the land itself."

In suits to compel the specific performance of contracts for the sale of land itself, it is the practice of courts of equity to inquire into the state of the title held by the party agreeing to convey, and, in case of the inability of such party to convey a good title to the entire estate, at the option of the purchaser, to refuse a decree of specific performance, or to compel an abatement of the purchase price to correspond with that interest which the seller may show himself able to convey. Hooper v. Smart, 18 L. R. Eq. 683; Leach v. Forney, 21 Iowa, 271, 89 Am. Dec. 574. Courts of equity, however, when called upon to command performance of contracts clearly providing in express terms for the transfer of an interest in real property, as contradistinguished from a sale of the property itself (as in the case at bar) will refuse to investigate the state of the title held by the party agreeing to sell, or to compel an abatement of the purchase price to correspond with such interest. Phipps v. Child, 3 Drewry, 709. In the light of the authorities it may be said, had Foley been in ignorance of the fact that Gaule owned but an undivided half interest in the land described, and had the contract provided for the sale of the land itself described therein, and the transfer of a good indefeasible estate thereto at the rate of $14 per acre, it is clear beyond doubt the court in such case, at the option of Foley, would have abated the purchase price one-half, and enforced performance of the contract as to the interest held by Gaule. But such

are not the facts in the case at bar. Here Foley knew the nature and exact extent of the interest held by Gaule in the property. For this reason it must be presumed it was not thought material to state in the contract the extent of the interest held. He contracted with reference to the purchase from Gaule of that interest alone, and agreed to pay therefor at the rate of $14 per acre.

It follows the decree must be modified to conform with the views herein expressed. It is so ordered.

HOOK, Circuit Judge (dissenting). I am unable to yield assent to the conclusions reached by my associates. It should be borne in mind that there was no controversy between Gaule and Foley over the extent of their respective interests. Had Gaule laid claim to the entire tract of land, or had his interest been indefinite and uncertain or the subject of unsettled controversy, there might be more reason for the construction now adopted, and the authorities cited in the foregoing opinion might be more pertinent. But such is not this case. Each one conceded that the other was the owner of an undivided half of the land. The proposition of Gaule may therefore be phrased in this way:

"I, Edward Gaule, hereby agree to sell and convey to James Foley my undivided half interest in 320 acres of land at the rate of $14 per acre."

The majority of the court hold that this means $14 per acre for each and every acre in which Gaule had an interest. In my opinion, the more reasonable construction is that it means "at the rate of $14 per entire acre" in title and quantity, and that Gaule's executor is entitled to but half of the total value of the land as so indicated. When one uses in a clause of admeasurement such words as "per acre," "per ton," "per pound," or "per dozen," he ordinarily means an entire unit of the quantity or number designated, and not a fractional interest therein; and, when he prefixes the phrase "at the rate of," such conclusion is strengthened. It seems to me quite clear that, when Gaule used the phrase "at the rate of $14 per acre," he intended an entire acre in respect of both quantity and title, and that the consideration for the sale was to be ascertained by a correlation of his partial interest with the designated value of the whole. The application of a stated price per unit to a definite and agreed fractional interest is of common occurrence in business affairs, and has an accepted signification. Suppose Gaule and Foley owned in equal shares 320 dozen of eggs, and Gaule had proposed to Foley in writing, "I will sell you my half interest in our eggs at the rate of 14 cents per dozen;" would it not appear that a construction that the price named was 14 cents for each and every dozen in which Gaule had an interest was too subtle and refined, and passed by the obvious meaning which lay on the surface? If one of two equal partners should propose to sell to the other all of his half interest in the firm property at the following rates: Cattle at $30 per head, land at $14 per acre, hay at $12 per ton, oats at 40 cents per bushel, and accounts at 80 per cent. of their face value—the more natural and reasonable construction would be that the prices specified related to the entire title, and that, if the proposition was accepted, the purchaser would not be required to pay the entire price for each head

of cattle, each acre of land, each ton of hay, each bushel of oats, and each outstanding account, "in which the vendor had an interest."

It is said in the foregoing opinion that the language employed in the contract is not that of technical learning or ambiguous meaning. One of the consequences of this holding would be that if, at the trial, Foley had offered testimony to show that the actual value of the entire title to the land did not exceed $14 per acre, it should have been excluded, as tending to vary or contradict a plain and unambiguous contract in writing. Cold Blast Transp. Co. v. Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696. What I believe to be the fallacy underlying the conclusions of my associates may perhaps be better disclosed by another illustration. Suppose Gaule and Foley were the equal owners of 320 registered 2 per cent. government bonds of the denomination of $100 each, and the written proposition of Gaule, accepted by Foley, was, "I will sell you my interest in our 320 government bonds at the rate of 104 per bond." The logic of the foregoing opinion would lead to the conclusion that Foley would have to pay $104 for each and every $100 bond in which Gaule had a half interest, which would be equivalent to $208 per bond for the entire title or ownership; and, although it might be said that it was common knowledge that bonds of that particular character had never attained such value, it would be replied that the contract was plain and unambiguous, and the parties thereto were competent to fix any value they chose upon their property.

The truth is the contract before us is ambiguous, and is susceptible of two possible constructions of unequal merit. I am of the opinion that the one adopted by the court below accords with the better reason, and that, even were it more balanced in doubt than I conceive it to be, it would be sustained by well-known rules of law Where the words of an instrument are doubtful, they are to be taken most strongly against the party employing them. Grace v. Insurance Company, 109 U. S. 382, 3 Sup. Ct. 207, 27 L. Ed. 932. Ambiguity in a written instrument must be interpreted most strongly against the person who prepared it. American Surety Company v. Pauly, 170 U. S. 144, 18 Sup. Ct. 552, 42 L. Ed. 977. Where the language of a contract is the vendor's it should be most strongly construed against him. J. J. Moore & Co. v. United States, 38 Ct. Cl. 590. Gaule is the vendor. The words of the writing before us are the words of Gaule, not those of Foley.

For these reasons I think that the judgment of the circuit court should be affirmed.

C. C. TAFT CO. v. CENTURY SAVINGS BANK et al.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1905.)

No. 2,100.

1. BANKRUPTCY—ADJUDICATION OF BANKRUPTCY—RECORD ON APPEAL.
The failure to incorporate any evidence in the record on an appeal from an adjudication of bankruptcy is not ground for dismissal, where it does not appear from the record that any evidence was taken.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. SAME—MODE OF REVIEW—APPEAL.
Under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], an adjudication of bankruptcy may be reviewed by appeal, although only questions of law are presented for review.

3. COURTS—FEDERAL COURTS—JURISDICTIONAL QUESTIONS.
It is the duty of the Circuit Court of Appeals to take notice of the want of jurisdiction of the court below, where it appears from the record on appeal, whether the question is raised by the parties or not.

4. BANKRUPTCY—INVOLUNTARY PETITION—JURISDICTIONAL ALLEGATIONS.
A petition in involuntary bankruptcy must allege that the defendant owes debts to the amount of $1,000 or over, to bring him within the class of debtors subject to the provisions of the act, as defined by Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat 547 [U. S. Comp. St. 1901, p. 3423]; and the omission of such allegation leaves the court without jurisdiction to make an adjudication.

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

Silas B. Allen and H. F. Dale, for appellant.

Charles A. Dudley and Nathan E. Coffin, for appellees.

E. Dean Fuller, for bankrupt.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a proceeding instituted by the Century Savings Bank, Todd & Kraft, and S. I. Ettinger, three creditors of N. Benjamin Cohen, to secure an adjudication of bankruptcy against him. Pursuant to the right conferred by section 18, subd. "b," of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), the C. C. Taft Company, a corporation, and creditor of the alleged bankrupt, duly appeared and pleaded to the petition. Subsequently there was a demurrer filed to the plea, exceptions to the demurrer, amendment of the plea, and final adjudication of the bankrupt. Within 10 days after the judgment of adjudication the C. C. Taft Company duly perfected its appeal to this court.

There is, first, for consideration a preliminary motion filed by the petitioning creditors to dismiss the appeal. They allege two grounds for their motion: First, that the cause was heard on its merits, and the record does not contain the evidence heard on the issues raised by the pleadings; second, that the question presented by the appeal is the revision in matter of law of the proceedings of the bankruptcy court, and therefore to be considered on petition to revise the proceedings pursuant to the provisions of section 24, subd. "b," of the bankruptcy

act (30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), rather than by appeal. The first ground of the motion involves a misconception of the record. The only entry determinative of what was done is as follows:

"At Des Moines, in said district, on the 10th day of June, A. D. 1904, before the undersigned, judge of said court in bankruptcy sitting, the petition of Todd & Kraft, and others, Des Moines, of the county of Polk and district aforesaid, that N. Benjamin Cohen be adjudged a bankrupt, within the true intent and meaning of the act of Congress relating to bankruptcy, being presented by Dudley & Coffin, attorneys for petitioners, and the same having been heard and duly considered, N. Benjamin Cohen is hereby declared and adjudged a bankrupt accordingly."

Then follows the order of reference to one of the referees in bankruptcy. From the foregoing record entry it appears that the judgment of adjudication went on a consideration of the petition either alone or as modified by the other pleadings. It is probable that with an answer on file a submission of the case on the petition, as this was stated to be, would necessarily imply a submission on the petition in the light of the answer on file with it; in other words, a submission on the pleadings. It is certain that the submission as made was either on the petition alone or on the pleadings in the case, for there is nothing found in the record indicating a submission on evidence adduced, or a submission on the issues joined. The failure, therefore, to incorporate evidence in the record, when there is nothing to show any evidence was taken, affords no ground for dismissing this appeal.

The second reason assigned for dismissing the appeal is also without merit. The judgment appealed from was the final judgment of adjudication. Explicit authority is found for the review of such a judgment by appeal in section 25a of the bankruptcy act, which reads as follows:

"That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, * * * in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt. * * * Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."

It is true the cases of Dodge v. Norlin, 133 Fed. 363, 66 C. C. A. 425, Plymouth Cordage Co. v. Smith, 194 U. S. 311, 24 Sup. Ct. 725, 48 L. Ed. 992, and In re Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434, afford authority for the proposition that the judgment appealed from might have been reviewed on a petition for revision pursuant to section 24b of the bankruptcy act, but all these cases clearly recognize that section 25a is also available to any party aggrieved by a judgment adjudging or refusing to adjudge one a bankrupt. It follows that the motion to dismiss the appeal is not well taken.

The assignment of errors presents many questions touching the regularity of the proceedings below, but the view we take of the jurisdictional question suggested in our order of January 13, 1905, requiring appellees to show cause why the adjudication of bankruptcy should not be reversed for want of jurisdiction in the court below, supersedes the necessity of considering them or any of the other questions raised by the

record. The fact that the parties failed to suggest want of jurisdiction to the court below, or to this court, is of no importance. It is the duty of this court, sua sponte, to take notice of want of jurisdiction if the same appears by the record. Chapman v. Barney, 129 U. S. 677, 681, 9 Sup. Ct. 426, 32 L. Ed. 800; Mattingly v. N. W. Virginia Railroad, 158 U. S. 53, 57, 15 Sup. Ct. 725, 39 L. Ed. 894; Yocum v. Parker, 130 Fed. 770, 66 C. C. A. 80, and cases cited.

An inspection of the petition discloses that there is no allegation showing the amount of the bankrupt's indebtedness. Section 4b of the bankruptcy act of 1898 (30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]), as amended by the act of February 5, 1903, (32 Stat. 797, c. 487, § 3 [U. S. Comp. St. Supp. 1905, p. 683]), reads as follows:

"Any natural person, except a wage-earner, or person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."

From this section it appears that all persons are not subject to the provisions of the bankruptcy act. Wage-earners, or persons engaged chiefly in farming or the tillage of the soil, or persons or corporations not owing debts to the amount of $1,000, are either expressly or by necessary implication excluded.

The District Court, as a court of bankruptcy, is undoubtedly a court of limited jurisdiction. Congress alone had power to determine the subjects over which it might exercise jurisdiction. As said by the Supreme Court in Johnson Company v. Wharton, 152 U. S. 252, 260, 14 Sup. Ct. 608, 38 L. Ed. 429:

"The distribution of the judicial power of the United States among the courts of the United States is a matter entirely within the control of the legislative branch of the government."

It is suggested that the bankruptcy court had jurisdiction over the alleged bankrupt in this case by due service of the subpœna upon him, and over the subject-matter by virtue of the bankruptcy act, which confers upon it plenary jurisdiction in bankruptcy proceedings. But this does not solve the question. It was said by the Supreme Court in Windsor v. McVeigh, 93 U. S. 274, 282, 23 L. Ed. 914, that:

"All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of actions. * * * Though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. * * * The judgments mentioned * * * (in the cases referred to for illustration) would not be merely erroneous. They would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases."

To the same effect are the following cases: Ex parte Lange, 18 Wall. 163, 176, 21 L. Ed. 872; Cornett v. Williams, 20 Wall. 226, 250, 22 L. Ed. 254. In the last-cited case it is said:

"The settled rule of law is that, jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud."

Applying the foregoing principles to the statute under consideration, it appears that Congress limited the jurisdiction of the District Court, as a court of bankruptcy, to cases in which the debtor owes at least $1,000. Cases in which the debtor owes less than that sum are not brought "within the power" of its jurisdiction, and debtors owing less than that sum are not subject to the provisions of the bankruptcy act. It has been held by the Circuit Court of Appeals for the Seventh Circuit that a petition in involuntary bankruptcy must show clearly that the debtor is not a wage-earner or engaged chiefly in farming or the tillage of the soil. In re Taylor, 102 Fed. 728, 42 C .C. A. 1. To the same effect is the decision of this court in Re Plymouth Cordage Company, 135 Fed. 1000, 68 C. C. A. 434, and the decision of the Circuit Court of Appeals of the Fifth Circuit in Beach v. Macon Grocery Company, 120 Fed. 736, 57 C. C. A. 150. We observe no difference in principle between the omission of an averment bringing the debtor without the exception as to wage-earners or persons engaged chiefly in farming or the tillage of the soil and the omission of an averment bringing the debtor within the class which owes debts to the amount of $1,000 or over. These provision are both, in our opinion, jurisdictional, and either of the omissions just mentioned shows that the debtor proceeded against is not within the class of persons subject to the provisions of the bankruptcy act, or subject to the jurisdiction of the court in bankruptcy. The petition in this case was therefore defective in not disclosing that the debtor owed at least $1,000, and for that reason it conferred no jurisdiction upon the court to subject Cohen, the debtor, to the provisions of the act. The decree must therefore be reversed, but, following the practice approved by this court in Re Plymouth Cordage Company, supra, the trial court is directed to permit the petitioning creditors, within a reasonable time, to amend their petition, if they desire, so as to show that the debtor owed at least $1,000, and to permit any other creditors to join with the petitioners, if they desire to do so. If it shall appear that the trial court has jurisdiction over the alleged bankrupt, the other important questions raised by the record, after having been duly considered and passed upon by a court with jurisdiction, may be properly reviewed, if occasion requires it.

The decree is reversed, and the cause remanded for further proceedings in harmony with this opinion.

CHARMBURY v. WALDEN.

(Circuit Court, D. New Jersey. October 2, 1905.)

1. PATENTS—ANTICIPATION—EVIDENCE.
Alleged anticipating patents introduced by a defendant in a suit for infringement are entitled to little consideration, unless there is expert or other evidence to show their relation to the patent in suit.

2. SAME—INFRINGEMENT—VAMP STAY FOR SHOES.
The Charmbury patent, No. 717,348, for a vamp stay for shoes, considered, and *held* not anticipated, valid, and infringed.

In Equity. Suit for infringement of letters patent No. 717,348, for a vamp stay for shoes, granted to John H. Charmbury December 30, 1902. On final hearing.

Russell M. Everett and Francis C. Lowthorp, for complainant.
William S. Beaman, for defendant.

CROSS, District Judge. The bill of complaint alleges infringement by the defendant of letters patent No. 717,348, dated December 30, 1902, issued to the complainant for a vamp stay for shoes. The inventor in the specifications describes this invention as follows:

"This invention relates to that class of stays for the vamps of shoes each stay of which is formed in a separate piece from the vamp, the said piece being folded on itself and the folded edge being arranged to project beyond the edge of the vamp so that the vamp stay will take the strain at the center of its folded edge, and thus prevent the vamp from tearing. Heretofore in the ordinary practice of recent years the stays, folded as above stated, have had a hard round edge, due to the folding, extend from end to end of the stay, and the vamp was of double thickness from end to end; and thus where it ended under the vamp materially increased the thickness or bulk of leather over the instep of the foot. Obviously this did not conduce to the comfort of the wearer. Because of the thickness of the vamp stay beneath the vamp, the shape of the former soon impressed itself in clear outline defined upon the outside of the vamp, and thus detracted from the sightly appearance of the shoe. Furthermore, the prior construction referred to was objectionable in the manufacture of the shoe, because in sewing the usual line of stitching along the upper edge of the vamp, when the needle struck the hard, thick, and round (in cross-section) edge due to doubling, the needle glancing off said edge frequently threw the stay out of proper place beneath the vamp preliminary to sewing, and this also detracted from the appearance of the finished shoe. This same objectionable result was oftentimes effected by the pressure foot of the machine sticking, indirectly, the thick double edge beneath the vamp, and thus shifting it from its true and proper place. Again, in the construction heretofore common, the edges of the stay, back from the curved folded edge were 'full,' the fullness being due to the stretching of the leather at the folded edge more than the parts back from said edges, to secure a desired curvature of the folded edge in plan; and thus, when the stay thus constructed was sewed in the shoe, the stretched and curved edge projecting from the vamp and the line of stitching passing through the full parts near the center of the stay, the tension of the vamp, due to the pressure of the foot therein, came upon the thread, rather than upon the stretched part, having tensile resistance due to the prior stretching, thus breaking the thread. These objections are avoided or greatly reduced because of my improved construction hereinafter described. It will be understood from the foregoing that the objects of the invention are to reduce the bulk and discomfort incident to the use of independent vamp-stays, and yet retain the strength thereby secured in the shoe; to secure greater neatness of appearance when the upper and vamp are joined; to prevent

the needle from glancing off the vamp stay when sewing the same in place, and thereby tending to shift or displace the stay, and injure the appearance of the sewing; to reduce the tendency of the thread in the line of sewing at the vamp stay to break because of the fullness in the stays as heretofore commonly furnished; and to secure other advantages and results, some of which may be referred to hereinafter more fully."

The patent has two claims, viz:

"(1) The improved vamp stay herein described, comprising a body portion, a, and a tongue, b, lying at one side of said body portion, and narrower than said body portion, said narrow tongue being turned against the back of said body portion, a folded edge being formed near the forward central part of the stay, and the lateral edges of the tongue lying in from the lateral edges of the said body portion, the said folded edge being turned forward to form a rib or boss, h, substantially as set forth."

"(2) The improved vamp stay herein described, comprising a body portion, a, having at the center of the forward edge a tongue narrower than said forward edge, and turned back against the body portion; the edges at the opposite sides of said tongue lying in from the side edges of the body portion, substantially as set forth."

The answer of the defendant admits the making of vamp stays, "which are not substantially different from the article set forth in the claims of said letters patent." The defense set up is want of novelty and invention, in the subject-matter of complainant's patent, and its consequent invalidity. As stated, the answer practically admits infringement, but whether so or not, the evidence clearly shows that the defendant, since the date of the complainant's patent, and prior to the commencement of this suit, has made and sold an article clearly within the protection of such patent, if the same is valid. The article patented is exceedingly simple in itself, and of simple construction, but conceding this, it nevertheless shows in our opinion, invention and novelty. The defendant has been interested in the manufacture of shoes and vamp stays for many years. The stays first used by him were made of a narrow strip of folded leather or other suitable material of the proper length.

Similar stays to these could be made from an article patented by one Stone, and called by him "an improved piping for boots and shoes." This piping was usually made in long strips of folded leather, which when used for stays, was cut in pieces of the desired length. Stays thus made in no wise, however, foreshadowed or suggested the complainant's construction, and clearly manifested the objectional features, which are set out in the specifications of the complainant's patent. The defendant used this kind of vamp stay for some time, but later, and for several years, made and used vamp stays, cut out by a die, known in the case as the "Osborn Die." These vamp stays were also unlike those manufactured under complainant's patent, and quite clearly resembled those made from the piping above referred to. The "Osborn Die," as the testimony shows, cut out a blank of thin leather which was folded longitudinally, then pasted together, and so held until stitched to the vamp. Mary C. Breen, a former employé of the defendant, says that they were curved on the folded edge; but to do this required considerable careful manipulation, and to some extent crimpled or puckered one of the flaps of the vamp stay.

It was clearly impossible to fold the blank made by this die so as to make a vamp stay with a curved edge, and stepped or graduated sides without crimping the leather or material in the middle. This construction did not suggest the tongue or narrowed portion of the stay, which is the important feature of the complainant's patent; and it was likewise open to some of the serious objections which the complainant's patent avoids.

The defendant entirely abandoned the use of this stay in 1897, and, thereupon, began to make what is known in the case as the "Walden Vamp Stay No. 1;" this was manufactured under design patent No. 27,961, dated December 7, 1897, issued to the defendant for a design for a vamp stay for shoes. This design shows no tongue or any equivalent, and as testified by the complainant's expert witness, the drawings accompanying the patent disclose a construction made of two pieces, one part being superimposed upon the other. Whether this be so or not, it appears from other evidence that the defendant always made this stay of one piece, by forcing the leather blank into a die, whereby the front and sides of the blank were turned under and inward towards the center. This vamp is of considerable thickness, and is stiff and hard, as the result of the doubling-in process of the front and sides. That these objections were real, is clearly shown by the evidence from which it appears that complaints of its thickness were more or less frequently made by customers, and that to obviate the defects complained of, the rear part of the vamp stay was skived or pared to make the stay thinner and more pliable. This process involved additional labor and expense, in an attempt to accomplish what the complainant's invention achieves, by means of its tongued or narrowed portion, which, when folded back upon itself, makes a stepped or graduated side to the stay. The complainant later manufactured a single-piece vamp stay with an unfolded edge. The stay with the unfolded or raw edge had manifest disadvantages, both in appearance and durability, and is not altogether unlike the complainant's stay, but was obviously unsuited for the purpose intended; its raw edge made it comparatively weak and unsightly, and it is manifest that it was adapted for use only in a cheap grade of shoes. Later the defendant began to make and sell stays like the complainant's. From what has already been said, it will be observed that the defendant, after using various constructions of a different character from the complainant's, was finally compelled, for no other reason apparently than to sustain himself in trade competition, to adopt the complainant's construction.

In addition to the Stone patent, above referred to, the defendant has cited several other patents as anticipations of the complainant's patent. These will be briefly considered.

First, then, we have a patent issued to Charles C. Geller, for improvements in shoes, No. 116,828, dated June 11, 1871. This patent it may be said at the outset, was not for a vamp stay, but for a vamp; the vamp having as a part of it, a tongue in the center "which, when the shoe is fitted, is turned under so as to form the same out-

line as the vamp commonly used." Of this construction, complainant's expert testifies as follows:

"I have also examined and understand 'defendant's Exhibit Geller Patent,' and fail to discover the subject of the Charmbury invention as claimed in this patent. The Geller patent in Fig. 1 shows the vamp having an integral vamp stay at the top. The vamp stay, however, has no tongue, and presents no indication whatever of a tongue and the advantages due thereto. Such a construction has material disadvantages in actual practice for obvious reasons; it projects from the upper edge of a vamp in such a manner as would naturally involve a wasteful expenditure of leather in cutting out the vamp. Should such a stay be folded beneath the vamp in cases where the vamp is perforated for ornamentation, the unblackened under side of the leather would show through the perforation, and detract from the appearance of the shoe. However, this patent does not disclose the invention at issue, and further consideration, I presume, is not called for."

For these reasons, and because the patent is for a vamp, and not for a vamp stay, we deem its further consideration unnecessary.

Another patent cited, was for an improvement in overalls, issued to Jacob Greenbaum August 25, 1874, and known as No. 154,473. This patent does not seem to require any serious consideration in this connection; it was simply for a stay or gusset to the pockets of overalls, and would seem to have been known and used for that purpose from time immemorial. A piece of cloth or flexible material of any size, shape, or thickness, either folded or unfolded, would answer all its requirements.

Two other patents cited were issued to the defendant, one for design patent No. 26,399, dated December 15, 1896, another dated May 4, 1897, No. 581,927; the former being a "design for a welt for shoes," and the latter "a new and useful improvement in shoes." Neither of these patents was designed or intended for the purpose under consideration, nor were they ever so used by the defendant, but if the fact were otherwise, they clearly do not, in our opinion, anticipate the complainant's patent; a further and detailed consideration of them therefore seems unnecessary.

But one other patent cited, No. 608,734, remains for our consideration; this also was issued to the defendant, bears date August 9, 1898, and is for a "vamp stay for shoes." This stay is made from material folded like the piping or edging above referred to, except that, after being folded, it is curved edgewise; that is the piping is bent or formed into (to use the language of the specifications) a "sinuous undulating shape," and the strip so shaped is thereupon cut into separate vamp stays, the cut being made on a longitudinal line through the center of the strip; each curve above and below such line constituting an individual stay. It does not appear that this article was ever made or used by the defendant, and it certainly seems to be open to all of the objections which are urged against the other patents cited, and furthermore, it does not disclose, any more than the stays made from the straight piping did, the peculiar and distinguishing features of the complainant's stay. These are all the matters which have been disclosed in this case, as affecting or showing the prior art.

The defendant then is placed in this position, having several patents

of his own for making vamp stays, he has discarded them all, and adopted the complainant's. As already suggested, we think the advantages disclosed by the complainant in his specifications, are not imaginary but real, and the defendant's conduct tends to prove that they are. The complainant's stay re-enforces the vamp; it does it neatly and with the least possible obstruction between the vamp and the foot of the wearer of the shoe; the outer surface of the vamp is not made uneven or unsightly by its insertion, and it can be more readily and securely stitched to the vamp than any of the others; that is to say, there is less danger of its displacement by the needle or presser foot of the machine, and less danger of breaking or bending the needle when it takes the added obstruction caused by the insertion of the stay, than is the case with the others; these results are all produced by the tongue or narrow portion of the stay, which constitutes the material part of the complainant's invention. Nothing approximating this idea is disclosed in any of the cases considered, or by the evidence in the cause.

The defendant is an admitted infringer. The complainant's patent implies novelty and invention; the burden of proof to establish prior use and want of novelty is upon the defendant. Cantrell v. Wallick, 117 U. S. 689, 695, 6 Sup. Ct. 970, 29 L. Ed. 1017. Not only is the burden of proof upon the party setting up the defense; but it has likewise been held that every reasonable doubt should be resolved against him, 117 U. S. 696, 6 Sup. Ct. 970, 29 L. Ed. 1017. It is unnecessary to cite additional cases to show the law in the above respect. Notwithstanding the burden of proof resting upon the defendant, he has not attempted by expert evidence or otherwise, to show the relation of the alleged anticipating patents to the patent in suit. Under such circumstances, the courts do not, as a rule, pay much attention to such patents. Putnam et al. v. Von Hofe (C. C.) 6 Fed. 897, 902; Miller et al. v. Smith et al. (C. C.) 5 Fed. 359, 363.

We do not find any evidence in the case to overthrow the prima facie evidence of the validity of the patent, since every other patent cited shows either a single piece of leather unfinished and without any double edge; or if folded, fails to show a tongue or narrow portion folded back producing graduated or stepped sides to the stay. Moreover the defendant's unsuccessful efforts to produce a vamp stay which possessed the advantages of the complainant's, show conclusively that the complainant's construction constitutes real invention; had it been apparent the defendant, a manufacturer and user of vamp stays for many years, would, by virtue of his necessities, have realized it, or something approximating it, long ago. He certainly is in no position either to belittle the complainant's invention, or assert its lack of novelty. It is a simple device, but it answers the purpose for which it was designed, far better than any other, and we think discloses novelty and invention.

A decree in accordance with these views will be signed.

PALMER v. WILCOX MFG. CO.

(Circuit Court, S. D. New York. December 6, 1905.)

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
The fact alone that a patent is unadjudicated will not defeat the right to a preliminary injunction against its infringement; but unless it also appears from common knowledge, or from the prior art shown, that there is reasonable ground for doubt as to its validity, the presumption arising from its issuance by the Patent Office is sufficient to warrant injunctive relief against an infringer.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 474.]

2. SAME—BOLT ANCHOR.
The Newton patent, No. 725,278, for a bolt anchor, *held* valid and infringed on a motion for a preliminary injunction.

In Equity. On suit for infringement of letters patent No. 725,278, for a bolt anchor, granted to S. S. Newton April 14, 1903. On motion for preliminary injunction.

Harold Binney, for complainant.
Mr. Adams, for defendant.

LACOMBE, Circuit Judge. The patent is only 2½ years old, and has not been adjudicated. That circumstance alone, however, is not enough to overcome the presumption of validity arising from issue by the Patent Office. It must also appear that from common knowledge, or by reason of some display of the prior art, there is reasonable ground for doubting the existence of patentable novelty. Fuller v. Gilmore (C. C.) 121 Fed. 129; Lambert v. Vibrator Co. (C. C.) 138 Fed. 82.

In addition to the device first described, the patentee on page 2, lines 27 to 68 of the specification, sets forth a modified form of his bolt anchor. It is so arranged that the interior corrugations are interrupted, and interrupted in such a manner that at intervals two or more of the corrugations engage with the threads of the screw; the threads being left free in the spaces between. And these intervals of engaging corrugations are so spaced that screws having threads of different pitch may be used with the same anchor bolt. This is possible, because all screws are made with a definite number of threads to the inch. In none of the prior patents is there the slightest indication of any such interior arrangement accomplishing such a result. In the patent which is relied upon as the best reference (Loffehardt, 665,536) the dowel pins, which may be considered to be the equivalents of interior corrugations, are shown as engaging each alternate thread, and it is apparent that they are not adapted for use with screws of varying pitch. If Loffehardt's dowels were located at intervals of an inch apart, a different question would be presented. The suggestion of a mode of insuring general adaptability would have been made, and Newton's device with greater engaging surface might be considered a mere improvement to be narrowly construed. But upon the showing of the art here presented Newton's device is entirely novel, it certainly is useful, and so far as appears exhibits patentable invention. The eighth claim fully and clearly covers this "modified form" of bolt anchor.

So far as interior corrugations are concerned, defendant's bolt anchor is a Chinese copy of the device shown in the patent. The argument that by using the words "spirally corrugated" the patentee restricted himself to an anchor bolt in which there are exterior spiral corrugations corresponding to the interior corrugations, is unpersuasive. The intent and meaning of the claim is made clear by the last clause of the sentence, in which the patentee indicates that the corrugated portions or parts which he claims are those which "engage with the threads of bolts having a different number of threads to the inch," and therefore are the interior corrugations.

Upon giving a bond in the amount of $1,000, conditioned that in the event of defendant's success at final hearing complainant will pay all damages resulting from the operation of preliminary injunction, complainant may have such injunction as prayed. The injunction, however, will be suspended for 30 days to give defendant opportunity to review this decision. The record is so brief that appeal can be perfected and record printed within ten days; and, since the rules give preference to such an appeal, it can be heard at December session of the court of appeals

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JULES & HUGO ROSENBERG v. UNITED STATES.

(Circuit Court, S. D. New York. May 18, 1905.)

No. 3,740.

CUSTOMS DUTIES—CLASSIFICATION—METAL THREAD ARTICLES—FABRICS IN THE PIECE.

The principle of ejusdem generis does not operate to exclude metal thread fabrics in the piece from the provision in paragraph 179, Schedule C, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1644], for "articles made wholly or in chief value of * * * metal threads," following the enumeration of metal thread laces, embroideries, trimmings and narrow fabrics of various descriptions.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision in question, in which the Board affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Jules & Hugo Rosenberg, reads as follows:

FISCHER, General Appraiser. The merchandise in question consists of laces, braids, ribbons, trimmings, galloons, fringes, and woven fabrics in the piece, such as cloth or netting, all made wholly or in chief value of metal thread. Duty was assessed thereon at the rate of 60 per cent. ad valorem under the provisions of paragraph 179, Schedule C, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1644], which reads in part as follows: "Laces, embroideries, braids, galloons, trimmings, or other articles, made wholly or in chief value of tinsel wire, lame, or lahn, bullions or metal threads, sixty per centum ad valorem."

The importers do not dispute that metal thread is the component material of chief value in the articles, and they confine their claim to the goods in the piece; their proposition being that such goods are not ejusdem generis with the other articles mentioned in said paragraph, and that they are properly dutiable at 45 per cent. under paragraph 193, Schedule C, § 1, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], or at 45 per cent. under paragraph 322,

Schedule I, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], or paragraph 347, Schedule J, 30 Stat. 182 [U. S. Comp. St. 1901, p. 1664], of said act.

We are of the opinion that the contention of the importers is not well founded. It would be an unreasonable straining of the doctrine relied upon to hold that metal thread goods in the piece are not ejusdem generis with the articles denominatively provided for in paragraph 179. They are of the same material and composition, are intended for the same ultimate use, and are not elsewhere specifically provided for. That the word "articles" is broad enough to cover piece goods is no longer open to question. See Junge v. Hedden, 146 U. S. 233, 13 Sup. Ct. 88, 36 L. Ed. 953, and Arthur v. Butterfield, 125 U. S. 70, 8 Sup. Ct. 714, 31 L. Ed. 643. Note, also, G. A. 4,734, T. D. 22,381.

The protests are overruled, and the decision of the collector affirmed, in each case.

Walden & Webster (Henry J. Webster, of counsel), for importers.
Charles Duane Baker, Asst. U. S. Atty.

TOWNSEND, Circuit Judge (orally). The merchandise in question consists of certain fabrics, assessed for duty under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 179, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1644], for "articles made wholly or in chief value of * * * metal threads." The importers protested, claiming that the merchandise should have been classified as manufactures of metal, under paragraph 193 (30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]) of said act.

Decision affirmed, on the opinion of the Board of Appraisers.

G. HIRSCH'S SONS v. UNITED STATES.

(Circuit Court, S. D. New York. May 19, 1905.)

No. 3,725.

CUSTOMS DUTIES—CLASSIFICATION—STRUNG GELATIN SPANGLES.

Gelatin spangles strung on cord, and used in making trimmings or ornaments for wearing apparel, are ejusdem generis with the articles enumerated in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], providing for "ornaments, trimmings and other articles" composed of gelatin spangles, and are dutiable under that provision, rather than under paragraph 450 (30 Stat. 193 [U. S. Comp. St. 1901, p. 1678]) relating to "manufactures of * * * gelatin."

On Application for Review of Decisions of the Board of United States General Appraisers.

The decisions in question affirmed the assessment of duty by the collector of customs at the port of New York. Note G. A. 5,818, T. D. 25,695, and Louis Metzger & Co. v. U. S. (C. C.) 141 Fed. 381.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.
Charles Duane Baker, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question consists of spangles made of gelatin, strung on cord, and used in making

trimmings or ornaments for wearing apparel. They were assessed for duty under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], at 60 per cent. ad valorem, as "ornaments, trimmings, and other articles, not specially provided for in this act, composed wholly or in part of spangles made of * * * gelatin." The importer has protested, claiming that they are dutiable, under the provisions of paragraph 450 of said act (30 Stat. 193 [U. S. Comp. St. 1901, p. 1678]), as manufactures of gelatin not specially provided for.

The testimony shows that the spangles as imported in their strung condition are adapted to be used, and are actually used, as ornaments and for trimmings. They are thus distinguished from the articles considered in Steinhardt v. U. S. (C. C.) 113 Fed. 996, where beads were merely temporarily strung upon a cotton thread. In these circumstances the spangles must be held to be ejusdem generis with the other articles specifically enumerated in paragraph 408.

The decision of the Board of General Appraisers is affirmed

LOUIS METZGER & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. June 1, 1905.)

No. 3,704.

1. CUSTOMS DUTIES—CLASSIFICATION—SPANGLED HAT CROWNS—ARTICLES OF GELATIN.

   Spangled hat crowns are in a general way of the same character as the class of materials considered under the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], for fabrics, wearing apparel, trimmings, etc., including "other articles * * * composed wholly or in part" of gelatin spangles, and are dutiable under said provision for "articles," rather than under paragraph 450 (30 Stat. 193 [U. S. Comp. St. 1901, p. 1678]), as manufactures of gelatin.

2. SAME—ARTICLES COMPOSED OF GELATIN SPANGLES—MANUFACTURES OF GELATIN—SPECIFIC DESIGNATION.

   Tariff Act July 24, 1897, c. 11, § 1, Schedule N. par. 408, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], relating to "articles * * * composed wholly or in part of * * * spangles * * * made of gelatin," is more specific than paragraph 450 (30 Stat 193 [U. S. Comp. St. 1901, p. 1678]), relating to manufactures of gelatin.

On application for Review of a Decision of the Board of United States General Appraisers.

For decision below see G. A. 5,788, T. D. 25,578, which affirmed the assessment of duty by the collector of customs at the port of New York.

Frederick W. Brooks, for importers.
Charles Duane Baker, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question differs from that considered and disposed of at this session of the court in Hirsch v. United States (C. C.) 141 Fed. 380, only in the fact

that while the articles there under consideration were adapted to be used, and evidently were used, as ornaments and for trimmings, the merchandise herein consists, so far as this appeal is concerned, of what are known as "spangled crowns," which constitute crowns for hats. It is therefore argued that they are not ejusdem generis with "fabrics, laces, embroidery, wearing apparel, ornaments, trimmings," etc., under said paragraph 408. Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]. They are, however, in any event, "articles composed wholly or in part of * * * spangles * * * made of gelatin, not specially provided for."

These articles are in a general way of the same character as the class of materials considered under paragraph 408, and, as the designation is more specific than the general catch-all provision in paragraph 450 (30 Stat. 193 [U. S. Comp. St. 1901, p. 1678]) for manufactures of gelatin, the decision of the Board of General Appraisers should be affirmed.

SILVERMAN v. PENNSYLVANIA R. CO.

(Circuit Court, S. D. New York. November 11, 1905.)

ATTORNEY AND CLIENT—SUBSTITUTION OF ATTORNEYS—CONDITIONS OF ALLOWANCE.

A party has an absolute right to change his attorney at any time, and while the court may, in its discretion, compel him to pay for services rendered as a condition of substitution, it will not do so where the case was taken on a contract for a contingent fee which is of doubtful validity, but will order the substitution and leave the attorney to his remedy by suit.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 113, 114.

Compensation of attorney on premature termination of employment, see note to 69 C. C. A. 113.]

On Motion by Plaintiff for an Order Substituting Attorneys.

Morris Kamber, for the motion.

House, Grossman & Vorhaus (Leo R. Brilles, of counsel), opposed.

HOLT, Circuit Judge. A party has an absolute right to change his attorney at any time. It is discretionary with the court whether it should compel him to pay for services already rendered, especially in a case taken upon a contingent fee, or whether a substitution should be ordered, leaving the attorney to sue for his fee. Du Bois v. Mayor (C. C. A.) 134 Fed. 570. In this case the attorney made a written contract with the plaintiff to conduct this suit upon a contingent fee; "all disbursements to be advanced by" the attorney. In my opinion, by the law of New York, this contract was void for champerty. Coughlin v. N. Y., C. & H. R. R. Co., 71 N. Y. 443, 27 Am. Rep. 75; Stedwell v. Hartmann, 74 App. Div. 126, 77 N. Y. Supp. 498. And see Matter of Fitzsimons, 174 N. Y. 23, 66 N. E. 554; Jeffries v. Mutual Life Ins. Co., 110 U. S. 305, 4 Sup. Ct. 8, 28 L. Ed. 156. The contract was made in

Philadelphia, and it may be that it was valid by the law of Pennsylvania. But in my opinion the validity of the contract is so doubtful that this court should not order any money to be paid as a condition of substitution, but should leave the attorney to his suit.

The commissioner's report is not confirmed, and an order of substitution is granted.

MORIMURA BROS. v. UNITED STATES.

CHINA & JAPAN TRADING CO. v. SAME.

(Circuit Court, S. D. New York. December 13, 1904.)

Nos. 3,547, 3,548.

CUSTOMS DUTIES—CLASSIFICATION—STUFFED BIRDS—TOYS.

In regard to stuffed skins of domestic chicks and ducklings, used by confectioners and dealers in Easter goods and novelties, held, that they are not "toys" within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674], but "birds, stuffed," under paragraph 493, § 2, Free List, 30 Stat. 196 [U. S. Comp. St. 1901, p. 1681].

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision under review, see G. A. 5,655, T. D. 25,234, which affirmed the assessment of duty by the collector of customs at the port of New York on importations by Morimura Bros., and the China & Japan Trading Company.

The articles comprised in these importations consisted of the stuffed skins of chicks and ducklings, the young of domestic fowl, which had been killed at the age of about two weeks; the skins being stuffed with cotton and wired to preserve their shape. The board found that these articles were "sold to confectioners and to people who trade in Easter goods and novelties, to be used in trimming candy boxes and branches of trees," and held that they had been properly classified as "toys" under paragraph 418, Schedule N, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674]. The contention of the importers that they should have been classified free of duty as "birds, stuffed, not suitable for millinery ornaments," under paragraph 493, § 2, Free List, 30 Stat. 196 [U. S. Comp. St. 1901, p. 1681], was overruled on the theory that "Congress only intended that there should be admitted free of duty, under said paragraph 493, birds which are prepared by a taxidermist either as specimens of natural history or for ornamental purposes, other than such as are suitable for millinery ornaments."

William B. Coughtry, for importers.
Charles D. Baker, Asst. U. S. Atty.

PLATT, District Judge. The decision of the Board of General Appraisers is reversed.

THE KENTONIA.

(District Court, D. New Jersey. October 17, 1905.)

COLLISION—WRECKING OF MOORED YACHT IN STORM—INEVITABLE ACCIDENT.

A yacht moored to a spile in the mooring grounds of a yacht club, which was driven on shore and wrecked in a storm, *held*, under the evidence, not to have been caused to break loose by being fouled by another yacht, which dragged her anchors and was driven ashore, but that the injury to both was due to the extreme severity of the storm, and must be attributed to inevitable accident.

In Admiralty. Suit for injury to vessel.

George R. Beach, for libelant.

James F. Minturn, for respondent.

LANNING, District Judge. This cause comes before the court upon a libel and cross-libel. It appears that on September 16, 1903, the libelant's yacht Naomi was moored to a spile on the mooring grounds of the Pavonia Yacht Club in New York Bay, and that the Kentonia was anchored on the same grounds a short distance from the Naomi. Toward noon of September 16th there arose a storm so fierce that about a dozen vessels anchored and moored in the vicinity of the Naomi and the Kentonia were driven to and wrecked on the shore. Seven vessels belonging to members of the Pavonia Yacht Club, including the Naomi and Kentonia, were among the number. The libelant insists that the Kentonia dragged her anchors and fouled the Naomi, causing the Naomi to break from her mooring and to drift, with the Kentonia pounding her, until the Naomi struck the shore and sunk. The evidence does not satisfy me that the Kentonia struck the Naomi while the Naomi was moored to her spile. No witness saw the vessels in contact with each other until after the Naomi had drifted some distance from the place where she had been moored. As above stated, other vessels in the same storm broke from their moorings. It is as reasonable to infer that the Naomi was forced from her mooring by the severity of the storm as by the pounding of the Kentonia. Furthermore, the evidence shows quite satisfactorily that reasonable provision was made to secure the Kentonia at the place where she was regularly anchored. Just before the storm struck the Kentonia, it appears that an additional 250 pound anchor was thrown out from her. The testimony shows that the two anchors which she then had were amply sufficient to hold her in any ordinary storm, and even in most extraordinary storms.

I can find no rule of admiralty law that would justify me in holding the Kentonia liable for damage to the Naomi in the circumstances of this case. The witnesses on both sides agree that the storm was cyclonic in its nature, and several of them declare they had never known so severe a one.

My conclusion is that the damages sustained by the Naomi and the Kentonia should be regarded as the result of inevitable accident, and that both the libel and the cross-libel should be dismissed.

HOUSEMAN v. PHILADELPHIA TRANSPORTATION & LIGHTERAGE CO.

(Circuit Court, E. D. Pennsylvania. December 9, 1905.)

No. 26.

MASTER AND SERVANT—LIABILITY OF MASTER FOR SERVANT'S NEGLIGENCE.

A defendant cannot be held liable for a personal injury resulting from the negligence of an engineer, who, while in the general employ of defendant, was at the time of the injury in the special service of a third person, to whom he was hired by defendant, and was doing the work in which the negligence occurred under the orders of such third person.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1213.]

At Law. On motion for new trial.

Willard M. Harris, for plaintiff.

Thomas Leaming, for defendant.

J. B. McPHERSON, District Judge. When A., who is the general master of a servant, paying his wages and possessing the right of discharge, hires him for a special purpose to B., who has the right to direct the manner in which that purpose shall be accomplished, the question has often arisen whether A. or B. is responsible for the servant's negligence in the performance of the special work which B. has set him to do. Upon this question the authorities are not harmonious, and it would be of little use to discuss them again. Many of the cases have been referred to in the briefs of counsel, and I have given them due consideration. Upon the facts now before the court my conclusion is, that, as the engineer—who was employed and paid by the defendant company—was at the time of the injury to the plaintiff's husband in the special service of Frazer, who had the right to direct him how the poles should be unloaded from the lighter, and who had actually exercised that right by giving an order that they should be swung over to a wagon, instead of being unloaded on the edge of the wharf, and as the injury was done while this order was being executed, the defendant company cannot properly be held liable for the asserted negligence of the engineer while thus obeying the instructions of his immediate master.

Believing, therefore, that the jury were correctly instructed to find for the defendant, I feel obliged to refuse the motion for a new trial.

UNITED STATES v. LUCE et al.

(Circuit Court, D. Delaware. September 26, 1905.)

No. 155.

1. NUISANCE—INJURY TO GOVERNMENT QUARANTINE STATION—RIGHT OF GOVERNMENT TO COMPLAIN.

The quarantine station on Delaware Bay between Lewes and Cape Henlopen has been established and maintained by the United States for the accomplishment of beneficent ends in which the public is vitally con-

cerned; and it is a matter of great importance that neither efficiency in the administration of the station nor its usefulness in other respects should be impaired. The United States is represented at the quarantine station in the persons of its officers, agents, and servants having charge and occupancy thereof. Immigrants and other persons there detained in quarantine or confined in the marine hospital are so detained or confined by authority of the United States in the maintenance of a system intended and calculated to serve at once as an aid to commerce and protection against the invasion of the country by contagious and infectious diseases. The United States owning and holding the property for the accomplishment of these benign purposes has a right to insist that neither the efficiency of the management of the station nor its usefulness in other respects shall be sacrificed or impaired by nuisances wrongfully created or continued, and it is entitled to secure relief from such nuisances when materially and injuriously affecting the health or comfort of those in charge of or employed at the station or of those detained or confined there and to both classes of persons the government owes protection against such wrongs and the courts should not hesitate to accord it.

2. SAME—EVIDENCE.

The fish fertilizer factory of the defendants and that erected by S. S. Brown & Company are distant from the quarantine station from five eighths to three quarters of a mile, located on the shore of Delaware Bay, and so situated in relation to each other that when the wind is in such direction as to carry to the quarantine station odors from the defendants' factory it will also carry to the station odors from the other factory. The period of their operation extends approximately from July 1 to the first or middle of November, and during this period the prevailing winds are in such direction as to carry the odors from the factories to the station.

3. SAME—OFFENSIVE ODORS—EFFECT.

The evidence is full, clear and convincing that the inmates of the quarantine station are materially annoyed and discomforted by offensive, noisome and nauseating odors originating at or in the immediate vicinity of the fish factories and caused by their operation, and that such annoyance and discomfort, while not uninterrupted, occur so frequently as to interfere to an unreasonable and unjustifiable degree with the common enjoyment of life and to constitute a nuisance which should be restrained by injunction if the government be in a position to complain of it.

4. SAME—ELEMENTS—INJURY TO HEALTH.

It is not essential to the existence of a nuisance from offensive odors that they should be calculated to break down or injure health or that health should be impaired or even threatened by them. It is sufficient that they be nauseating or physically discomforting or annoying to persons of ordinary sensibilities, "interfering with the ordinary comfort physically of human existence, not merely according to elegant and dainty modes and habits of living, but according to plain and sober and simple notions among the English people." The sound condition of those employed in the fish factories and habituated to the smells necessarily generated in their operation is not determinative of this case. It is well known that persons can become accustomed to foul and noisome odors and retain their health.

5. SAME—EFFECT OF ODORS.

It by no means follows from the fact that the odors from the fish factories may not be nauseating or discomforting and annoying to those employed there, or to others inured to noisome smells, that they do not constitute a nuisance to the inmates of the quarantine station and marine hospital. It is important in this connection to bear in mind that the accomplishment of the purposes for which the station and hospital were established involves not only the presence there of the officers and employés in charge but the detention and confinement of many who have never been subjected to such a tainted atmosphere.

6. SAME—FREQUENCY OF ANNOYANCE.

The frequency with which during the period from July 1 to the early part or middle of November in each year the quarantine station is visited with the noisome smells is sufficient to constitute a nuisance there.

7. SAME—RIGHT TO OBJECT.

The doctrine that owners and occupants of houses and lands are entitled to the enjoyment of air of reasonable purity, though of general, not being of universal application, there is sometimes difficulty in applying it to a given case. Considerations affecting the social state require in some instances concessions or compromises, to a greater or less extent, of what would otherwise be regarded as of strict right.

8. SAME—MANUFACTURING NEIGHBORHOOD.

But the existence of the two factories in question does not constitute such an industrial or manufacturing neighborhood that the government is compelled to submit to the stench emanating from them. It cannot be compared to the growth and territorial expansion of the industries of a city.

9. SAME—REASONABLE USE OF PROPERTY.

The principal question after all is whether the defendants, in view of their obligation to others, are making a reasonable use of the premises occupied by them. Are they duly observing the precept, Sic utere tuo ut alienum non lædas? On the evidence and the authorities clearly they are not.

10. SAME—RIGHT TO MAINTAIN NUISANCE.

It is well settled that the mere fact that one voluntarily "comes to a nuisance" will not preclude him from complaining of and relief against it. A contrary doctrine would be so unreasonable and oppressive as to work its own condemnation. Where one operates a factory emitting foul or noisome smells and owns and controls all the land within the area traversed by them in sufficient strength to be nauseating or substantially discomforting, no one has just cause to complain. But to foist impure and disgusting odors upon others in their homes, is a different matter, and, save in localities generally devoted to a business of a character to produce such or equally offensive smells, or unless by virtue of grant, license, estoppel or prescription, is not to be tolerated.

11. SAME—INVESTMENT OF MONEY.

The fact that defendants have invested a considerable amount of money cannot clothe them with immunity for creating or contributing to and maintaining a nuisance.

12. INJUNCTION—PROPRIETY OF GRANTING—BALANCE OF CONVENIENCE.

The doctrine of the balance of convenience or injury which so frequently is determinative of the propriety of granting or denying a preliminary injunction has no application to decrees after a hearing on plenary proofs taken in due course.

13. NUISANCE—SEPARATE ACTS OF SEVERAL PERSONS—INJUNCTION.

The fish fertilizer factory of the defendants and that erected by S. S. Brown & Company on the Delaware Bay are so situated with respect to each other that when the wind is in such direction as to carry the odors from one of them to the quarantine station it will carry the odors from the other there, and the odors from one cannot be distinguished from the odors from the other. There is no evidence of co-operation, privity or business relationship of any kind between the defendants and S. S. Brown & Company in the erection and operation of their respective factories, or between the defendants and the succeeding owners or managers, if such there be, of the factory erected by S. S. Brown & Company; nor is there any evidence to the point that the odors from either of the factories alone would or would not so contaminate the air at the quarantine station as to create a nuisance there within the definition of the authorities. But the combined odors from both factories unquestionably have that effect, and in producing it the two establishments in fact

co-operate in and contribute to the creation of the nuisance. Under these circumstances, in the absence of a plain, adequate and complete remedy at law, the owners or managers of both or either of the factories can be enjoined from maintaining or contributing to the maintenance of the nuisance. The acts of several persons may together constitute a nuisance, which the courts will restrain, though the damage occasioned by the acts of any one, if taken alone, would be inappreciable.

14. SAME—ABSENCE OF REMEDY AT LAW.

This court has jurisdiction to award an injunction in this case by reason of the absence of a plain, adequate and complete remedy at law. The existence of such a remedy is negatived by several separate and independent considerations. Injury resulting from noisome or foul odors producing personal discomfort and annoyance is not susceptible of compensation in damages according to any approximately accurate measure, and from its recurrence would lead to multiplicity of suits. The peculiar circumstances of this case afford further support to the proposition that the United States, unless prevented by estoppel, acquiescence, or some other act or conduct on its part, is here entitled to injunctive relief. That the government, in the absence of a plain, adequate and complete remedy at law has a right to maintain an injunction bill to restrain a nuisance materially and injuriously affecting the occupancy of its own property there can be no doubt. If, as is the case, a private individual be entitled to equitable relief against foul or noisome odors rendering the occupancy of his property substantially and frequently discomforting and annoying, the government for stronger reasons is entitled to such relief against the continuous or recurrent nuisance at the quarantine station. For should the goverment resort to an action at law, it could not recover damages measured by the discomfort and annoyance suffered by the inmates of the station; and, unless the nuisance were of such intensity as to compel the abandonment of the station by the government, there would be absolutely no basis on which it would be possible even to guess at the quantum of damages. Further, in view of the fact that the nuisance has been created by both of the fish factories without concert between those operating them and with no practicable means of ascertaining what the effect of the defendants' alone would be, it is very questionable whether the government could in an action at law recover even nominal damages.

15. INJUNCTION—PRACTICE—FINDING FACTS.

The jurisdiction of this court to award an injunction in this case, therefore, seems clear; and, possessing such jurisdiction, it has plenary power over the suit, including the ascertainment of disputed facts. Such an ascertainment, indeed, is contemplated by the Constitution.

16. NUISANCE—ACQUIESCENCE—ESTOPPEL—PRESCRIPTION.

The defendants, even on the assumption that the government is proceeding in this suit in a quasi private or proprietary character, have not acquired a prescriptive right as against it to continue or contribute to the continuance of the nuisance complained of, nor has there been any such acquiescence, act or conduct, on the part of the government as to estop or preclude it from complaining of such nuisance. Mere lapse of time short of the prescriptive period cannot operate as a bar.

17. SAME—ESTOPPEL—EVIDENCE—LACHES.

It does not appear either directly or inferentially that the government at any time assented to or acquiesced in the operation of the fish factories in such manner as to produce or contribute to the production of the nuisance of which it now complains. These factories were not, nor was either of them, located, built or operated by the procurement or inducement of the government, nor under any promise, express or implied, on its part that no complaint would be made by it of foul, noisome or nauseating odors, emanating from the manufacture of fish fertilizer, and passing to and over the site of the quarantine station. The evidence wholly fails to disclose the essential elements of an estoppel in pais or an equitable estoppel against the government. The period necessary for the acquisition of a prescriptive right on the part of the defendants as

against the government had not elapsed before the filing of the bill in this case and such right was not and could not be acquired afterwards. It does not appear that the government was prior to the cession to it by Delaware of the site of the quarantine station in 1889 in a position, or had any right, to complain of the stench resulting from the operation of the fish factories or either of them; for there is no evidence that prior to such cession the United States had any right, title, interest or claim to or in the site of the present quarantine station and marine hospital. The law, indeed, goes further and holds that, notwithstanding the prescriptive period may have fully elapsed, no right to maintain a private nuisance is thereby acquired except as against those who have during all of that period been in such a position as to entitle them to complain of it. The acquisition of a prescriptive right by the defendants is, therefore, wholly negatived. If the unwarrantable assumption be made that the mere lapse of time short of the prescriptive period may be evidence of such laches as would bar the government, there was not, even on that assumption, such laches as to defeat this suit. The cession having been made to the United States in 1889, the buildings on the quarantine station were thereafter completed within less than one year of the commencement of this suit. Under these circumstances any imputation of laches on the part of the government is wholly inadmissible.

18. SAME—RELATIVE EQUITIES OF PARTIES.

The circumstances under which the defendants erected and have continued to operate their factory are not such as to disclose a reasonable use by them of their premises or to clothe them with an equity as against the government. Of all localities at or near the mouth of the Delaware Bay the quarantine station was erected in that most convenient and desirable for the purposes of such an establishment. The government had constructed the breakwater affording a safe and excellent harbor as well for the facilitation of the transfer of persons from vessels to the quarantine station and marine hospital as for shipping generally. It had also built a pier to the east and a life saving station to the west of the site of the fish factories and within such a short distance from that site that the erection and operation of the latter could not fail so to contaminate the air with noisome odors as frequently, if not continuously, to cause discomfort and annoyance at those government works. From the initiation of their fish fertilizer business the defendants, while availing themselves of the protection of the breakwater, have displayed a striking lack of consideration toward the government by the emission of foul and nauseating smells injuriously affecting its interests. In view of the peculiar suitability of the site of the quarantine station for the accomplishment of the beneficent and important public purposes for which the station was designed and of the establishment by the government of environments materially contributing thereto, it is clear that, on the question whether the right of the government to have uncontaminated and reasonably pure air at the quarantine station and marine hospital is not superior to any supposed right or equity on the part of the defendants in the conduct of their business to create or contribute to noisome odors substantially and injuriously affecting the inmates of the station and hospital, the case is altogether with the government.

19. SAME—ABATEMENT.

This court is strongly impressed with the conviction that unless efficient relief be granted in the present proceedings to the government from atmospheric contamination caused by the fish factories, the nuisance complained of will by gradual addition grow to such an extent as to destroy the usefulness, or compel the abandonment by the United States, of the quarantine station and marine hospital, to the serious detriment of the public interests. To assume that the government should be forced to acquire by purchase or condemnation all the territory within the sphere of operation of the nuisance created by the fish factories is unwarranted by the authorities and a palpable absurdity.

(Syllabus by the Court.)

William Michael Byrne, late U. S. Atty., and John P. Nields, U. S. Atty.

William Findlay Brown and William S. Hilles, for defendants.

BRADFORD, District Judge. This suit is one of long standing and should have been disposed of several years ago. It has been elaborately and exhaustively argued by counsel in all its phases and has also been reargued on some points. It was brought by the United States against Edward Luce, James V. Luce and Edward C. Luce, trading as Luce Brothers, for the abatement or suppression of an alleged nuisance. The bill, as amended, prays in substance for an injunction restraining the defendants from further prosecuting their business of manufacturing oil and fertilizers from fish at their factory on the shore of Delaware Bay near Lewes, in this district; or, alternatively, from so prosecuting their business there as to allow offensive odors from their factory premises to reach the quarantine station of the United States on the bay shore which is between five eighths and three quarters of a mile to the east of the factory; or causing annoyance to the inmates of the station by flies drawn to or generated on the factory premises and blown to or upon and over the station; or causing such noise by steam whistles or by men and appliances used in unloading the defendants' boats as to break and disturb the sleep and rest of the inmates of the station; or from so using their factory premises as to injure the United States in the use and enjoyment of the station; or from allowing refuse liquids to pass from those premises to and upon the station. Concurrently with the bringing of this suit the United States also filed an independent injunction bill against Samuel S. Brown and James Lennen, trading as S. S. Brown & Company, which, as amended, prays similar relief against the defendants therein, whose factory was and is in the immediate vicinity of the factory of the defendants in this suit. Evidence was taken in the suit against S. S. Brown & Company which by stipulaiton of counsel "is applicable to and shall be used not only in this case, but also in the case of the United States v. Luce Brothers, the same as if the said testimony had been taken for each of said cases respectively." While the term "testimony" is used in the stipulation, it was evidently intended to embrace, and has been treated in the presentation of the case as embracing, all the evidence, whether written or oral.

It appears from the evidence that the defendants and S. S. Brown & Company erected their respective factories in the spring and summer of 1883, and that the same were in operation in the summer of that year, and have since continued to be operated during the fishing season in each year extending approximately from July 1 to the early part or middle of November. The premises on which the two factories are located were leased by the town of Lewes to the defendants and S. S. Brown & Company for the purposes of their business, and are distant about a mile and a quarter or a mile and a half from the built up portion of the town. At the time of the completion and operation of the factory of the defendants and that of S. S. Brown & Company in 1883 no building had been erected on the

site of the present quarantine station and there were within the distance of about a mile from those factories two dwelling houses and a life saving station of the United States; and it is fairly to be inferred from the evidence that there was at that time no other house or dwelling within that distance. One of the dwelling houses was on the bay shore about one third of a mile to the east of the factories and was occupied by Andrew H. Baker. The other dwelling house was on the bay shore about or possibly a little more than a mile to the west of the factories and was occupied by Levin D. Lynch. The life saving station was about half a mile to the west of the factories and in charge of John A. Clampit. The testimony of these witnesses relative to some of the results of the business conducted at the factories at or a short time after they were first operated is instructive. Baker, a witness for the government, testifies:

"Q. 4. How long have you been living there? A. I have been living there thirty years next spring. I think it was in 1868 when I built my house. Q. 5. Have you at your residence at the place mentioned experienced disagreeable odors, and, if so, where did those odors come from? A. I cannot hardly tell what kind of a smell it is. Q. 6. What effect did it have upon you? A. Sometimes it would be apt to make me sick and qualmish. Q. 7. What effect did it have upon the members of your family? A. The same as on myself. Q. 8. How long have you and your family suffered from these disagreeable odors that you speak of making you qualmish and sick? A. I don't know about what you call suffering. You mean how long. As long as the fish factories have been there. * * * Q. 16. Have you been made sick during the last summer? A. I have been made feel qualmish. Q. 17. And that has been your experience during the summer since these factories have been there? A. Pretty nearly all; all but the first summer, and that made me actually sick so that I vomited—that is, the first year or two. There might have been two years before I got used to it. Q. 18. Have you ever been used to it to such an extent that it would not make you feel qualmish? A. It always made me feel qualmish. Q. 19. It always made you feel qualmish? A. That is, when the wind blows right at me. Q. 20. If the wind passed your place, would that be in a direct line for it to pass over the quarantine station? A. Just about the same. It is on the same line; just about the same line, east and west."

Lynch, a witness for the defendants, with respect to the odors from the fish factories, testifies:

"XQ. 72. You don't complain yourself? A. It did smell sometimes, when I have been down there. I thought I could not stand it when I first went down there, but the longer I stayed the better I liked it. XQ. 73. You got used to it? A. Yes, sir; I got used to it. XQ. 74. Did it make you sick when you first went there? A. No, sir; not at all. XQ. 75. It didn't affect your stomach? A. Not a bit. XQ. 76. But the longer you stayed in it the more used to it you got? A. Yes, sir. When you first go into it you feel as though you could not stand it hardly."

Clampit, a witness for the government, testifies, among other things, as to the effect of the odor from the fish factories at or in the immediate vicinity of the life saving station:

"XQ. 47. How did it affect you? A. It affected me the same way as a person having a sick stomach—caused me to throw up. Sometimes I would be at the table, and I would get up from the table and come out and get a whiff of that odor, and I would then lose my meal. XQ. 48. Did you ever vomit before you came out? A. Came out from my dinner? XQ. 49. Yes. A. I have been almost ready to vomit when I went in the room to the dinner table, and I would see the dinner table fearfully full of flies. XQ. 50. Are you troubled with dyspepsia at all? A. No, sir. XQ. 51. How long did

that sickness continue? A. Sometimes it continued for half an hour—that sick stomach, until I would take something to get clear of it. * * * XQ. 100. Did it have the same effect on the other people in the station as it had on you? A. I have seen some of them very sick."

In 1885 John W. Luce and Frank Luce were indicted and tried in the court of general sessions for Sussex County, Delaware, for an alleged common or public nuisance in maintaining and operating the fish factory of the defendants in this suit. State v. Luce, 9 Houst. (Del.) 396, 32 Atl. 1076. There was a verdict of acquittal. Chief Justice Comegys, however, in charging the jury, said:

"The indictment charges that certain noxious and offensive odors arose out of the manufacture carried on by the defendants, and that the people of the said neighborhood and passers along the respective highways were subjected to the noisomeness and offensiveness of those odors, to their great damage and common nuisance. * * * There must be proof that the manufacture at their factory, under the circumstances, operated a nuisance. From what has been proved in this case, I feel safe in saying that the manufacture of fish into scrap as a fertilizer is a nuisance per se—that is, of itself; as it involves, for its successful operation as conducted in this case, the exposure to the outside air of the refuse bone and flesh, that it may become dry. This requires more or less time, during all of which there is emitted an offensive odor. It is not that of boiling the fish; that has its own special smell, which it is to be presumed is not very offensive and is not sufficiently strong to pervade the air for a considerable distance; but it is that of the exposure of the scrap to the sun and air, which diffuses for long distances, as the evidence shows, an odor of fertilizers—one very offensive and disagreeable to people not accustomed to it."

The verdict in the above case by no means indicates that the odors emanating from the factory were not of a character calculated to prove offensive, nauseating or discomforting to those not accustomed to them or other foul or noisome smells, but that the jury was not satisfied that they affected such a number of persons as it was necessary, under the charge of the court, should have been affected, in order to warrant a finding that a common or public nuisance was maintained. It may fairly be assumed that such was the ground of the verdict in view of the following language in the charge:

"If the odors do not reach a populous neighborhood or do not pervade the traveled highway there is no damage to any portion of the public and no indictable nuisance. You see at once, then, that upon the theory that this trade or business was necessarily one attended, by bad smells, stinking odors, impregnating the air with foulness, so as to render existence uncomfortable and disagreeable, yet unless they reached the nostrils of the people of the neighborhood of the factory there cannot be said to be any violation of law. When, with reference to an alleged nuisance, the people or citizens of a neighborhood or the public are mentioned, it does not mean all the people, or of the public, but only such considerable number of them as to show that more than a few merely are meant. No general definition can be given to denote precisely what is meant by 'few' or 'many,' nor can any be precisely given of the limits expressed by the term 'neighborhood.' It is sufficient to say of the latter term that in case of an operating nuisance, every part is in the neighborhood which is affected by it. 'Few' and 'many' are to be considered with reference to the surroundings. If there is a nuisance affecting a place and a very small number only are victims of it, it would be an injury to but a few: and while they would have their separate actions for compensation in damages for the injury, there would be no public evil for an indictment. * * * The term 'public' does not mean all the people, nor most of the people, nor very many of the people of a place; but so many of them as con-

tradistinguishes them from a few. Now, the question in this case in this: Was any considerable number of the people of Lewes, or of those who passed and re-passed along the highway of the bay shore and the bay itself, subjected from time to time to the discomfort of noxious, fetid air, unpleasant odors, by reason of the operations carried on by the defendants at their factory? If there were, then the defendants are guilty under this indictment and should be so found; otherwise they should be acquitted."

The criminal proceeding above referred to is in no sense determinative of the case before this court. It is, however, suggestive by way of contrast. There, the state proceeded by criminal prosecution to punish an alleged offense against the public. Here, the government pursues a civil remedy to secure redress for an alleged wrong or injury to it in its quasi private or proprietary character, although in a matter affecting the general welfare. There, the case principally concerned the inhabitants of Lewes, a mile and a quarter or more away from the defendants' factory, and in such a direction that the prevailing winds during the period of its operation carried its odors away from and not toward the town. Here, it involves the condition of things at a point distant from the fish factories only from five eighths to three quarters of a mile, and so situated as necessarily to be subjected frequently to such odors owing to the direction of the prevailing winds during such period. It further appears that since the facts transpired on which the above mentioned prosecution was founded the factory of the defendants, as well as that erected by S. S. Brown & Company, was materially enlarged. The defendants in their answer to the amended bill admit that "during the years 1884 to 1888 defendants spent large sums of money in the improvement and extension of their works amounting to eight thousand dollars at least." A similar statement is contained in the answer to the amended bill in the suit of the United States v. S. S. Brown & Company. The foregoing considerations widely differentiate this suit from State v. Luce.

It appears that the first building on the site of the quarantine station was a marine hospital erected by the government in 1884. There is nothing in the evidence to show whether the United States had at that time acquired, or whether it did prior to the cession hereinafter mentioned, acquire any right or title to the ground on which the hospital stood. The state of Delaware, however, by virtue of an act of assembly passed April 12, 1889 (18 Del. Laws p. 549, C. 449), and proceedings had pursuant thereto, ceded to and vested in the United States in perpetuity the land included in the quarantine station and "all claim, title and right of soil and jurisdiction of the State of Delaware, in, to or over the same," subject to a certain reservation of jurisdiction touching the service of civil and criminal process, upon the express condition that a quarantine station "shall be located and maintained thereon by the United States." Upon the land so ceded the existing quarantine station was established, and provided with buildings, furniture and appliances suitable for quarantine and hospital purposes and in other respects adapted thereto, at a total cost including the old marine hospital of from $50,000 to $55,000. The work was completed in the latter part of 1893, after having been in

progress several years. The evidence is to the effect that the station is well equipped and admirably located. Dr. Henry D. Geddings, past assistant surgeon in the marine hospital service of the United States, who was in charge of and resided at the station from July 1, 1893, to September 16, 1893, testifies:

"The Delaware Breakwater Quarantine Station and Marine Hospital was established for the protection of the city of Philadelphia, and other cities situated on the Delaware Bay and River, against infection, by importation through shipping, of contagious or infectious diseases, which might be a menace to the health of the people of the United States. It served every purpose for which it was intended during my residence there. * * * At that time it was the most complete quarantine station, either national or municipal, in existence in the United States. I was well acquainted with other quarantine stations and make this statement from comparison. There were a residence, an executive building, hospitals for contagious and non-contagious diseases, bathhouses and laundry, barracks for the accommodation of one thousand immigrants, fully fitted with all the necessary bedding and appliances, the most approved apparatus for cooking for such a number of immigrants, and an artesian well, which furnished an abundant supply of pure water, and apparatus for the steam disinfection of clothing, bedding, etc.; also, apparatus for the application of disinfecting solutions."

Samuel W. Richardson, who was hospital steward and executive officer of the quarantine station from July 26, 1893, to December 11, 1893, testifies:

"Q. 74. You spoke about the facility of this site for the purposes intended and the easy access to vessels coming there. State whether, of your own knowledge, you know that the quarantine station is well located for inspecting vessels coming into the Delaware Breakwater bound in any direction? A. In my personal opinion the station is admirably located for that purpose, because vessels coming in between the capes can be immediately sighted, and those that report to the Breakwater for orders generally drop anchor and display the quarantine flag calling the inspection officer. Q. 75. Have you ever had any difficulty in going from or landing at the usual landing place of the quarantine station when going to or coming from the inspection of vessels? A. No, sir; not to my knowledge, and I have been outside in the heaviest weather. Q. 76. Then, has this station a safe landing place there? A. Yes, sir; it has a good landing place—a good beach landing, and it also has the use of the large iron pier. Q. 77. You mean the Government iron pier? A. Yes, sir; the Government iron pier. The anchorage inside of the breakwater is perfectly safe, I would say, in almost any weather."

The quarantine station has been established and maintained by the United States for the accomplishment of beneficent ends in which the public are vitally concerned; and it is a matter of great importance that neither efficiency in the administration of the station nor its usefulness in other respects should be impaired.

The defendants, in conducting their business, take the fish from their fishing steamers; convey them into their factory, put them into tanks and boil them in water; and draw off the water and subject them to hydraulic pressure to extract the oil and water from them. The residuum of the fish, or fish scrap, is either treated with sulphuric acid, run through cylinders for thorough mixing and then placed in heaps, or it is spread on a platform or other surface to be dried by the sun. In practicing the latter method the fish scrap is turned over three or four times a day to facilitate drying. The former method,

by which acid is applied to the scrap, is principally pursued. The water containing the oil extracted from the fish is drained into tanks and the oil rises to the surface and is secured as far as practicable. The refuse liquid, to the amount of one hundred and fifty barrels a day, consisting of water impregnated with such of the oil as cannot be secured, and other drainage from the tanks, is emptied or run into the bay. The factory erected by S. S. Brown & Company is operated in a similar manner. It may fairly be assumed that the two factories are about equal to each other in capacity, as it appears that the cost of each was equal to that of the other, and that the value of the product of each is about equal to that of the other. The factory of the defendants and that erected by S. S. Brown & Company are so situated in relation to each other that when the wind is in such direction as to carry to the quarantine station odors from the defendants' factory it will also carry to the station odors from the other factory. Dr. Geddings sent August 17, 1893, an official communication to the board of health of Lewes as follows:

"U. S. Marine Hospital Service,
Delaware Breakwater Quarantine
Station, Delaware, August 17, 1893.

To the President of the Board of Health, Lewes, Delaware:

Sir:—I have the honor to invite your attention to the fish-rendering establishments on the beach between Lewes and this station. They are a nuisance, and I consider them prejudicial to the health of the residents of this station. I have to request that immediate steps be taken for their suppression. Please acknowledge the receipt of this communication.

Yours respectfully,

H. D. Geddings,
P. A. Surgeon, M. H. S.
In Command.

The members of the board of health replied August 25, 1893, saying among other things:

"Whereas, We, the undersigned members of the Board of Health, have this day visited the fish-oil factories on the beach, and of which complaint has been made by H. D. Geddings, Surgeon in command, U. S. Quarantine Station, Delaware Breakwater; therefore Resolved, that this Board, after having visited the factories of S. S. Brown & Company and of Luce Brothers this a. m., and having made a thorough examination and inspection of the same, conclude and report that the factory of S. S. Brown & Company is in as perfect sanitary condition as it can well be kept, and that the factory of Luce Brothers is also in good condition, except the tramway is not as clean as it should be, which defect they promise to remedy immediately; and it is the opinion of this board that, while the odor arising from them is at times offensive, they are unable to find anything about them which is, in their judgment, a menace to the public health. The board further find all the men employed about these factories, some of which have been in the business for thirty years and upwards, are in perfect health, hearty and robust. From the above facts we conclude that the factories are not unhealthy, and that we see no reason why the works should be condemned as a nuisance."

The counsel for the defendants have laid much stress upon the above report. It, however, does not help their case. It is not essential to the existence of a nuisance that it be injurious to health. The sound condition of those employed in the factories and habituated to the smells necessarily generated in their operation cannot be determinative of the proper decision of this case. It is well known that persons

can be accustomed to foul and noisome odors and retain their health. With respect to the fish factories the board admitted that the odor arising from them is at times offensive; but it did not state how offensive nor how often offensive. Nor did the board visit the quarantine station to ascertain the condition of things there. The minutes of the Lewes board of health show that July 29, 1895, the secretary reported a complaint received from Dr. Wertenbaker, hereinafter referred to, against the fish factories; that a committee of three was "appointed to go over and inspect them"; that July 30, 1895, a majority of the committee made a report, which was adopted by the board, as follows:

"We have just returned from an examination of the fish manf. of Luce and Brown of Lewes Beach and find all the employees in said manufactory in good health, and found nothing unusual in the condition of these manufactories."

This is in substance similar to the report of August 25, 1893, previously mentioned, and requires no independent consideration. It is sufficient to say, in passing, that it does not appear that either the board or the committee visited the quarantine station.

A careful examination and analysis of the evidence will show almost, if not quite, to a moral demonstration that the operation of the fish factories has produced a condition of things at the quarantine station which should not be tolerated if it be possible legally to prevent its continuance. Samuel W. Richardson who, as before stated, was hospital steward and executive officer at the station from July 26, 1893, until December 11, 1893, testifies with reference to that period:

"The odor from the factories was almost over-present, and at times was almost overpowering—the odor of decaying fish. It nauseated and rendered ill not only myself but members of the family. Q. 27. Members of your family? A. Members of my family; yes, sir. And at times the men who were employed upon the station. They complained of it bitterly when the wind was from the factories towards the station, that it took away their appetites and made them sick, and that they could not work. * * * Q. 29. State how many times you have been nauseated by it yourself? A. I could not state the exact number of times, but it was quite a number of times. It was not an isolated case at all, but almost, I might say, a daily occurrence when the wind was from that direction, and the flies would come down upon us in swarms. Q. 30. Where from? A. From these fish factories; and actually the sides of the building and the wire screens they were to such an extent that they almost, at times, obstructed one's view through them (the screens). * * * Q. 37. What makes you say they came from the defendants' factories? A. There was no other place in the neighborhood that would breed those flies, and they were there in immense quantities. * * * Q. 39. Did they disturb the food or water supply of the people at the quarantine station or reservation? A. It was impossible to leave food exposed at all, or even for a short period. * * * XQ. 127. Were the odors of the fish there when the flies were not there? A. If the day should happen to be still and murky or sultry, and not much air stirring, the odor of the factories was very intense even if the wind did not happen to be in that direction. XQ. 128. Then the flies were not there only when the wind drove them there? A. No, sir. XQ. 129. How many times from July 26th to December 11, 1893, were the flies there? A. That I could not tell you. I did not count them. XQ. 130. You could guess once or twice? A. They were there more than once or twice or a half dozen times or a dozen times. It was a frequent occurrence, two or three times a week, or more."

The witness further states that during the time he was at the quarantine station the prevailing winds were from the direction of the fish factories. David C. Blake, who was acting hospital steward at the station at the time of giving his testimony September 4, 1895, and had been such since September 1, 1893, testifies with respect to the odor from the factories:

"Q. 13. State your experiences, then? A. My experience has been that it caused me to become sick and nauseated a great deal of the time. It is impossible to eat your meals. Q. 14. Why? A. On account of the odor. Q. 15. Where from? A. From the fish factories. Q. 16. What kind of odor? A. It would be hard to explain. Q. 17. Is it an odor of flowers or an odor of fish? A. An odor of fish—decayed fish. Q. 18. Decaying fish? A. Yes, sir; decaying fish. Q. 19. What is the effect, as you have experienced it yourself, and seen the effects upon others, upon that quarantine station of this odor? A. As I said before, it is nauseating to such a degree that it makes a person sick. Q. 20. Caused them to vomit, when you say nauseating? A. Yes. Q. 21. Have you had that experience? A. Yes, sir; on several occasions. Q. 22. What part of the time, since you have been there up to the present, has this difficulty existed? A. More so in the months when the factories are in operation, but, as a general rule, the odor is there the year round, continually—that is, when the wind is from the westward. Q. 23. What effect has it upon the atmosphere—the air you breathe? Does it render it pure or impure? A. Very impure. * * * Q. 40. Have you ever seen other persons upon the quarantine premises or reservation made sick by this odor? A. Yes, sir. Q. 41. Have you ever seen it interfere with the meals of employees or persons upon said reservation? A. I have; yes, sir. Q. 42. Is this of frequent or infrequent occurrence? A. I should judge it was on an average of about six or seven times a month. * * * Q. 45. What have you to say with respect to the flies on this quarantine station? A. The flies are so numerous that they get on the screens of the windows in such numbers that it really darkens the rooms. * * * XQ. 99. Then it has had no very bad effect upon your health? A. Only to make me sick at times when the smell would be overpowering. XQ. 100. How long would that effect last? A. It would last as long as that overpowering smell was there. XQ. 101. How long was the overpowering smell there? A. It was there sometimes two or three days. XQ. 102. Would you be sick all that time? A. I would be what I might say not sick really, but it would be nauseating. XQ. 103. It was simply disagreeable; that is what you mean, is it? A. Disagreeable, and make a person have a very bad feeling."

Dr. William P. Orr, who was acting assistant surgeon of the United States marine hospital service in 1892 and 1893 and until November 1, 1894, and in that capacity visited the quarantine station every day, testifies:

"Whenever the wind would blow from the direction of the fish factories, I could smell the odor. There is no doubt in my mind that it came from the fish factories. Q. 13. Was it an agreeable or a disagreeable odor? A. Disagreeable. * * * Q. 19. What do you know about the flies that infested this place from that factory? A. Whenever the wind blows from the direction of the factories the flies are always very thick. Q. 20. Very thick? A. Yes, sir. Q. 21. Infested the quarantine station? A. Yes. All over all the buildings. I mean around all the buildings. * * * XQ. 34. In your opinion, are the odors from these factories injurious to health—your opinion, from your observation of men and people that you know who have been there, and worked there, are these odors injurious to health? A. I do not believe that they are injurious to health except to those people—and there are quite a number of them around Lewes—who are continually annoyed by the scent from the factories and the worry to which they are subjected by it. Not from the scent itself, I do not believe, but simply be-

cause they believe that it affects their health, and they worry, and it produces, or causes, I must say, I think an injury to their health. You understand me. I do not think that the odor is injurious, but I think that there are people who are affected by it simply because they are annoyed so much by it. * * * RQ. 70. You stated that these odors from this factory were not, in and by themselves, injurious to health. If people otherwise in good health are made sick at the stomach and vomit by reason of them and are unable to eat their meals, are the odors of a character in which you would be willing to quarantine sick people? A. No. I would not want to quarantine sick people in such an odor as that, of course. I would want to avoid it. RQ. 71. Do you think the odor that you have experienced from these fish factories is of a character that you would want to quarantine patients in if you could avoid it? A. No, I would not."

John A. Clampit, who at the time he gave his evidence lived in Lewes, and, as previously stated, had formerly had charge of the life saving station for a number of years, testified:

"Q. 8. While upon that reservation, have you ever experienced any odors from the fish factories, and if so, state their nature? A. I have experienced them, I was going to say, a thousand times. Q. 9. I mean at the quarantine station and on the reservation? A. Whenever I went there or about there and the wind was from the northwest or westward I would experience those odors. Q. 10. And what was their character and degree? A. So far as the degree was concerned, I could not tell you, but the character was terrible to me. It sickened my stomach, but in what degree it was, I could not tell you. Q. 11. I mean by 'degree' was it very bad, or not? A. It was terrible to me. Q. 12. What did those odors come from? A. They came from the fish scrap."

Clampit's testimony as to the nauseating effect of the odors from the fish factories upon himself and other persons at the life saving station has already been referred to. Dr. Wertenbaker, past assistant surgeon in the marine hospital service of the United States, who was in command of the quarantine station from September 1, 1894, to the date of giving his evidence, testifies:

"Q. 4. What have you to say, during the time you have been there, with respect to the odors alleged to emanate from these fish factories? A. The odors are unquestionably there, and have been ever since I have been there. Q. 5. And what are the odors? A. It is the odor of decaying fish. Q. 6. Where do they come from? A. They come from the neighborhood of these fish factories. Q. 7. What effect do they have upon the people at the quarantine station from your own observation? A. They are very disagreeable at all times. At some times they produce nausea and vomiting. Q. 8. Have you seen people under your charge there sick from it? A. Not the patients, but the employees and my own family. Q. 9. You have seen the employees and your own family sick from it? A. I have, and I have also been nauseated myself. We have to close the windows on that side of the house. Q. 10. Is that effective, even if the windows are closed? A. It is not effective, but it is the best we can do. Q. 11. It helps some? A. It helps some. Q. 12. Do you know anything about the alleged influx of flies from these factories to the quarantine station? A. When the factories commence operations, within a very short time afterward there are vast swarms of large, green flies that make their appearance. * * * Q. 20. What makes you say that flies of that kind, and those flies came from those factories? A. Because, in the first place, they make their appearance in greater numbers immediately after the factories commence operation. In the second place, in passing the factory you will find everything in the neighborhood covered with these large green flies. * * * Q. 73. State in your own way, from your experience there, the effect of these factories with regard to being injurious or deleterious upon this quarantine station? A. I consider the presence of the fish factories, with their flies and the odors, are distinctly a menace to

public health and that we cannot maintain an effective quarantine under the circumstances. I think it would be far wiser for the government to confiscate and destroy, paying all damages, than to let them remain there. It would be cheaper, many times cheaper, in the end. * * * XQ. 83. That is all. There is no material damage done by the odors? A. No. I do not know that they have ever produced a case of disease, but they are unquestionably very disagreeable, and, as I say, may produce nausea and sickness, but no permanent injury. XQ. 84. So that the real source of danger in your opinion, and the real source of damage to the quarantine station and its workings, is from the flies? A. Largely in the flies. Not entirely, but largely. XQ. 85. What other? A. The odors must be taken into consideration too. You must consider the fact that so far as the damage done to the quarantine by the odors is in itself not very much; but at the same time when you put sick people as well as well people into those odors, and have them nauseated by them, you cannot eliminate them possibly in making up your sum total of the damage done to the quarantine station."

Alice G. Wertenbaker, wife of the preceding witness, who was with her husband at the quarantine station, testifies:

"Q. 4. Have you ever suffered from the odors, and if so, state how? A. I have suffered sometimes from the odors. They are most disagreeable and very sickening, and when they are very strong they cause nausea, most decidedly. Q. 5. Have you ever been made sick by them? A. I have frequently. Q. 6. Have you been prevented from eating your meals? A. Yes. XQ. 7. You notice the odors more strongly when the wind is blowing from that direction than you do at other times? A. Certainly, sir. XQ. 8. Very much? A. It varies at times. One could not be sick all the time. It is only when it is very strong that one is made sick of it. XQ. 9. Then there are long periods of time when you do not notice it at all? A. No. Not long periods. It comes quite frequently. XQ. 10. How often? A. I could not tell you how often. XQ. 11. How often in the course of a month have you noticed these odors so strong as to create nausea? A. That would be impossible to tell. XQ. 12. You could not tell that? A. No. XQ. 13. Then they were not sufficiently effective to attract your attention, or you would remember it? A. Yes, indeed they are. That is not it at all. The odor is constantly disagreeable. We can stand it without having it make us sick constantly, of course. One could not live there if it was not so, but it is frequently so that one is quite sick, so sick that they are miserably sick. RQ. 14. How many days, on an average, of the week will you be reminded of the existence of these fish-house factories by the odor? A. Probably we would have one bright day with the wind blowing in that direction, and we will not notice it so much; and probably the next day it will be unbearable. The next day might be very still and the wind favorable, and it would not be so noticeable, and then, again, the day after that it would be terrible. RQ. 15. You have the odor half the time? A. Half the time the odor is there. RQ. 16. And you say you have been made sick by these odors? A. Yes, sir. RQ. 17. And have been prevented from eating your meals? A. Yes, sir.

Dr. Henry D. Geddings testifies:

"While stationed on the Government reservation there was extreme annoyance from bad-smelling odors, flies and noise. * * * The odors were disagreeable in the extreme, very oppressive, even nauseating. * * * At least three or four times a week we suffered from the noise consequent upon the discharge of these cargoes of fish, and from the bad odors arising from the rotten fish we suffered continuously, these odors producing discomfort, frequently nausea and vomiting. * * * The chief annoyance was from the odors mentioned, and I have answered that they came from decomposed fish unloaded at the wharves of these factories. In my opinion, it was about as bad as it possibly could be, and this stench arising from said cause existed not alone during the night, while they were unloading the cargoes, but was continuous during the day as well. * * * The annoyance

from flies was a very serious one. They came from these decomposing fish and from the fish scrap into which these fish were converted. They were literally in swarms. The flies were so thick that it became necessary to screen every window at the station, being over seventy in number, in the buildings occupied, and the swarms of flies were so thick that they would cut off the view through these windows and screens. This annoyance from flies continued during my entire residence there. * * * There is no doubt about the origin of said odors and flies, the same being caused by the decomposing fish at the factories, as heretofore stated, and the business carried on at the factories gave rise to said odors and flies, as heretofore answered. * * * I was frequently made sick by the odors arising from the decomposed fish coming from said factories. * * * My wife and child were made sick in the same way; my hospital steward was also made sick in the same way—that is, I have seen him sick, made sick from these same odors from these fish factories; the nature of the sickness was nausea, vomiting, loss of appetite and general depression and a feeling of debility. * * * I saw the Surgeon General of the United States, and Surgeon Austin, of the Marine Hospital Service, who were temporarily at the station on a visit of inspection, made sick in the same way and from the same causes. * * * It was impossible to keep the odors out of the executive and other buildings, and almost impossible to keep out the flies. When the wind was blowing from the factories all the window sashes would have to be shut tight, and all the window openings screened, and with all these precautions the success was only partial as to keeping out the flies and utterly unsuccessful in keeping out the odors. * * * The odors and flies would be co-operating causes for the spread of contagious diseases. * * * If the flies and odors arising from said factories continue as they did while I was there, they are a direct menace to the usefulness of said quarantine station and hospital."

Horace Willard, who was employed at the quarantine station as engineer from January, 1895, and was such at the time of giving his testimony in April, 1896, testifies:

"Q. 5. How long have you been employed by the government at the quarantine station? A. Three years in all. Q. 6. Have you ever experienced any odor while on the quarantine station, and if so, describe it, and where it came from, if you know? A. Yes, sir; I have. It comes from the two fish factories right above the iron pier, about three-quarters of a mile, I guess, from the station—the reservation. Q. 7. What is the nature of the odor as you experience it on the reservation? A. Carrion, as near as I can tell. Q. 8. Is it agreeable or disagreeable? A. Very disagreeable. Q. 9. What effect does it have upon you physically? A. It makes you sick; you can't eat anything half of the time. Q. 10. How frequently do you have this odor? A. When ever the wind is onto the station. Q. 11. From the factories? A. From the factories; yes, sir. Q. 12. Have you experienced it within the past six or eight months? A. Yes, sir; I have experienced it all last summer, and here lately when they were loading the vessels with scrap—about two weeks ago. Q. 13. Is it as bad in the fall and winter as when they are working there in the summer? A. No, sir. Q. 14. How is it in the winter and fall? A. In the winter and fall it is kind of a dead smell, it is not strong like it is in the summer, while it is in full blast. Q. 15. But even in the winter and fall, is it agreeable or otherwise? A. It is disagreeable when the wind is blowing towards the station. Q. 16. And even in the winter and fall does it have that sickening effect that you speak of at times? A. It does. Q. 17. Have you experienced that during the last winter and fall? A. This last winter, about the first of December. Q. 18. Have you perceived the odor on the reservation from these factories since December? A. Yes, sir; two weeks ago, when they were loading the scrap. Q. 19. And then it was very disagreeable? A. Yes, sir. * * * XQ. 71. You say that these odors which you experienced made you sick? A. They have done so; yes, sir. XQ. 72. When did that happen? A. Last summer. XQ. 73. Did it happen more than once? A. Yes; several times in that hot weather—hot days. XQ. 74. Were you very sick? A. I was not so sick but what I could work. XQ. 75.

You were not so sick but what you could work? A. No, sir; but I was sick. I was uncomfortable. XQ. 76. Were you so sick that you could not eat? A. I ate a little. XQ. 77. You never stopped eating at the time? A. You can't work when you can't eat. XQ. 78. You could do that work and eat, notwithstanding your discomfort? A. Yes, sir; but then it was miserable. It was not fit for anyone to be around."

Dr. Wertenbaker, who had given evidence in September, 1895, being examined in April, 1896, testifies:

"Q. 3. Since then and up to the present time, what have been your experiences, pleasant or disagreeable, with respect to the odors from these fish factories? A. Several times during the winter we have experienced very unpleasant odors from the factories; in fact, whenever the wind is from the factories toward the station, we get these same disagreeable odors that we have had all the time. Q. 4. You are not troubled with the flies in the winter? A. There are no flies in the winter. Only last Monday the odors from the factories were very disagreeable. It was one of the warm days of spring, with the wind from that direction. * * * Q. 7. Tell whether it was fit to live in or not? A. No, I do not think so. I should not care to live in that sort of atmosphere always; it would be decidedly disagreeable. Q. 8. Uncomfortable? A. Uncomfortable. The odor of decaying fish in the nostrils all the time is very far from comfortable, or conducive to health. * * * XQ. 22. But you think that always when the wind was from that direction you experienced it? A. We get them at all times when the wind is from that direction. * * * XQ. 23. What is its intensity compared with these summer odors? A. It varies with the day, with the wind and the atmosphere generally. If it is a warm, damp day and the odors cling, of course it is stronger than it would be otherwise. XQ. 24. Since you last testified, the factories have not been in operation, have they? A. I could not tell you. I do not know whether they had closed down or not at that time in September. XQ. 25. Then, briefly, I understand you to say that you have observed no flies, but you detect the same kind of odors winter and summer? A. Same kind of odors. XQ. 26. All the year round? A. All the year round, but they have varied in their intensity. XQ. 27. And frequency? A. And frequency and peculiarity. Some days it may have a peculiar, more decayed fish odor that at others, but they are always nauseating."

Edmund B. Frazer, who was secretary of the state board of health from 1884 until after the giving of his evidence in May, 1896, testified to the effect that he was requested by Walter Wyman, surgeon general of the marine hospital service, August 12, 1893, to inspect the fish factories, and also the marine hospital at the quarantine station; that he accordingly visited the marine hospital and was taken into the office of the surgeon; that the windows on the outside were so thickly covered with flies that it was necessary to have an artificial light in the office to see; that he could not see out of the window; that the windows were shut and he did not particularly notice any odor in the house at that time, but observed an odor outside of the building; that "it smelled to me like a rotten egg when it is broken"; that he visited the fish factories, the odor there being the same odor that he had noticed while at the quarantine station. The witness further states that in June, 1895, at the invitation of Dr. Wertenbaker, the surgeon in charge, he visited the quarantine station; that on that occasion he did not smell anything at that point, but that he went out with Dr. Wertenbaker in his boat, and when in the bay opposite the marine hospital "we smelled the odor very perceptibly—very strongly." He further testifies:

"Q. 47. When you got in the line of the wind from these factories, in pursuit of Dr. Wertenbaker's duty there as a quarantine officer, you struck this odor? A. Yes; it was bad—very bad. The physicians didn't know what it was. Dr. Wertenbaker said, 'That is what I have got to put up with all the time.' Q. 48. You recognized it as the same odor you experienced when on the Reservation down there when Dr. Geddings was there? A. Yes, sir. Q. 49. With the odors that you experienced when you were down on the reservation, and the flies that you saw there in connection with your long experience as a health officer, is it possible in your judgment to maintain a proper quarantine station and marine hospital there, subject to these discomforts? A. No, sir; it is not. * * * XQ. 136. You can't control the direction of the wind? A. No. Of course, if that odor was coming there, while it would be very offensive, I do not know that the odor itself would create any disease, but you could not keep the wind out in a sick room with that odor—it would kill a man."

He further testifies that the odor did not make him sick, but was very disagreeable, and that he did not think it was unhealthy to a healthy man "no more than a man cleaning out outhouses." Dr. Walter Wyman, who at the time of giving his testimony was surgeon general of the United States marine hospital service, testified in July, 1896:

"I have visited the Government reservation where the Marine Hospital and Quarantine Station at the Delaware Breakwater are situated, and I have experienced there great discomfort from foul odors and unusual quantities of flies. * * * The foul odors were evidently from decaying animal matter, and were so intense as to prevent continuous sleep through the night, causing also a feeling of nausea. * * * The flies evidently came from the neighboring fish-oil factories. They were large, and the cause for their existence in unusual quantities was undoubtedly the factories. * * * The disagreeable odors and unusual quantities of flies referred to must in effect hamper and diminish the efficiency of the administration both of the Marine Hospital and the Quarantine Station at the Delaware Breakwater. * * * The odors complained of, in the event of a large number of immigrants being held under observation, together with cabin passengers taken from an infected steamer, would cause great discontent and increase the difficulty of maintaining discipline and holding said people under the necessary restraints. The odors, in my opinion, would also cause sickness and retard the recovery of the sick in hospital. There is also great danger that the purposes of the Government in maintaining said Marine Hospital and Quarantine Station at this point may be frustrated by the flies, since the latter are carriers of the contagion of cholera."

Dr. Wertenbaker, being recalled, testified in September, 1896:

"Q. 3. I will ask you what has been your experience during the past summer as to any diminution of inconvenience from odors and from flies from the same source? A. We have still had the odors and still had the flies. Q. 4. And would your testimony with respect to the two preceding summers also be applicable to this summer, or not? A. Yes, sir."

He further testifies:

"The flies and the odors in themselves are always a nuisance. They are disagreeable at all times, and especially so when the wind comes from the direction of the fish factories."

Robert Allen, who lived at the quarantine station from August 16 to September 16, 1896, as "general utility man" testifies:

"Q. 4. While on the Government reservation at the Delaware Breakwater, did you ever experience any bad odors, and if so, from whence did they come, if you know? A. On several occasions I experienced an odor that arose

from the fish houses there. Q. 5. Do you know whether it ever made your wife sick? A. Yes, sir; on several occasions. Q. Sick at her stomach? A. Quite sick at the stomach—deprived her of eating her food. * * * XQ. 17. How many times during that month while you were at the quarantine station did you notice these odors? A. I could not tell you the number of times, but two or three times a week. XQ. 18. You are sure of that, are you? A. Quite sure.

He states on re-cross examination that he heard the men at the station "complain at different times about the smell." Isabella Allen, wife of the preceding witness, who was with him at the quarantine station during his stay there testifies:

"Q. 3. You were at service in the doctor's house there, were you not, during your time there? A. Yes, sir. Q. 4. I will ask you whether you were ever annoyed with odors and flies while there, to an unusual degree. A. Yes, sir. Q. 5. Just state what you know about them to the Commissioner? A. Sometimes when I would get up in the morning, I used to be so sick that I could not eat any food, and I had to get up at three or four o'clock in the morning on account of the smell making me sick at the stomach. Q. 6. And it frequently destroyed your appetite to eat your meals? A. Yes, sir; very often. Q. 7. How often would it average a week that these odors would be so disagreeable to you? A. There were some weeks when it was more than others. I didn't really take particular notice, but I know that sometimes it was as many as three or four times in a week. * * * XQ. 26. Then all your knowledge derived from this is what you saw and smelled at the quarantine station? A. Yes, sir. XQ. 27. And not from any knowledge of the fish houses at all? A. The only knowledge I have, the night that we were driving down there I smelled a terrible smell, and I asked the driver what that was, and he said it was the fish houses. I asked him if that was there all the time and he said 'Not all the time.' * * * XQ. 30. You say that these odors and these flies made you sick on an average of three or four times a week? A. Yes, sir. XQ. 31. Then, do I understand you to say that you were sick from this smell one-half the time you were there? A. Yes, sir; I should say so. XQ. 32. One-half the time you were there? A. Yes. XQ. 33. There were other people in the house? A. Yes, sir. * * * XQ. 40. Do you know whether or not any of them were made sick? A. I heard them say it made them sick. One night I had a young lady stop at the breakfast table, and I know they talked once or twice to me in the kitchen about it making them sick. XQ. 41. It seemed to affect you more than anybody else? A. Very much, indeed. I was sick after I got up there for a week. I had to go to the doctor with a bad throat."

The testimony of Andrew H. Baker who, as before stated, lived between the fish factories and the quarantine station, as to the effect of the odor from them upon himself and his family, causing nausea and vomiting, has already been quoted.

The evidence adduced by the defendants palpably fails to meet the case made by the government with respect to the offensive character at the quarantine station of the odor from the fish factories, and the frequency with which it impregnates the air at the station, to say nothing of the flies. A number of the defendants' witnesses are or have been connected with the fish factories or otherwise have become used to their noisome smells, and the statements of others in some instances have been so extreme as to discredit them. Considered as a whole the evidence adduced by the defendants, I think, tends rather to sustain than to refute the contention of the government as to nauseating, discomforting or disagreeable and annoying odors. Reference will be made to the testimony in this connection of some of the

defendants' witnesses. Francis Shunk Brown testified in July, 1897, to the effect that on several occasions within the space of a few years, when on a yacht or ice-boat inside the breakwater, he had noticed an odor from the fish factories when the vessel he was on "was anchored dead to the leeward of them." To the question, "Did you notice any particularly offensive or deleterious odors?" he replied: "I only noticed such odors as you would expect to find at a place where they were converting fish into oil, etc." But that he found the odors disagreeable or discomforting appears from the following testimony:

"Q. 14. How did you avoid this smell when you were anchored in the breakwater? A. Of course, this odor could only be smelt when you are directly to the leeward of the factories, and on one occasion I simply weighed anchor and let the yacht drift along with the tide a short distance until we got out of the line of it, probably three or four hundred yards—something like that."

Levin D. Lynch, who occupied the house on the beach about a mile to the west of the fish factories, testified with respect to the odor, as heretofore stated, "when you first go into it you feel as though you could not stand it hardly." William H. Virden testified to the effect that as contractor and builder he had "been working about the fish factories and the quarantine station nearly every year since both were established"; that during the three or four months while building the doctor's residence at the quarantine station "once or twice my attention was called to the odor. * * * But I do not think at any time that I noticed it over an hour at a time." The witness testified that he had a conversation with Dr. Geddings at the station on the subject of the fish factories.

"Q. 67. Tell us what took place? A. I went up there to put in some water, and it was rather unusual that morning. Q. 68. You mean that the odor was rather unusual that morning? A. Yes, sir; and the doctor made some remarks about it. I used to tantalize him a little. We went down in the cellar and the Doctor spoke about losing his breakfast, and says I, 'It isn't so bad this morning,' and the Doctor said, 'I don't know that it is unhealthy, but it is damnably disagreeable,' or something or another to that effect."

The fact that Virden "used to tantalize him a little" is significant as to the existence of disagreeable odors at the quarantine station. The testimony of this witness, however, is not calculated to impress one as being reliable. John W. Luce, who at the time of giving his evidence had been employed by the defendants at their fish factory continuously since its erection, testified to the effect that he had detected when the wind was blowing in the proper direction the odor from the factories at a distance of "a mile and a half, I guess," and that it came from the fish scrap. Robert Arnold testifies:

"XQ. 28. But I understood you to say there were no odors; that you had never noticed any offensive odors? A. I have been at the hospital— (interrupted by Mr. Vandegrift). XQ. 29. Did you say you never noticed any offensive odors there? A. No more than the smell of a fish factory. XQ. 30. Would it be offensive to you? A. Not to me. XQ. 31. Would it be offensive to other people? A. Some of them claim it is. XQ. 32. Are there not a good many who make that claim? A. My neighbor's hog pen would be offensive to me, as much so as the fish house. XQ. 33. A hog pen is a very offensive thing, isn't it? A. If it is very close to you, it is. Going up

and down I can't help but smell the fish houses, or any other man, if the wind is favorable. XQ. 34. That is, if the wind is blowing from the fish houses towards you, you get them? A. If you are close enough to them; yes, sir. XQ. 35. How far off have you ever noticed them? One witness said that he had noticed them a mile or a mile and a half, or even from here (Lewes) to there (fish factories). How far off have you ever noticed them? A. I have noticed the smell of the fish houses to this town (Lewes). XQ. 36. Pretty strong? A. Yes; I have smelt enough to know what it was."

Elbert T. Williams, a sea captain running a vessel for the fish factories, testifies:

"Q. 40. What about the odors? Have you ever noticed this odor at the iron pier? A. I have, when the wind has been in the right direction. Q. 41. In what direction is that? A. When you are at the iron pier you have to have the wind from the southwest. Q. 42. The wind coming straight from these factories in line with you, you could smell the odor? A. Yes, sir. Q. 43. Was it disagreeable to you? A. Not to me, because I am so used to it; but it might make some others sick. It doesn't have any more effect on me than pouring water on a duck's back."

Edward C. Luce, one of the defendants, testifies:

"XQ. 92. There are odors from these fish factories, aren't there? A. Certainly. XQ. 93. And if you are in a breeze that comes from them you catch the odor, do you not? A. Yes, sir; I have noticed this odor quite a distance off, but it is not very objectionable to me. I would think that it was a fish factory. XQ. 94. How far off? A. I do not think I ever noticed it over a mile away. I don't know that I ever did notice it so far as that."

Joseph Draper testifies:

"XQ. 72. How far could you smell the fish house factory with a fair wind? A. I could not say that. I was never far enough away to try it. I have only been on our beach. I don't know that I ever smelt it on our beach two miles above. * * * XQ. 73. Have you ever smelt that as far as we are from the fish factories now? A. Yes; I have smelt it here (Lewes) when the wind was blowing in the right direction. * * * XQ. 78. But there is a pretty stiff odor at times if you are in the breeze, is there not? A. Yes, sir, if you are in the breeze any very close to them there is; but when the wind shifts it goes away."

Charles Keuhn, who was for a number of years a nurse at the quarantine station, testifies:

"XQ. 76. Dr. Geddings testified that he was made sick at the stomach, and that his wife was also made sick, and there were other persons at the station there who testified that they were made sick by the odors from the fish factory. Do you know anything about those instances? A. I only know of one instance when Dr. Wyman was there. XQ. 77. The Surgeon General of the United States? A. Yes, sir. I heard him say when they came out —I was not among them, but I just came out on the steps with them—that he didn't enjoy the breakfast very well on account of the smell. I thought then it was not very bad that day. Gentlemen coming from the city, they are not as used to it as we are."

John W. Josephs, who resided in Lewes twenty eight years previous to giving his testimony and was a pilot, testifies:

"XQ. 30. How far off, with the wind in the right direction, can you smell the fish factories? A. I can't say. Sometimes you can smell it quite a ways, further than you can at other times. I have frequently smelt it at the breakwater. XQ. 31. Some of the witnesses have said they could smell it a mile, and others have said they could smell it a mile and a half. What would you say? A. I would say a mile or a mile and a half. I would not smell it further, I do not think. * * * XQ. 33. It has boarded you at sea, has it? A. No, sir. It has never bothered us any at sea. XQ. 34.

Only when you would come within a mile and a half of shore? A. Inside, close to the breakwater. * * * XQ. 36. Do you like it? A. No, sir; or any other smell. It don't smell very good. XQ. 37. You don't mean to speak that broadly? There are some smells you like, are there not? A. Not anything like that. I smell bone factories and morocco factories, but I don't like them."

Dr. Hiram R. Burton, who has been a practicing physician in Lewes for many years and was also a member of the board of health of that town, testifies:

"Q. 25. When you were around the fish factories you smelt an odor, of course? A. Oh, yes. Q. 26. In your opinion as a practicing physician, is that odor in itself deleterious to health? A. I think not. That is, speaking in general terms now. There might be some people, or there might be some persons who have specially delicate stomachs, that are very sensitive to odors and things of that kind, that might be nauseated by that as they would be by any other unpleasant odor. Sometimes it happens that men cannot stand very much of that thing. I have been nauseated myself."

The witness further states in answering Q. 44 and Q. 45:

'Flies are an annoyance to any sick patient, of course, any patient that you may have, wherever it may be, but I have never known of there being any great disadvantage arise from the presence of flies, except the annoyance."

The witness with respect to the fish factories testifies:

"XQ. 49. You don't believe they are a menace, you mean? A. I do not think so. I only say that they may be an annoyance, as a disagreeable odor would be to anyone. I think that is all. I think there it stops. XQ. 50. Many of the people have testified that the odors from these fish factories—the people on the reservation—were so nauseous and so disagreeable that they have been nauseated, have been prevented from sleeping, and have been made very sick at the stomach. What would you say with respect to that; is that improbable? A. That is possible. XQ. 51. Such odors as you know emanate from that factory would, in you judgment then, have that effect upon some people? A. Yes, sir. XQ. 52. Then you would not be inclined to dispute the oaths of the people who have testified here to that effect? A. No. There is room for a difference of opinion in that respect. I have no doubt that to a sensitive stomach, a patient that was sick at the hospital might be seriously inconvenienced by the odor, but I do not believe that if they were exposed to it for a day or two, but what they would forget that there was anything of that kind. It is that kind of an odor that you become accustomed to. XQ. 53. Some of the well people who were there, friends and members of the doctor's family, or the men who were working there, have testified that the odor was so bad at times that it made them sick at the stomach. Would you be prepared to say that in your judgment that is not so and impossible? A. No, sir; I am not prepared to say that that is not true. I think very likely that that is true. XQ. 54. You know this odor well, do you? A. Yes, sir; I think I do. I have frequently smelt it off here. XQ. 55. We are now in the town of Lewes and you have smelt it this far? A. Yes, sir. XQ. 56. Is that further than the quarantine station is from these fish factories? A. I think it is rather further."

He further testifies:

"In answer to that question as to whether I was prepared to say that it was not true that those people were not telling the truth when they said it nauseated them, made them sick at the stomach, interfered with their sleep and so on, I have no doubt that is so, and that far any offensive odor, you know, would be prejudicial to the health of an individual if it was continued and continues long—it would be prejudicial to the health of the individual. As I understand, in giving my opinion about the gases conveyed by the winds from these fish factories being prejudical to health, it is as to whether they bear disease germs or not. That, I say, I do not believe; I do

not believe that they are loaded with disease germs; but they may be disagreeable to people, and that they are, I have not the slightest doubt in the world, and would be a great menace to their comfort and pleasure. XQ. 58. If it would have that effect on some people who were in comparatively good health, might not the effect be very serious if you had patients who were brought within the line of this odor and who were in other ways in a weak condition? A. Yes. Anything that nauseated them would be injurious to the patient. * * * XQ. 71. Would you say that because men who work in this factory are well and strong that, therefore, the odors that they are able to dwell in daily with impunity could be inhaled by other persons with equal impunity? A. I think so. XQ. 72. You think so? A. Yes, sir. XQ. 73. And with no different results? A. No different results other than those stated—that it might nauseate some persons unaccustomed to disagreeable odors. To a doctor it would not be any very great annoyance, you know. We are so accustomed to coming in contact with offensive odors that we do not think much of it; it don't interfere with our eating or sleeping, or anything of that sort, as a rule. That is my experience."

He further testifies:

"When the factories are shut down and not at work the odor is very different from what it is when they are in operation. You might get a little odor from the piles of scrap, that comes from there, but it is not mixed with that greasy odor that you get from the kettles of fish boiling. That, I think, is the nauseating odor that they get. RXQ. 85. That is mostly theory on your part? A. Yes, that is theory. I wish to say that I do not want you to understand that the odor from the fish factories is not disagreeable. I am willing to admit that, but I don't believe it is prejudicial to the health of the community."

The United States is represented at the quarantine station in the persons of its officers, agents and servants having charge and occupancy thereof. Immigrants and other persons there detained in quarantine or confined in the marine hospital are so detained or confined by authority of the United States in the maintenance of a system intended and calculated to serve at once as an aid to commerce and a protection against the invasion of the country by contagious and infectious diseases. The United States, owning and holding the property for the accomplishment of these benign purposes, has a right to insist that neither the efficiency of the management of the station nor its usefulness in other respects shall be sacrificed or impaired by nuisances wrongfully created or continued, and it is entitled to secure relief from such nuisances, when materially and injuriously affecting the health or comfort either of those in charge of or employed at the station, or of those detained or confined there. To both classes of persons the government owes protection against such wrongs and the courts should not hesitate to accord it. The evidence in the case is not confined to the subjects of foul or noisome smells passing directly from the fish factories to the quarantine station, and discomfort and annoyance to the inmates of the station from the multiplication of flies resulting from the operation of the factories. It covers several other points on which the counsel for the government laid much stress; among them being the impregnation of the beach with the large amount of liquid refuse daily run from the factories into the bay and consequent contamination of the air with offensive odors, and the increased danger of the spread of contagious and infectious diseases beyond the limits of the quarantine station owing to the great number of flies frequently wafted from the factories to the station.

The evidence on the two points just mentioned is voluminous and is not lightly to be disregarded. There is also evidence touching noises for several hours in the night directly or indirectly caused by the unloading of the fish from the vessels at the factories. But, wholly aside from the three grounds of contention last alluded to, the evidence is full, clear and convincing that the inmates of the quarantine station are materially annoyed and discomforted by offensive, noisome and nauseating odors originating at or in the immediate vicinity of the fish factories and caused by their operation, and that such annoyance and discomfort, while not uninterrupted, occur so frequently as to interfere to an unreasonable and unjustifiable degree with the common enjoyment of life and to constitute a nuisance which should be restrained by injunction, if the government be in a position to complain of it. As before stated in effect, it is not essential to the existence of an actionable nuisance that health should be broken down, impaired or even threatened. Baltimore & Potomac R. R. Co. v. Fifth Bap. Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739; Camfield v. United States, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260; Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 201; State v. Luce, 9 Houst. (Del.) 396, 32 Atl. 1076; Brady v. Weeks, 3 Barb. 157; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Ducktown Sulphur, Copper & Iron Co. v. Barnes (Tenn.) 60 S. W. 593; Walter v. Selfe, 4 Eng. L. & Eq. 15; Catlin v. Valentine, 9 Paige, 575, 38 Am. Dec. 567; Crump v. Lambert, L. R. 3 Eq. Cas. *409; State v. Wetherall, 5 Har. (Del.) 487; In Baltimore & Potomac R. R. Co. v. Fifth Bap. Church, 108 U. S. 317, 329, 2 Sup. Ct. 719, 726, 27 L. Ed. 739, the court through Mr. Justice Field said:

"That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance."

In Camfield v. United States, 167 U. S. 518, 522–523, 17 Sup. Ct. 864, 866, 42 L. Ed. 260, the court through Mr. Justice Brown said:

"There is no doubt of the general proposition that a man may do what he will with his own, but this right is subordinate to another, which finds expression in the familiar maxim: Sic utere tuo ut alienum non lædas. His right to erect what he pleases upon his own land will not justify him in maintaining a nuisance, or in carrying on a business or trade that is offensive to his neighbors. Ever since Aldred's Case, 9 Coke, 57, it has been the settled law, both of this country and of England, that a man has no right to maintain a structure upon his own land, which, by reason of disgusting smells, loud or unusual noises, thick smoke, noxious vapors, the jarring of machinery, or the unwarrantable collection of flies, renders the occupancy of adjoining property dangerous, intolerable or even uncomfortable to its tenants. No person maintaining such a nuisance can shelter himself behind the sanctity of private property."

Chancellor Zabriskie in Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654, in awarding at the suit of sundry owners and occupants of dwelling houses an injunction against the operation of a pottery in which it was proposed to use, in burning the earthenware, pine wood emitting

large volumes of dense and offensive smoke laden with cinders, elaborately reviewed the authorities. Among other things pertinent to this case he said:

"The law takes care that lawful and useful business shall not be put a stop to on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or over refined person. But, on the other hand, it does not allow any one, whatever his circumstances or condition may be, to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by a lawful and useful business, carried on in his vicinity. The maxim, sic utere tuo ut alienum non lædas, expresses the well established doctrine of the law. It is not necessary, to constitute a nuisance, that the matter complained of should affect the health or do injury to material property. It is sufficient, in the language of Sir Knight Bruce, if it is 'an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant and dainty modes and habits of living, but according to plain and sober and simple notions among the English people.' In accordance with this view, it is settled in England and in this country, that smoke, or offensive vapors, or noise, although not injurious to health, may constitute a nuisance; the only question being, whether the degree or extent is such as to interfere materially with the comfort of life. * * * The law, then, must be regarded as settled, that when the prosecution of a business, of itself lawful, in the neighborhood of a dwelling-house, renders the enjoyment of it materially uncomfortable, by the smoke and cinders, or noise or offensive odors produced by such business, although not in any degree injurious to health, the carrying on such business there is a nuisance, and it will be restrained by injunction."

In Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 201, the same learned judge, in awarding an injunction against the use of the lime process in the purification of gas, or any process of which lime was a substantial part, and from manufacturing gas in any way that would produce annoyance to persons dwelling in the houses of the complainants, by smoke, gases, other effluvia or odors that might issue from the works, said:

"Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and when continued or repeated, make life uncomfortable. To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it; and any interference with our neighbor in the comfortable enjoyment of life is a wrong which the law will redress. The only question is what amounts to that discomfort from which the law will protect. The discomforts must be physical, not such as depend upon taste or imagination."

It by no means follows from the fact that the odors from the fish factories may not be nauseating or discomforting and annoying to those employed there, or to others inured to noisome smells, that they do not constitute a nuisance to the inmates of the quarantine station and marine hospital. It is important in this connection to bear in mind that the accomplishment of the purposes for which the station and hospital were established involves not only the presence there of the officers and employees in charge, but the detention and confinement of many who have never been subjected to such a tainted atmosphere. In Cleveland v. Citizens' Gaslight Co., supra, the Chancellor said:

"Whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so, because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort. Other persons or classes

of persons whose senses have not been so hardened, and who, by their education and habits of life, retain the sensitiveness of their natural organization, are entitled to enjoy life in comfort as they are constituted. * * * This, then, is the question before me: Whether the proposed works of the defendants would produce such annoyance as would render such families, composed of women and children, as well as men, uncomfortable; not whether men accustomed to follow their occupations in places where they are surrounded, and unavoidably, by much that is offensive, may not be so accustomed to odors of like nature as not to be annoyed by these."

Chief Justice Comegys in charging the jury in State v. Luce, 9 Houst. (Del.) 396, 32 Atl. 1076, said:

"It is true that such of the defendants' witnesses as spoke of the odors resembling fertilizers said that they did not annoy them. Well, there are people in the world who are not made uncomfortable by bad smells. Living among vile odors, having insensitive olfactories, they are shielded, mercifully. But such is not the case with most men, nor with women and female children who have very acute sensibilities. The law of nuisance exists for the protection of such."

It is well settled that the mere fact that one voluntarily "comes to a nuisance" will not preclude him from complaining of and obtaining relief against it. Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900, 9 L. R. A. 737, 25 Am. St. Rep. 595; Brady v. Weeks, 3 Barb. 157; Tipping v. St. Helen's Smelting Co., L. R. 1. Ch. App. Cas. *66; Cooley on Torts, 612; People v. White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; Kissell v. Lewis, 156 Ind. 233, 59 N. E. 478; Van Fossen v. Clark, 113 Iowa, 86, 84 N. W. 989, 52 L. R. A. 279. A contrary doctrine would be so unreasonable and oppressive as to work its own condemnation. If, by way of illustration, one should purchase a lot of land one hundred feet square in an uninhabited section and erect and operate upon it a bone boiling establishment, or other factory, causing noxious, noisome or physically discomforting and annoying odors or stenches to spread over the surrounding country within a radius of half a mile from such mill or factory, he would furnish the means of destroying the ordinary enjoyment of human existence throughout an area more than 2188 times as large as the lot owned by him and devoted to the offensive business. It would be in the highest degree unreasonable and absolutely repugnant to the sense of justice that he should in the supposed case have a right to subordinate to his own selfish ends the beneficial enjoyment of land of others having an area in comparison with which that of the lot acquired by him is so insignificant. The establishment of the offensive business in such case could not prevent the then owners of the residue of the land within the sphere of the noisome odors from building and occupying dwelling houses thereon, nor deprive them of the right to have and enjoy reasonably pure and inoffensive air in and about their homes. Such right they would possess by virtue of their ownership and occupancy of the land; and that right undoubtedly would pass to their grantees or others taking title mediately or immediately from them. Indeed, were such right not capable of passing to others, the value of the land in the hands of those subsequently parting with the title would be seriously impaired or, perchance, wholly destroyed, by the erection and opera-

tion of the offensive business, and those succeeding to the title would be without remedy or redress of any kind for the continuance of the nuisance. But such clearly is not the law. Cooley, in his work on Torts, p. 612, says:

"The party who at the time suffers the inconvenience of a nuisance is entitled to complain of it, and it is immaterial whether it was or was not a nuisance to him in its origin. Therefore, it is of no importance to the right of action that the plaintiff has come into the neighborhood since the nuisance was created; he has the right to locate himself wherever he can do so to his satisfaction, and no one can have the authority to set limits to his choice of location by interposing something which is offensive. Moreover, it would detract very seriously from the value of property if the owner, desiring to dispose of it, could not transfer all his rights, including his right to protection in its complete enjoyment, but must, when a nuisance is created near him, either await the result of proceedings for its abatement, or dispose of his land with the nuisance practically assented to, and for a price which the nuisance has assisted in establishing. Nothing can be plainer than if the grantor could have complained when he conveyed, the grantee may complain afterwards; and to whatever use the grantor might have put the land, as being suitable and proper for the locality, the grantee is at liberty to choose and adopt."

In Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567, the court through Earl, J., said:

"It matters not that the brickyard was used before plaintiffs bought their lands or built their houses. * * * One cannot erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor's land may in the future be subjected. He may make a reasonable and lawful use of his land and thus cause his neighbor some inconvenience, and probably some damage which the law would regard as damnum absque injuria. But he cannot place upon his land anything which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it in such way only as the neighboring nuisance will allow."

Where one operates a factory emitting foul or noisome smells, and owns and controls all the land within the area traversed by them in sufficient strength to be nauseating or substantially discomforting and annoying, no one has just cause of complaint. But to foist impure and disgusting odors upon others in their homes is a different matter, and save in localities generally devoted to business of a character to produce such or equally offensive smells, or unless by virtue of grant, license, estoppel or prescription, is not to be tolerated.

The factory of the defendants and that erected by S. S. Brown & Company, as has been stated, are so situated with respect to each other that when the wind is in such direction as to carry the odors from one of them to the quarantine station it will carry the odors from the other there, and the odors from one cannot be distinguished from the odors from the other. There is no evidence of co-operation, privity or business relationship of any kind between the defendants and S. S. Brown & Company in the erection and operation of their respective factories, or between the defendants and the succeeding owners or managers, if such there be, of the factory erected by S. S. Brown & Company; nor is there any evidence to the point that the odors from either of the factories alone would or would not so contaminate the air at the quarantine station as to create a nuisance there within the definition of the authorities. But the combined odors from both factories un-

questionably have that effect, and in producing it the two establishments in fact co-operate in and contribute to the creation of the nuisance. Under these circumstances, in the absence of a plain, adequate and complete remedy at law, the owners or managers of both or either of the factories can be enjoined from maintaining or contributing to the maintenance of the nuisance. Woodyear v. Schaefer, 57 Md. 1, 40 Am. Rep. 419; Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Lockwood Co. v. Lawrence, 77 Me. 297, 52 Am. Rep. 763; Hillman v. Newington, 57 Cal. 56; Thorpe v. Brumfitt, L. R. 8 Ch. App. Cas. 650; People v. Gold Run D. & M. Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80. In Thorpe v. Brumfitt, supra, it was held that the acts of several persons may together constitute a nuisance, which the court will restrain, though the damage occasioned by the acts of any one, if taken alone, would be inappreciable. Sir W. M. James, L. J., in affirming the decree of the Master of the Rolls, awarding a perpetual injunction, said:

"Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to shew this. Nor do I think it is necessary that he should shew it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defense to any one person among the hundred to say that what he does causes of itself no damage to the complainant."

In Woodyear v. Schaefer, supra, in which the court of appeals reversed the decree of the court below refusing an injunction to restrain an alleged nuisance, the court through Magruder, J., said:

"It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action, and to be restrained. * * * The extent to which the appellee has contributed to the nuisance, may be slight and scarcely appreciable. Standing alone, it might well be that it would only, very slightly, if at all, prove a source of annoyance. And so it might be, as to each of the other numerous persons contributing to the nuisance. Each standing alone, might amount to little or nothing. But it is when all are united together and contribute to a common result, that they become important as factors, in producing the mischief complained of. * * * One drop of poison in a person's cup, may have no injurious effect. But when a dozen, or twenty, or fifty, each put in a drop, fatal results may follow. It would not do to say that neither was to be held responsible. In that state of facts, as in the one presented by this case, each element of contributive injury is a part of one common whole, and to stop the mischief of the whole, each part in detail must be arrested and removed. The right to pure air is held to be a natural right, and as incident to the enjoyment of land. Its sensible pollution by the exercise of a noxious trade, whereby the comfortable enjoyment of property is diminished, is a nuisance, against which courts of equity will always, when the state of facts applies, give relief, and such injury as is not fairly and reasonably incident to the ordinary use of property, and renders surrounding property physically uncomfortable, will be restrained. * * * And the remedy in equity to prevent a nuisance, is generally said to exist whenever the nature of the injury is such that it cannot be adequately compensated by damages, or will occasion a constantly recurring grievance. An injunction is the only effectual remedy to stop the injury. Adams, Eq. 211.

Especially is this the case when the injury is caused by so many, that it would be difficult to apportion the damage, or say how far any one may have contributed to the result, and so damages would likely be but nominal, and repeated actions without any substantial benefit, might be the result. This very difficulty in obtaining substantial damages was stated in Clowes v. Staffordshire, & Co., 1 L. R. Ch. App. 142, to be a ground for relief by injunction. And the doctrine is well settled that where the nuisance operates to destroy health, or impair the comfortable enjoyment of property, an action at law furnishes no adequate remedy, and protection by injunction must be given. * * * We think that the complainant has shown himself to have suffered greatly, and likely to suffer more in the future, from the nuisance to his property, whereby it is likely to become practically valueless, unless the injury is restrained. He will be entitled to the same relief against all the parties contributing to the injury, and as all are together contributing to the same result, if the injury does not cease upon the granting of the injunction in this case, he may be entitled to join in one case, all who still continue the injury; upon the principle of the case of Thorpe v. Brumfitt, 8 L. R. Ch. 656, where it is held that the acts of several persons, acting separately, and without concert and entirely independent of each other, may together constitute a nuisance, when the acts of either one alone would not create it, and such persons may be joined as defendants in a bill for an injunction."

In Lockwood Co. v. Lawrence, supra, where a bill was filed to restrain a nuisance, the same doctrine was clearly enunciated. The court through Foster, J., said:

"In considering the questions thus raised by the pleadings upon this branch of the case, and assuming the facts set forth by the allegations in the bill to be true, no other conclusion can be reached than that the respondents, though acting independently of each other as alleged, all deposit the refuse material and debris arising from the operation of their mills into the same stream, whence, by the natural current of the water, it is carried down the river and commingles before reaching the complainants' ponds, raceways, racks and wheels, where the nuisance complained of is committed. * * * Whatever, then, may have been the act of these different respondents, either in the operation of their several mills, or in the depositing of the waste and debris arising from such operations, into the stream, there is a co-operation in fact in the production of the nuisance. * * * The acts of the respondents may be independent and several, but the result of these several acts combines to produce whatever damage or injury these complainants suffer, and in equity constitutes but one cause of action. It is otherwise in law where damages are sought to be recovered. There, only those parties can be joined who have acted jointly in the commission of the act. There must be concert of action and co-operation to make several persons jointly liable in an action at law. * * * In the case at bar, it may be that the act of any one respondent alone might not be sufficient cause for any well grounded action on the part of the complainants; but when the individual acts of the several respondents, through the combined results of these individual acts, produce appreciable and serious injury, it is a single result, not traceable perhaps to any particular one of these respondents, but a result for which they may be liable in equity as contributing to the common nuisance, as we have before stated."

The case of People v. Gold Run D. & M. Co., supra, is in line with the other decisions cited in this connection. The court through McKee, J., said:

"But it is contended that as the nuisance complained of and found by the court was the result of the aggregate of mining debris dumped into the stream by the defendant and other mining companies, acting separately and independently of each other, the acts of the defendant cannot be joined with the acts of other mining companies, to create a cause of action against the defendant. * * * This case (Hillman v. Newington, supra) clearly recognized the equitable principle that, in an action to abate a public or private

nuisance, all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined, jointly or severally. It is the nuisance itself, which, if destructive of public or private rights of property, may be enjoined."

The frequency with which during the period from July 1 to the early part or middle of November in each year the quarantine station is visited with the noisome smells is sufficient to constitute a nuisance there. In Ross v. Butler, 19 N. J. Eq. 294, 302, 97 Am. Dec. 654, the court said:

"In this case, it is contended that as the burning will be but twice in a month, and for twelve hours only, and that principally at night, it will be so slight as not to be a material discomfort. A nuisance of this kind may possibly occur so seldom that it will not be held to produce a material discomfort. Where the occurrence was only accidental and not produced by the regular course of business, and recurring only three or four times a year, and not intended to be again permitted, it was held not to be a proper cause for an injunction to stop a lawful business, but that the party must be put to his action for damages. But I am not aware of any authority or established principle, holding that a clear unmistakable nuisance, which it is intended to commit periodically, will be permitted because it does not exist the greater portion of the time, but only for a small portion of it. This court will not determine that a family shall have their dwelling-house made uncomfortable to live in for twelve hours, once in two weeks, or that they shall protect themselves by closing the house tightly, and remaining in doors for that time. It is surely no justification to a wrongdoer, that he takes away only one-twenty-eighth of his neighbor's property, comfort, or life. The qualifications contained in the opinions of the judges that a lawful business will not be restrained for every trifling inconvenience, and that persons must not stand on extreme rights, and bring actions in respect to every matter of annoyance, does not refer to the proportion of time for which the nuisance is continued, but only to the degree or kind of annoyance."

In Campbell v. Seaman, supra, the court said:

"The policy of the law favors, and the peace and good order of society are best promoted by the termination of such litigations by a single suit. The fact that this nuisance is not continual, and that the injury is only occasional, furnishes no answer to the claim for an injunction. The nuisance has occurred often enough within two years to do the plaintiffs large damage. Every time a kiln is burned some injury may be expected, unless the wind should blow the poisonous gas away from plaintiff's lands. Nuisances causing damage less frequently have been restrained."

The doctrine that owners and occupants of houses and lands are entitled to the enjoyment of air of reasonable purity, though of general, not being of universal application, often there is difficulty in applying it to a given case. Considerations affecting the social state require in some instances concessions or compromises, to a greater or less extent, of what would otherwise be regarded as of strict right. Cogswell v. N. Y., etc., R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; People v. White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; Robinson v. Baugh, 31 Mich. 289, 295, 296. In Cogswell v. N. Y., etc., R. Co., supra, the court through Andrews, J., said:

"The compromises exacted by the necessities of the social state, and the fact that some inconvenience to others must of necessity often attend the ordinary use of property, without permitting which there could in many cases be no valuable use at all, have compelled the recognition, in all systems of

jurisprudence, of the principle that each member of society must submit to annoyances consequent upon the ordinary and common use of property, provided such use is reasonable both as respects the owner of the property, and those immediately affected by the use, in view of time, place and other circumstances. It is in many cases difficult to draw the line, and to determine whether a particular use is consistent with the duties and burdens arising from vicinage, or whether it inflicts an injury for which the law affords a remedy."

In Campbell v. Seaman, supra, the court said:

"'Sic utere tuo ut alienum non lædas' is an old maxim which has a broad application. It does not mean that one must never use his own so as to do any injury to his neighbor or his property. Such a rule could not be enforced in civilized society. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. For these they are compensated by all the advantages of civilized society. If one lives in the city he must expect to suffer the dirt, smoke, noisome odors, noise and confusion incident to city life."

But the existence of the two factories in question does not constitute such an industrial or manufacturing neighborhood that the government is compelled to submit to the stench emanating from them. It cannot be compared to the growth and territorial expansion of the industries of a city. In Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 201, 208, the court said:

"The justification that this is a neighborhood devoted to such manufacture, in which annoyances of this kind should not be restrained, is not sustained by the proof. Only two factories that could be an annoyance are shown. One the patent leather manufactory, and the other the cement works. No neighborhood can be outlawed from protection by the existence of only two establishments of this kind. It is only when a town or part of a town is, by their continuance for years, wholly given up to such establishments, so that one more would not add sensibly to the discomfort, that this rule applies; as if in Sheffield, Birmingham, or Pittsburg, or any other city, begrimed and clouded with the soot and smoke issuing from hundreds of engines, one more was added, such almost imperceptible addition to the evil would not be restrained."

The principal question after all is whether the defendants, in view of their obligations to others, are making a reasonable use of the premises occupied by them. Are they duly observing the precept, sic utere tuo ut alienum non lædas? On the evidence and the authorities clearly they are not. In Ducktown Sulphur, Copper & Iron Co. v. Barnes (Tenn.) 60 S. W. 593, the Court of Chancery Appeals through Wilson, J., said:

"The place where a business is carried on may be convenient to the party engaged in it, and it may be convenient to the public, but in legal contemplation no place can be suitable or convenient for carrying on a business which is a nuisance and inflicts material injury to the property of another. No use of one's land can be held to be a reasonable use which deprives an adjoining owner of the lawful use and enjoyment of his property. * * * It is enough that the enjoyment of life and property has been rendered uncomfortable."

In Attorney General v. Cole, L. R. 1 Ch. 1901, 205, the court through Kekewich, J., said:

"Is what is complained of a nuisance? And if it really is a nuisance, then it seems almost to follow as a matter of course that it is a nuisance which ought to be restrained, assuming that it is not of a trifling or a passing character. * * * Can a man reasonably create a nuisance? That seems to me

to be the question. I think the answer to be derived from the case of Bamford v. Turnley, from which, so far as I am aware, there has never been any departure at all, is that he cannot. If he commits a nuisance, then he cannot say that he is acting reasonably. The two things are self-contradictory."

In Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567, the court said:

"Every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If he makes an unreasonable, unwarrantable or unlawful use of it, so as to produce material annoyance, inconvenience, discomfort or hurt to his neighbor, he will be guilty of a nuisance to his neighbor. And the law will hold him responsible for the consequent damage. As to what is a reasonable use of one's own property cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable and a nuisance."

The doctrine of the balance of convenience or injury which so frequently is determinative of the propriety of granting or denying a preliminary injunction has no application to decrees after a hearing on plenary proofs taken in due course. Endlich, J., in delivering the opinion of the court below, which was approved on appeal in Evans v. Fertilizer Co., 160 Pa. 209, 222, 28 Atl. 702, 709, said:

"So far as the 'balance of injury' notion refers to the parties of the litigation, it is pointed out in Higgins v. Water Co., 36 N. J. Eq. 538, 544, that its legitimate application is to motions for preliminary injunctions, not to final decrees. Where the question for the consideration of the court is as to the propriety of stopping a business by preliminary injunctions upon an ex parte showing, which may or may not be substantiated by further examination of the case in due course, it is very well for a chancellor to take into account the magnitude of the defendant's investment and compare it with the character of the plaintiff's alleged injury, and if the latter appears trifling beside that which would result from the impairment of the former, he may well refuse to exercise his power until more fully advised. But where, upon final hearing the mind of the chancellor is satisfied that the complainant's right is clear, and the injury sustained by him substantial, so that his claim to damages at law is indisputable, and where, moreover, such damages could not give him adequate redress except by an endless repetition of suits, a refusal of an injunction, upon the ground that plaintiff cannot suffer as great a loss from the continuance of the nuisance as defendant would from its interdiction, would be as far removed from equity as can be."

The fact that defendants have invested a considerable amount of money cannot clothe them with immunity for creating or contributing to and maintaining a nuisance. In Pennsylvania Lead Co.'s Appeal, 96 Pa. 116, 42 Am. Rep. 534, the court, through Gordon, J., said:

"Where, in ordinary parlance, the damage sought to be prevented is irreparable, that is, where the wrong is repeated from time to time, or is of a continuing character, or productive of damages which cannot be measured by ordinary standards, equity may be invoked. * * * The rule sic utere tuo ut alienum non lædas is a most valuable one, and must be maintained if our civilization is to be cherished and preserved, and it is not at all to the purpose to answer the charge of a violation of this rule that the defendant's works have been erected at a great outlay of capital; that they are important to the public at large, and give employment to many men. * * * Where justice is properly administered rights are never measured by their mere money value, neither are wrongs tolerated because it may be to the advantage of the powerful to impose upon the weak. Whether it be the great corpora-

tion with its lead works, or the mechanic with his tin shop, the rule is the same: 'So use your own as not to injure another.'"

Endlich, J., in delivering the opinion of the court below, approved, as before stated, on appeal in Evans v. Fertilizer Co., 160 Pa. 209, 224, 28 Atl. 702, 709, said:

"There is to my mind no more offensive plea than that by which one seeks to justify an act injurious to his neighbors on the ground of its advantage to himself. * * * Where justice is properly administered, rights are never measured by their mere money value, neither are wrongs tolerated because it may be to the advantage of the powerful to impose upon the weak."

In Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900, 9 L. R. A. 737, 25 Am. St. Rep. 595, which related to a nuisance resulting from the operation of a fertilizer factory, the court through Robinson, J., said:

"No principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner, for which an action will lie. And this, too, without regard to the locality where such business is carried on; and this, too, although the business may be a lawful business, and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business. * * * The law, in cases of this kind, will not undertake to balance the conveniences, or estimate the difference between the injury sustained by the plaintiff, and the loss that may result to the defendant from having its trade and business, as now carried on, found to be a nuisance. No one has a right to erect works which are a nuisance to a neighboring owner, and then say he has expended large sums of money in the erection of his works, while the neighboring property is comparatively of little value. The neighboring owner is entitled to the reasonable and comfortable enjoyment of his property, and if his rights in this respect are invaded, he is entitled to the protection of the law, let the consequences be what they may."

The circumstances under which the defendants erected and have continued to operate their factory are not such as to disclose a reasonable use by them of their premises or to clothe them with an equity as against the government. Of all localities at or near the mouth of the Delaware bay the quarantine station was erected in that most convenient and desirable for the purposes of such an establishment. The government had constructed the breakwater affording a safe and excellent harbor as well for the facilitation of the transfer of persons from vessels to the quarantine station and marine hospital as for shipping generally. It had also built a pier to the east and a life saving station to the west of the site of the fish factories and within such a short distance from that site that the erection and operation of the latter could not fail so to contaminate the air with noisome odors as frequently, if not continuously, to cause discomfort and annoyance at those government works. From the initiation of their fish fertilizer business the defendants, while availing themselves of the protection of the breakwater, have displayed a striking lack of consideration toward the government by the emission of foul and nauseating smells injuriously affecting its interests. In view of the peculiar suitability of the site of the quarantine station for the accomplishment of the beneficent and important public purposes for which the station was designed and

of the establishment by the government of environments materially contributing thereto, it is clear that, on the question whether the right of the government to have uncontaminated and reasonably pure air at the quarantine station and marine hospital is not superior to any supposed right or equity on the part of the defendants in the conduct of their business to create or contribute to noisome odors substantially and injuriously affecting the inmates of the station and hospital, the case is altogether with the government.

This court has jurisdiction to award an injunction in this case. Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Baltimore & Potomac R. R. Co. v. Fifth Bap. Church, 108 U. S. 317, 329, 2 Sup. Ct. 719, 27 L. Ed. 739; Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; New Castle v. Raney, 130 Pa. 546, 564, 18 Atl. 1066, 6 L. R. A. 737; Sellers v. Parvis & Williams Co. (C. C.) 30 Fed. 164; Crump v. Lambert, L. R. 3 Eq. Cas. *409; Woodyear v. Schaefer, 57 Md. 1, 40 Am. Rep. 419; Hillman v. Newington, 57 Cal. 66; Clowes v. Staffordshire, etc., Co., L. R. 8 Ch. App. Cas. 125, 142; Thorpe v. Brumfitt, L. R. 8 Ch. 650; People v. Gold Run D. & M. Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; Adams v. Michael, 38 Md. 123, 17 Am. Rep. 516. Such jurisdiction exists by reason of the absence of a plain, adequate and complete remedy at law. The existence of such a remedy is negatived by several separate and independent considerations. Injury resulting from noisome or foul odors producing personal discomfort and annoyance is not susceptible of compensation in damages according to any approximately accurate measure, and from its recurrence would lead to multiplicity of suits. In Holsman v. Boiling Spring Bleaching Co., supra, the court said:

"The court of chancery has a concurrent jurisdiction with courts of law, by injunction, equally clear and well established, in cases of private nuisance. * * * To entitle the party to the remedy by injunction in cases of private nuisance, the right must be clear, and the injury must be such as from its nature is not susceptible of being adequately compensated for by damages, or such as from its long continuance may occasion a constantly recurring grievance which cannot be prevented otherwise than by injunction. Where the nuisance operates to destroy health or to diminish the comfort of a dwelling an action at law furnishes no adequate remedy, and the party injured is entitled to protection by injunction."

In Sellers v. Parvis & Williams Co., supra, this court, through Wales, J., said:

"When a plain and adequate remedy at law cannot be obtained, the power of a court of equity to abate a private nuisance which is destructive of the property of a complainant, or renders its use and occupation physically uncomfortable, is no longer questionable. The jurisdiction of the court, in such cases, is predicated upon the broad ground of preventing irreparable injury, interminable litigation, a multiplicity of actions, and for the protection of rights. * * * The right to pure air is incident to the land,—as much so as the right to the uninterrupted flow of a stream of pure water which runs through it,—and no one can be permitted to pollute either, to the injury and disadvantage of the owner."

In Campbell v. Seaman, supra, the court said:

"A suit at law is no longer a necessary preliminary, and the right to an injunction, in a proper case, in England and most of the states, is just as fixed

and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate tribunal. It is a matter of grace in no sense except that it rests on the sound discretion of the court, and that discretion is not an arbitrary one. If improperly exercised in any case either in granting or refusing it, the error is one to be corrected upon appeal."

In Adams v. Michael, supra, the court with respect to the injunctive power to restrain the erection or continuance of a nuisance, said:

"The power to interfere by injunction to restrain a party from so using his own property as to destroy or materially prejudice the rights of his neighbor, and thus to enforce the maxim, 'sic utere tuo ut alienum non lædas,' is not only a well established jurisdiction of the court of chancery, but is one of great utility, and which is constantly exercised. Indeed, without such jurisdiction, parties would in many cases suffer the greatest wrongs, for which actions at law would afford them no adequate redress."

The peculiar circumstances of this case afford further support to the proposition that the United States, unless prevented by estoppel, acquiescence, or some other act or conduct on its part, is here entitled to injunctive relief. That the government, in the absence of a plain, adequate and complete remedy at law has a right to maintain an injunction bill to restrain a nuisance materially and injuriously affecting the occupancy of its own property there can be no doubt. Camfield v. United States, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260. If, as is the case, a private individual be entitled to equitable relief against foul or noisome odors rendering the occupancy of his property substantially and frequently discomforting and annoying, the government for stronger reasons is entitled to such relief against the continuous or recurrent nuisance at the quarantine station. For should the government resort to an action at law, it could not recover damages measured by the discomfort and annoyance suffered by the inmates of the station; and, unless the nuisance were of such intensity as to compel an abandonment of the station by the government, there would be absolutely no basis on which it would be possible even to guess at the quantum of damages. Further, in view of the fact that the nuisance has been created by both of the fish factories without concert between those operating them and with no practicable means of ascertaining what the effect of that of the defendants alone would be, it is very questionable whether the government could in an action at law recover even nominal damages. In Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566, not to mention cases hereinbefore cited, the court, through Miller, J., said:

"The right of the plaintiff to recover of the defendant all the damages which he had sustained by reason of the nuisance I think cannot be maintained. The injury was not caused by the act of the defendant alone, or by that of others who were acting jointly or in concert with the defendant. It was occasioned by the discharge of sewerage from the premises of the defendant and other owners of lots into the creek separately and independently of each other. The right of action arises from the discharge into the stream, and the nuisance is only a consequence of the act. The liability commences with the act of the defendant upon his own premises, and this act was separate and independent of and without any regard to the act of others. The defendant's act, being several when it was committed, cannot be made joint because of the consequences which followed in connection with others who

had done the same or a similar act. It is true, that it is difficult to separate the injury; but that furnishes no reason why one tort feasor should be liable for the act of others who have no association and do not act in concert with him. If the law was otherwise, the one who did the least might be made liable for the damages of others, far exceeding the amount for which he really was chargeable, without any means to enforce contribution, or to adjust the amount among the different parties. * * * While an action in equity may be maintained in favor of different parties, who were the owners of property upon the same stream, against the owners of different properties, to restrain the nuisance, they may not be jointly or severally liable for the entire injury occasioned thereby. * * * While, as we have seen, an equitable action will lie to restrain parties who, severally contribute to a nuisance, the general rule is well settled that where different parties are engaged in polluting or obstructing a stream, at different times and places, the whole damages occasioned by such wrongful acts cannot be collected of one of the parties. * * * There must be concert of action and co-operation to make several persons jointly liable."

The jurisdiction of this court to award an injunction in this case, therefore, seems clear; and, possessing such jurisdiction, it has plenary power over the suit, including the ascertainment of disputed facts. Such an ascertainment, indeed, is contemplated by the Constitution. In Parsons v. Bedford, 3 Pet. 432, 446, 7 L. Ed. 732, the court, through Mr. Justice Story, said:

"It is well known, that in civil causes in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved, in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment."

The defendants, even on the assumption that the government is proceeding in this suit in a quasi private or proprietary character, have not acquired a prescriptive right as against it to continue or contribute to the continuance of the nuisance complained of, nor has there been any such acquiescence, act or conduct on the part of the government as to estop or preclude it from complaining of such nuisance. Mere lapse of time short of the prescriptive period cannot operate as a bar. In Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567, the court said:

"It is claimed that the plaintiffs so far acquiesced in this nuisance as to bar them from any equitable relief. I do not perceive how any acquiescence short of twenty years can bar one from complaining of a nuisance unless his conduct has been such as to estop him."

In Crump v. Lambert, L. R. 3 Eq. Cas. *409, Lord Romilly, M. R., said:

"It is true that, by lapse of time, if the owner of the adjoining tenement, which, in case of light or water, is usually called the servient tenement, has not resisted for a period of twenty years, then the owner of the dominant tenement has acquired the right of discharging gases or fluid, or sending smoke or noise from his tenement over the tenement of his neighbor; but until that time has elapsed, the owner of the adjoining or neighboring tenement, whether he has or has not previously occupied it,—in other words, whether he comes to the nuisance or the nuisance comes to him,—retains his right to have the air that passes over his land pure and unpolluted, and the soil and produce of it uninjured by the passage of gases, by the deposit of deleterious substances, or by the flow of water."

The law, indeed, goes further and holds that, notwithstanding the prescriptive period may have fully elapsed, no right to maintain a private nuisance is thereby acquired except as against those who have during all of that period been in such position as to entitle them to complain of it. Sturges v. Bridgman, L. R. 11 Ch. Div. 852. One is not short of the prescriptive period deprived of a remedy for a private nuisance he suffers from unless there has been such conduct on his part as to render it fraudulent or inequitable that he should seek its suppression. In Leonard v. Spencer, 108 N. Y. 338, 346, 15 N. E. 397, the court through Earl, J., said:

"There was no such acquiescence, within the meaning of the law, as deprives the plaintiff of the remedy which he now seeks for the abatement of the nuisance. It does not appear that he actively encouraged the defendants in the erection of their buildings and structures. They were erected upon their own land, and it was not within his power to interfere with or prevent their erection. All that can be said is that he did not make objection or protest against their erection, and that he did not give notice that the operation of the dam for the uses of the factory would prove detrimental or injurious to him. But what is still more important, it does not appear that the defendants took any action whatever in reliance upon the silence or acquiescence of the plaintiff."

In Radenhorst v. Coate, 6 Grant's Ch. 139, Spragge, V. C., used language, quoted in the case last referred to, as follows:

"The omission to warn the defendant, and the subsequent forbearance to take any proceedings against him, are relied upon as disentitling the plaintiff to relief. We do not think that it is shown by the evidence that there was any encouragement on the part of Mr. Radenhorst, or that the defendant took any step or incurred any expense upon the faith of anything said or done by Mr. Radenhorst, or that Mr. Radenhorst's conduct had any influence in determining the defendant to do anything in regard to his factory. Putting it most strongly for the defendant, that the evidence will warrant, there was an acquiescence for several years in the defendant's carrying on his business as he did carry it on, but nothing more. It is a plain common law right to have the free use of the air in its natural unpolluted state, and an acquiescence in its being polluted for any period short of twenty years will not bar that right. To bar that right within a shorter period, there must be such encouragement or other act by the party afterwards complaining as to make it a fraud in him to object."

It does not appear either directly or inferentially that the government at any time assented to or acquiesced in the operation of the fish factories in such manner as to produce or contribute to the production of the nuisance of which it now complains. These factories were not, nor was either of them, located, built or operated by the procurement or inducement of the government, nor under any promise, express or implied, on its part that no complaint would be made by it of foul, noisome or nauseating odors, emanating from the manufacture of fish fertilizer, and passing to and over the site of the quarantine station. The evidence wholly fails to disclose the essential elements of an estoppel in pais or an equitable estoppel against the government. The period necessary for the acquisition of a prescriptive right on the part of the defendants as against the government had not elapsed before the filing of the bill in this case, and such right was not and could not be acquired afterwards. It does not appear that the government was prior to the cession to it by Delaware of the site of the quarantine station

in 1889 in a position, or had any right, to complain of the stench resulting from the operation of the fish factories or either of them; for, as before stated, there is no evidence that prior to such cession the United States had any right, title, interest or claim to or in the site of the present quarantine station and marine hospital. The acquisition of a prescriptive right by the defendants is, therefore, wholly negatived. If the unwarrantable assumption be made that the mere lapse of time short of the prescriptive period may be evidence of such laches as would bar the government, there was not even on that assumption such laches as to defeat this suit. The cession having been made to the United States in 1889, the buildings on the quarantine station were thereafter completed within less than one year of the commencement of this suit. Under these circumstances any imputation of laches on the part of the government is wholly inadmissible.

This court is strongly impressed with the conviction that unless efficient relief be granted in the present proceedings to the government from atmospheric contamination caused by the fish factories, the nuisance complained of will by gradual addition grow to such an extent as to destroy the usefulness, or compel the abandonment by the United States, of the quarantine station and marine hospital, to the serious detriment of the public interests. To assume that the government should be forced to acquire by purchase or condemnation all the territory within the sphere of operation of the nuisance created by the fish factories is unwarranted by the authorities and a palpable absurdity. The government is entitled to injunctive relief.

What should be the nature and scope of the injunction which should now be awarded has been the subject of careful consideration. It would not be a proper exercise of authority, unless necessary to effect a discontinuance of the nuisance, to put a stop to the operation of the factory of the defendants, thereby destroying their business and the value of their present plant. It may and probably will be necessary to do this; but I am not now prepared to hold that it is impossible that such expedients may be adopted in the conduct of their business as to remove all just cause of complaint by the government. The accomplishment of this end would save from interruption or destruction a lawful and useful business; and the defendants should be accorded a fair opportunity of suppressing the nuisance caused or contributed to by them, if they can. It is a matter of common knowledge that by the use of deodorizers and disinfectants, by the combustion of fumes, and by preventing exposure of offensive matter to the outside air, and possibly by other means, foul, physically discomforting and nauseating odors largely may be controlled and neutralized. A decree will be made awarding an injunction against the operation of the factory of the defendants as a fish factory without such use of deodorizers and disinfectants in and about the factory, such combustion of the fumes generated or present in the factory, such prevention of exposure of fish scrap or other offensive refuse from the factory to the outside air or the employment of such other means as will serve to relieve the quarantine station and marine hospital from the presence of the nauseating and physically discomforting and annoying odors herein found

to exist and declared to constitute a nuisance at said station and hospital; such injunction to take effect at the expiration of sixty days next ensuing the date of such decree. The court will retain full jurisdiction and control over this cause to the end that it may make any and all such orders and decrees from time to time as shall be necessary for the effectual suppression of such nuisance. Should complaint be made by the government after the expiration of the above mentioned period of sixty days that the operation of the fish factories after that period continues to work a nuisance at the quarantine station, it may be necessary to take further evidence in the case. Such a course is fully warranted by the authorities. The costs of this cause heretofore accrued must be paid by the defendants. A decree in accordance with this opinion may be prepared and submitted.

UNITED STATES v. BROWN et al.

(Circuit Court, D. Delaware. September 26, 1905.)

No. 156.

BRADFORD, District Judge. This suit is similar to that of United States v. Edward Luce, James V. Luce and Edward C. Luce, trading as Luce Brothers, 141 Fed. 385. Both cases have been heard on the same evidence and are identical in principle. In that against Luce Brothers an opinion has this day been filed declaring the government entitled to injunctive relief. In this case relief of the same kind must be granted. A decree may be prepared and submitted accordingly.

SHANLEY v. HEROLD.

(Circuit Court, D. New Jersey. October 20, 1905.)

1. INTERNAL REVENUE—LEGACY TAX—VESTED INTEREST.

A bequest to a person when he reaches a certain age is contingent, and not taxable under War Revenue Act June 13, 1898, c. 448, Schedule B, §§ 29, 30, 30 Stat. 464, 465, as amended by Act March 2, 1901, c. 806, §§ 10, 11, 31 Stat. 946 [U. S. Comp. St. 1901, pp. 2307, 2308], before such age is reached; but, where the legatee is in the meantime to receive the income therefrom, he has a present beneficial interest which is subject to the tax, to be based on a computation of the amount he will receive before reaching such age or during his expectancy of life, if shorter than such time.

2. SAME.

A testator by his will left his residuary estate in trust until the death or remarriage of his widow, on the happening of either of which events it was to be divided equally between his three sons. Until such time the income was to be collected by the trustees, and on a stated day each year, after deducting the cost of administration, divided equally between the widow and sons, share and share alike. *Held*, that the reversionary interest of the sons in the corpus of the estate was not subject to tax under War Revenue Act June 13, 1898, c. 448, Schedule B, §§ 29, 30, 30 Stat. 464, 465, as amended by Act March 2, 1901, c. 806, §§ 10, 11, 31 Stat. 946 [U. S. Comp. St. 1901, pp. 2307, 2308], because such interests were not "absolute-

ly vested in possession or enjoyment" prior to July 1, 1902, within the meaning of Act June 27, 1902, c. 1156, 32 Stat. 406 [U. S. Comp. St. Supp. 1905, p. 637], the widow being then living and unmarried, and for the further reason, as to the one-fourth part from which the widow received the income, that the statute requires the tax to be deducted from the particular legacy or distributive share on account of which the same is charged, and the widow's interest is not subject to tax nor deduction on account of the same. *Held*, also, that the interest of the sons in the income during the continuance of the trust was not taxable, except as to the amount actually received prior to July 1, 1902, because the provision of the will that the trust should terminate in the event of the widow's remarriage rendered the amount of such income, and hence its "clear value," undeterminable.

At Law. Trial to court, a jury having been waived pursuant to statute.

Lintott, Johnson & Capen, for plaintiff.
John B. Vreeland, for defendant.

CROSS, District Judge. This action is brought to recover legacy taxes assessed under the war revenue act, the same being entitled "An act to provide ways and means to meet war expenditures and other purposes," approved June 13, 1898 (30 Stat. 448, c. 448), as amended March 2, 1901 (31 Stat. 938, c. 806, § 1 [U. S. Comp. St. 1901, p. 2286]), which were paid by John F. Shanley, executor and trustee under the last will of Bernard M. Shanley, deceased, who died March 19, 1900, leaving personal estate of a clear value of $5,589,668.14. Testator's widow is still living and was 40 years of age at the time of his death.

The legacies which were taxed passed under the following paragraphs of decedent's will:

'Fourthly. I give and bequeath to my three sons, William Carleton, James Roosevelt and Bernard M., Jr., each the sum of one hundred thousand dollars; and I give and bequeath to my said three sons all my stock in the B. M. & J. F. Shanley Company, share and share alike.

"Fifthly. I give and bequeath the sum of one hundred thousand dollars to my executor hereinafter named, in trust nevertheless, to invest the same in safe securities and to expend the income thereof for the support, maintenance and education of my grandson, Joseph Sanford Shanley until he shall arrive at the age of twenty-one years, when the said sum of one hundred thousand dollars shall be his and shall be paid to him accordingly. If my said grandson shall not have arrived at the age of twenty-one when the distribution of my estate is to be effected as hereinafter provided, that is, upon the death or remarriage of my wife, then I direct that my executor shall hold in trust the further sum of one hundred and fifty thousand dollars and to pay the income thereof for the support, maintenance and education of my said grandson, until he shall arrive at that age, and, upon his reaching that age and the time of distribution of my estate having arrived as aforesaid, the said sum of one hundred and fifty thousand dollars shall be his and be paid to him. If my said grandson should die before attaining the age of twenty-one years, the said bequests for his benefit of one hundred thousand dollars and one hundred and fifty thousand dollars shall lapse, revert to and become part of my general estate. If he arrives at that age he shall have the first-mentioned sum immediately thereupon, and the other sum, one hundred and fifty thousand dollars, when the final distribution of my estate is made as herein provided."

"Seventhly. I direct that the net income of all the residue and remainder of my estate, after the payment of all necessary and proper expenses and

charges on account of the same, be annually divided, on the twenty-fifth day of January of each year, between my wife, and my three sons, share and share alike, each receiving one-fourth thereof, until the death or remarriage of my said wife, upon the happening of either of which events all her right, title and interest in my estate shall cease. And, thereupon, I direct that all the rest, residue and remainder of my estate, real and personal, subject to the provisions above written for the benefit of my grandson, shall be distributed and divided among my said three sons share and share alike."

The taxes paid, and for the return of which suit is brought, amount to $97,936.63, as shown by the schedule annexed to the declaration, and were paid by the said executor and trustee under protest. The legality of the taxes paid under the foregoing paragraphs of said will will be discussed in the order of said paragraphs.

First, as to the taxes paid under the item of said will denominated "fourthly." Under this paragraph each son was given the sum of $100,000 and one-third of testator's stock in the B. M. & J. F. Shanley Company, which one-third interest was valued at $18,333.33, making the total value of the legacy passing to each son under this item of the will $118,333.33. No question is made that this amount was properly taxed to each son, but the rate of taxation is questioned, and as the rate must depend upon the sum of all the legacies bequeathed by the will to each son, this question will be held in abeyance until after a discussion of the other legacies passing to them; we shall then be able to ascertain the sum of such legacies, and apply the rate provided by law.

Under the item "fifthly" of said will, two legacies were given to a grandson, Joseph Sanford Shanley, of $100,000 and $150,000, respectively. Counsel for the plaintiff contends that these legacies are not taxable, because they are both technically contingent legacies, and the legatee is not in the absolute possession or enjoyment thereof. As to the legacy of $150,000, counsel for the defendant admits that under the rule laid down in Vanderbilt v. Eidman, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, no tax could be legally assessed thereon, and we regard such admission as entirely warranted, since he was not in the possession or enjoyment of either the income or principal of said fund, and also because the question of his ever deriving any beneficial interest from said legacy was purely contingent, as will readily be seen from reading the paragraph.

As to the principal of the other legacy of $100,000, we regard that also as contingent. The right of the legatee to possess it will depend upon his living to the age of 21 years. By the will it is provided that the said sum of $100,000 shall be held in trust by the executor until the said grandson shall arrive at said age, "when the said sum of one hundred thousand dollars shall be his and shall be paid to him accordingly"; and again, "if he arrives at that age he shall have the first mentioned sum [$100,000] immediately thereupon." That this legacy was contingent seems to be settled by the case of Gifford v. Thorn, 9 N. J. Eq. 702, where it was held that a bequest to a party when he arrives at the age of 21 years, to him and his heirs forever, is a contingent legacy. The Court of Errors and Appeals, in delivering its opinion, used this language:

"Now, it has been repeatedly held, and seems at this day, to be settled law, that, where the bequest made to a legatee is in these words or words of a similar meaning, without being controlled by the context to the will, they imply a condition precedent, to wit, that the legatee live to that age, and consequently the legatee does not take a vested interest in the legacy until 21. 'I give and bequeath to A. B. at the age of twenty-one,' or 'as he arrives at twenty-one,' or 'provided he lives to be twenty-one,' or 'in case of his arriving at twenty-one,' or 'when he arrives at the age of twenty-one,' have all been held to be contingent legacies."

The foregoing decision has never been questioned, but, on the contrary, has been cited and approved in very many cases, among them Post v. Herbert's Executors, 27 N. J. Eq. 540; Howell v. Green, 31 N. J. Law, 571; Neilson v. Bishop, 45 N. J. Eq. 473, 17 Atl. 962. As has already been indicated, there are no words in the context of the Shanley will which require any other or different construction than the above. We think, therefore, that the principal of the legacy of $100,000 was not taxable. Notwithstanding this conclusion, however, we think that the legatee had a present beneficial interest in the legacy which was taxable. At the death of the testator he was 7 years of age, and he had a life expectancy of nearly 40 years. The trustee who held the legacy was directed to expend the income thereof for his support, maintenance, and education until he should arrive at the age of 21 years, and, since his life expectancy extended beyond that period, he would seem to have, and to be in the possession and enjoyment of, a present beneficial interest in said fund for the period of 14 years, being the difference between his age at the death of the testator and the time when he would reach the age of 21. We estimate the total taxable value of the legacy therefore at $42,252.48, which value should be taxed under the act at the rate of $1.12½ per 100, making the tax payable thereon $475.34.

We will next consider the legacies passing under item "seventhly" of the will. This paragraph directs that the net income of all the residue and remainder of testator's estate, after the payment of all taxes and proper expenses and charges on account of the same, be annually divided on the 25th day of January of each year, between his wife and three sons, one-fourth to each, until the death or remarriage of his wife. Upon the happening of either of such events, the rest, residue, and remainder was to be distributed between his three sons, share and share alike. Under this paragraph the beneficial interest of each son was valued for taxation as follows: $757,842.30¼ of income of residue during life of widow, $618,703.25 ⅓ of reversionary remainder at death of widow. The reversionary interest just referred to was the entire residue of the estate at the death of the widow, including the part of which she had the income. We think it entirely clear that the one-fourth part of which the widow has the use during her life or widowhood has not passed to the sons, and is not taxable under the act referred to. This view is supported by the opinion of the Supreme Court in Mason v. Sargent, 104 U. S. 689, 26 L. Ed. 894. In that case the decedent's personal estate upon which the tax was levied was given to trustees for the use of his widow for life, and at her death to his children absolutely. The remainder was taxed prior to the death of the

widow, the tax was paid under protest, and claim was duly made for its return, for the reason that the property did not vest in possession in the remaindermen until the death of the widow. The tax was imposed pursuant to section 124 of the act of June 30, 1864 (30 Stat. 285, c. 173), and the amendment to said act of July 13, 1866 (30 Stat. 98, c. 184). These sections are practically the same as those found in the act under which the taxes now being considered were assessed. Both the act of 1864 and the act of 1898 contain clauses exempting from taxation all legacies or property passing by a will, or by the law of any state or territory to the husband and wife of the person who died possessed thereof; and both contain clauses that the taxes to be paid thereunder shall be deducted from the particular legacy, or distributive share, on account of which the same is charged. In the Mason Case the court held that:

"The tax was illegally demanded and collected. * * * The subject of the tax is the interest of the legatees in remainder; but it is not taxable as a remainder, for by the terms of the law it does not become a subject of taxation until the right accrued to reduce it to possession. Until then it is expressly exempt from taxation."

The conclusion reached in that case was inevitable in view of the fact that the wife's interest in the estate could not be taxed, and that the law directed the tax to be paid from the particular legacy or distributive share on account of which the same was charged. Any other result would have required the tax to be deducted from the corpus of the estate, while it was in the hands of the widow, and would have proportionately depleted her income; and the same result would happen in the presnt case. The facts in the two cases are quite alike, save that in the Mason Case the widow had the income from the entire estate, while in the present case she has the income from one-fourth of the estate only. We conclude, therefore, that the reversionary interest in said one-fourth part was not taxable under the act of 1898 and its supplement, and would not have become taxable had the act remained unrepealed until after the death or remarriage of the widow.

Before considering the liability to taxation of the remaining three-fourths of the reversionary interests, we will advert briefly to some of the points which we deem were decided in the Vanderbilt Case. Without adhering strictly to the language of the court, they are as follows: (1) That the liability for taxation depends not upon the mere vesting in a technical sense of title to the gift, but upon the actual possession or enjoyment thereof. (2) A mere technically vested interest, where the right of possession or enjoyment is subordinated to an uncertain contingency, cannot be taxed before the period when possession or enjoyment has attached. (3) The right to receive a legacy, and the duty to pay the tax, are practically contemporaneous. (4) The taxes which the act of 1902 directs to be refunded, and those which it forbids to be collected in the future, are one and the same in their nature, and the taxes directed by said act to be refunded are such as had been assessed or imposed upon, or in respect to contingent beneficial interests which had not become absolutely vested in possession or enjoyment, prior to July 1, 1902.

The proposition then presented for solution is whether, applying the

principles above laid down, the reversionary interests of the three sons in the residue of the estate were absolutely vested in possession or enjoyment prior to July 1, 1902, so as to make them liable to taxation. Technically speaking, they were vested estates; but under the Vanderbilt decision that of itself is immaterial and does not answer the question as to whether such beneficial interests had become absolutely vested in possession or enjoyment. "The word absolutely is an appropriate expression for the exclusion of the idea that an estate is either partial or conditional." 1 Am. & Eng. Enc. of Law (2d Ed.) p. 208. In Rapalje & Lawrence's Law Dictionary, "absolutely" is defined as "complete; final; perfect; unconditional; unrestricted; an estate without condition or qualification." A beneficial interest, to be taxable, must not only be vested in possession or enjoyment, but it must be absolutely so vested. This is a controlling word, and, as applied to property and property rights, means unqualified ownership; that is to say, qualified ownership in property is not absolute ownership. Absolute ownership is perfect ownership, without condition and without restriction or limitation. The reversionary interest of the sons in the property in question is held by a trustee, and is to be so held until the widow shall die or remarry. They have no present legal title to, or control over, the same. They can only receive a portion of the interest yearly, and that upon a fixed date. The share upon which the widow receives interest is in the same fund as the shares upon which they receive interest. Interest is accumulated by the trustee upon the entire fund, until the date when it is to be divided, and then, before it is divided, the charges and expenses of administration are deducted. Since, then, the legatees did not have the full and complete possession and enjoyment of their reversionary interests, and as the time when they will have such full and complete possession and enjoyment has not yet arrived, and the period when it will arrive is uncertain, we fail to see how such interests are taxable. They do not seem to us to be absolutely vested in the legatees in possession or enjoyment. The only present right they have is to a portion of the income. True, they can assign their interests, but only subject to the burdens and limitations imposed by the will, and at a correspondingly depreciated value. Moreover, since the duty to pay the tax and the right to receive the legacy are held to be practically contemporaneous, and the legacies are not yet payable, we think it must be held that the taxes also are not payable. We therefore hold that the taxes assessed upon the reversionary remainders were illegally assessed.

A further tax was imposed upon each of the sons for his interest under the seventh paragraph of the said will, as follows: "$757,842.30 one-quarter of income of residue, during the life of the widow." This assessment is made upon what was regarded as the present right of the legatees to receive three-fourths of the income of the estate until the death of the widow. But we fail to see any method provided in the act by which a valuation of such interest could, under the circumstances, be determined. It was determined undoubtedly by ascertaining the life expectancy of the widow, which could be arrived at with sufficient definiteness for most purposes by means of life tables. But another important contingency entered into the proposition which was not considered.

The interests in question of the legatees were determinable not only by the death of the widow, but also by her remarriage. It is apparent therefore that the interests might terminate at any time, and that there is consequently no way to fix or determine their present value. No tables have ever been calculated which will show the time, when, if ever, a widow will remarry. Dunbar v. Dunbar, 190 U. S. 345, 23 Sup. Ct. 757, 47 L. Ed. 1084. Congress might possibly have established an arbitrary rule of valuation in such cases; but it has not done so, and it is useless to speculate as to whether or not such legislation would have been valid had it been enacted. There must be, however, some method by which these estates could be valued with reasonable certainty, if this taxation is to be supported. No taxation can rest upon a haphazard or guess-work valuation, but that in our judgment is the only foundation upon which the property interests under consideration were taxed. Their clear value was not and could not have been ascertained. Under the circumstances we think the only method open to the government was to tax the income received by the legatees when, and as, it should be received. The evidence taken at the hearing discloses that each son received, prior to July 1, 1902, two annual payments amounting together to $87,279.41. We think the tax to this extent was properly imposed.

Before concluding we will, as briefly as may be, advert to the contention of the government that the tax levied on the income of the life of the widow and on the reversionary remainder amounted together to only the clear value of the legacy at the death of the testator, and that, if the tax imposed upon the income should prove too large, by reason of the remarriage of the widow, the tax imposed upon the reversion would be correspondingly too small, and, since the same person was entitled to both the income and the remainder, the tax as a whole was just. This reasoning is plausible, but runs counter to propositions which we regard as settled by Vanderbilt v. Eidman. The valuation of both the income and the reversion were necessarily based upon contingencies, some only of which were considered, while others were ignored. Valuations thus reached must necessarily be uncertain. The result of the method adopted was to value the legacy as if it were already vested absolutely in possession or enjoyment. No other or different valuation could have been placed upon the legacy, had it been payable immediately. If it were impossible to ascertain the present value of the reversion because of the possibility of the widow's remarriage, then it was equally impossible to value the income thereof. The government foresaw the difficulty, and attempted to overcome it by ignoring the possibility of remarriage, and fixing the same valuation upon the income and reversion that it would have fixed, had the legacies been vested in possession and enjoyment and payable immediately. We think this course was unwarranted.

Accordingly we find that each of the sons was taxable on a total valuation of $205,612.74, at a rate of 1½ per cent., upon $118,333.33 of that amount, however, the tax was paid without protest, and that the grandson was taxable upon the beneficial interest accruing from the receipt of the income on the legacy of $100,000, from the death of the testator,

when his age was 7, until he should become 21, the present value of which was $42,252.48. This sum is taxable at a rate of $1.12½ per $100 less these amounts. We think the taxes paid should be returned, with interest from February 6, 1903. Erskine v. Van Arsdale, 15 Wall. 75, 21 L. Ed. 63; Redfield v. Bartels, 139 U. S. 694, 11 Sup. Ct. 683, 35 L. Ed. 310. The following statement shows the amount for which judgment should be entered, calculated upon the above basis:

Amount paid under protest		$97,936 65
Amount payable on share of grandson valued at $42,252.48 at 1.12½ per centum	$ 475 34	
Amount payable on income received by each son, $87,279.41, at 1.50, $1,309.19, or for the three sons	3,927 57	4,402 91
Amount overpaid and to be refunded		$93,533 74
Interest thereon from February 6, 1903		15,052 41
Amount for which judgment will be entered		$108,586 15

In re NEW YORK CAR WHEEL WORKS.

(District Court, W. D. New York. October 16, 1905.)

No. 1,570.

1. BANKRUPTCY—CORPORATIONS—VALIDITY OF NOTES.

Evidence considered, and *held* insufficient to establish the invalidity of notes of a bankrupt corporation given in payment for stock of another corporation, which the purchaser had statutory power to buy, signed by the proper officer, and executed pursuant to a resolution of the board of trustees; it being shown that, although the bankrupt was insolvent at the time, the purchase might reasonably have been made to protect the interest which it already had in the second corporation, which was large, and there being no proof of fraud on the part of its officers or trustees to overcome the presumption of validity arising from the notes themselves, or to warrant the setting aside of the contract of purchase after it had been fully executed by the other party.

2. CORPORATIONS—INDORSEMENT OF NOTES—VALIDITY.

An indorsement by a corporation of notes of another corporation is not an accommodation in a legal sense and void as ultra vires, but is a guaranty, based on a valuable consideration, and valid, where the indorsing corporation at the time owned all the stock of the other.

In Bankruptcy. In the matter of the claim of the Ramapo Manufacturing Company.

Alexander & Green, for Ramapo Mfg. Co.
Fred D. Corey, for Trustee.
Rogers, Locke & Milburn, for Keystone Car Wheel Co.

HAZEL, District Judge. This is a petition by the Ramapo Manufacturing Company to review the action of the special master appointed by the court to report as to certain claims. I have examined the questions involved herein and am of opinion that the special master is correct in his conclusions. There is nothing to be said additional to what is set forth in his able opinion, in which I concur. The report of the special master is as follows:

GEORGE P. KEATING, Special Master. Two claims in this proceeding were presented for allowance to Referee Hotchkiss in favor of the Ramapo Manufacturing Company, and objections thereto were filed on behalf of the trustee and the Keystone Car Wheel Company. For certain personal reasons the referee considered himself disqualified to pass upon them, and so certified to the District Court. The claims were then referred to the undersigned, as Special Master, to hear the same and report to the court.

The claims are designated No. 1 and No. 2, and are for $25,000 and $4,359.09. respectively. Claim 1 is based on five certain promissory notes of the New York Car Wheel Works to the order of Ramapo Manufacturing Company, payable, respectively, one, two, three, four, and five years from the date thereof. The second is based on four certain promissory notes indorsed by New York Car Wheel Works, and made by the Ramapo Car Wheel Company, amounting to $4,526.52. Objections of the same character are filed against each of the claims, and the propriety of their allowance can be considered together. For convenience, the two car wheel corporations may be designated as New York and Ramapo; the Ramapo Manufacturing Company being designated as the Manufacturing Company.

On March 5, 1903, the date of the transaction in question, New York and Ramapo were domestic corporations, engaged in manufacturing and selling of car wheels; the New York at Buffalo, and the Ramapo Company at Ramapo, N. Y. The common stock of the Ramapo Company was mostly owned by the New York Company. The Ramapo Manufacturing Company, the claimant here, owned all the preferred stock of the Ramapo, to wit, 300 shares, par value $100, and was the owner of the plant which that corporation had leased for the purpose of carrying on its business. It appears that J. Fred Pierson, president of the Manufacturing Company, was at that time also president of the Ramapo Company, by virtue of the ownership by the Manufacturing Company of all the preferred stock of the Ramapo. It also appears that no officer of the claimant had any connection with the bankrupt New York Company as director, trustee, or stockholder. It appears negotiations had been had as far back as November, 1902, between officers of the New York and the Manufacturing Company in reference to the purchase by the New York of the preferred stock of Ramapo held by the Manufacturing Company. Evidence of such negotiation was received by the master as bearing upon the bona fides of the entire transaction. Evidence was also received as to the strained relations between the Manufacturing Company and the New York interests in the Ramapo Company, which might render the transaction under consideration a possibly advantageous one for the New York Car Wheel Works. It appears that on March 5, 1903, there was owing the Manufacturing Company from the Ramapo for accrued rent, taxes, etc., the sum of $4,526.52 as a consequence of which the Manufacturing Company had threatened removal proceedings. The New York Car Wheel Works, it should be borne in mind, was owner of the common stock of the Ramapo Company, and whether or not, in its judgment, this indebtedness should be taken care of to preserve possession of the plant, is another point which bears upon the bona fides of the entire transaction. It appears that the officers of the New York, who were also officers of the Ramapo, had expressed their desire for a new lease of the plant. As a result of all these negotiations, which have been not even briefly outlined, a final arrangement was entered into on March 5, 1903. This arrangement is embodied in certain resolutions of the Ramapo and New York Companies, passed at the meetings of those corporations held on that day in New York City. The Ramapo Manufacturing Company was to transfer the $30,000 preferred stock to the New York Car Wheel Works, forego any claims that it had against either car wheel company, and execute a new lease to the Ramapo Car Wheel Company. The New York Car Wheel Works was to deliver to the Ramapo Manufacturing Company its five notes for $5,000 each, indorsed by the Ramapo Car Wheel Company (being the notes which are the basis of claim No. 1); indorse the four notes of the Ramapo Car Wheel Company to the order of Ramapo Manufacturing Company, aggregating $4,526.52 (being the notes which are the basis of claim No. 2): and indemnify the Ramapo Car Wheel Company from liability on the $30,000 notes given by it to the City Bank. The

Ramapo Car Wheel Company was to indorse the five notes of New York Car Wheel Works aggregating $25,000, and execute its notes to the sum of $4,526.52.

The agreement embodied in these resolutions was thereafter executed and performed by all parties. The certificate representing the preferred stock was delivered by the Manufacturing Company to an officer of the New York Car Wheel Works, to wit, its vice president. The notes, as has previously been stated, were indorsed and delivered, and the indemnity agreement executed. On March 5, 1903, James R. Barnet, Howard C. Smith and Patrick H. Griffin constituted the board of trustees of the New York Car Wheel Works, while H. M. C. Vedder was its secretary and treasurer. The board of directors of Ramapo consisted of G. Fred Pierson, James R. Barnet, Howard C. Smith, Victor I. Cumnock, and Patrick H. Griffin; the directorate in each instance being composed, with the exception of Messrs, Griffin and Pierson, of nominees of corporate creditors. The testimony of these various directors, when examined at length, while showing evidence of insolvency in a very large measure, still does not establish to the mind of the master that the directors were acting otherwise than in good faith, or to the detriment of their trust, as their judgment advised. It seems to have been in the view of the directors of New York and Ramapo, either the adoption of this method or immediate destruction of Ramapo, and a consequent injury to New York, the owner of Ramapo's entire common stock. The fact that the majority of the boards represented creditors is surely persuasive of this conclusion.

The board of trustees of New York had for more than a year consisted of James R. Barnet, Howard C. Smith, and Patrick H. Griffin, while one H. M. C. Vedder had been its treasurer the same length of time. J. Fred Pierson, James R. Barnet, Howard C. Smith, Victor I. Cumnock, and Patrick H. Griffin constituted the board of Ramapo.

To quote the language of 3 Cook on Corps. 3926, "A general assumption of validity attends the acts of corporate directors at the outset, where nothing to the contrary appears." Has the trustee succeeded in removing this presumption? Aside from this rule the bankruptcy law provides that a prima facie case is made out by the proof of claim itself. The burden of removing this showing is placed upon the objectors. Such burden is also placed upon the objectors to the validity of these notes by section 35 of the negotiable instrument law of the state of New York (Laws 1897, p. 725, c. 612), providing that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value. The notes and indorsements are signed by H. M. C. Vedder, the treasurer of the New York Car Wheel Works. The by-laws as amended by November 27, 1901, provide: "The treasurer shall sign all checks, drafts, notes, negotiable instruments and orders for the payment of money and he shall pay out and dispose of the same." In addition to this authority, the minutes of the meeting of March 5, 1903, specifically authorize the treasurer to sign the notes in question. To continue the quotation from Cook, 3926: "This presumption includes the presumption that the meeting of a board of directors, at which a given resolution was passed, was regularly convened." The trustee has sought to establish that Mr. Griffin was not notified of the Ramapo meeting of March 5, 1903. There is no positive evidence to that effect assuming that the meeting was not upon the regular meeting day fixed by resolution, which does not seem to the master has been established. The presumption of regularity has not been overcome.

New York was represented at this meeting by its officers, and a quorum was present. The notes were signed by the treasurer in accordance with the by-laws of the company. As is said in Cook on Stockholders, § 713a: "A party dealing with a corporation is not bound to inquire whether proper notice was given of a directors' meeting." The Supreme Court of the United States, in Louisville Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, says: "One who takes from a railroad or business corporation, in good faith and without actual notice of any inherent defect,

a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or both, have authorized the execution and issue of the obligation." In addition to the possession of the notes properly executed at the time the stock was delivered by Pierson, representing the Manufacturing Company, to the officers of the New York Car Wheel Works, who executed the notes in controversy, a certificate was delivered to him by the vice president and secretary and treasurer of the New York Car Wheel Works, which read as follows: "This is to certify that at a meeting of the trustees of the New York Car Wheel Works, held at No. 25 Pine street, New York City, on the 5th day of March, 1903, the following resolution was unanimously passed." Then followed the resolution, and the certificate was signed, "Attest: H. M. C. Vedder, Secretary." It is the duty of the secretary, as provided by the by-laws, to keep the minutes of the trustees, and to attend to giving and serving of notices of the company. It would therefore seem to follow that it was within the scope of the duties of secretary to issue the certificate above set forth, and that the company should be bound by the act of its secretary. A like certificate was relied upon, for the purpose of proving the regularity of a meeting, in Hutchison v. Real Estate Co., 65 S. C. 45, 43 S. E. 295. The court said: "The signing of the certificate was within the scope of his [the secretary's] employment, and, therefore, even if they were unauthorized and fraudulent on the part of the secretary, his action was nevertheless binding on the corporation."

As has been previously said, however, the master does not find any evidence specifically proving that the meeting was not regularly called, and therefore the burden of proving irregularity, which rests upon the objectors, has not been removed. The minutes of the various meetings offered in evidence disclose the fact that no notice is mentioned in any of such minutes. The by-laws of New York require that five days' notice of meeting shall be mailed. It certainly cannot be held that such provision is binding, where a custom is shown of sending short notices, and such custom is shown. And it further appears from the testimony of Barnet, Smith, and Vedder that an agreement had long existed between the trustees of New York that the meetings should be held weekly. In any event a quorum was present, and in County Court v. B. & O. (C. C.) 35 Fed. 161, while not necessary to a decision in that case, the court inclined to the opinion that such notice was not necessary, where a majority or a quorum was present. In Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207, the court says of the above doctrine: "This ruling is, in our judgment, founded, not only on principles of common sense, but common justice."

It certainly is a strange position that the trustee of the New York Car Wheel Works complains of a lack of notice to Griffin, the president of that institution, against whom his efforts have been directed for his management of that institution ever since the commencement of the bankruptcy proceedings, and where counsel himself has stated, as appears in the minutes at page 233, that Griffin had been deposed of all management of the institution. The counsel for the trustee bases this statement upon the minutes of the trustees of the New York Car Wheel Works at Buffalo, November 24, 1902, where the authority of Griffin as an officer of the institution is very much curtailed. The New York Car Wheel Works had certainly all the powers vested in like corporations by the statutes of the state under which it was organized. Section 40 of the stock corporation law (Laws N. Y. 1892, p. 1834, c. 688) specifically provides that any stock corporation may purchase * * * the stock of any corporation, if the corporation whose stock is so purchased is engaged in a business similar to that of such stock corporation, or engaged in the manufacture, use, or sale of the property, or in the construction or operation of works necessary or useful in the business of such stock corporation, or in which, or in connection with which, the manufactured articles, product, or property of such stock corporation are or may be used. An examination of the certificates of incorporation of New York and Ramapo show that they are of such a character that each might pur-

chase and hold under this provision the stock of the others by virtue of the similarity of their business.

The claim of ultra vires should not prevail in the present instance, for the additional reason that the agreement of sale as executed has been fully performed by the delivery of the certificate to the officers of the New York Car Wheel Works. As is said by the Supreme Court of the United States in Eastern Building Association v. Williamson, 189 U. S. 122, 23 Sup. Ct. 527, 47 L. Ed. 735. "It is now well settled that a corporation cannot avail itself of the defense of ultra vires when the contract has been in good faith fully performed by the other party, and the corporation has had the benefit of the performance and of the contract. * * * It may be that, while a contract remains unexecuted upon both sides, a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced. Yet, when it becomes executed by the other party, it is estopped from asserting its own wrong, and cannot be excused from payment upon the plea that the contract was beyond its power." It has already been seen that by the statute under which the New York was conducting its business this transaction was not forbidden. Therefore the notes should not be invalidated where the contract has been executed. As is said in Waterloo Organ Co., 134 Fed. 343, 67 C. C. A. 257, "Plea of ultra vires will not prevail in cases where the transaction is not forbidden by statute, where its effect will be to accomplish a legal wrong or to do injustice, and especially where contract has been fully performed, and the other party has received the full benefit of said performance." It cannot be found from the evidence that the officers of New York, who owned the common stock in the Ramapo, were acting in bad faith, and that the subsequent results, which have not been profitable, were sufficient evidence of fraud or bad faith on their part in purchasing stock in the Ramapo Car Wheel Company from the Manufacturing Company. Missouri Pacific v. Sidell, 67 Fed. 464, 14 C. C. A. 477; Memphis R. R. v. Dow (C. C.) 19 Fed. 393; Eastern Bldg. Ass'n v. Williamson, 189 U. S. 122, 23 Sup. Ct. 527, 47 L. Ed. 735; Vought v. Eastern Building Ass'n, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. Rep. 761.

It is claimed by the trustee that J. Fred Pierson, president of the Ramapo Manufacturing Company, who, by virtue of the ownership of its preferred stock, was the president of Ramapo, wrung, through fraud and duress, the agreement and notes issued pursuant thereto from Ramapo and New York, respectively. Pierson was not an officer of New York. The fact that he was a member of the board of Ramapo directors, and that the other members of that board were trustees or directors of New York, while Pierson was not connected with that board, is surely insufficient to establish that Pierson is charged with such knowledge of the affairs of New York as to constitute a fiduciary relation between him and that company. The evidence does not establish that Pierson attended meetings of New York which would charge him with knowledge of the affairs of that company. It should be steadily borne in mind that no officers of New York were officers of the Manufacturing Company, and that the officers of New York testify emphatically that they were endeavoring to advance the best interests of that concern. The trustees having acted in good faith in purchasing the stock, the fact that the deal did not finally turn out successfully does not militate against the validity of the notes given for the purchase price, and no evidence of duress or fraud upon the corporation has been submitted which would justify the nullification of the purchase of the stock; there being sufficient evidence, as it appears to the Master, to establish that the new certificate of stock was legally delivered to New York. The certificate for 300 shares of preferred stock of Ramapo issued to New York is in due form, and came into the possession of the treasurer of New York. It was produced upon the hearing by the trustee of New York for surrender. So much for the five notes amounting to $25,000, issued for the purchase of preferred stock.

In addition to the objections already discussed, and which are overruled on the same grounds, the trustee claims that the four promissory notes, amounting in all to $4,359.09, made by Ramapo and indorsed by New York, cannot be enforced against the bankrupt, for the reason that New York is simply an accommodation indorser. It is undoubtedly true that a corpora-

tion cannot indorse for accommodation. Such indorsement, as is said in Morawetz on Corporations, 423, "rest upon no consideration, and would not be valid." They would amount to a donation of the corporate funds, and therefore an unlawful diversion. Were the indorsements upon which claimant relies as a basis for this claim accommodation in a legal sense?

New York had by a simultaneous transaction purchased the entire preferred stock of Ramapo. It was to her interest in the scheme for the continuance of that corporation that the pressing indebtedness of Ramapo to the claimant should be secured and legal proceedings to dispossess Ramapo averted. That result was accomplished by the execution and indorsement of the notes which are the basis of the claim. The indorsements were, therefore, a guaranty, and not an accommodation in the strict sense of the term. They were made for the benefit, as it appeared to the corporate officers, of New York, and not for the accommodation of Ramapo. As is said in C. R. & P. R. R. Co. v. Howard, 7 Wall. 392, 19 L. Ed. 117: "Private corporations may borrow money or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited." In Tod v. Kentucky Land Co. (C. C.) 57 Fed. 47, the court said: "There is no inherent want of power in a business corporation having the power to execute negotiable paper to obligate itself as a surety or guarantor." An indorsement is certainly such an obligation, and in the present case the obligation was incurred, not for the accommodation of Ramapo, but in the belief, mistaken perhaps, that the interests of New York were thus protected. This objection cannot therefore be sustained, and both claims are allowed as filed.

An order may be entered confirming the special master's report, with disbursements to the claimant, Ramapo Manufacturing Company, to be paid out of the bankrupt's estate.

THE GORDON CAMPBELL.

(District Court, W. D. New York. October 21, 1905.)

1. SHIPPING—CONTRACT OF AFFREIGHTMENT—TIME OF PERFORMANCE.

   The general rule, in the absence of a clear agreement, as to when a vessel for hire shall proceed from her port of loading is that she is to deliver the goods carried or fulfill her engagement within a reasonable time.

   [Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 399, 436, 459.]

2. SAME—DAMAGE TO CARGO—UNSEAWORTHY CONDITION OF VESSEL.

   Injury to a cargo of oats shipped from Chicago to Buffalo from becoming wet and heated between the time it was loaded and the time of delivery (which was over a month) owing to the vessel being delayed for repairs after loading, *held*, under the evidence, to have been due to her having been unseaworthy and not in good condition for the carriage of such cargo when the voyage was begun, owing to her defective decks and the careless handling of the pump during her detention, by reason of which water leaked through into the hold.

In Admiralty. Suit for damage to cargo.

Harvey L. Brown, for libelant.

William F. Carroll and Crangle & Burke, for respondent.

HAZEL, District Judge. This is a proceeding in rem against the steamer Gordon Campbell to recover damages to a cargo of clipped white oats, shipped by libelants in good condition at the port of Chicago, Ill. to Buffalo, N. Y. The elicited facts support the conclusion that the

owners of the cargo have shown by preponderating evidence that the carrying vessel the Gordon Campbell was in fault, in that it was not in a reasonably fit condition at the time of sailing, and, in consequence, her cargo of 80,000 bushels of oats, or a substantial part thereof, became heated or sweat-damaged. The charter, which was in writing, was made with the master of the steamship, and subsequently was ratified by the owner. It was a contract of affreightment, by which the vessel, in terms, became obligated to deliver the cargo in good condition, according to the reasonable import of the bill of lading. The words contained in the contract declaring that the steamer was "bound for Buffalo" if unexplained would seem to imply a readiness on the part of the vessel, wind and weather permitting, to immediately proceed on her voyage, and, under ordinary circumstances, the presumption would follow that at the time of the charter the vessel was prepared for sailing. A parol arrangement, however, by which it was plainly understood that the steamer was not completely fitted or prepared for sailing, in that she needed repairs to her machinery and boiler, and accordingly would be unable to begin her trip until the end of six or seven days, was concededly a part of the sailing contract. Such evidenced arrangement undoubtedly qualified the contract, and was a part thereof. Although the charter was dated on April 11, 1903, the Gordon Campbell did not finish repairing and get ready to sail for more than a month. She was loaded on April 12th, and began her voyage on May 10th, arriving at her destination on May 15, 1903. The delay was owing to the time necessarily spent after loading in fitting or preparing the vessel for the trip. The general rule, in the absence of a clear intention as to when a vessel for hire shall proceed from the port of loading, is that she is to deliver the goods carried or fulfill her engagement with ordinary promptitude and within a reasonable time. What constitutes a "reasonable time" is often difficult of ascertainment, but the principle is well settled, and needs no citation of authorities, that the conditions and attendant circumstances are controlling. The bill of lading in evidence does not indicate the time when the cargo was to have been delivered to the consignees, nor when the vessel should load or depart upon her voyage; nevertheless, the owner obligated himself, as already stated, to deliver the cargo with ordinary dispatch. If, after making the contract and loading the vessel, the owner, on account of unforeseen difficulties, should be unable to depart within a reasonable time, as he anticipated, it is his duty to notify the shippers, and either obtain a modification of the contract, or reship the goods, to the end that the agreement would be fulfilled with the least possible delay and injury. Broadwell v. Butler, Fed. Cas. No. 1,910; Davison v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885; The Alice (D. C.) 12 Fed. 496.

Libelants contend that the facts indicate that the stipulated time of sailing was in five or six days after making the charter, and that such term was a condition precedent. The respondent claims, on the other hand, that the charterers had ample notice that the vessel required repairs to her machinery and boilers and other preparations for her departure. The exact length of time that it would take to finish such re-

pairs and fittings was not discussed. The record shows that, about two weeks after the vessel was chartered, and after she was loaded with the merchandise in question, the agent of the shippers inspected the cargo. It may be presumed, I think, that he had knowledge of the cause of her detention. An element of indefiniteness and uncertainty is apparent from the evidence, as a whole, as to the exact time which would elapse before the steamship could begin the trip; therefore, the surrounding circumstances were not such as to warrant the conclusion that time was of the essence of the contract. But this question is unimportant, for demurrage in consequence of the detention is not claimed. Consideration of the question of the vessel's delay is urged simply as bearing upon the asserted negligence and want of care in transportation.

This brings me to the next question, namely, whether the vessel at the beginning of the trip was unseaworthy in structure for the carriage of the cargo. Although the respondent claims that it rained or drizzled at different times during the loading of the vessel, I am satisfied by the proofs that the grain when stowed was in a reasonably fair condition, and that no injurious moisture got into the cargo at such time. It is undisputed that, on the arrival of the steamship at the place of unloading, about 2,229 bushels of oats, extending along the lower hold from the pump box near the fore bulkhead to the aft bulkhead near the engine room, and a quantity of oats aft in the fantail, were wet and in a caked condition. Neither is it controverted that a considerable quantity of grain underneath the hatches was warm or heated. The respondent chiefly relies upon the showing that the vessel was loaded in rainy, damp, or foggy weather, and that the cargo in consequence became heated, and not, as claimed, because of unseaworthiness. This reliance, however, is not supported by the evidence.

Upon the question of the unseaworthiness of the vessel, it appears that the deck near the windlass bulkhead was decayed and the oakum yielding. The pump was located on the main deck, near the windlass room, and the supply pipe reached to the keelson or to the bilge. The evidence indicates that, whenever the pump was used, the water which had collected in the bilges was spilt upon the leaky deck. During a part of the time that the ship was detained, a spout or trough six inches wide, made of wood, was used to conduct the water to the scuppers. This trough, however, was inadequate to carry the quantity of water pumped, for the evidence is open to the inference that the water splashed over the edges and leaked through the deck upon the cargo in the lower hold. When the trough was not used, the water was pumped upon the deck, and, as a large quantity of water collected in the bilges, it was necessary to frequently resort to the pump. An examination of the vessel was made by libelant's witness Clark immediately upon her arrival at Buffalo and before unloading. He testified that there was a continuous streak of wet or caked grain in the main hold at the bottom, extending about 120 feet from the fore bulkhead to the aft bulkhead near the engine room; that at the aft bulkhead, in the bottom of the vessel, he observed water from bilge to bilge, and that damage to the cargo in different places, on account of water and heating, was plainly perceivable. Other testimony in corroboration of this witness was given by libelants.

The other particulars of unseaworthiness claimed relate to the defective deck in the tiller room near the ice box, through which water is also claimed to have leaked on the cargo. The testimony is conflicting as to the source of the water. Some of the witnesses for respondent suggested that the water which damaged the grain was not that which was pumped from the bilges, but that when the vessel was unloaded she listed, causing the water in the bilges to run through the ceiling near the limbers, and thence into the cargo. The improbability of this statement, however, is quite apparent, for the heated condition of the cargo undoubtedly was induced by moisture from external causes other than rain, existing for a considerable time before the vessel was unloaded. Such a presumption is warranted from the caked and heated appearance of the cargo and from the defective decks and careless use of the pump, together with the delay in proceeding on the voyage, which enabled the moisture to permeate the cargo, in consequence of which it became heated. That water percolated through the grain on different occasions before the grain was unloaded is undeniable. Under the circumstances, the rule of law applies that a vessel is unseaworthy unless she is structurally fit and properly equipped to safely and securely carry the cargo she has undertaken to transport. The burden of proof was on the respondent to show the seaworthiness of the vessel and that she was in good condition at the beginning of the voyage. This he has not done. He has not explained the heated condition of the cargo on its arrival at the port of unloading, and, as it was received in good condition, the carrying vessel must be held responsible. Ins. Co. of North America v. North German Lloyd Co. (D. C.) 106 Fed. 973; The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688; The Caledonia (C. C.) 43 Fed. 681; The Patria (D. C.) 125 Fed. 425.

The stipulation in evidence shows that 2,229 bushels of grain were in such damaged condition as to render elevating the same impracticable. The libelants having refused to pay the freight, the damaged grain was sold, and the proceeds of the sale paid to the respondent. Such adjustment of freight, of course, does not affect the question of depreciation of the value of the balance of the cargo from heating.

Consideration of all the evidence induces the conclusion already intimated that the libelants are entitled to a decree. As no evidence was given of the sound value of the heated grain, or of the actual amount of the damages claimed to have been sustained, an order may be entered, with costs, referring the case to the clerk to assess such damages. So ordered.

VOM BAUR v. UNITED STATES.

(Circuit Court, S. D. New York. June 1, 1905.)

No. 3,640.

CUSTOMS DUTIES—CLASSIFICATION—FEATHERSTITCH BRAIDS.

Featherstitch braids, so called, which are not produced by braiding, but by a process of weaving, but which are known commercially as braids, are within the provision for "braids" in paragraph 339, Schedule J, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision here reviewed, which is known as G. A. 5,744, T. D. 25,480, affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by C. M. Vom Baur. The opinion filed by the Board of General Appraisers reads as follows:

HOWELL, General Appraiser. The goods covered by the protests are described in the invoices as "featherstitch braids." They consist of articles ranging variously from about one-fourth to one-half of an inch in width, loom woven, of white or colored threads throughout, or of mixed white and variously colored threads, of cotton or other vegetable fiber, and ornamented with raised figures in various designs, "herringbone" and others, some of which have plain and others scalloped or looped edges. They were returned by the appraiser as "cotton braids," and were assessed with duty by the collector at the rate of 60 per cent. ad valorem under paragraph 339, Schedule J, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], the pertinent provision of which is as follows: "Embroideries and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings, and bands, * * * composed wholly or in chief value of flax, cotton or other vegetable fiber, and not elsewhere specially provided for in this act."

Various claims are made in the protests, but the one relied upon by counsel for the importer is that the articles are dutiable at the rate of 45 per cent. ad valorem under paragraph 320, Schedule I, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], as "bindings," or as "tapes * * * made of cotton or other vegetable fiber." In G. A. 4,326, T. D. 20,515, and G. A. 4,929, T. D. 23,703, the Board held that featherstitch braids were dutiable under paragraph 339, as assessed in this case. On appeal from the latter decision, the Circuit Court for the Southern District of New York in Steinhardt v. U. S. (C. C.) 121 Fed. 442, reversed the decision of the Board; the opinion of the court (Wheeler, J.) being in part as follows: "The articles in question appear to be narrow, woven tapes of cotton, used largely for covering the seams of underwear and waists. The Standard Dictionary gives one definition of a "braid" as "a narrow, flat tape or woven strip for binding the edges of fabrics, or for ornamenting them." If these articles are braids within this or a like definition, they are also bindings or tapes within paragraph 320, and, being provided for there, are otherwise provided for than in 339." The government did not appeal from that decision, but limited its acquiescence in that ruling to the particular case (T. D. 24,269), and has brought forward this case for the purpose of showing that the articles are commercially known as braids, and were so commercially known at and prior to the passage of the tariff act of July 24, 1897, and therefore dutiable under paragraph 339. Counsel for the importer contends in his brief that there is no definite, general, and uniform trade designation of these articles by the name of "braids"; that the name "binding" and "tapes" is employed to designate these goods, just as is the name "featherstitch braids"; that they are in fact tapes, having been produced by weaving, instead of being braided; and that they are not within

the language of paragraph 339, or, if primarily within its scope, they are prevented from remaining there because they are "elsewhere specially provided for" in the act.

We think that, in determining the proper classification of these goods, the fact that they are produced by weaving, instead of being braided, is quite immaterial; for the commercial designation must control as against the method of fabrication. In the case of In re Dieckerhoff (C. C.) 54 Fed. 161, involving featherstitch braids similar to these here in question, the government took the position that braids must be braided; but this contention was overruled by the court, and the commercial designation accepted. In the case of U. S. v. Wright & Young (C. C.) reported in T. D. 13,707, the Circuit Court decided that goods commercially known as "tapes" were not dutiable as "braids," although made by being braided. So, in the case of Field v. U. S. (C. C.) 50 Fed. 908, affirmed in U. S. v. Field, 54 Fed. 367, 4 C. C. A. 371, it was held that the method of manufacture was ineffective as against a commercial designation. The goods in that case were made on a lace machine, and had the substantial characteristics of laces, but, not being known commercially as laces, were held not to be dutiable as such. So, too, in the case of Wolff v. U. S. (C. C.) 116 Fed. 1023, it was recently decided that articles commercially known as tapes were dutiable as such, without any reference to the method of fabrication; this evidently being regarded by the court as immaterial.

Two questions, then, remain for determination: First. Were these goods known in the trade and commerce of this country, at and immediately prior to July 24, 1897, as "braids"? Second. If the goods were commercially known as braids at and immediately prior to July 24, 1897, are they dutiable under paragraph 339?

Fourteen witnesses, including the importer were examined in this case, and the testimony taken in the Steinhardt Case, supra, where seven witnesses testified, four of them being the same witnesses who appeared before the Board in the case at bar, was made a part of this record. All of the witnesses testified that one of the terms under which these goods were known is "featherstitch braids," but some of them testified that they were also known under various other names, such as "finishing tape," "herringbone webbing," "seam binding," "cotton binding," "binding tape," "herringbone binding," "finishing braid," "finishing binding," "webbing," "web," "seam coverings," "seam tape," "herringbone," and "featherstitch binding." The goods are labeled "featherstitch braids," as shown by the several exhibits introduced in evidence. Seven of the witnesses produced samples of the importations made by the firms with which they were connected, and with one exception they were labeled "featherstitch braids." We think the testimony of the witnesses, when carefully examined, shows that the articles are commercially known as "featherstitch braids," and that they have been so known since 1890.

Mr. Vom Baur, the importer in this case, testified in part as follows: "Q. During all the time you have known of these goods, please state by what name or names they have been designated in trade in this country. A. In this country they have been named 'featherstitch braids,' as finishing tape, herringbone webbing, as seam binding; that is about all. Q. And do you say that any one of those names would, at all times during which you have dealt in these goods, have designated them commercially? A. Yes, sir. Q. How can the General Appraisers, in passing upon these protests, identify the goods of this character on your invoices? A. As featherstitch braids. Q. That is the usual way in which they are invoiced? A. The usual way. Q. You mean invoiced from abroad? A. Yes, sir. Q. And it is the usual way in which you bill goods to this country when you sell them here? A. Usually. Q. As far as you know, it is the usual way in which they are sold and bought in the retail trade? A. Well, they are bought under different inquiries, as I stated. Q. But I am talking about the usual word, the one that is most commonly employed? A. Yes, sir. Q. In other words, the term 'featherstitch braids' expresses a little more nearly and exactly than any other of the terms you have given us this particular class of goods, does it not? Yes, sir."

Mr. Vom Baur was a witness in the Steinhardt Case, supra, and a portion of his testimony in that case is as follows: "Q. How do you buy and sell generally in your wholesale trade; under what name? A. Featherstitch braid. Q. That is the general name? A. Yes, sir. Mr. Frank E. Stockum, a buyer for the firm of George Borgfeldt & Co., importers, testified in part as follows: "Q. 'Featherstitch braids' is one of the names under which they are known commercially? A. That's about the idea. Q. Whether or not it is true, when you sell these goods, they are known generally as 'featherstitch braids'? A. They are known as such, but we bill them as bindings. Q. Do you ever bill them as featherstitch braids? A. Well, occasionally. However, the label may read— Q. Whether or not it is true that, generally speaking, you bill them as featherstitch braids? A. Rather. Q. How long have you been handling, with one firm or another, this particular line of goods? A. For probably eight or ten years. Q. During that time has their commercial name been the same? A. Yes, sir. Q. Referring to the label on the goods which you hold in your hand there, is it true that that label stays with the goods until they get into the hands of the retail dealer? A. Yes, sir."

Daniel Weiller, of the firm of Weiller & Sons, importers, who was also a witness in the Steinhardt Case, was asked: "Q. Is there an article commercially known as 'featherstitch braids? A. Yes, sir. Q. You handle such an article? A. Yes, sir. Q. Have been during the time you have been in business? in this manner? A. Yes, sir. Q. That is, as featherstitch braids? A. Yes, sir. Q. That is the name they are usually sold by? A. Well, one of the names. Q. That is the name they are usually sold by, I mean? A. They are sometimes sold by that name. Q. Do you say that is not the name they are usually sold by, then? A. Well, yes; it is the name. Q. Do you know of a name which expresses more exactly this class of articles than the term 'featherstitch braids'? A. No, sir. Q. You have been dealing in these, you say, for 20 years? A. Yes, sir. Q. During that time has the commercial name changed, or has it been the same, do you say? A. The same."

Mr. Adolph Kellar, customhouse clerk for the firm of Dieckerhoff, Raffloer & Co., testified that he was familiar with this class of goods, and he was asked: "Q. Do you know of any other term which describes this class of goods any more exactly than 'featherstitch braids'? A. I think the term 'seam binding' is used just as frequently for this class of goods as the term 'featherstitch braids.' Q. I don't think you quite understood the question. Do you know of any other term which describes this class of goods any more exactly than 'featherstitch braids'? A. 'Seam binding.' Q. Do you think that describes it more exactly? A. More explicit; I would call it web finishing tape. Q. Is that term usually employed? A. No; it is not usually employed. Is there any term more usually employed than the term 'featherstitch braid,' that you know of? A. No; that is, 'featherstitch braid' is really a foreign name. When these goods were first made and brought to this country, they were known as finishing tape. 'Featherstitch braid' was given by the foreign manufacturers afterwards."

Mr. Ainsworth J. Hague, of A. J. Hague & Co., importers, testified that the goods were known as "featherstitch braids," as "webbing," as "web," and as "bindings."

Mr. Morris Steinhardt, buyer for A. Steinhardt & Bro., testified in both cases. His testimony in the case in court was in part as follows: "Q. Under what trade-name has this been bought and sold since you have been familiar with them? A. They are both bought as seam bindings, and they are bought as featherstitch braids and herringbone. Those are about the principal names. Q. Buy and sell them under those names? A. Bought and sold under those names." And in this case he was asked: "Q. Please state each and every name which, in the usage of the trade in this country prior to 1897, was employed to designate these goods? A. Seam binding, seam coverings, seam tape, herringbone, and featherstitch braid."

The testimony of Philip J. Krackehl, assistant buyer and manager of the notion department of Mills & Gibb, who also testified in the Steinhardt Case, is in part as follows: "Q. Do you know of any term which describes these goods more specifically than the term 'featherstitch braids?' No, sir; I do

not. Q. Now, has the commercial designation or designations of this article (Exhibit G) changed during the time you have been familiar with it? A. No, sir; not that I know of."

Mr. Joseph A. Flaherty, of Joseph A. Flaherty & Sons, manufacturers of wearing apparel, testified that he had been buying and using these goods for 12 years, and in his dealings with both importers and manufacturers no other name than "featherstitch braid" had been employed. He has never even heard them called "finishing tapes" nor "seam binding," but has heard them called "herringbone braid."

Mr. Martin Roman, buyer for the Siegel-Cooper Company, testified in part as follows: "Q. In your dealings with wholesale houses, importers, or jobbers—people from whom you buy—what did you call these articles at and prior to July 24, 1897? A. We called them herringbone at that time. Q. Then that seemed to be the earlier name? A. Than featherstitch braids. Q. Anything else that you remember? A. They were called seam bindings, seam coverings, finishing braids. Q. What was the most usual term you used in orders in buying these? A. Featherstitch braids. Q. Was the term 'herringbone trimming' a term in general use at that time? A. I don't think we ordered them as such. Q. Was the term 'seam binding' a general term as applied to these articles? A. I do not think, in ordering them. Q. You seem to imply that it was a term used in some other way. In what way would the term 'seam binding' be used, or by whom? A. Well, it is used largely by our consumers. Dealing with a consumer, we often get generally their usage. Q. Please state again what was the term used in your dealings with the wholesale trade or jobbing trade, or importers, carefully excluding retail customers. A. Featherstitch braids. Q. Any other term—now still with the wholesale people only? A. I think that was the most general. I think that was general."

Mr. John Edwards, a buyer for the Simpson-Crawford Company, testified that he had been handling these goods for 17 years, and that the only names he had ever heard applied to them were "featherstitch braid" and "herringbone trimming."

Mr. Frederick Mossbach, connected with the firm of Bloomingdale Bros., testified in part as follows: "Q. How long have you been dealing in articles like these samples? A. About 18 years. Q. Have you bought them in New York? A. We bought some, and we imported some ourselves, but recently we haven't imported any. Q. You bought them from importers and wholesale dealers, have you? A. Yes, in the last 10 or 12 years. Q. Did you buy any from importers and wholesale dealers prior to July 24, 1897? A. Yes, sir. Q. At that date, and before that, and in dealings with wholesale dealers only, what was the name or names generally applied to articles like that? A. Featherstitch braid and herringbone braid. Q. Is that all? A. That is all that I remember. Q. Will you give us the names of some people you bought those from prior to 1897? A. C. M. Vom Baur, B. Ullmann & Co., Dieckerhoff, Raffloer & Co., Edelhoff & Rinke, A. J. Hague & Co. and Dreyfuss, Weyler & Co., and there may be one or two others that I can't recall. Q. In your dealings with those people, in orders sent to them, correspondence with them, if you had any, what was the name that was used as applied to these goods? A. Featherstitch braid. Q. Can you state positively that in orders that you sent to the houses you have named, you called for featherstitch braid? A. I can. Q. Did you ever use any other term in orders? A. May have called them herringbone braid, but not recently. Q. Did you ever use any other name than those two, in orders? A. No, sir."

Mr. Charles S. King, general manager of the Sanford Narrow Fabric Company, of Pawtucket, R. I., manufacturers of featherstitch braids, testified that in his experience no other name than "featherstitch braid" had been applied to these goods.

The testimony of Mr. Percy Gardner, salesman for this company, is to the same effect; and it is further shown by the testimony of Mr. King and Mr. Gardner that they have sold these goods to Weiller & Son, Mills & Gibb, A. J. Hague & Co., Steinhardt & Bro., Dieckerhoff, Raffloer & Co. and others. Their testimony is substantiated by letters admitted in evidence, which were written

in the usual course of business, wherein the goods are designated as "featherstitch braids."

It is also shown by the testimony that prior to 1897 several of the importing firms, whose representatives have testified in this case, when ordering goods like these in question, of the Sanford Narrow Fabric Company, directed that they should be labeled "featherstitch braids." It is further shown that the goods are designated as "featherstitch braids" in advertisements in trade papers.

We have briefly reviewed the testimony of all the witnesses examined by the Board, except that of Mr. George J. Heaphy, buyer of notions for the firm of Lord & Taylor, whose testimony is of little value because of his limited experience in dealing in these articles prior to July 24, 1897. Three witnesses testified in the Steinhardt Case who were not called in this case. They were Mr. Frank Ganong, lace buyer for A. J. Hague & Co., who testified that the goods were known under the names "binding" and "seam binding"; Mr. John H. Connell, of H. B. Claflin & Co., who testified that the goods were generally designated as "featherstitch braid" or "seam bindings"; and Mr. Henry Kleinschmidt, salesman for Mr. C. M. Vom Baur, who stated that the goods were known as "seam binding," as "featherstitch braids," as "herringbone," and as "webbing." This examination of the testimony discloses the absence of the use of any general name for these goods in the trade except 'featherstitch braids." All the witnesses are agreed, however, that the goods are known as "featherstitch braids," and we think the other names are subordinate to this general trade-name, and should not be given an "undue importance" for the purpose of changing the tariff classification of the goods. In re H. B. Claflin & Company, 52 Fed. 121, 2 C. C. A. 647.

It is important to note that the witnesses testify that there has been no change in the commercial designation of these articles for the past 10 to 15 years, for in 1892 it was proved by the testimony of numerous importers that these goods were commercially known as "featherstitch braids," and the United States Circuit Court found them to be so commercially known in the case of In re Dieckerhoff, supra. In the statement of the case as reported, we find: "The importers * * * produced the testimony of a number of trade witnesses before the said Board, from whose evidence it appeared that the merchandise was known in trade and commerce at and immediately prior to October 1, 1890, as 'featherstitch braids,' and that the articles were not known as 'trimmings,' or included within the line of goods of that character. It also appeared that the braids were sometimes made on looms and sometimes on braiding machines, but that by far the greater proportion was made on looms."

On this record we find, as matter of fact: (1) That the goods in question were generally known in the wholesale trade of the United States, at and prior to July 24, 1897, as "featherstitch braids." (2) That the term "featherstitch braids" was the only general commercial name under which the goods were known in the trade and commerce of this country at and immediately prior to July 24, 1897, and that the terms "seam bindings," "finishing tapes," and others are subordinate names which have not been generally employed to designate these goods. In view of these findings, we think the case is distinguished from the Steinhardt Case, supra. That case only decided that, if the articles were braids within the lexicographical definitions, they were also bindings or tapes, and were therefore more specifically provided for in paragraph 339. There was no satisfactory testimony in the case as to the commercial designation of the articles, whereas it has now been shown by competent testimony that they are generally known in the commerce of this country as "braids," and not as "tapes" or "bindings."

The Circuit Court of Appeals, in Hiller v. U. S., 106 Fed. 73, 45 C. C. A. 229, decided that cotton braids of all classes are included within the scope of paragraph 339. The decision of the court is in part as follows: "A comparison of the provisions of the cotton schedules in the acts of 1894 and 1897 in regard to the classification of braids is, however, quite significant of the intent of Congress. Paragraph 263 of the act of 1894 (28 Stat. 529), which corresponded to paragraph 320 of the act of 1897, imposed a duty of 45 per

cent. upon cords, braids, etc., made of cotton; but braids are omitted in paragraph 320 of the new act, which imposes the same duty. Paragraph 276 of the act of 1894 (28 Stat. 530), which corresponded to paragraph 339 of the new act, omitted braids, which was inserted in paragraph 339—the one under consideration. A comparison of the two acts indicates that Congress intentionally took braids out of the 45 per cent. paragraph, where it had been in 1894, and put the article into a paragraph imposing the higher rate of duty, and that it intended to impose the rate upon the articles, irrespective of the use to which they might be applied."

Under this decision, featherstitch braids, which were held in the Dieckerhoff Case to be dutiable as "braids" under the act of 1890, and which we have found were commercially known as "braids" at the time of the passage of the act of July 24, 1897, are, in our opinion, dutiable as assessed under the provisions of paragraph 339 of the act of July 24, 1897. The protests are accordingly overruled, and the decision of the collector in each case is affirmed.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Charles Duane Baker, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The decision of the Board of General Appraisers is affirmed, on the opinion of the Board.

TIFFANY v. LA PLUME CONDENSED MILK CO.

(District Court, M. D. Pennsylvania. October 20, 1905.)

No. 589.

1. BANKRUPTCY—CORPORATION—PRINCIPAL PLACE OF BUSINESS.

Where a manufacturing corporation, although maintaining a nominal office in the state in which it is organized, has its manufactory and an office from which it conducts its business within a district in another state, its principal place of business is in the latter district, within the meaning of Bankr. Act July 1, 1898, c. 541, § 2 (1), 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], and it is subject to adjudication as a bankrupt therein, although it has ceased manufacturing and is engaged in liquidating its affairs from such principal office.

2. SAME—NATURE OF BUSINESS—EFFECT OF GOING INTO LIQUIDATION.

The liability of a person, whether natural or artificial, to bankruptcy, is to be judged by the character of the pursuit in which such person was engaged at the time the debts due the petitioning creditor were incurred, where he has since changed from an nonexempt to an exempt pursuit. As to such debts, an individual does not lose his previous character by ceasing to carry on the business in which they were contracted and turning to another in which he is not liable to bankruptcy; and neither does a corporation, by stopping business altogether and going into liquidation, voluntary or involuntary.

[Ed. Note.—What persons are subject to bankruptcy laws, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

3. SAME—JURISDICTION—CEASING TO DO BUSINESS FOR GREATER PART OF SIX MONTHS NEXT PRECEDING FILING OF PETITION.

A person who contracts debts while engaged in a business which makes him liable to bankruptcy is not to be heard to say that he is not so engaged, even though he has in fact ceased to be so, so long as his debts remain unpaid. Hence, where a corporation conducted a milk-condensing business up to October 6, 1904, when its plant was burned, and thereafter

did nothing except to gather in its assets and settle up its affairs, retaining a central office within its district for the purpose, upon a petition in bankruptcy being filed against it February 2, 1905, the court had jurisdiction under section 2 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]) notwithstanding the fact that for the greater part of the six months next preceding the filing of the petition it was not conducting the business for which it was incorporated, but only engaged in liquidation.

In Bankruptcy. On exceptions to report of W. L. Hill, referee, sur plea to the jurisdiction.

T. J. Davies, W. N. Leach, and R. W. Rymer, for petitioner.
C. A. Van Wormer, for respondent.

ARCHBALD, District Judge. The controversy here is one of jurisdiction. The respondent, a New Jersey corporation, denies by its plea that it has had its principal place of business within the district for the greater portion of six months preceding the institution of these proceedings, as averred in the petition, and as is essential; there being no claim of residence or domicile. Bankr. Act July 1, 1898, c. 541, § 2 (1), 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]. The evidence shows that while incorporated under the laws of New Jersey—and, in order to comply with them, having a nominal office at Camden in that state—the company was engaged in the business of manufacturing and selling condensed milk at La Plume and at Brooklyn, Pa., in this district, from the early part of 1903 up to October 6, 1904, when its plant at the latter place was destroyed by fire; that at the other having been sold the previous January. It also had during the same period a central office at Scranton, from which the management of the company was directed; the whole of its corporate business having been conducted in these three places. The fire, however, broke up what was left of its manufacturing business, which was not afterwards resumed. But it still retained its central office at Scranton, and from it, through its treasurer as its executive officer, with the assistance of a regularly employed stenographer, proceeded to settle up its affairs. An adjustment of the insurance was secured, amounting to some $14,000, a considerable portion of which was not paid until the latter part of November; the relics of the fire were disposed of; accounts aggregating about $5,000 were collected in, the money received from these several sources being deposited in a local bank; and sundry bills which were due were compromised and paid. The manager of the burned condensary was also retained until the middle of November, and a man put in charge of what was left of the property for some two months after that. This was the situation on February 2, 1905, when the present petition was filed; the debts due to the petitioning creditors having been incurred in the course of its condensing business.

There can be no question upon this showing as to the principal place of business of the company being within the district, not only for the greater part, but the whole, of the six months necessary to give jurisdiction. In re Marine Machine Co., 1 Am. Bankr. Rep. 421, 91 Fed. 630; In re Brice, 2 Am. Bankr. Rep. 197, 93 Fed. 942; In re

Elmira Steel Co., 5 Am. Bankr. Rep. 484; Dressel v. North State Lumber Co., 5 Am. Bankr. Rep. 744, 107 Fed. 255; In re Mackey, 6 Am. Bankr. Rep. 577, 110 Fed. 355; In re Magid-Hope Silk Co., 6 Am. Bankr. Rep. 610, 110 Fed. 352. The fact is that (not counting the nominal office at Camden, N. J.) not only the principal part, but substantially the whole, of its business was conducted here. It is contended, however, that after October 6th, the date of the fire, it was engaged in nothing but liquidation, which is not the doing of business within the meaning of the law, the business required to be done, either by a corporation or an individual, in order to give jurisdiction, being none other than that by which either is made liable to bankruptcy, and that, the respondent here having been out of such business for nearly four months of the six next preceding the filing of the petition, the court has no jurisdiction over it, and the proceedings cannot be maintained.

The question involved in this contention is not altogether a new one, although the particular form which it assumes here may be. "Fuit agrē," as it is said in Heylor v. Hall, Palmer, 325 (1619–1629), "q̄ q̄ un exercise trafficque, & donque devient indebted, & apres delert son trade, & liue in le pais sans alcū trade, mes sur son tre, & lup conceale de ses Creditors, uncore est Bankrupt quia vide p son trade, q̄nt le Debt grow;" (It was agreed that if one engages in traffic and thereby becomes indebted, and afterwards abandons his trade and lives in the country without any trade, but upon his gains, and conceals it from his creditors, yet is he a bankrupt, because he lives by means of the trade out of which the debt grew). In line with this, in Meggott v. Mills, 12 Mod. 159, s. c. Ld. Raym. 286, a person exercising the trade of a victualer, in which he was liable to bankruptcy, contracted a debt, and subsequently quit the trade and became an innkeeper, after which he committed an act of bankruptcy, and it was held that, though a man quit his trade, he may be bankrupt for the debts that he owed before. And in Ex parte Bamford, 15 Vesey, 449, Lord Eldon declared that a commission in bankruptcy could be sustained beyond doubt by an act of bankruptcy committed after retiring from trade; the debts contracted during trade remaining unpaid. To the same effect are Dawe v. Holsworth, Peake, 64, Doe ex dem. v. Hayward, 2 Car. & Payne, 134, and Bailie v. Grant, 9 Bing. 121; it being stated in the latter case by Tindal, C. J., that the point was settled. It seems to have been carried one step further, or at least a new form given to it, in Ex parte Griffiths, 3 De G., M. & G. 174, where it was said by Knight Bruce, L. J.; "A trader, who, after having become indebted, leaves off trade, is not to be heard to say to his creditor that the trading has been left off, if a question arises whether the debtor can or cannot be, as a trader, made bankrupt." And Lord Alverstone, C. J., in Re Worsley, 1 K. B. (1901) 309, similarly declares that, so long as a debtor does not pay the debts which he contracted while engaged in trade, he is to be regarded as still so engaged. The doctrine of these cases was adopted and applied in this country, in Everett v. Derby, 5 Law Rep. 225, Fed. Cas. No. 4,576, a case arising under the bankruptcy act of 1841. It was there objected that the respondent was not liable

to bankruptcy, not being at the time of the alleged acts, nor at the time of the filing of the petition a merchant actually using the trade of merchandise, nor yet a retailer, so as to bring him within the law. But it was held by Judge Ware, on the authority of what was said by Lord Eldon in Ex parte Bamford, supra, that the proceedings should be sustained.

A case under the present act, more nearly approaching to the one in hand, is to be found in Re Luckhardt, 4 Am. Bankr. Rep. 307, 101 Fed. 807. The bankrupt there, who was engaged in the retail boot and shoe trade, abandoned it and went to farming; and, a petition having been filed against him, it was claimed that he was exempt. In holding him liable, however, it is said by Hook, J.:

"The exemption from involuntary proceedings in favor of wage earners and persons engaged chiefly in farming or the tillage of the soil is not intended as a means of escape for insolvents, whose property was acquired and whose debts were incurred in other occupations recently engaged in. If the right of the creditors to institute involuntary proceedings may be thus defeated by the debtors within the period allowed for the commencement of such proceedings, it could be defeated by a change of occupation made coincidently with the commission of an act of bankruptcy, and an insolvent debtor would thus be permitted to dispose of a stock of merchandise or other property, distribute the proceeds thereof in such manner as pleased him, immediately become for the time being a tiller of the soil, or a wage earner, * * * and so avoid the operation of the bankruptcy act. Such a result is not in accord with the purpose nor within the spirit of the law. A petition in an involuntary proceeding must be filed within four months after the commission of the act of bankruptcy relied on, and, if an insolvent, who is engaged in an occupation which is within the purview of the law, has committed an act rendering him amenable to its provisions, and desires within such period to adopt one of the callings favored by the law and exempted from its operation in respect of involuntary proceedings, he should not be permitted to carry with him the property previously accumulated, to the defrauding of pre-existing creditors. The excepted occupations are not designas a refuge for insolvent debtors, laden with property and fleeing from other callings. The right of the creditors to proceed within the period limited after the commission of an act of bankruptcy cannot be thus defeated by the debtor."

Closely in point is In re White Mountain Paper Co., 11 Am. Bankr. Rep. 491, 127 Fed. 180, where a corporation, organized under the laws of New Jersey for the purpose of manufacturing pulp, acquired land and erected a plant in New Hampshire for the purpose of engaging in that business, but became involved before any direct manufacturing was done. In holding it liable to proceedings in bankruptcy, notwithstanding the latter circumstance, it is said by Aldrich, J.:

"The question * * * does not depend upon * * * whether the corporation was at the particular time of the petition actually engaged in * * * the process of manufacturing. My impression would be that the language 'engaged principally in manufacturing * * * pursuits' was used for the purpose of describing the kind of a corporation which may be put into bankruptcy, and that it was not intended that the operation of the bankrupt law upon a corporation of a kind within the meaning of the statute should depend upon the question whether it was actually engaged in manufacturing at the particular time when the petition is filed."

This case was affirmed on appeal (11 Am. Bankr. Rep. 633, 127 Fed. 643, 62 C. C. A. 369) upon the somewhat narrower ground that,

in the opinion of the court, manufacturing, under the evidence, had in fact begun, although only in its earlier stages—a view which, while it may not adopt, does not detract from, that expressed by the lower court. Finally, in Re Moench Co., 12 Am. Bankr. Rep. 240, 130 Fed. 685, 66 C. C. A. 37, where the corporation at the time of filing the petition was in the hands of receivers appointed by a state court, it was contended, similarly to what it is here, that the company, having ceased to do business when the receivers were appointed, was not within the provisions of the act. But it was said by Lacombe, J., speaking for the Court of Appeals of the Second Circuit:

"No case is cited in support of this proposition, and, in the absence of authority, we shall be unwilling to hold that a corporation could thus easily avoid the operation of the bankruptcy act by making a general assignment, or by securing the appointment of receivers, or by ceasing to do any business, before its creditors filed a petition against it."

While neither of the authorities so cited may be in exact correspondence with the case in hand, the principle to be deduced from them, applicable thereto, is clear. The liability of a person, whether natural or artificial, to bankruptcy is to be judged by the character of the pursuit in which such person was engaged at the time the debts due the petitioning creditors were incurred, with respect to which it may be conceded that, as to a corporation, its actual business is to be considered, and not that which it might possibly have undertaken by virtue of authorized but unexercised powers. In re New York & W. Water Co., 3 Am. Bankr. Rep. 508, 98 Fed. 711; In re Tontine Surety Co., 8 Am. Bankr. Rep. 421, 116 Fed. 401. As to such debts, an individual does not lose his previous character by ceasing to carry on the business in which they were contracted and turning to another, in which he is not liable to bankruptcy, and neither does a corporation, by stopping business altogether and going into liquidation, voluntary or involuntary. In either case, as to debts previously contracted, the business character of such person, in the contemplation of the law, remains the same. Wherever, therefore, the principal place of business of such person has been established for the greater part of six months preceding the filing of the petition, and without regard to the business there carried on, as to debts previously contracted, proceedings may be maintained.

This is not to deny the force of those cases which hold that, where a person ceases to belong to one of the excepted classes, he becomes liable according to the class in which he is found at the time proceedings are instituted. In re Matson, 10 Am. Bankr. Rep. 473, 123 Fed. 743; Hoffschlaeger v. Young Nap, 12 Am. Bankr. Rep. 521. It is simply that a different principle applies. Nor does it seem to make any difference that the debts due the petitioning creditors were incurred before the change (Butler v. Easto, Doug. 295), provided only the act of bankruptcy has been committed since. Bailie v. Grant, 9 Bing. 121. As declared in the latter case, "a debt contracted before trade, but remaining unpaid at and after the time the debtor enters into trade," is "a subsisting debt for every purpose, and subject to every consequence which belongs to a debt originally contracted dur-

ing trade." But without enlarging upon this, which is somewhat obiter, whatever be the rule where a change is made from an exempt to a nonexempt class, there can be no question as to what is the rule here.

The exceptions to the report of the referee are overruled, the issue raised by the plea is found in favor of the petitioners, and the respondent is directed to answer over within 10 days.

ILLINOIS LIFE INS. CO. v. NEWMAN, County Clerk, et al.

(Circuit Court, D. Kansas, First Division. September 30, 1905.)

No. 8,337.

1. TAXATION—ENJOINING COLLECTION OF ILLEGAL TAX—EQUITY JURISDICTION.

A federal court of equity is without power to enjoin the collection of a tax levied under the authority of a state on the ground of its illegality alone, although such power is conferred by statute on the courts of the state.

2. SAME—FEDERAL COURTS—ENFORCING STATUTORY REMEDY.

To authorize the granting of an injunction by a federal court of equity, facts must be alleged showing some recognized ground of equity jurisdiction aside from the mere fact that an injunction is prayed for, and from which it appears that complainant is without adequate remedy at law; but, when such jurisdiction is shown, as incidental thereto the court may enforce an enlarged equitable right or remedy given by a state statute, as by the issuance of an injunction to restrain the collection of an illegal tax.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 797, 976.]

In Equity. On demurrer to bill.

Mulvane & Gault and Long & Price, for complainant.
Hazen & Gaw and Otis E. Hungate, for defendants.

POLLOCK, District Judge. Complainant, an Illinois corporation, the owner of securities in the amount of $510,000, deposited with the treasurer of this state as a reserve fund for the benefit of its policy holders, brings this suit to enjoin the defendants, the proper taxing officers of the defendant board, from levying a tax against this property for the years 1894 and 1895. The foundation of complainant's suit rests on the claim that it is a citizen of the state of Illinois. Hence its personal property, although found in this jurisdiction, is not here taxable. Complainant further claims the property is, in its nature, such that, under the laws of this state, it is exempt from taxation. Hence any attempt on the part of the defendants to levy or collect a tax thereon is illegal. A restraining order was heretofore granted, and a temporary injunction is now asked. Defendants demur to the bill for want of equity.

Many objections were urged by solicitors for defendants at the oral argument against the sufficiency of the bill to warrant this court in granting the relief prayed. It is urged the bill presented does not

show defendants to have done or threatened any act looking towards the fixing of a charge against complainant or its property, except such acts as involve the judgment or discretion of defendants in the discharge of their duties as officers of the county, imposed by law. Hence it is contended the suit is prematurely brought. Again, it is contended the situs of the property is by the averments of the bill admitted to be within this jurisdiction. Therefore it is contended the property is taxable here, although the complainant is a citizen and resident of the state of Illinois. Again, it is urged the property is not exempt from, but is the legitimate subject of, taxation in this jurisdiction. I shall, however, consider but one objection made to the bill, the decision of which, to my mind, is decisive of the controversy.

Complainant bases its right to the extraordinary relief demanded upon the provisions of section 4700, Gen. St. 1901, of this state, as amended by chapter 334, p. 550, Laws 1905, which reads:

"An injunction may be granted to enjoin the illegal levy of any tax, charge, or assessment, or the collection of any illegal tax, charge, or assessment, or any proceeding to enforce the same, or to enjoin any public officer, board or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge or assessment; and any number of persons whose property is or may be affected by a tax or assessment so levied, or whose burdens as taxpayers may be increased by the threatened unauthorized contract or act, may unite in the petition filed to obtain such injunction. An injunction may be granted in the name of the state to enjoin and suppress the keeping and maintaining of a common nuisance. The petition therefore shall be verified by the county attorney of the proper county, or by the Attorney General, upon information and belief, and no bond shall be required."

This statute undoubtedly furnishes ample authority to the courts of this state to restrain by injunction the levy and collection of an illegal tax. It is also indisputable a federal court of equity may, in a proper case cognizable in a court of equity, afford to complainant the full measure of remedy granted by this statute. Ex parte McNeil, 13 Wall. 236, 20 L. Ed. 624; Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447; Case of Broderick's Will, 21 Wall. 503, 22 L. Ed. 599; Cowley v. Northern Pacific Railroad Co., 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263; Anthony v. Burrow (C. C.) 129 Fed. 783. But the Legislature of a state is powerless to enlarge or diminish the jurisdiction of the federal courts sitting in equity by any enactment it may make. Therefore, while the remedy provided by this statute may be afforded by this court to complainant in a proper case arising in equity, yet some specific reason for a resort to a court of equity must be stated in the bill, some established ground of equitable cognizance averred, or jurisdiction does not attach. As has been seen, the sole right of suit, the single claim made to the relief sought in this bill, is based on the illegality of the tax threatened to be levied. It is conclusively settled by an unbroken chain of decisions emanating from the Supreme Court that federal courts of equity will not enjoin the levy or collection of a tax on the single ground of illegality, but that some special circumstance, such as the avoidance of a multiplicity of suits, the casting of a cloud upon title to real estate, or some injury that cannot

be remedied by an action at law, instituted either before or after the payment of the tax, or other circumstance bringing the case within the well-recognized principles of equity, must be averred in addition to the single fact of the illegality of the tax before a court of equity will take cognizance of the controversy and interpose by injunction. Dows v. City of Chicago, 11 Wall. 108, 20 L. Ed. 165; Hannewinkle v. Georgetown, 15 Wall. 548, 21 L. Ed. 231; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Milwaukee v. Koeffler, 116 U. S. 219, 6 Sup. Ct. 372, 29 L. Ed. 612; Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273; Pittsburgh, etc., Ry. v. Board of Pub. Works, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354; Arkansas Building Association v. Madden, 175 U. S. 269, 20 Sup. Ct. 119, 44 L. Ed. 159. In Dows v. City of Chicago, supra, Mr. Justice Field, speaking for the court, says:

"Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public. No court of equity will therefore allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed; and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found upon examination that the question of jurisdiction was not raised, or was waived. * * * The party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection, or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights."

In State Railroad Tax Cases, supra, Mr. Justice Miller, delivering the opinion of the court, says:

"We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

In Union Pacific Railway Co. v. Ryan, 5 Sup. Ct. 601, 28 L. Ed. 1098, Mr. Justice Bradley, delivering the opinion, says:

"Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot of themselves furnish any ground for equitable interposition. In ordinary cases a party must find his remedy in the courts of law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident, or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than

those the common law can give; and these, in proper cases, may be afforded in courts of equity.'"

In Shelton v. Platt, supra, Mr. Chief Justice Fuller says:

"It was ruled in Dows v. Chicago, 11 Wall. 108, 20 L. Ed. 165, that a suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal, but that there must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant. And Mr. Justice Field, speaking for the court, said: 'The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the federal courts, where there is a plain and adequate remedy at law.' And, except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection, or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action. We see no ground for the interposition of a court of equity which would not equally justify such interference in any case of threatened invasion of real or personal property."

In Pittsburgh, etc., Ry. v. Board of Pub. Works, supra, Mr. Justice Gray, delivering the opinion, says:

"The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case within some recognized head of equity jurisdiction."

As has been seen, the claimed illegality of the levy is the sole ground on which injunction is here sought. True, the bill contains the usual stock averment:

"That the placing of an assessment against your orator on said tax rolls in respect of said securities will accomplish against your orator a great and irreparable damage, for which your orator has no adequate remedy by the ordinary course of the law."

This averment, however, is merely a matter of inference, and wholly insufficient to confer jurisdiction in equity upon this court. Shelton v. Platt, supra. The facts constituting the special circumstances of the case, showing the necessity of a resort to a court of equity, and why the relief granted by a court of law will not be adequate and sufficient, must be set forth in the bill to justify the interposition of a court of equity.

As before seen, the Legislature of the state may create a new ground of injunction cognizable and enforceable in a court of the state, and a state court may proceed to the granting of an injunction on such ground alone, for in this state all distinction between actions at law and suits in equity is expressly abolished by statute. The injunction granted in such case in the state court is not granted in a suit in equity. It is granted in the one form of legal proceeding authorized

by the Code; that is, in a civil proceeding. The Legislature may also enlarge equitable remedies, and such enlarged relief may be afforded complainant in a suit of equitable cognizance in the federal courts, but the Legislature is wholly incompetent to create a new ground of equitable jurisdiction in the federal courts, for the distinction between suits in equity and actions at law here prevails in all its strictness, and this distinction is not a mere matter of form or mode of procedure, but is a matter of substantial right, going to the very power of the court to proceed at all. Fenn v. Holme, 21 How. 481, 16 L. Ed. 198; Thompson v. Railroad Companies, 6 Wall. 134, 18 L. Ed. 165; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804; Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052. This principle is well illustrated in the case of Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52, a suit brought in the Circuit Court of the United States for the District of Nebraska to quiet title, and was grounded upon a statute of that state. At the time of the passage of the act it was the common, if not the universal, practice in courts of equity to require the complainant, in a bill to quiet title to lands, to aver, and, if denied, to prove, his possession of the lands at the commencement of the suit. This requirement, with others, was dispensed with by an act of the Legislature of that state, and it was held in that case that a federal court of equity in Nebraska had jurisdiction of the suit, although the bill did not aver the possession of complainant at the time the suit was commenced. Mr. Justice Field, delivering the opinion of the court, says:

"The truth is that the jurisdiction to relieve the holders of real property from vexatious claims to it, casting a cloud upon their title, and thus disturbing them in its peaceable use and enjoyment, is inherent in a court of equity; and though conditions to its exercise have at different times been prescribed by that court, both in England and in this country, they may at any time be changed or dispensed with by the Legislature without impairing the general authority of the court. Pomeroy's Equity Jurisprudence, § 1398. The equitable rights of parties in Nebraska, claiming the legal title to real property, are simply enlarged by its statute; not changed in character. And the language used by this court, speaking by Mr. Justice Bradley, in the Broderick's Will Case, 21 Wall. 520, 22 L. Ed. 591, is appropriate here: 'Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the Circuit Courts, as well as by the courts of the state.' And it may be affirmed of this case, what was said as probably true of that one, that it is 'a case in which an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding.' 'Indeed,' as the court there observed, 'much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties.'"

In other words, in that case, a cause of purely equitable cognizance, a suit to quiet title was presented by the bill. One of the terms upon which federal courts of equity were accustomed to grant the relief prayed was lacking. This term was supplied by an act of the Legislature of the state in which the controversy arose. This was held sufficient as an enlargement of the equitable remedy which might be granted. Such, also, is the holding in Clark v. Smith, 13 Pet. 195, 10 L. Ed. 123, and kindred cases. In the case at bar the preventive

remedy of injunction applied for is not a mere incident to the relief sought by the bill, but the injunction prayed is the very life of the bill itself, the sole relief demanded. Federal courts of equity have no jurisdiction solely for the purpose of granting an injunction. An injunction may be granted as an incident to other relief sought in the bill, or, in a suit arising from peculiar circumstances, constituting a right of suit cognizable in a court of equity because the law can afford to complainant no adequate and sufficient remedy, the right of injunction may be the very life of the bill; but it is the peculiar facts and circumstances of the case which create the right of resort to a court of equity, and not the fact that injunctive relief is demanded. In other words, the injunction constitutes the relief sought in a court of equity, and not the right of resort to, or the foundation of, the jurisdiction of a court of equity. An examination of the bill in the present case shows no such peculiar circumstances or facts as justify a resort to a court of equity. No reason appears from the bill why a single action at law may not fully compensate complainant for any injury it may sustain if the threatened assessment be made and carried out on the tax roll. Indeed, it is difficult to conceive how complainant will be injured by the performance of the acts threatened by the defendants here sought to be enjoined. In any view of the case, I am of the opinion the acts sought to be enjoined are not such, in their nature, as call for the interposition of this court at this time, under the showing made in the bill.

It is therefore ordered that the demurrer to the bill be sustained, the application for temporary injunction be denied, the restraining order heretofore granted be discharged, and the bill dismissed.

WEEMS STEAMBOAT CO. OF BALTIMORE, MD., v. PEOPLE'S STEAMBOAT CO. et al.

(Circuit Court, E. D. Virginia. October 17, 1905.)

WHARVES—PUBLIC CHARACTER—MONOPOLY OF USE.

A wharf built on the bank of a navigable river, not in a city or town where there are a number of others, but at the terminus of public highways in the country, or at a small place, where it constitutes the only means by which the people of the community can reach the river and use the mediums of commerce navigating the same, and which was built for such use, or is being so used, is impressed with a public interest; and a single carrier cannot, by purchasing or leasing the same, convert it into private property, so as to have the right to exclude the public or other carriers from using it for the loading or unloading of vessels on the payment of reasonable wharfage.

In Equity. On application for an injunction to restrain the use of certain alleged private wharves.

The complainant company, a corporation of the state of Maryland, the owner and operator of a line of steamers plying between the city of Baltimore, in the state of Maryland, and the city of Fredericksburg, in the state of Virginia, said route being from Baltimore down Chesapeake Bay to the mouth of the Rappahannock river, and thence up said river to Fredericksburg,

filed its bill in this cause to enjoin the People's Steamboat Company, a corporation of the state of Virginia, the owner and operator of a competing steamer to that of complainant, from allowing its steamer, the Tourist, to use certain wharves, 13 in number, on the Rappahannock river, owned or leased by the complainant company, because, as alleged, said wharves were not public wharves, but the private property of the complainants. Upon presentation of the bill, a rule was awarded requiring the defendant to show cause why the injunction prayed for should not issue; and, upon its return, affidavits in favor of and against the motion were filed; and the court thereupon, before granting the injunction, directed a reference to a special master, with a view of ascertaining the status of the said wharves. A great mass of evidence was taken, and an investigation of the titles to the property made by the special master; and, in an elaborate and able report, he concluded that all of the said wharves were either owned in fee by the complainant company, or held by it under proper leases from the lawful owners thereof; and that said wharves, one and all, were the private property of said owners, and private, as distinguished from public wharves. Exceptions were filed to this report by the defendant company and fully argued before the court; and the question for determination is whether said wharves are, in point of fact, public or private wharves. If public, the defendant has the right to the use of them as contended; whereas, if private, such right does not exist.

The Rappahannock river is one of the ancient and important waterways of the commonwealth. The distance from its points of navigability at the city of Fredericksburg, to where it empties into Chesapeake Bay, is about 120 miles; and considerable commerce is conducted upon it; and the complainants and their predecessors have for a long number of years (40 or 50) operated a line of steamers from the city of Baltimore, over said route; and on said river are located some of the oldest villages and towns in the state, notably at two of the wharves in question, Rappahannock and Port Royal, the latter place being one of the oldest, as it was at one time one of the largest ports of entry, in the commonwealth, although now it has only some few hundred inhabitants. The complainants are the owners of six of the wharves under consideration, having acquired the same from time to time during the operation of their line of steamers; and they succeeded in leasing the remaining seven of said wharves, shortly before the institution of this proceeding, and after the defendant company inaugurated its line of steamers on said river. While the said 13 wharves involved in this proceeding by no means include all the wharves or stopping places for vessels on the river, it may be said that they embrace the important wharves from which the passenger and freight business is chiefly procured, in passing up and down the river; and that the business from said wharves is large. With possibly a single exception, these wharves are at the termini of public highways in the counties in which they are respectively built; the character of the business consists of passenger travel, and merchandise received over said wharves, consisting of the general products of the country; and they are the usual shipping places of persons living in the immediate neighborhood of the wharves, and of the inhabitants of the country for some distance in the interior. That, at said wharves, United States post offices are established, at which the mail of the people for the surrounding country is procured; and that, as to the wharves leased as aforesaid, the same were leased upon a rental of a commission of 10 per cent. of all freight charges and passenger fares collected by the complainant at said wharves, the owner of said wharves maintaining an agent there to assist in mooring the vessels of the complainants making landings there, and in receiving and forwarding freight therefrom; and at some of the wharves sail vessels from time to time moor, and lade, and unlade, making proper compensation to the owners of the wharves for their use.

H. St. George Fitzhugh and George W. Williams, for complainants.

William D. Carter and A. T. Embrey, for respondents.

WADDILL, District Judge (after stating the facts as above). While the special master is doubtless correct in his findings as to the actual ownership of the property rights in said wharves, namely, that they are the individual property of the several owners thereof, and, as such, pass regularly by the laws of descent and purchase, it by no means follows that said wharves are private as against the public; that is, either the citizens desiring to use the wharves to reach the means of transportation upon and over said river, or owners of such methods of transportation plying the waters of said river; the obligation upon each being to render and pay to the wharf owner reasonable wharfage and charges for the use of his property, under such proper and reasonable regulations as might be imposed either by law or by the owner of the property.

Wharves belong to a class of property in which the public is concerned, and as to which the government has always reserved the right, as between its citizens, to regulate and control. This has prevailed in England from time immemorial, and in this country from its earliest colonization; that is to say, the government has exercised the authority to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc. And hence this class of property, when used by the public, becomes affected with a public interest, and it ceases to be juris privati only. As was said by Mr. Chief Justice Waite, in delivering the opinion of the court and discussing the subject under consideration, in Munn v. Illinois, 94 U. S. 126, 24 L. Ed. 77:

"This was said by Lord Chief Justice Hale more than 200 years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

The question of what is technically a public, and what a private, wharf may be matter of some doubt; but there should be no serious question in this case as to the wharves under consideration. The Supreme Court of the United States, in Dutton and others v. Strong and others, 66 U. S. 23, 32, 17 L. Ed. 29, had under consideration this precise question, as to when piers, landing places, and wharves were private, or became public wharves, although the property in such wharves remained in the individual owner; and in apt language said:

"And whether they are the one or the other may depend, in case of dispute, upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure."

These wharves, it must be borne in mind, are not the landing places or piers of a line of steamers in a city, but mere wharves along the banks of a river in the country, in the main at the termini of public county roads; and hence the means, and only means, whereby the people of the community can reach the river and use the mediums of commerce navi-

gating the same. These wharves were all built that they might be so used, and for the profit that was in the use; and they have been continually thus used, some of them yielding to the owners, because of the travel upon and over them by the public, with the complainant and others, a large return; and so long as they are thus used, as between the public and their owners, they are public, as distinguished from private wharves. Nor does the fact that the complainant does not charge wharfage eo nomine, in its transactions with its patrons, change the character of the wharves; since they built, used, and maintained them for the public generally, who used their wharves and their steamers, paying their passage and freight money, which includes wharfage; and they cannot thereby, whether actual wharfage is charged or not, either discriminate as between the public seeking to go upon and over the wharf, or public carriers seeking to lawfully ply the waters of said river. The complainant is a public carrier, using a public waterway; and it cannot, by the mere fact of not charging wharfage at a wharf used generally by the public, secure a right to prevent any part of the public from using the wharf upon equal terms with others. And least of all can they cut off a competitor lawfully engaged in the navigation of such waterway from the free use thereof, and the right to have and receive the patronage of the public lawfully using such wharf, upon making or proffering proper compensation therefor. It will be readily seen that, if the complainant could exercise such a privilege as this, it would be a simple thing for the owners of a line of steamers to acquire all the wharves on the river, and thereby subject the public to a monopoly from which there would be no escape, and deny to them the free use of the public waters of the commonwealth. If such a thing were possible, the continued improvement of rivers and harbors by the general government would quickly cease, and the commerce of the country receive a serious setback.

The question of private ownership of wharves is fully recognized in the case of Dutton et al. v. Strong et al., 66 U. S. 33, 17 L. Ed. 29, by the Supreme Court of the United States, in this language:

"Undoubtedly, a riparian proprietor may construct any one of these improvements *for his own exclusive use and benefit;* and, if not located in a harbor, or other usual resting place for vessels, and, if confined within the shore of the sea or the unnavigable waters of a lake, *and it had not been used by others or held out and intended for such use,* no implication would arise, in a case like the present, that the owner had consented to the mooring of the vessel to the bridge pier." (Court's italics.)

That is to say, riparian owners can construct and maintain, for their own exclusive use and benefit, private wharves upon their property; and, as long as they so use them, they are not affected with a public interest; and a temporary use by another, by special arrangement with the owner, might not affect the character of such wharf. Transportation Co. v. Parkersburg, 107 U. S. 691, 699, 2 Sup. Ct. 732, 27 L. Ed. 584. But a general or habitual use thereof by persons other than the owner will relieve the property of its private character. No hardship would befall the owner of the private property by this interpretation, in that it could or might be claimed that it was a deprivation thereof, and the appropriation of the same to public use without proper compensation.

This phase of the question was considered by the Supreme Court of the United States in the case of Munn v. Illinois, 94 U. S. 125, 24 L. Ed. 77, and the suggestion refuted; and in this same case, the court, at page 126, 94 U. S. (24 L. Ed. 77), speaking of the owner, said:

"He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

The owners of wharves have a complete remedy within their own hands, if, in point of fact, they be private, as distinguished from public wharves. They have the right to withdraw the use of their wharves entirely from the public. But they cannot allow the latter to use the wharves, or use them themselves in their business as public carriers for the public, and discriminate between them in their use.

In what has been said, no opinion is meant to be expressed upon any question affecting the ownership of wharves and piers in cities and towns of the commonwealth, or harbors or places where there may be more than one landing place, as entirely different considerations may determine a controversy arising over such property, and under such circumstances. The fact of the existence of a different rule as to wharves like the ones in question, along the banks of a river in the country, where they may be said to be the only means of communication by the public with the waterway, from those in the harbors of cities or towns, where there are not unfrequently many and other wharves and landing places for the landing and embarking of passengers and freight, has long since been recognized; and much can be said as to the necessity for, and the wisdom of, such distinction. The location of wharves in the country, the meandering of the river, the character of the river banks, the condition of marshes along the river courses, the fact that the forests and country along the river and adjacent to such wharves for long distances might not be opened up, would one and all tend to show the reason for the existence of a different rule. This fact was recognized by Sir Mathew Hale long ago; and the Supreme Court of the United States, speaking through Mr. Justice Bradley, referring to that learned jurist, in Transportation Co. v. Parkersburg, 107 U. S. 699, 2 Sup. Ct. 739, 27 L. Ed. 584, said:

"Whether a private wharf may be maintained as such, where it is the only facility of the kind in a particular port or harbor, may be questioned."

And in treating of this subject, Lord Hale, in his treatise De Jure Maris (Hargreaves, Law Tracts, 77), says:

"A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. * * * If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the king, or because there is no other wharf in that port, as it may fall out where a port is newly erected, in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be juris privati only; as

if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest."

This quotation from Lord Hale has been referred to approvingly by the Supreme Court of the United States at least twice—in the case of Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, and Transportation Co. v. Parkersburg, 107 U. S. 699, 2 Sup. Ct. 739, 27 L. Ed. 584. Reference may also be had to Gould on Waters (3d Ed.) § 119; Barrington v. Commercial Dock Co. (Wash.) 45 Pac. 748, 33 L. R. A. 116, and cases there cited; Oregon Short Line v. Ilwaco Ry. & Nav. Co. (C. C.) 51 Fed. 611; Indian River Co. v. E. C. Transportation Co. (Fla.) 10 South. 485; Sherlock v. Bainbridge, 41 Ind. 35, 13 Am. Rep. 302.

The array of authorities cited by the complainant in support of its several contentions, and which largely treat of the rights of riparian owners to the status of wharf property in cities and towns, and ports where there are more than one wharf, and the title to private property in wharves, have been carefully considered by the court; and, while some of the cases apparently conflict with the views herein expressed, the court feels controlled by the authorities relied upon as the basis of this decision.

The conclusion of the court is that the injunction asked for should be refused, at the cost of the complainant.

BREW v. COCHRAN et al.

(Circuit Court, M. D. Pennsylvania. November 11, 1905.)

No. 11.

1. PARTNERSHIP—SUIT FOR SETTLEMENT AGAINST SURVIVING PARTNER—PARTIES.

To a suit in equity by the personal respresentative of a deceased partner against a sole surviving partner, to whom also all the assets of the partnership have been transferred as trustee under an agreement between all parties in interest, to obtain a final settlement of the partnership affairs, the personal representatives of other deceased partners are indispensable parties.

2. SAME—RIGHT TO MAINTAIN SUIT FOR SETTLEMENT.

All but one of the members of a banking partnership died before the time fixed for its termination. The articles provided that on the death of any partner his capital should remain in the firm until that time, and should share in the profits unless otherwise mutually agreed. For some time the surviving partner carried on the business, and then by agreement of all parties in interest the business and the greater part of the assets of the firm were transferred to a corporation in exchange for its stock, which was placed in the hands of the surviving partner as trustee. *Held*, that the personal representative of one of the partners, who had been dead eight years, and upon whose share no profits had been paid, because his right was disputed, was entitled to maintain a suit in equity for a settlement and accounting without waiting until the remnant of the partnership had been fully closed up; it being within the power of the court to protect the interests of all concerned in the final decree.

In Equity. On demurrer to bill.

Charles P. Hewes, for plaintiff.

Seth T. McCormick, for demurrer.

ARCHBALD, District Judge. The plaintiff's intestate, George W. Jackson, was a member of the copartnership of Jackson, Hastings & Co., organized August 31, 1897, to engage in the general banking business at Bellefonte, Pa. Two months later, on October 22, he died; and Henry C. McCormick and Daniel H. Hastings two other members have also died since then, the one in May, 1902, and the other in January, 1903, leaving J. Henry Cochran as the sole survivor. As recited in the copartnership agreement, Jackson had a six-fifteenths interest in the business, Hastings had five-fifteenths, McCormick two-fifteenths, and Cochran two-fifteenths. By the second article, the copartnership was to continue 10 years; and by the fourth article, it was provided, that, in case of the death of one or more of the partners before the expiration of that term, the capital of such partner or partners should remain in the business, unless otherwise agreed to, but that the legal representatives of any such partner should be paid 6 per cent. per annum on the capital so left in it, and should also participate in the earnings to the same extent as the deceased partner himself would have done if living; the business, however, to be exclusively managed by the surviving partners or partner, and the legal representatives of the deceased partners to have no voice therein. In accordance with what was so provided, the business of the partnership continued, notwithstanding the death of its several members, up to January last, and twice in this interval the plaintiff by suit in the state courts has endeavored to obtain a recognition of the interest of the estate which he represents in its affairs, and a participation in the profits derived therefrom, as secured to him by the articles quoted. But in each case, without avail; it being held that, by reason of the ten-years provision, the suit was premature. Brew v. Hastings, 196 Pa. 222, 46 Atl. 257; Id., 206 Pa. 155, 55 Atl. 922. Now, again, the same position is taken, but for somewhat different reasons, the facts having changed, and the question is whether the plaintiff is still in advance of his rights.

After the death of the other two partners and the final disposition of the second suit, the parties to the present bill, consisting of the surviving partner and the legal representatives of the three who are deceased, came together, December 24, 1903, and entered into a new agreement. By it (article 1) the provision for the continuance of the copartnership, contained in the original articles, was abrogated, the same being thereby terminated, as it is said, by mutual consent. Recognizing the desirability of the partnership being merged into a trust company to be organized under the laws of Pennsylvania, it was further agreed (article 2) that, as soon as such trust company should be incorporated, all the assets and property of the firm should be transferred and conveyed to it, and capital stock therein be received in return, to the extent of the net value of the property turned over less the liabilities assumed; such value to be determined (article 3) by agreement between the parties and a committee of stockholders; and the stock (article 4) to be issued to and held by the defendant J. Henry Cochran as trustee for all parties, until their rights should be determined and a distribution of the stock made. It was, however, further provided (article 5) that immediately upon the formation of the trust company, and the issue and delivery of the stock, any of the parties in interest should be entitled to require a distribution of it,

and a settlement of the affairs of the copartnership, the same as though Mr. Cochran was the sole surviving member without any provision (such as had previously existed) for the continuance of the business; for which purpose, suits at law or in equity, if necessary to compel a settlement and distribution, could be maintained. Nothing in the agreement, however, as it was declared (article 6), should be construed into an admission that the estate of the plaintiff's intestate had any interest in the assets of the copartnership, which the others expressly denied, the sole purpose of the agreement—as it is stated—being to substitute the trust company stock for the existing partnership assets, with the right to an immediate accounting instead of waiting until the end of the 10 years. It was also, at the same time, provided (article 7) that the agreement was only to be operative upon the organization of the proposed trust company, and that it was to be deemed canceled unless this was accomplished and a sale of the assets effected within four months.

The proposed trust company was subsequently organized, although not within the time contemplated, and only a part of the assets were accepted, necessitating another agreement, which was entered into January 2, 1905, between the trust company and the present parties. By it the latter agreed to sell and transfer to the trust company all the property and effects of the copartnership, excepting; (a) notes, accounts, and indebtedness, due thereto by plaintiff's intestate; (b) notes made or endorsed by Henry Green, amounting to $20,000, with the collateral deposited therewith as security; and (c) two certain notes aggregating about $4,400, one made by the Aultman Company, and the other by the Western Manufacturing & Supply Company and indorsed by the Aultman company; all of which were to remain the property of the copartnership. In consideration of this, the trust company agreed to assume all the liabilities of the bank as shown by the books, and to issue at once to J. Henry Cochran, trustee, as provided in the agreement of December 24, 1903, $70,000 of fully paid up stock. It was still further agreed that the firm of Jackson, Hastings & Co. should indorse certain notes (presumably part of the accepted assets); one made by J. W. Gephart for $6,000, due February 1, 1905, and indorsed by F. H. Clemson, and another by the same maker for $5,000, due February 10, 1905, and indorsed by the Bellefonte Furnace Company, and should also guaranty payment of a certain note, made by W. R. Jenkins for $3,000, indorsed by the Jenkins Iron & Steel Company, and secured by a bond of the Howard Iron & Steel Company; the indorsement of these notes or any renewals not to continue longer than a year from the date of the agreement. The several matters which were so provided for were all carried out, and it is to secure the share due to the estate which he represents, in what has been so realized, that the plaintiff brings this suit.

As already stated the principal objection made to it is that it is premature. The further objection that it should be against Mr. Cochran alone, as sole surviving member of the original copartnership, as well as the trustee to whom the stock of the trust company has been issued, is readily disposed of. As already appears, the other defendants are the personal representatives of the two other deceased members, and while the plaintiff may not be entitled to the same measure of relief against

them as against Mr. Cochran as parties directly interested, they are indispensable to any suit which attempts to pass upon and settle the interest of the plaintiff's intestate in the affairs of the partnership, involving as it does an adjustment of the equities between him and his former partners. 1 Dan. Chanc. Prac. 216.

The objection that the suit is brought too soon resolves itself into the argument that an accounting cannot be required until there can be substantially a complete one; and cannot therefore be demanded here, there being outstanding and unsettled matters, such as the several notes which the trust company declined to take, or which it required the firm to indorse or guaranty. The bill was filed April 7, 1905, some three months after the agreement with the trust company, and the large body of stock thereby called for, had admittedly been issued to Mr. Cochran at that time. And while it is not averred that the excepted assets, or the notes, which the firm was required to guaranty, have been realized upon, and the possibility of the latter remaining open for a year is apparently contemplated, it is also a possibility that they have in fact long since been taken care of, or, if not, have been found practically worthless, the plaintiff in either case being entitled to an account. There is certainly a strong appeal for it under the showing that has been made. The plaintiff's intestate has now been dead over eight years, and the settlement of his estate has been necessarily held up until it could be known, whether anything was coming to it from this source. The defendants deny that he had any interest in the partnership (although the original articles recite that he had six-fifteenths); whatever he had being exhausted—as it is claimed—by his indebtedness to the firm. If it should prove that he had none, the controversy, which has been dragging its slow length along all these years, will be brought to an end, to the relief, as it would seem, of all parties. But if, on the other hand, it should be found that he had, his estate, to that extent, with no apparent reason, has been kept out of the interest due it yearly on the capital left with the firm, as well as its proportionate share of the profits, both of which were stipulated and provided for by the original articles.

Finally, by the arrangement with the trust company, the available assets of the firm, constituting by far the greater bulk of them, were disposed of, and stock in that institution secured therefor, which is capable of division among the parties, according to their respective interests, and which they are therefore entitled to have distributed, without more. Denver v. Roane, 99 U. S. 355, 25 L. Ed. 476. Moreover, by the express provision of article 5 of the agreement of December, 1903, either party was to have the right to call for this, as well as for a settlement of the unsettled affairs of the copartnership, and to enforce it by suit at law or in equity; which, of itself, is a sufficient warrant for this bill. It is contended that this was constructively abrogated by the subsequent agreement of January 2, 1905, by which the inability of the parties to fully dispose of the property of the firm, as previously contemplated, is recognized, the unaccepted assets being thrown back on their hands, and others required to be guarantied, leaving the partnership affairs correspondingly open and unliquidated. But the agreement of January 2, 1905, was intended to carry out that of December 24, 1903,

which, although limited by its own terms, it expressly declares to be in force; and, if so, the plaintiff has a right to appeal to it. Outside of its provisions the defendants would admittedly be liable to account after a substantial liquidation, and much more would they in the face of them. And unless therefore it is clear that something material is to be obtained out of the doubtful and discredited assets which remain, it would be a hardship on those who are interested in the estate, which the plaintiff represents, to longer wait upon them. If occasion should be found in the course of the accounting for protecting the defendants, or either of them, against indorsements or obligations assumed in accordance with the agreement of January 2, 1905, there is no difficulty in providing for it in the final decree, and it affords no ground for not proceeding thereto.

The demurrer is overruled, with leave to the defendants to answer over within 10 days.

In re KAPLAN et al.

(District Court, E. D. Pennsylvania. December 16, 1905.)

No. 1,997.

BANKRUPTCY—DISCHARGE—OBTAINING CREDIT ON FALSE STATEMENT.

An objection to the discharge of bankrupts under Bankr. Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended in Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684], on the ground that they obtained property on credit from the objecting creditor upon a materially false statement in writing, further specified as being a statement in writing of their assets and liabilities made for the purpose of obtaining a loan, is not sustained, where the evidence shows that the statement was given to the creditor 10 weeks before the loan was made, that he refused to make a loan thereon, and afterwards made it on security given at the time and which was deemed by him sufficient.

In Bankruptcy. On review of report of referee.

The following is the report of Referee David Werner Amram:

An adjudication in bankruptcy in the above matter was entered on August 10, 1904, and the cause referred to me as referee. Thereafter the bankrupts filed their petition for discharge, and Daniel Myers, Jr., of Philadelphia, one of their creditors, filed specifications of objection thereto. On March 22, 1905, your honorable court referred the said petition of the bankrupts for their discharge and the specifications of grounds of opposition to me to ascertain and report the facts with the testimony and my findings thereon. In compliance with the said order I gave due notice to the attorneys for the bankrupts and the objecting creditor, and held a meeting for hearing upon the said objections on April 4, 1905, at 3:30 p. m., when I was attended by the bankrupts and their attorney Bernard Pockrass, Esq., and the objecting creditor and his attorney, Henry N. Wessel, Esq. Testimony was taken at this meeting, and the meeting was adjourned from time to time for the purpose of taking further testimony. A record of the said meetings and a transcript of the testimony taken is hereto attached.

The objection to the bankrupts' discharge is based upon section 14b (3) of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), to wit, that the "bankrupts have hitherto and prior to their adjudication in bankruptcy, obtained from this deponent property on credit upon a materially false statement in writing made to this deponent for the pur-

pose of obtaining such property on credit"; specifying more particularly that on February 4, 1904, the bankrupts requested a loan of $300 from the objecting creditor, and made and submitted for his consideration a statement in writing as follows:

"To D. Myers, Jr., of Philadelphia:

"The undersigned, for the purpose of procuring credit from time to time from you for the negotiable paper of the undersigned or otherwise, furnish you with the following statement which fully and truly sets forth the financial condition of the undersigned on the 4th day of Feb. 1904, which statement you can consider as continuing to be full and accurate unless notice of change is given you. The undersigned agree to notify you promptly of any change that materially reduces the pecuniary responsibility of the undersigned.

Assets.		Liabilities.	
Real Estate (Asse'd Value $.....)		Mortgages.....	$9 000
Market Value.....	$12 000	Bills Payable.....	
Merchandise on hand cost.....	7 000	Amount due for merchandise on hand.....	3 000
Merchandise in transit.....		Amount due for merchandise in transit.....	
Bills Receivable.....	75	Other liabilities not specified above..	
Outstanding accounts new.....	800	Loans from Banks or Trust Co.....	
Outstanding accounts 6 mos. old.....			$12 000
Cash in bank and on hand.....	500		
Machinery and Fixtures.....			
Horse and Wagon.....	500		
Other assets not specified above.....			
	$20 875		

Description of Real Estate and in Whose Name.....	in my name House & Lotte 710 S. 5th St Lotte 26 X 37 Feet
Do You Borrow on Accounts Receivable?.....	No.
What Banks or Trust Company are You Depositing With?.....	Centeral.
Have You Given Judgment Notes to Any Person or Firm to Secure Them? Answer No.....	No.
To What Extent are Endorser on Other Paper? Answer No...	No.
Insurance Carried on Real Estate. $9,000.00. On Stock. $8,000.00.	
Do You Carry Life Insurance? Yes. What Amount? $25,000...	
To Whom Payable? In our name.	

"The above is a true statement of our condition this fourth day of Feb., 1904.

"[Signed] Nathan Kaplan.

"Frank Skwersky.

"Kaplan & Skwersky."

Indorsed: "Statement Kaplan & Skwersky, made February 4, 1904."

—and that the deponent relying upon this statement loaned the bankrupts the sum of $300 in cash.

The objecting creditor further avers that the statement was materially false in four particulars: (1) That the bankrupts did not own the real estate mentioned in said statement. (2) That they did not have on hand merchandise to the value set forth in said statement. (3) That they owed more than $3,000, as stated by them. (4) That they had given judgment notes to divers persons, firms, and corporations.

The statement in writing above referred to was offered in evidence, and it is admitted that the signatures thereto are in the handwriting of the bankrupts.

From the testimony taken before me, I find and report the following facts:

That on February 4, 1904, the bankrupts called on Daniel Myers, Jr., the objecting creditor, at his office in the building of the Central Trust Company, Philadelphia, and asked him for a loan of $500. At that time, Kaplan, one of the bankrupts, was about to purchase a house and lot 710 South Fifth street, Philadelphia. Myers requested them to give him a statement of their financial condition. Kaplan informed him that he was about to purchase the above-mentioned property, the price of which was $12,000, and that a mortgage of $9,000 was to be placed on it; that he valued the business of the firm at $7,000,

and that they owed $3,000; that they had bills receivable of $75, new outstanding accounts of $800, cash in bank and on hand $500, and a horse and wagon worth $500; that he carried no life insurance, but that his partner Skwersky had a policy for $1,000.

At the time of this interview Myers, the objecting creditor, using one of the blanks of the Central Trust & Savings Company, with which he was connected, prepared a statement from the answers of Kaplan and offered it to the bankrupts for their signature. They signed it, and were told by Myers to come in a few days for an answer. A few days later Skwersky, one of the bankrupts, called on Myers, the objecting creditor, who then told him that he declined to give him any money on account of the statement, but suggested that if the bankrupts could give him any real estate security he would make the loan. Skwersky left Myers without receiving the money and thus the matter ended.

On February 9th, five days after the above statement was given, the property above referred to, 710 South Fifth street, was bought by Kaplan, one of the bankrupts, whose cash book shows that on that date he paid to William H. Moss $585; $500 of which was on account of the purchase price of this piece of real estate. More than two months after these events the bankrupts renewed their application for a loan with Myers, who again declined to make it because they had no real estate. He was informed, however, by Skwersky that he (Skwersky) had paid in $208 on account of the 20-year endowment policy on his life for $1,000, and Myers agreed to make a loan of $200, if this policy were assigned to him as collateral security. Skwersky told Myers that $200 was not enough for him, and the latter then agreed to make a loan of $300, provided the policy of life insurance was assigned to him, and the bankrupts would give him their judgment note for $300. This was agreed to and on April 18, 1904, the judgment note signed by the firm and by Skwersky individually for $300 was delivered to Myers, and Skwersky's policy of life insurance issued by the New York Life Insurance Company for $1,000, was assigned to him, and he thereupon paid over to Skwersky $282, deducting $18 for reasons which do not appear in evidence.

I am convinced from the testimony that the objecting creditor did not make the loan of $300 on April 18, 1904, on the faith of the statement signed by the bankrupts on February 4, 1904. His answers to questions on this point are significant: "Q. Why didn't you give them the money when the statement was signed? A. Because it didn't suit me at that time. Q. Why didn't it suit you at that time? A. Because I didn't feel like giving it to them at that time. Q. Why didn't you feel like giving it to them at that time? A. I can't tell you." Immediately before giving the above answers he was asked: "Q. Then you did not give them any money on the strength of this statement?" to which he replied: "A. Yes; that statement had a great deal to do with it. That had all to do with it. If they were perfectly responsible, the way they had been telling me."

In spite of this answer of Myers, I am convinced from his other answers and from the other testimony in the case that the statement had nothing to do with the loan, and that he made the loan to them on what he believed at that time to be entirely good security without considering the statement which they had made to him 10 weeks before. In view of these findings of fact, I am of the opinion that the objecting creditor has failed to prove, as required by the bankruptcy law, that the bankrupts obtained property on credit from him upon a materially false statement in writing made to him for the purpose of obtaining such property on credit, and that therefore the objections to the discharge should be dismissed and the discharge granted.

Counsel for the objecting creditor has argued that the printed words at the head of the statement of February 4, 1904, are of such a character as to bind the bankrupts by the statements made and to justify the objecting creditor in offering the statement as a basis for his objection to the discharge.

The following are the printed words at the head of the said statement: "The undersigned, for the purpose of procuring credit from time to time from you for the negotiable paper of the undersigned or otherwise, furnish you with the following statement, which fully and truly sets forth the financial

condition of the undersigned on the ——— day of ——— 190—, which statement you can consider as continuing to be full and accurate unless notice of change is given you. The undersigned agree to notify you promptly of any change that materially reduces the pecuniary responsibility of the undersigned." The blanks in the above heading were filled in with the date February 4, 1904. It may very well be that if a loan had been made by Myers on or about the 4th day of February, 1904, on the faith of this statement, and that subsequently, say 10 weeks later, a new loan had been made, the statement might have with justice been considered to be still in force, and its contents, true or false, binding on the bankrupts. In other words, it might then be considered a continuing statement, but in view of my findings of fact that no loan whatever had been made on this statement, and that the loan actually made was 10 weeks after the statement was given upon security not mentioned in the statement, I cannot agree with the conclusion of law urged by the attorney for the objecting creditor that this is a continuing statement and binding on the bankrupts. This would only be possible in one of two cases, either that a loan had originally been made at the time when the statement was given and the statement thus kept alive, or that it was clearly understood between the parties, and appeared so from the evidence, that notwithstanding the fact that the loan was made 10 weeks after the statement was given the statement was considered by both parties to be still in full force.

Thus far, I have not considered the question of the truth or falsity of the statement, believing that this is an immaterial matter in view of my finding that the statement was not the basis of the credit. The circumstances surrounding the execution of the statement and certain facts in the statement itself have raised the gravest doubt in my mind as to whether the bankrupts were really advised of the nature of the statement that they were signing. The bankrupts are both illiterate men. The transaction took place in the office of Myers in the Central Trust Company's building. The only other person present was Mr. Myers' stenographer, and her testimony as to the circumstances is not convincing. She was called as a witness by the objecting creditor and said among other things: "They [the bankrupts] didn't seem to understand the questions, so Mr. Myers read them off to them, and they answered them, and he wrote it down as they answered them. It was then reread to them, and they said it was correct and signed it. And I wrote on the back the name, and when it was made, and put it in Mr. Myers' safe." I am convinced that this statement of the stenographer is not true, because there are at least two facts in the statement which must necessarily have led to some dispute and change in the statement before signature. One of these facts is the answer to the question "Q. What banks or trust company are you depositing with?" and the other is the answer to the question as to what amount of life insurance was carried. To the first of these questions the answer appearing in the statement is "Centeral." Now this paper was signed in the building of the Central Trust Company and was written by Mr. Myers, who is connected with the Central Trust Company, and yet, it appears positively from the testimony that the bankrupts never had an account with the Central Trust Company or the Central National Bank. I cannot believe that the bankrupts would make a statement like this if it were not true, and therefore, am driven to the conclusion that they did not make the statement. I cannot believe, that the bankrupts would have the audacity to go into the building of the Central Trust Company and attempt to do business with a person connected with that institution and try to make him believe that they were depositors in that institution when, as a matter of fact, they were not. The statement shows that to the question concerning the amount of life insurance carried by the bankrupts the answer is $25,000. I do not believe that this statement was read to the bankrupts and that they admitted it to be correct. It is improbable on the face of it considering the financial standing of the bankrupts as shown by other parts of this document; it is admitted by Myers in his testimony to be a clerical error on his part; and it seems to show upon careful inspection that the figure "2" has been written over the figure "1." There is no evidence as to the latter point and it is the result of my own examination with a low-power magnifying glass.

The testimony of the stenographer shows an unmistakable desire on her part to make her statement as favorable as possible to the objecting creditor. She even went so far as to say that the check for the loan was given immediately after the statement was signed; but, under cross-examination, she was obliged to modify her statement. The fact is that no money was given at all until 10 weeks thereafter. She also appeared anxious to make it clear that she was present and heard the entire conversation between Mr. Myers and the bankrupts but was obliged to admit that part of it was in German, part of it in English and part of it in Hebrew, and that she only understood the English. I believe that this lady's linguistic acquirements do not warrant her in stating that part of the conversation was in Hebrew; what she probably meant was that the German spoken by the parties was not the classical German, but the dialect spoken by immigrant Jews of Eastern Europe. She furthermore stated that she left Mr. Myers' employ about January or February, 1905; whereas, Mr. Myers, testifying before me on April 4, 1905, said: "I had a young lady there. She was attending to my books. Miss Perkins. She is still there yet." There can be no doubt that on February 4, 1904, the matter of the financial standing of the bankrupts was discussed, and that Mr. Myers wrote down, in the statement which the bankrupts signed, certain facts which he testified were the facts as he understood them, or to quote his words: "Just what I understood them to said I put down." * * * "I put down just exactly as they told me—as I understood them. Put down exactly word for word just exactly what I understood they told me, and I believed it was true." If these facts are falsely stated, it is due to Myers' own carelessness. If I may guess at what occurred at that interview it was probably something like the following: The bankrupts having told Myers that Kaplan was about to buy a piece of real estate for $12,000, and place a $9,000 mortgage on it, Myers probably said: "Well, if that's the case, we'll put down the value of that real estate at $12,000 and a mortgage at $9,000." to which the bankrupts probably assented. Then Myers probably asked them, "What is your business worth?" and they probably said to him, "It cost us more than $7,000," meaning thereby, as they actually explained in their testimony, that their merchandise, license, and other expenses in connection with the establishment of the business from and after June 1, 1903, was upwards of $7,000. Myers probably said, "Well, we'll put down $7,000," to which the bankrupts again assented.

It is possible that in a similarly careless manner Myers suggested to the bankrupts that they ought to deposit in the Central Trust Company, the institution with which he is connected, and that they agreed to this, and that he then put down the word "Central" after the question, "What banks or trust company are you depositing with?" Indeed, this thought was suggested by counsel for Myers in his argument after the testimony had been closed. There is no evidence whatever in support of the statement in the specification of objection that the bankrupts "were in debt to a greater extent than $3,000 as stated by them."

The only point about which I have serious doubt is the alleged answer of the bankrupts to the question, "Have you given judgment notes to any person or firm to secure them?" the answer being "No." It is uncontradicted that on the 4th of February, when this statement was given, the bankrupts had outstanding judgment notes given to various persons and amounting altogether to $500. All of these notes were made the basis of proofs of claim filed in this cause. The answer of the bankrupts, therefore, if given as appears in the statement, is clearly untrue. The bankrupts, however, aver that this answer was not given, and that at the time when their signatures were attached to the statement of February 4th, the answer "No" to this question, as well as the answers to all the other questions following it, did not appear, and that these blanks must have been filled in subsequently by Mr. Myers. I cannot believe that this is a correct explanation, and I am obliged to conclude that this was a false statement; but as Mr. Myers was not injured by it, it is not material. The important fact in this case is that Myers did not give credit on the faith of the statement notwithstanding his averment that he be-

lieved it to be true. The hesitation of a business man of Mr. Myers' experience to make a loan of $300, or even $500, on a statement which shows an excess of assets over liabilities of $8,000 cannot be explained on any other ground than that he did not believe the statement to be true, or that he knew the real facts to be different than those set forth in the statement, the latter being merely his own careless method of recording the substance of his talk with the bankrupts.

In view of the foregoing I recommend to your honorable court to dismiss the specifications of objection to the discharge, and enter a decree discharging the bankrupts.

Exceptions to report of special referee sur specifications of objection to bankrupts' discharge.

And now, to wit, this 15th day of September, 1905, comes Daniel Myers, Jr., objecting creditor, by Henry N. Wessel, Esquire, his attorney, and excepts to the report of the special referee in the above cause and assigns the following reasons:

(1) The learned special referee erred in finding as follows: "Kaplan informed him that he was about to purchase the above-mentioned property, the price of which was $12,000, and that a mortgage of $9,000 was to be placed on it, that he valued the business of the firm at $7,000."

(2) The learned special referee erred in finding that Kaplan informed Myers "that his partner, Skwersky, had a policy for $1,000."

(3) The learned special referee erred in finding that a few days after the statement was given "Skwersky, one of the bankrupts, called on Myers, the objecting creditor, who then told him that he declined to give him any money on account of the statement, but suggested that if the bankrupts could give him any real estate security he would make the loan. Skwersky left Myers without receiving the money, and thus the matter ended."

(4) The learned special referee erred in finding as follows: "I am convinced from the testimony that the objecting creditor did not make the loan of $300 on April 18, 1904, on the faith of the statement signed by the bankrupts on February 4, 1904."

(5) The learned special referee erred in holding that "the objecting creditor has failed to prove, as required by the bankruptcy law, that the bankrupts obtained property on credit from him upon a materially false statement in writing made to him for the purpose of obtaining such property on credit, and that therefore the objections to the discharge should be dismissed and the discharge granted."

(6) The learned special referee erred in holding that the statement in this case was not a continuing statement and binding on the bankrupts.

(7) The learned special referee erred in finding as to the answer concerning the insurance question "that the figure '2' has been written over the figure '1.' There is no evidence as to the latter point, and it is the result of my own examination with a low-power magnifying glass."

(8) The learned special referee erred in his recommendation to the court which was as follows: "In view of the foregoing I recommend to your honorable court to dismiss the specifications of objections to the discharge, and enter a decree discharging the bankrupts."

Order overruling exceptions:

And now, September 18, 1905, the exceptions of the objecting creditor to the report of special referee are dismissed. In the seventh exception the finding of the special referee is not correctly quoted.

Bernard Pockrass, for bankrupts.

Wessel & Aarons, for objecting creditor.

HOLLAND, District Judge. The referee's findings of fact, conclusions of law, and recommendation are approved, and the excep-

tions thereto are dismissed. And now, to wit, December 16, 1905, it is directed that the specifications of objection to the discharge of the said bankrupts are dismissed, and a decree discharging said bankrupts is directed to be entered, upon filing proper papers showing a conformity with all legal requirements.

ALEXANDER D. SHAW & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. June 5, 1905.)

No. 3,907.

1. CUSTOMS DUTIES—UNIFORMITY—CONSTITUTION—LEAKAGE OF WINE—GAUGE.
On an importation of wine in casks, having a wantage in excess of normal, the collector assessed duty without allowance for the excess, on the ground that it was due to leakage and was within the terms of paragraph 296, Schedule H, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 174 [U. S. Comp. St. 1901, p. 1654], forbidding "constructive or other allowance for breakage, leakage or damage on wines." *Held*, that this was in violation of section 8, art. 1, Const. U. S., prescribing that "all duties * * * shall be uniform throughout the United States."

2. SAME—SUBJECT-MATTER—CONSTITUTION.
Section 8, art. 1, Const. U. S., giving Congress power to lay and collect duties, necessarily implies that there must be some article imported on which such duty is imposed.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,939 (T. D. 26,086), which affirmed the assessment of duty by the collector of customs at the port of New York.

Hatch, Keener & Clute (J. Stuart Tompkins, of counsel), for importers.

Henry A. Wise, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The appellant shipped from abroad certain wines in casks and barrels and certain spirits in bottles. When the importation reached New York there had been a complete destruction of some of the goods, and as to these the Board of General Appraisers properly sustained the protests of the importer, and held that no duty was collectible. As to the other cases, where the spirits were contained in bottles, some of which were broken, the Board of Appraisers properly overruled the protests of the importer and sustained the decision of the collector, and held that no relief could be granted for the broken bottles. This decision was correct under the proviso of Tariff Act July 24, 1897 (chapter 11, § 1, Schedule H, par. 296, 30 Stat. 174 [U. S. Comp. St. 1901, p. 1654]), which reads as follows:

"And provided, further, that there shall be no constructive or other allowance for breakage, leakage or damage on wines, liquors, cordials or distilled spirits."

The only question herein is as to the correctness of the decision of the board in affirming the action of the collector in assessing duty, not only on the amount of wine contained in the casks or barrels, as re-

turned by the gauger, but plus the wantage in excess of normal outage. The normal outage or wantage is defined by the board as:

"The difference between the capacity of a cask or bottle and the quantity of wine or liquor which is usually placed in it, according to the custom of trade, a certain vacancy being allowed for the expansion of such wines and liquors."

The protest of the importers, therefore, is against the action of the collector in assessing duty upon the difference between the actual quantity contained in the casks, as shown by return of the gauger on arrival at the port of entry and the quantity shipped from the foreign port as stated in the invoice. The action of the collector is defended by reason of the proviso in paragraph 296, quoted above. The collector held that this difference in quantity was produced by leakage, and by no other cause, basing this conclusion upon the statement of the United States gauger. This statement, as reported by the collector, was as follows:

"I have to state that the United States gauger, in his return attached to the entry, reports that casks numbers * * * show evidence of leakage, since the outage is 22½ gallons above normal."

It is admitted in the opinion of the board that the practice of the Treasury Department in assessing duties upon similar importations has not been uniform, and that under the provision in the tariff act of 1883, which provided that there should be no allowance for breakage, leakage, etc., the Attorney General had held, in view of the decision of the Supreme Court in Marriott v. Brune, 9 How. 619, 13 L. Ed. 282, and other subsequent decisions, that duty could only be assessed upon the quantity of imported merchandise which arrived in this country, and that any portion not arriving, though described in the invoice, was not dutiable. The Board of General Appraisers, however, seeks to differentiate the question herein by reason of the amendment to the paragraph as above, so as to provide that there should be no constructive or other allowance. The theory of the Board is stated by it as follows:

"The words 'constructive allowance,' thus introduced into the law, would seem to imply an allowance for a leakage which may be presumed or implied, or which would exist in contemplation of law, rather than an allowance for an actual leakage established by affirmative proof."

Whether this change in phraseology actually does effect any change in the operation of the law as applied to the facts herein it is unnecessary to determine. The fundamental question is the constitutional one as to the power of Congress to collect, as alleged duties or imposts, charges on portions of an importation which are nonexistent or which do not arrive when the rest of the importation reaches the United States.

Article 1, § 8, of the United States Constitution, provides as follows:

"Sec. 8. The Congress shall have power: (1) To lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States."

Duties or imposts are taxes levied on articles brought into a country. Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678. The power to collect such duty necessarily implies that there must be some article imported into the United States on which such duty is imposed. In the case at bar, although there was a shortage of some 27 gallons of wines which never reached this country, the appellants were required to pay the full duty thereon at the tariff rate. I think this imposition is not justified. It is not only an appropriation of moneys under the guise of taxation, when the object on which the tax is levied does not exist, but the practical effect of such an interpretation would be to violate the provisions of the Constitution that taxes shall be uniform throughout the United States, and such taxation in effect imposes unequal taxation on the quantities of different shipments arriving in the United States. If there were any doubt upon these questions, it would seem to be removed by the recent decision of the United States Supreme Court in Lawder v. Stone, 187 U. S. 281, 23 Sup. Ct. 79, 47 L. Ed. 178.

It is to be noted that in this case there is no competent evidence that the loss arose from any of the causes excepted in the paragraph above. There is nothing in the record which furnishes any evidence of leakage. In fact, the collector by his statement indicates that the sole evidence of leakage is in the fact that the outage is above normal. In these circumstances I fail to find any justification for a departure from the practical construction placed upon the corresponding provision of the tariff act of 1883 by the Treasury Department, customs officials, and the Attorney General of the United States.

The decision of the Board of General Appraisers is reversed.

YOUNG v. BOHN.

(Circuit Court, D. Indiana. January 10, 1905.)

No. 10,331 (1,652).

CUSTOMS DUTIES—CLASSIFICATION—ARCHITECTURAL DRAWINGS—WORKS OF ART—AMERICAN ARTIST—ARCHITECT.

Pen and ink drawings of an artistic character, of a proposed building, produced by an architect, are within paragraph 703, Free List, § 2, c. 11, Tariff Act July 24, 1897, 30 Stat. 203, U. S. Comp. St. 1901, p. 1690, relating to "works of art, the production of American artists."

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below, which is reported as G. A. 5,609, T. D. 25,104, reversed the assessment of duty by the surveyor of customs at the port of Indianapolis. The opinion filed by the Board of General Appraisers is as follows:

SOMERVILLE, General Appraiser. The importation was made at the port of Indianapolis, Ind., in April, 1903, and consists of pen and ink drawings executed by Mr. Arthur Bohn, who is described as a well-known architect of Indianapolis, with the accompanying statement that the design prepared by him has been accepted by the Indianapolis Art Association for an art mu-

seum. Mr. Bohn makes affidavit in due form, verified before the United States deputy consul general at Paris, France, declaring that he is a citizen of the United States of America and by profession an architect; that his place of permanent residence is at Indianapolis, in the United States; that he departed from the United States to take up his temporary residence in Europe; that he has not given up, nor is it his intention to give up, his residence in the United States; and that it is his purpose to return ultimately to this country. He further states under oath that the architectural drawings in question, described as a design for an art museum, valued at 600 francs, are his own production, having been produced at Paris and Karlsruhe during the year 1903. The surveyor assessed these drawings for duty at 20 per cent., under paragraph 454, Schedule N, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1678], which provides that rate of duty for "paintings in oil or water colors, pastels, pen and ink drawings, and statuary, not specially provided for" in said act. The claim made in the protest is that the articles are free of duty, under paragraph 703, § 2, Free List, of said act (30 Stat. 203 [U. S. Comp. St. 1901, p. 1690]), which places on the free list, among other articles, "works of art, the production of American artists residing temporarily abroad."

The questions presented for our decision are: First, whether these drawings are of such artistic character as to fall within the descriptive term "works of art," as used in said paragraph; and, secondly, whether an architect may be regarded as an "artist" within the ordinary signification of that word. The photographs of these drawings introduced in evidence at the hearing before the board represent longitudinal and perspective views of the proposed building. They clearly represent mere sketch drawings, not available for practical building work, for which purpose separate drawings must necessarily be made. The photographs represent a building unquestionably of an artistic character, with six Doric columns in front and a frieze on the cornice, with statuary placed in various positions in front of the building, and front doors of elaborate workmanship.

While the usual definition of an "artist" would perhaps be confined to an adept in any of the fine arts, especially in painting, or to one who makes a fine art, especially a plastic art, his profession, the word would also embrace one who, in any department, does his work according to the constructive principles of art, or works artistically; and in this sense the term would be broad enough in our opinion to include an architect, a term which is defined as "one skilled in practical architecture, one whose profession is to devise plans or ornamentation of buildings or other structures and to direct their construction." We are unable to draw any sound distinction as works of art between a pen and ink drawing of men, animals, or other objects, artistically executed, and a painting of the same objects. In fact, such drawings are associated for tariff purposes in the same paragraph with paintings and statuary, and derive color of meaning from them, upon the principle of "noscitur a sociis."

Architecture has always been historically classified as an art, and in a certain sense a skilled architect, therefore, may be an artist. In Dr. Smith's History of Greece, in a chapter on "The History of Art," the author observes: "Architecture first claims our attention in tracing the history of Grecian art, since it attained a high degree of excellence at a much earlier period than either sculpture or painting." Further observing that architecture had its origin in nature and religion, he adds: "In Greece, however, as in most other countries, architecture was chiefly indebted to religion for its development, and hence its history as a fine art is closely connected with that of a temple. He also speaks of works of art "in sculpture, architecture, and painting," and observes that sculptors in the age of Pericles possessed great practical skill "in the sister arts of painting and architecture." The architects of the Roman Pantheon or of the Parthenon of Athens were undoubtedly artists, and so of others who planned the Temple of Diana at Ephesus, and that of Juno at Samos. So Ruskin, in his essay on "The Sublime in Architecture," styles it "the primal art of man," and leaves no room for doubt that he who could design a structure like St. Peter's at Rome, or St. Paul's, London, must be an artist in the truest sense of the term. These authorities are quoted to il-

lustrate the fact, not that every architect is an artist, but that architecture is itself an art, and that one who follows this profession may achieve the reputation and position of an artist, in the ordinary sense of the term.

We are accordingly of the opinion that the design of the building, which is shown to have been accepted by the Indianapolis Art Association for an art museum, is artistic in character and is a work of art, and that the author of it is an artist, within the meaning of that term as used in the tariff act. The evidence leaves no doubt of the fact that the designer is an American citizen residing temporarily abroad. In re Knoedler, G. A. 4,727, T. D. 22,363, affirmed in Knoedler v. U. S. (C. C.) 113 Fed. 999.

The protest is sustained, and the decision of the surveyor reversed, with instructions to reliquidate the entry.

In his application for review of the foregoing decision the surveyor assigned the following points of error: (1) That the pen and ink drawings of an architect are not works of art within the meaning of said paragraph 703; and (2) that an architect is not an artist within the meaning of the same provision.

Joseph B. Kealing, U. S. Atty., for the surveyor.

ANDERSON, District Judge. The above-entitled cause being an application on behalf of A. A. Young, surveyor of customs at the port of Indianapolis, Ind., for a review of the findings and decision of the Board of General Appraisers upon a protest of the said Arthur Bohn to the assessment of duties upon pen and ink drawings made by him while temporarily residing abroad, and imported to this country as drawings and plans for an art museum at Indianapolis, Ind., the said matter being presented to the court both on behalf of the said Arthur Bohn and the said surveyor of customs, the court finds; that said Arthur Bohn is an architect, a citizen of the United States, and resident of Indianapolis, Ind.; that while temporarily residing abroad he made said pen and ink drawings referred to in the application for review herein and imported them to this country; that they are of the value of 600 francs; that they are "works of art," within the meaning of the tariff law of the United States, and should be permitted to be imported into this country.

It is therefore considered and adjudged by the court that the decision of the Board of General Appraisers, as heretofore made in the said proceedings, be affirmed; and it is so ordered.

UNITED STATES v. COMMERCIAL CABLE CO.

(Circuit Court, S. D. New York. May 24, 1905.)

No. 3,756.

CUSTOMS DUTIES—DUTIABLE VALUE—ENTRY ON PRO FORMA INVOICE.

The provision in Customs Administrative Act June 10, 1890, c. 407, § 7, 26 Stat. 134 [U. S. Comp. St. 1901, p. 1892], that duty shall not be assessed on "less than the invoice or entered value," does not prevent assessment on less than the value stated in a pro forma invoice on which entry is made under section 4 (26 Stat. 131 [U. S. Comp. St. 1901, p. 1888]); and where a certified invoice is produced in accordance with the latter section, and the value stated therein is approved by the appraiser, duty may properly be assessed on that value, even though less than that given in the pro forma invoice.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,856 (T. D. 25,801).

The opinion of the board reads as follows:

SOMERVILLE, General Appraiser. In this case the goods consist of telegraph instruments imported into the port of New York by the Commercial Cable Company. Entry was made on a pro forma invoice on April 19, 1904; the importers estimating the value of the merchandise at £342. Before any action was taken by the local appraiser toward ascertaining the market value of the goods, and prior to the liquidation of the entry by the collector, the importers produced an invoice, duly certified by the consul, which was filed with the collector on April 21, 1904. On May 3, following, the local appraiser made his return, approving the value named on the certified invoice, and finding that the goods had a foreign market value of £315 3s. 1d., which value is exactly that stated on the certified invoice. The collector, however, assessed duty upon the goods on the basis of the valuation shown by the entry based on the pro forma invoice. The importers contend that the assessment should be made upon the valuation as shown by the consular invoice and the return of the local appraiser.

In our opinion, the protest is well founded, and should be sustained. The rule is well settled that an entry on a pro forma invoice remains "open" until the conditions of the bond for the production of the consular invoice have been fulfilled, or until the bond itself has become forfeited. As stated by Attorney General Devens, 16 Op. Atty. Gen. 158, 161, the statement of value on a pro forma invoice is "wholly that of the importer, made in order to effect an entry." The importer's bond for the production of a duly certified invoice is usually conditioned for the payment of such duties as may be found due above the estimated duties. Customs Administrative Act June 10, 1890, c. 407, § 4, 26 Stat. 131 [U. S. Comp. St. 1901, p. 1888], provides that, "when entry of merchandise exceeding one hundred dollars in value is made by a statement in the form of an invoice [meaning a pro forma invoice], the collector shall require a bond for the production of a duly certified invoice." Unless corrections of value and of liquidation can be made upon the basis of the consular invoice when obtained and approved by the appraiser, the provisions of this section would be nugatory. Where an importer gives a bond for the production of necessary documents, or where the collector waives the giving of such a bond, the importer's rights are preserved. In re Courtin, G. A. 5,089 (T. D. 23,557). An entry made upon a pro forma invoice is necessarily tentative and liable to correction on the production of a corrected invoice, duly authenticated, when filed in time. Carnes v. Maxwell, 3 Blatchf. 420, Fed. Cas. No. 2,417. In Schmeider v. Barney (C. C.) 6 Fed. 150, it was held by Shipman, J., sitting in the United States Circuit Court for the Southern District of New York, that the valuation of imported merchandise should be made on the basis of a corrected invoice, which should have been received by the collector; it having been offered before the appraisement of the goods had taken place. So, in Howland v. Maxwell, 3 Blatchf. 146, Fed. Cas. No. 6,799, it was decided by Judge Betts, sitting in Circuit Court with Judge Nelson, that the plaintiffs in that case had a right to claim that the value of their importations should be made "upon the corrected invoice, and not on the one first produced." He added: "Had the goods been seized for a fraudulent undervaluation, or had an appraisal been made upon the entry before the corrected invoice was produced, the question on this point might stand on different grounds." See, also, Carnes v. Maxwell, 3 Blatchf. 420, Fed. Cas. No. 2,417. In Gillespie v. U. S. (C. C.) 124 Fed. 106, importers of certain sugar in hogsheads made entry on an invoice which included by mistake the value of the hogsheads, which were of American manufacture, in that of the sugar. Before the entry was liquidated they produced a corrected invoice, showing the proper deduction of the value of the hogsheads. It was held by the court that the collector should have made an allowance for the hogsheads, passing them free of duty, in accordance with the showing on the

face of the corrected invoice. The action of the collector was sought to be justified by the provisions of Customs Administrative Act June 10, 1890, c. 407, § 7, 26 Stat. 134 [U. S. Comp. St. 1901, p. 1892], that "duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value." In the case of Gillespie v. U. S. (C. C.) 114 Fed. 1022, decided by Judge Townsend, the record is before us, and our examination of it shows that the importers at the time of entry had given a bond for the production of certain documents necessary to establish the American origin of the goods. These documents were subsequently produced, but the collector refused to regard them, although the proof thus tendered him was in due compliance with the law and the treasury regulations. The court held that the collector's action was erroneous, and that the importers were entitled to the benefit of the proof which they had produced as to the American origin of the articles.

Following the principles settled by the foregoing authorities, we are of opinion that the giving of the bond required by statute preserved the rights of the importers, and left the entry open; it having been made on a mere pro forma invoice. Upon the subsequent production of the consular invoice, and on its approval by the appraiser, the importers were entitled to have the entry liquidated on the basis of the appraised value corresponding with the value shown by the consular invoice.

The protest is sustained, and the decision of the collector reversed, with instructions to reliquidate the entry in accordance with this opinion.

Henry A. Wise, Asst. U. S. Atty.
Frederick W. Brooks, for importers.

TOWNSEND, Circuit Judge. Decision of the board of general appraisers affirmed.

UNITED STATES v. MANUFACTURING APPARATUS, ETC., OF NEW JERSEY MELTING & CHURNING CO.

(District Court, D. New Jersey. November 27, 1905.)

INTERNAL REVENUE—FRAUD BY MANUFACTURER OF OLEOMARGARINE—INFORMATION FOR FORFEITURE OF PLANT.

An information for the forfeiture of an oleomargarine plant, under Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 [U. S. Comp. St. 1901, p. 2234], is sufficient, which charges in the language of the statute that the claimant was engaged in the business of manufacturing oleomargarine, and defrauded and attempted to defraud the United States of the tax on the oleomargarine produced by it, or a part thereof.

On Demurrer to Information.

John B. Vreeland, for the United States.
Joseph F. Farmer, for respondent.

CROSS, District Judge. An information for the seizure and forfeiture of the defendant's oleomargarine plant is in the words following:

"For that before and at the time of the seizure of the said personal property as aforesaid, the said the New Jersey Melting & Churning Company, at Hoboken, in the district aforesaid, was engaged in carrying on the business of manufacturer of oleomargarine, and did then and there produce a large quantity of oleomargarine, to wit, 28,000 pounds of oleomargarine, then and there subject to the internal revenue tax then imposed by law upon oleomargarine, and that the said the New Jersey Melting & Churning Company, then and there unlawfully did defraud and attempt to defraud the said United States of the said tax on the oleomargarine so produced by it."

There was a second count in the same form, except that it limited the attempt to defraud to only a part of the oleomargarine produced by the respondent.

To both of these counts the respondent has demurred. The information follows the language of the statute (section 17, Act Aug. 2, 1886, c. 840, 24 Stat. 212 [U. S. Comp. St. 1901, p. 2234]) which section is, except as to the product referred to, and the necessary changes in verbiage incident thereto, identical in terms with the statute relative to defrauding and attempting to defraud the United States of tax on distilled spirits (Act March 31, 1868, c. 41, § 5, 15 Stat. 59, Rev. St. § 3257 [U. S. Comp. St. 1901, p. 2112]); hence decisions upon the latter act are authoritative as to the former.

In Coffey v. United States, 116 U. S. 427, 6 Sup. Ct. 432, 29 L. Ed. 681, which sustains an information filed under section 3257 of the Revised Statutes, above referred to, Mr. Justice Blatchford held that an information following the language of the statute was good, and in the course of his opinion said:

"It was not necessary to aver in the information that the distilled spirits found on the claimant's distillery premises and seized were distilled by him, or were the product of his distillery, or that the distillery apparatus was wrongfully used, because section 3257 does not make these facts elements of the causes of forfeiture denounced by it. The only necessary elements are that the person shall be engaged in carrying on the business of a distiller, and that he shall defraud, or attempt to defraud, the United States of the tax on the spirits distilled by him."

He refers to the case of United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819, in which an indictment which had been found under section 3281 of the Revised Statutes [U. S. Comp. St. 1901, p. 2127], was held good; the indictment merely alleged that the defendant did knowingly and unlawfully engage in, and carry on, the business of a distiller within the intent and meaning of the internal revenue laws of the United States, with the intent to defraud the United States of the tax on the spirits distilled by him. It was also held that it was not necessary to state the particular means by which the United States were to be defrauded of the tax, Mr. Justice Harlan, who delivered the opinion of the court, said:

"The intent to defraud the United States is of the very essence of the offense; and its existence in connection with the business of distilling, being distinctly charged, must be established by satisfactory evidence. Such intent may, however, be manifested by so many acts upon the part of the accused covering such a long period of time as to render it difficult, if not wholly impracticable, to aver with any degree of certainty all the essential facts from which it may be fairly inferred. * * * It is the act of engaging in the distillation of spirits combined with that intent which constitutes the offense."

The case of United States v. Joyce (D. C.) 138 Fed. 455, holds that an indictment in the words of the oleomargarine act charging the 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 manufactur-

er selling his own product; and a motion to quash the indictment for insufficiency was denied.

These authorities dispose of this demurrer. Both counts of the information follow the language of the act on which they are based, and are sufficient.

The demurrer will be overruled, with costs.

SCOWS NOS. 1 AND 10.

(District Court, D. New Jersey. October 16, 1905.)

SALVAGE—COMPENSATION.

Mud scows Nos. 1 and 10, one loaded and the other unloaded, while being towed by the steam tug Samuel E. Bouker from near the lightship outside of New York harbor to Staten Island, were set adrift near Romer Shoals, a dangerous reef, by reason of the fact that the towline which attached the head scow to the steam tug was cut in two by the propeller of another steam tug which crossed it. The towline was cut and the scows left adrift about 4 o'clock in the morning. There was a dense low-lying fog at the time, which did not begin to lift until about 8 o'clock, and did not entirely clear away until between 10 and 11 o'clock; that because of this fog the Bouker was unable to find the scows; that about 7:15 o'clock the drifting scows were found and taken in tow by another steam tug, the John T. Pratt, and left at their moorings between 11 and 12 o'clock. The scows were without power or ability to signal or answer signals. A light southwesterly wind was blowing, which would naturally tend to drift them toward the Shoals. They were, furthermore, not far from the channel. *Held*, under the circumstances, that the scows were in some danger, but that the service rendered by the Pratt was of the lowest order of salvage, and that $250 would be allowed therefor.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Salvage, §§ 80–83.]

(Syllabus by the Court.)

In Admiralty. Libel for salvage.

Hyland & Zabriskie, for libelants.

Benedict & Benedict, for respondents.

CROSS, District Judge. In the early morning of May 4, 1905, two mud scows, Nos. 1 and 10, towed by the steam tug Samuel E. Bouker, were taken to the dumping grounds at or near the Scotland Lightship, outside of the harbor of the city of New York, for the purpose of being dumped. The signal to dump the scows was given by the tug at 20 minutes of two o'clock on the morning of the above date. One only of the scows was dumped. The captain of the other scow, being asleep, did not hear the signal, and consequently his scow was not dumped. The start to return was made about quarter after 2. The morning was very foggy. It was, however, a low fog, and smokestacks and masts of vessels could be seen above the fog at some little distance. On the return trip, when approaching Romer Shoals, the hawser connecting the tug with the tow was cut in two by the tug of another tow, which ran across the towline. The captain of the Bouker, by the sudden forward motion of his boat, knew that he had lost his tow, and

immediately turned about. He was prevented, however, from going directly back to it by two other scows in tow of the tug which had cut his hawser, and also by still another tow following immediately in the wake of the former. By the time these tows had passed, the captain of the Bouker had apparently lost his bearings in the fog, and consequently was unable to find the missing scows until later in the morning, and under circumstances to be hereafter mentioned. His tow went adrift about 4 o'clock in the morning, and was picked up by the steam tug John T. Pratt about quarter past 7 o'clock of the same morning. The Pratt was cruising at the time in the lower bay in search of business, and its captain having been informed that two scows were adrift near Romer Shoals, he went in search of and found them, so far as can be ascertained from the somewhat conflicting testimony, near Red Buoy No. 4, at the Romer Shoals. At this time it appears that there was still a low-lying but dense fog, which, however, soon after began to lift, so that objects could be discerned at some distance, but it was not thoroughly clear until between 10 and 11 o'clock. The sea at the time was quiet, and a light southwesterly breeze was blowing, which naturally tended to drift the scows toward the Romer Shoals. The tide was approaching flood at this point, but the testimony shows that it continues to run flood for an hour and a half or more after nominal high tide, or at least that this amount of time elapses before the ebb tide is materially felt. The scows draw when loaded 9 or 10 feet of water, depending upon the character of the load, and when unloaded about 3 feet. There is one point of the Shoals where the loaded scow might perhaps have grounded at high water in case the wind or tide carried it thither, and where at low water the loaded scow, and possibly both, would have grounded. These, in general, are the conditions under which the Pratt found the missing scows. Each of the scows was at the time in charge of a captain. The Pratt came alongside scow No. 1, which had been the first in line, and tooted its whistle, to see if any one were on board. On one appearing, he and two of the crew then went aboard, and, according to the testimony, the captain knocked at the hatch to arouse any one who might be in the cabin, but whether this is so or not is immaterial. The captain of scow No. 1 then came out, and was asked about the ownership of the scows and of the tug which had been towing them. The captains of the scows both say that at this time, and for some time previously, they had been able to see the smokestack and light boxes on the pilot house of the Bouker at some distance away, and that they asked the captain of the Pratt to signal for her to come and get them. This testimony is, however, denied by the captain of the Pratt and the men who boarded the scow with him, and, considering all the testimony, I am constrained to disbelieve the testimony of the scow captains in this respect. They are not only contradicted, but contradict themselves, and are not supported by the testimony of the captain of the Bouker. I do not believe the Bouker was at this time in the neighborhood of the drifting scows, but if their testimony were true, the further blowing of the Pratt's whistle would seem to have been useless, for if the captain of the Bouker was not attracted by the whistling to bring the man from the

hold of the scow, it is not to be presumed that he would have been attracted by further whistling. The Pratt thereupon made fast to the scows, and they were towed by it, with the aid of another tug subsequently called to its assistance, to Staten Island, where they were moored at the owner's wharf. The fog began to lift soon after 8 o'clock, but the Pratt, with the scows in tow, was approaching Staten Island between 9 and 10 o'clock, before the Bouker came up with it. The captain of the Bouker acquiesced in the situation and in the employment by the captain of the Pratt of the additional tug. He certainly made no request upon the captain of the Pratt to relieve him of his tow, or in any manner protested against his service, any more than did the men on the scows at the time the rescue was undertaken by the Pratt.

It is claimed on behalf of the respondent that there was no peril and no rescue; that, if the scows had been left to themselves, they would have drifted harmlessly until the fog lifted, when they would have been seen and taken in charge by the Bouker. I think this, however, is assuming more than is warranted by the circumstances. The scows were without power and without means of signaling or answering signals, and they were adrift near to dangerous shoals. The wind, such as there was, was from the southwest, and was blowing from a course which would tend to carry the scows upon the Romer Shoals. It cannot be said, under the circumstances disclosed, that the scows were in no danger; they were in some danger from that source, and, furthermore, they were, considering the fog and their proximity to the channel, dangerous to other craft and in danger from other craft. If I believed the testimony of the captains of the scows that they saw the smokestack and light boxes of the Bouker only 900 or 1000 feet away, that they called the attention of the captain of the Pratt to the fact before he took the scows in tow, and that he refused to notify the captain of the Bouker of the location of his scows, I would hesitate to permit the libelants to profit thereby to any extent whatever. As already stated, however, I do not accept that testimony, in view of its contradiction and apparent improbability. It is undoubtedly true, however, that the service rendered by the Pratt was of the lowest order of salvage. There was no danger whatever to the rescuing boat or to her crew. The sea was calm, the wind light, and the weather warm. The facts are not unlike those disclosed in the case of Hughes Bros. & Bangs Co., No. 49, 135 Fed. 746, 68 C. C. A. 384, with the exception that in that case the bay was full of ice and the weather bitterly cold; that two hawsers were broken on the receiving tug, and that one of the men had his hands frozen and sprained. I think, considering all the circumstances of this case, that a small amount of salvage should be allowed. There is some difficulty in ascertaining the exact period of time covered by the service, as the testimony is to some extent variant, but in my opinion four hours would cover its actual duration. I will allow libelants the sum of $250, which includes the amount paid to the captain of the tug assisting the Pratt.

THE SAMUEL E. BOUKER.

(District Court, D. New Jersey. October 16, 1905.)

TOWAGE—INJURY TO TOW—LIABILITY OF TUG.

A tug is not an insurer of its tow, and is liable for loss or damage to it only in case of negligent management of the tug or in the handling of the tow. *Held*, under the facts disclosed in this case, that the tug was not negligent.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Towage, §§ 11–29.]

(Syllabus by the Court.)

Benedict & Benedict, for libelant.

Wing, Putnam & Burlingham and James Forrester, for claimant.

CROSS, District Judge. The P. Sanford Ross corporation owns mud scows Nos. 1 and 10, which were found adrift in the lower part of the New York Bay on the 4th day of May, 1905, and rescued by the steam tug John T. Pratt under circumstances disclosed in the case of Abner P. Downer et al. v. Mud Scows Nos. 1 and 10, 141 Fed. 477. The evidence in the two cases was taken together, and they were argued at the same time. The libelant in this case claims that it has been damaged to the extent of whatever sum might be awarded by the court against its scows Nos. 1 and 10 in the above-mentioned suit. In my opinion, however, the facts do not warrant the claim made by the libel. The owner of the Bouker was not an insurer of its tow. The tug is liable only in case of its negligence. Negligence consists in the want of ordinary skill in navigation, and of the exercise of such care and diligence in handling the tow as a man of ordinary prudence would exercise in the preservation of his own property. The Niagara (D. C.) 20 Fed. 152. The duty imposed upon a tug is to use the caution and skill which belong to prudent navigators. The Florence (D. C.) 88 Fed. 302, and cases cited. This is the rule of law applicable to the case under consideration. If the Bouker managed her tow with reasonable care and skill under the circumstances, it cannot be held liable for its loss. The burden of proving negligence is upon the libelant, but it has not sustained this burden; indeed, there is no proof whatever of the negligent management of the Bouker. Practically the only claim of negligence made in the case is that the captain of the Bouker did not keep a man aloft during the entire period of its search for the missing scows. The evidence shows, however, that he did from time to time send a man there for that very purpose. It is quite apparent that to have kept a man there continuously would have been futile, when, if we accept the testimony of the captain of the mud scows as true, only the smokestack and light boxes on top of the pilot house of the Bouker were at any time prior to the lifting of the fog discernible; but, apart from their testimony, the other testimony in the case shows that the fog was low and very dense, and hence the mud scows, lying close to the water, would, under the circumstances, have been completely enveloped by it. There is no pretense that there was any negligence in the loss of the scows. On the contrary, the evidence shows that the towline attached to them (a

comparatively new one) was cut by the propeller of the tug crossing it in the fog, and that after they were lost, the captain of the Bouker made diligent and careful search to find them. Since no negligence in the management by the Bouker of its tow is disclosed, the libel against it will be dismissed, with costs.

FRENZ v. HUME et al.

(District Court, N. D. California. October 24, 1905.)

No. 13,401.

1. SHIPPING—MASTER—WAGES—ATTEMPTED ABANDONMENT OF VESSELS TO INSURERS.

   The attempted abandonment of a vessel to the insurers after her stranding, which they refused to accept, whether sufficient in law to vest the ownership in them or not, could not operate to render them liable for the subsequent wages of the master, whom they did not employ.

2. SAME.

   Libelant was employed by the owners of a schooner, which was afterward stranded. The insurers undertook the salving of the vessel, and the owners wrote libelant to co-operate with them in the work. They subsequently gave notice to the insurers of the abandonment of the vessel, which the insurers refused to accept. After she was salved and temporarily repaired libelant loaded a cargo and proceeded on the voyage, not having any notice of the attempted abandonment until he reached his port of destination. *Held*, that the former owners, by whom he was employed, were liable to libelant for his wages up to that time.

In Admiralty. Suit in personam by master to recover wages.

H. W. Hutton, for libelant.
Nathan H. Frank, for defendant R. D. Hume.
L. T. Hengstler and Charles W. Slack, for insurance companies.

DE HAVEN, District Judge. This is a libel in personam. The libel alleges that between June 18, 1904, and January 16, 1905, the libelant rendered to the defendants, at their request, 5 months and 27 days service as master of the schooner Del Norte, at the agreed rate of compensation of $100 per month, and during that time also expended for and on account of the vessel the sum of $85.22, leaving a balance due to the libelant of the sum of $671.91. The defendants filed separate answers, each denying the allegations of the libel. It appears from the evidence that the defendant Hume was on April 14, 1904, a member of the firm of R. D. Hume & Co. This firm was at that time the owner of the schooner Del Norte, and then employed libelant as her master, agreeing to pay him $100 per month for his services. On the 11th of June following the Del Norte went ashore at the mouth of the Siuslaw river, on the coast of Oregon. The other defendants, insurance companies, were insurers of the vessel, and with the consent of the firm of R. D. Hume & Co. immediately undertook the work of salving her, and repairing the injuries which she had sustained as the result of her stranding. Shortly after the work of salving and repairing had commenced, the defendant Hume notified his codefendants, the insurance companies,

that they could take the vessel and do what they pleased with her, and that she was abandoned to them. The insurance companies refused to accept the abandonment. The Del Norte was rescued from her perilous situation on the Siuslaw bar, underwent temporary repairs, and then the libelant, still retaining his position as her master, took on board a cargo of lumber for San Francisco, and arrived in that port October 15, 1904. Neither of the defendants would accept the freight earned on this trip; all of them disclaiming ownership of the vessel, and the defendant Hume asserting that she had been abandoned to the defendant insurance companies, and the insurance companies insisting upon their refusal to accept such abandonment. There was also evidence tending to show that after her arrival in San Francisco the vessel was sold to satisfy liens for permanent repairs made necessary by her stranding, and which defendant Hume claims should have been discharged by the other defendants. The libelant was not informed by Hume until October 15, 1904, that the firm of R. D. Hume & Co. had abandoned the Del Norte to the insurance companies.

1. The defendant Hume contends that he is not liable for the wages of libelant after the defendant insurance companies took possession of the Del Norte, for the purpose of salving her, that she was then abandoned to the insurance companies, and that they are responsible for the wages subsequently earned by the libelant as her master. In the view I take of the case, it is unnecessary to determine whether the owners of the Del Norte had the right to abandon her to the insurance companies or not, or whether the notice of abandonment was under the circumstances sufficient to vest in those companies the ownership, and make them liable as insurers as for a total loss of the vessel. It is undisputed that the defendant insurance companies have at all times denied the right of the owners to make such abandonment, and have refused to accept or to have anything to do with the vessel or her earnings; and it is not shown that they ever employed the libelant as master. It is clear upon this state of facts the libelant has no cause of action against the insurance companies. It is a familiar principle of law that:

"Neither a liability ex contractu nor a liability quasi ex contractu can be imposed upon a person otherwise than by his act or consent. One man cannot force a benefit upon another without his knowledge or consent, and then compel him to pay for it." Clark on Contracts, p. 779.

The only exception to this rule is found in that class of cases "in which the law creates a duty to perform that for which it implies a promise to pay, notwithstanding the party owing the duty absolutely refuses to enter into an obligation to perform it. The law promises in his stead and his behalf." Earle v. Coburn, 130 Mass. 596. But the libelant's case as against the insurance companies is not covered by this exception, but falls within the general rule "that no one can be permitted to force himself upon another as his creditor." Even if it should be conceded that the notice of abandonment was, in view of the circumstances under which it was given, sufficient to vest in them the constructive ownership of the Del Norte, the law did not impose upon the defendant insurance companies any duty to employ her in any manner, and the services ren-

dered by the libelant as her master were as to them officious and against their consent, because they at all times disclaimed any ownership of the Del Norte, or right to employ her or receive her earnings.

2. The case as to defendant Hume is different. The libelant was originally employed by the firm of R. D. Hume & Co., of which the defendant Hume was a member, and after the stranding of the steamer Hume, on June 22, 1904, wrote him as follows:

"As a representative of the insurance companies is there and as you are the master of the vessel, you are agent for all concerned, so I depend on you to see that the operations are conducted with as much economy as is possible. At this distance, I am unable to judge of the conditions existing and must depend on your good judgment to bring back the vessel with as little expense incurred as is possible."

The libelant might well have understood from this letter that he was to continue as master of the Del Norte under his original employment, and he was not otherwise informed by the firm of R. D. Hume & Co. until October 15, 1904, when he was first notified by them of their present contention that the services rendered by him subsequent to the stranding of the vessel were in fact rendered to the insurance companies as her owners. Upon consideration of all of the evidence, my conclusion is that the libelant is entitled to recover from the defendant Hume for his services as master of the Del Norte from June 18, 1904, to October 15, 1904, at the rate of $100 per month.

Let a decree be entered dismissing the libel as to the defendant insurance companies, with costs, and in favor of the libelant against the defendant Hume, for the sum of $390, with interest thereon from October 15, 1904, and costs.

In re ALEX.

(District Court, E. D. Pennsylvania. December 16, 1905.)

No. 2,131.

BANKRUPTCY—EXEMPTIONS—FRAUDULENT CONCEALMENT OF PROPERTY.

Where a bankrupt within a short time before his bankruptcy bought goods largely in excess of the needs of his business on credit, and disposed of them for cash, leaving the bills therefor unpaid, and when examined in the bankruptcy proceeding failed to account for a large portion of his receipts, gave testimony which he afterwards admitted to be untrue, and finally claimed to have gambled away a large amount, while his wife purchased his fixtures and continued the business in her name, he may reasonably be held to have concealed money and property with intent to defraud his creditors, and is not entitled to his exemption under the laws of Pennsylvania.

In Bankruptcy. On report of referee.

The following is the report of Referee John G. Diefenderfer in the matter of the exceptions to the allowance of the exemption to the bankrupt:

Leo Alex was declared a bankrupt on the 14th day of January, 1905, upon a petition filed against him December 19, 1904. On the 19th of January, 1905, he filed his schedules, in triplicate, and in Schedule B5 claimed $300 worth of property out of his business, "from the fixtures, etc., in store at No. 643 Ham-

ilton street, Allentown, Pa."; and asked that goods of that value be set aside for him as his exemption. On the 10th day of February, 1905, the trustee of the bankrupt's estate made report of exempted property, and the report was on that day duly filed by the referee. On the same day R. J. Butz, Esq., attorney for creditors, filed exceptions to the allowance of the exemption. The report and the exceptions thereto were filed at an adjourned first meeting of the creditors of the bankrupt, after full examination of the bankrupt by the creditors. The examination of the bankrupt, at the first meeting of creditors and adjournments thereof, is the evidence by which the exceptions to the exemption are meant to be sustained. The first specification of the exceptions substantially comprises also the remaining two. It is "that the bankrupt has concealed money and property with intent to defraud his creditors." By agreement of counsel concerned the referee fixed October 26, 1905, for hearing of the exceptions. At that hearing counsel for the excepting creditors was heard. Counsel for the bankrupt did not argue the exceptions.

The facts before the referee may be sketched in rapid outline: The bankrupt is of Greek nationality, of apparently middle age, and immigrant in this country since 1890. He came to Allentown in 1901, opened a candy store, and carried on the candy business until about the middle of December, 1904, when his property was seized in an execution for debt, and the petition in bankruptcy against him followed on the 19th of December, 1904. He had been in the same kind of business at Easton, Pa., for some seven years before he came to Allentown. He had some $3,000 in money when he came to Allentown and all debts paid. He rented the premises at 623 Hamilton street, spent considerable money to make them suitable for his business, and conducted the business there until he failed; and at the trustee's sale of the bankrupt's property his wife bought a considerable portion of the business fixtures, established herself in her husband's former place and business, using money, as she testifies, which she had saved out of her household expenses. The bankrupt's business seems to have prospered fairly until the last year. During the last two months he bought recklessly, on credit, from about 70 different tradespeople, scattered over a wide area of country, in a total of about $8,000, and tried to buy still more, but failed of further credit. He obtained the merchandise in the amount aforesaid, sold the same and got the money therefor, left the bills unpaid, and has failed to account for a full half of the money which he realized from the sale of the large stock of merchandise. He kept no books in his business. He had a bank deposit book and corresponding check books. He was urged to account for the receipts and made little attempt to do so. He swore first that he had deposited the money in bank and used it to pay his debts. The bank deposit book showed deposits in a total of $2,962.58 for the month of November, 1904, to December 10, 1904. The goods purchased from and after November 1, 1904, amounted to just about $7,500, as appears by the schedules filed by the bankrupt; and there was about the same value of goods in the store when the receiver in bankruptcy took the store as there was at the beginning of November, 1904, a month and a half before. The bankrupt admits that he received the goods and got the money for them when he sold them again, and must consequently have had about $7,500 in hand between November 1, 1904, to December 19, following. Of the money deposited in bank, his stubs of checks show $1,691.38. The bankrupt was given time between adjourned meetings to prepare to account for the balance of the money that must have been in his hands. He proved indifferent and failed, and when, under rigid cross-examination, his attention was called to the large deficit, after having sworn that he had applied all the money towards the payment of debts, he admitted that he had testified to what he knew was not true, and had gambled away some $2,300 or $2,500 in New York.

Under substantially the above facts the question is whether the bankrupt is entitled to his exemption. "The rights of a bankrupt to property as exempt are those given him by the state law." Smalley v. Laugenour, 13 Am. Bankr. Rep. 692, 25 Sup. Ct. 216, 49 L. Ed. 400. "The only question to be determined upon a bankrupt's claim for exemption is whether he is entitled thereto as against general creditors." In re Brumbaugh, 12 Am. Bankr. Rep. 204, 128 Fed. 971. In the case in hand the creditors seek to bring the property claimed

into the fund for the general creditors, and under the decisions above recited the bankruptcy court has no doubt jurisdiction to distribute the property, if the exemption is not to be allowed to the bankrupt. "The exemption laws [of Pennsylvania] are enacted for the honest poor, not for the roguish." Imhoff's Appeal, 119 Pa. 350, 13 Atl. 279, and the cases there cited. When a bankrupt buys merchandise largely in excess of what he needs in his business, and disposes of it for cash, and leaves the bills unpaid, and within three months is put under oath in a proceeding in which he is bound to exercise diligence and good faith in all matters pertaining to his property and business transactions, and proves indifferent and unsatisfactory, fails to account for a large portion of his receipts, testifies to that which he afterwards admits to have been false, and afterwards, in order to escape threatened danger, takes refuge in the plea of having gambled away a third of the money, such a bankrupt is, in the opinion of the referee, not entitled to his exemption under the laws of Pennsylvania, and has in effect concealed money and property with the intent to defraud his creditors. The referee sustains the first exception and disallows the exemption claimed. This finding makes it unnecessary to consider the remaining two exceptions.

And, now, October 27, 1905, it is ordered that the schedule of property of Leo Alex, bankrupt, set apart to be retained by the bankrupt, made by the trustee of the bankrupt's estate and filed in this cause February 10, 1905, be, and it is hereby, set aside, and the trustee is directed to distribute said property as an asset of the bankrupt's estate, unless exception to this order be properly filed of record in this cause on or before November 7, 1905.

The following is the verified petition of the bankrupt for review:

To John G. Diefenderfer, Esq., Referee in Bankruptcy: Your petitioner respectfully shows: That he was adjudged a bankrupt herein on the 14th day of January, A. D. 1905, and that a trustee of his estate was in such proceeding subsequently appointed. That such trustee on the 10th day of February, A. D. 1905, filed a report of exempted property herein, and that on the 27th day of October, A. D. 1905, an order was entered determining your petitioner's claim to exempt property, as stated in such report, as follows: "When a bankrupt buys merchandise largely in excess of what he needs in his business, and disposes of it for cash, and leaves the bills unpaid, and within three months is put under oath in a proceeding in which he is bound to exercise diligence and good faith in all matters pertaining to his property and business transactions, and proves indifferent and unsatisfactory, fails to account for a large portion of his receipts, testifies to that which he afterwards admits to have been false, and afterwards, in order to escape threatened danger, takes refuge in the plea of having gambled away a third of the money, such a bankrupt is, in the opinion of the referee, not entitled to his exemption under the laws of Pennsylvania, and has in effect concealed money and property with the intent to defraud his creditors. Now, October 27, 1905, it is ordered that the schedule of property of Leo Alex, bankrupt, set apart to be retained by the bankrupt, etc., be, and it is hereby, set aside, and the trustee is directed to distribute said property as an asset of the bankrupt's estate, etc. That such order was erroneous for the following reasons:

(1) The state laws as to exemption in bankruptcy cases control, and the reasons assigned by the referee would not deprive the bankrupt of his exemption under the laws of Pennsylvania. (2) Property set apart to a bankrupt under his claim to exemption forms no part of his estate in bankruptcy. (3) Because the bankrupt testified that he lost his money by gambling would not deprive him or his family of the right to his exemption. (4) Under the laws of the state of Pennsylvania the bankrupt must be allowed his exemption, unless the same has been waived. (5) There was no evidence before the referee that the bankrupt had transferred or concealed any portion of his property, and unless this be shown his exemption must be allowed.

Wherefore your petitioner, feeling aggrieved because of said order, prays that said trustee report and the said order be reviewed, as provided in the bankruptcy law of 1898, and general order 32.

Dated Allentown, Pa., November 6, 1905. Leo Alex.

W. La Monte Gillette, for bankrupt.
Reuben J. Butz and Thomas F. Gross, for objecting creditors.

HOLLAND, District Judge. The findings of fact by the referee in this case are approved, and we agree with his conclusion that the bankrupt was not entitled to have property to the amount of $300 set aside for his use. The order entered by the referee October 27, 1905, is also approved, and the trustee directed to proceed in accordance with the directions therein contained.

HERMANN v. UNITED STATES. LEON RHEIMS CO. v. SAME. SULLIVAN, DREW & CO. v. SAME.

(Circuit Court, S. D. New York. June 1, 1905.)

Nos. 3,524, 3,525, 3,526.

CUSTOMS DUTIES—CLASSIFICATION—BEAVER STRIPS—MANUFACTURES OF FUR.

Held, that so-called beaver strips, in the form of rectangular pieces of felted material measuring 15 to 24 inches wide and 36 to 48 inches long, used in the manufacture of hats and composed in part of wool, but chiefly of rabbit fur, are not within the provision in paragraph 370, Schedule K, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], for articles of wearing apparel in part of wool, nor within that in paragraph 432, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], for hats or forms for hats, but are dutiable as manufactures in chief value of fur, under paragraph 450, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision under review affirmed the assessment of duty by the collector of customs at the port of New York on importations by Henry Hermann, the Leon Rheims Company, and Sullivan, Drew & Company.

The articles in controversy consist of various manufactures of rabbit fur and wool; the fur being the component material of chief value. They are known as "beaver strips," and are in the form of rectangular strips or bands, varying in width from about 15 to 24 inches and in length from about 36 to 48 inches. One of the samples put in evidence was in the shape of a section from a large tube, constituting when flat a double thickness about 24 inches square. They are felted, are dyed black and in colors, and are used in the manufacture of hats. A portion of the goods was classified under paragraph 370, Schedule K, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], and the remainder under paragraph 432, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675]. The importers contended that they should all have been classified under paragraph 450, 30 Stat. 193, [U. S. Comp. St. 1901, p. 1678]. The pertinent portions of said paragraphs read as follows:

"370. * * * Articles of wearing apparel of every description, * * * made up or manufactured wholly or in part, * * * composed wholly or in part of wool."

"432. Hats, bonnets, or hoods, * * * trimmed or untrimmed, including bodies, hoods, plateaux, forms, or shapes, for hats or bonnets, composed wholly or in chief value of fur of the rabbit, beaver, or other animals."

"450. * * * Manufacturers of fur, * * * or of which * * * [it] is the component material of chief value, not specially provided for."

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Henry A. Wise, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question is cloth claimed by the importer to be a manufacture of fur, of which fur is the component of chief value, and dutiable at 35 per cent. ad valorem under Act July 24, 1897, c. 11, § 1, Schedule N, par. 450, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678]. The Board of General Appraisers, however, assessed the merchandise as articles of wearing apparel under paragraph 370, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], or as fur hats and forms for hats under paragraph 432, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675].

Apparently the Board rested its decision chiefly on the ground that the protests were submitted by the importers to be decided on the record, and therefore were to be treated as defaulted. This claim of a default is not pressed on this appeal. An examination of the exhibits, in connection with the testimony taken on behalf of the importers as to the character of the cloth, establishes the fact that the classification contended for by them was correct.

The decision of the Board of General Appraisers is reversed.

E. & W. H. CALDWELL v. UNITED STATES.

(Circuit Court, S. D. New York. June 1, 1905.)

No. 3,894.

CUSTOMS DUTIES—CLASSIFICATION—HAIR PRESS CLOTH—EJUSDEM GENERIS.

The provision in paragraph 431, Schedule N, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], for "hair press cloth," is not limited to fabrics composed of the same material (horsehair) as the other articles enumerated in said paragraph.

On application for Review of a Decision of the Board of United States General Appraisers.

The decision in question affirmed the assessment of duty by the collector of customs at the port of New York on importations by E. & W. H. Caldwell, consisting of hair press cloth, found by the Board of General Appraisers to have been made from camel and goat hair.

This article was classified as "manufactures * * * of wool, not specially provided for," under paragraph 366, Schedule K, § 1, c. 11, Tariff Act July 24, 1897, 3 0Stat. 184 [U. S. Comp. St. 191, p. 1666], by virtue of the provision in paragraph 383 of said act (30 Stat. 185 [U. S. Comp. St. 1901, p. 1688]) that "whenever, in any schedule of this act, the word 'wool' is used in connection with a manufactured article of which it is a component material, it shall be held to include wool or hair of the sheep, camel, goat, alpaca or other animal." The importers contended that the goods should have been classified under the provision for "hair press cloth" in paragraph 431, Schedule N, § 1, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], which reads as follows: "431. Haircloth, known as 'crinoline' cloth, ten cents per square yard; haircloth, known as 'hair seating,' and hair press cloth, twenty cents per square yard." The Board overruled this contention on the authority of a former decision of the Board

in Re American Express Company, G. A. 4,448, T. D. 21,200, where it was held that hair press cloth, in order to come within paragraph 431, must be made of the same material (horsehair) as that composing the other textiles enumerated in that paragraph, and that goods made of camel hair, involved in that case, would therefore be excluded.

Walden & Webster (Henry J. Webster, of counsel), for importers.
D. Frank Lloyd, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question consists of cloth made of hair adapted to be used in hydraulic presses. It is in fact a hair press cloth. It is so known commercially, and was so invoiced and sold. The Board of General Appraisers, however, apparently basing its decision upon evidence taken in another case as to other merchandise, adopted the language of their opinion therein and assessed the article at 33 cents per pound and 50 per cent. ad valorem, under Act July 24, 1897, c. 11, § 1, Schedule K, par. 366, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1666], as a manufacture of wool not specifically provided for. The importers protested on the ground that the cloth was dutiable eo nomine as hair press cloth at 20 cents per yard under paragraph 431, Schedule N, of said Act (30 Stat. 191 [U. S. Comp. St. 1901, p. 1675]). The government introduced no testimony in this case before the board. Paragraph 366 provides only for manufactures of wool not specially provided for. Paragraph 431 provides specifically for hair press cloth eo nomine. The construction given to these words by the Board would seem to deprive this specific provision of all effect, inasmuch as the mats made of horse hair and cattle hair appear to be included under a separate designation. The assessment by the Board would operate to impose an ad valorem duty on this cloth of between 300 and 400 per cent.

The decision of the Board of General Appraisers is reversed.

R. HOE & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. June 5, 1905.)

No. 3,773.

CUSTOMS DUTIES—CLASSIFICATION—PATTERNS FOR MACHINERY—MOLDERS' PATTERNS.

The provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 616, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], for "models of inventions and of other improvements in the arts, including patterns for machinery," is not limited to the class of patterns known as "model patterns," intended to show the working of the thing illustrated, but includes also molders' patterns, which are used as models about which to form sand molds in in which castings may be made and which are fitted for successive use in that way.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision here reviewed (G. A. 5,889, T. D. 25,942) affirmed the assessment of duty by the collector of customs at the port of New York.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

W. Wickham Smith, Sp. Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question consists of articles made of wood, known as "patterns." They are of the class known as "molders' patterns," which are intended to be placed in sand in order to form the matrix in which the molten metal is cast; such castings constituting in this case portions of a printing press. They were assessed for duty as manufactures of wood not specially provided for, under Act July 24, 1897, c. 11, Schedule D, par. 208, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], and are claimed to be free under paragraph 616 of said act, which reads as follows:

"Models of inventions and of other improvements in the arts, including patterns for machinery, but no article shall be deemed a model or pattern which can be fitted for use otherwise." 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685].

The government contends that the word "patterns" as thus used is confined to the class of patterns known as "model patterns," of the same size as the blue print or drawing from which they are made, and which are patterns of an inventor's idea, gotten up for him in order to show the working of the invention, and generally incapable of use for any other purpose, and that the word "including," preceding "patterns for machinery," was intended to operate as a limitation to patterns ejusdem generis with models of inventions, etc. The government further contends that the addition of the word "otherwise" at the end of the paragraph of the law of 1890 and of the present law was intended to emphasize the limitation to the class of patterns to be used as models. The government further relies upon the fact that molders' patterns, such as those here in question, are fitted for successive use in making castings, and are therefore in the nature of tools of trade, constantly worn out and replaced, and that, as the manufacture of such patterns is a large industry in this country, it could not have been the intention of Congress to permit such articles to come in free, when the material of which they are composed would be taxable.

Counsel for the importers contends that the word "patterns," as used in said paragraph, covers both classes of patterns. The dictionary definitions specifically include under the word "patterns" such molders' patterns as models about which to form a sand mold in which a casting may be made. Counsel for the importers further contends that the word "patterns" should not be limited to a model pattern, because it is not so limited in the paragraph, and because the use of the words "model or pattern" in the closing clause shows that Congress did not intend to confine the exemption to model patterns, which would have been included under the word "model," but to extend it to the general class of patterns, which would not be so included, provided they are fitted for use only as patterns.

There is much force in the contention of counsel for the government, and the question is one as to which I feel great doubt. I feel

it to be my duty to resolve said doubt in favor of the importer, and I therefore conclude that as no commercial designation has been shown which confines the word "patterns" to any particular class, and as the ordinary use of patterns is for making parts of machinery in the way these patterns are used, and as it appears from the testimony that model patterns are more strictly patterns of machinery, rather than patterns for machinery, these articles are patterns for machinery, and cannot be fitted for use otherwise.

The decision of the Board of General Appraisers is therefore reversed.

R. F. DOWNING & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 24, 1905.)

No. 3,895.

CUSTOMS DUTIES—CLASSIFICATION—PAPER FANS—NOVELTIES.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 427, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1679], for "fans of all kinds," does not include so-called fans consisting of unsubstantial paper novelties in the shape of fans, which range from four feet in diameter down to very small sizes, and which are not commercially known nor dealt in as fans, nor adapted to practical use as such, but are intended solely for decorative purposes.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision under review affirmed the assessment of duty by the Collector of Customs at the port of New York on merchandise imported by R. F. Downing & Co., which was classified under the provision for "fans of all kinds" in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 427, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1679]. Note In re Kaufmann, G. A. 5,860 (T. D. 25,820).

Everit Brown, for importers.

Henry A. Wise, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question comprises, inter alia, articles which simulate fans, were invoiced as fans, are known as fans, and were classified for duty as fans, under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 427, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1679]. Nevertheless, the conclusion reached at the close of the argument is that these articles are not dutiable as fans, but as manufactures of which paper is the component material of chief value, not specially provided for, under paragraph 407 of said act. 30 Stat. 189, Schedule M [U. S. Comp. St. 1901, p. 1673]. The reasons for this conclusion are the following: These articles are imported as novelties from Germany, with other like articles, solely for use for decorative purposes. The names or designations applied to the various articles in the invoice are merely indicative of the things which they represent. Thus another exhibit called a bell is not a bell. The so-called parasol is not a parasol. The so-called hat, although fitted with an elastic, and capable of being put upon the head, is not a

hat in the tariff signification. In the same sense this article is not a fan, because, while it is capable of being temporarily used for fanning purposes in the same way as a hat or other similar object might be used, it is not adapted to such purpose, because it is not ribbed and is merely a flimsy mass of fluffy paper, and is therefore unfit for practical use for any length of time. Dealers in fans do not deal in this article as a fan, and vice versa; and persons who deal both in this article and in fans sell these articles in the novelty or holiday department, and not in the fan department. It appears that they are imported in all sizes, from four feet in diameter down to the small ones, such as are used for German favors or toys. They are unlike the folding fans of commerce, they are not commercially known as fans, and they are not fans within the reasoning of prior decisions of the Board of Appraisers. This class of articles was not imported into this country until after the passage of the act of 1897.

"It is plain that neither the importer nor the collector can sweep into a paragraph of a tariff act a novel article of merchandise which was not the article therein described, because a particular trade-name, which corresponded with the name of the old article, was attached to the new article after the passage of the act." U. S. v. Sehlbach, 90 Fed. 798, 33 C. C. A. 227.

In United States v. China & Japan Trading Company, 71 Fed. 864, 18 C. C. A. 335, the court said, referring to the articles in question:

"No one pretends that they are the umbrella of trade and commerce, and dealers in those articles do not keep them. They are called 'umbrellas' for convenience, but they are not used or designed for use as such. They might as appropriately be called 'rainbows.'"

The decision of the Board of General Appraisers is reversed.

SIEGMAN & WEIL v. UNITED STATES.

(Circuit Court, S. D. New York. May 19, 1905.)

No. 3,869.

1. CUSTOMS DUTIES—AUTHORITY OF SECRETARY OF THE TREASURY—REGALIA.
The Secretary of the Treasury is not empowered to abridge the right of free entry of the articles covered by Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 649, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1687], relating to regalia, etc.

2. SAME—CLASSIFICATION—REGALIA—PRODUCTION OF PROOF.
Proof that certain imported regalia was entitled to admission under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 649, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1687], was not produced at the time of entry as required by the customs regulations, but was offered the collector before he had liquidated the entry. *Held*, that free entry should have been allowed by the collector.

On Application for Review of a Decision of the Board of United States General Appraisers.

Note, United States v. Goodsell, 91 Fed. 519, 33 C. C. A. 661.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York. The case involved the validity of article 562, Customs Regulations 1899, so far as it relates to Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 649, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1687]. The pertinent portion of said article reads as follows:

"Art. 562. When entry is made free of duty under paragraphs * * * 649, * * * of the act of July 24, 1897, the oath or declaration required of the importer or consignee must be actually made at the time of entry, and no bond for the production of the same will be accepted in lieu thereof."

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for Importers.

Henry A. Wise, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The importation herein comprises church regalia, claimed to be free under the provisions of Act July 24, 1897, c. 11, § 2, Free List, par. 649, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1687]. The oaths necessary to establish the right to free entry were not before the collector at the time of making the entry, but they were before him at the time of its liquidation. There is no regulation which empowers the Secretary of the Treasury to abridge the right of free entry of articles such as those here in question when imported under the conditions shown to exist herein; and inasmuch as the evidence of said right was before the collector at the time of his action, duty should not have been assessed.

The decision of the Board of General Appraisers is reversed.

UNITED STATES v. D. S. HESSE & BRO.

SAME v. R. HOEHN CO.

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

Nos. 3,634, 3,635.

CUSTOMS DUTIES—CLASSIFICATION—ARTICLES OF CUT GLASS.

As to certain cut glass thermometers, the cutting on which is not shown to ornament or decorate the articles, *held*, that they are not within the provision in Tariff Act July 24, 1897, c. 11, §1, Schedule B, par. 100, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], for "articles of glass, cut, * * * or otherwise ornamented, decorated, or ground."

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below related to merchandise imported at the port of New York by D. S. Hesse & Bro. and the R. Hoehn Company, and reversed the assessment of duty on the merchandise by the collector of customs at said port, who had classified it under the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], the pertinent part of which reads as follows:

"Par. 100. * * * Articles of glass, cut, * * * or otherwise ornamented, decorated, or ground."

D. Frank Lloyd, Asst. U. S. Atty.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

TOWNSEND, Circuit Judge (orally). The merchandise in question, consisting of certain thermometers, was classified for duty under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], as "articles of glass, cut." The importer contended that the merchandise was properly dutiable under paragraph 112 of the same act 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635, as "manufactures of glass." The Board of Appraisers sustained the claim of the importers.

The article in question herein is not before the court for examination, and there is nothing in the return of the assistant appraisers to indicate whether the cutting thereon is of such a character as to ornament or decorate the article; and therefore the decision of the Board of General Appraisers is affirmed, on the authority of Koscherak v. U. S., 98 Fed. 596, 39 C. C. A. 166.

GOAT & SHEEPSKIN IMPORT CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 19, 1905.)

No. 3,641.

CUSTOMS DUTIES—CLASSIFICATION—MOCHA SHEEPSKINS—WOOL.

As to the coat on so-called mocha whitehead sheepskins, which contains a percentage of wool of a low order, *held*, that it is subject to the duty provided for wools on the skin in paragraphs 351, 358, 360, Schedule K, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 182, 183 [U. S. Comp. St. 1901, pp. 1664, 1665, 1666], and is not free of duty under paragraph 664, Free List, § 2, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688]; relating to raw skins, "except sheepskins with the wool on."

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision in question affirmed the assessment of duty by the collector of customs at the port of New York. Note G. A. 4,593 (T. D. 21,737).

Hatch, Keener & Clute (J. Stuart Tompkins, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in controversy consists of mocha whitehead sheepskins from which the coat had not been removed at the time of importation. They were assessed for duty at 3 cents per pound, under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule K, pars. 351, 358, 360, 30 Stat. 182, 183,

[U. S. Comp. St. 1901, pp. 1664, 1665, 1666], as wools of the third class on the skin, and were claimed to be free under the provisions of paragraph 664 of said act (section 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688]), as "skins of all kinds, raw (except sheepskins with the wool on)," etc. The sole question presented is whether these skins have wool on or hair only. The Board of General Appraisers reached the conclusion that a certain percentage of the covering was wool, and therefore that the skins were sheepskins with the wool on, within the meaning of the tariff act. Inasmuch as there was sufficient evidence to support the finding of the board as to the fact of wool upon the skins, and as the court upon examination of the sample is unable to say that this finding is incorrect, and as the definitions in the encyclopædias and dictionaries support the claim that such a product is wool, although of a low order, the decision of the Board of General Appraisers is affirmed.

UNITED STATES v. A. STEINHARDT & BRO.

(Circuit Court, S. D. New York. February 17, 1892.)

No. 620.

CUSTOMS DUTIES—CLASSIFICATION—GARTERS—WEARING APPAREL.

Garters are included within the term "wearing apparel" in Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule L, par. 413, 26 Stat. 598.

On Application for Review of a Decision of the Board of United States General Appraisers.

Affirmed 4 C. C. A. 679.

The decision below (G. A. 974, T. D. 12,112) reversed the assessment of duty by the collector of customs at the port of New York on goods imported by A. Steinhardt & Bro., consisting of elastic garters, composed in chief value of silk. The collector subjected them to the duty provided in paragraph 413, Schedule L, § 1, c. 1244, Tariff Act Oct. 1, 1890, 26 Stat. 598, for "articles of wearing apparel of every description, * * * of which silk is the component material of chief value," and to the additional duty prescribed in the proviso of said paragraph for "all such * * * articles of wearing apparel when composed in part of India rubber." The importers contended that they should have been classified under paragraph 414, 26 Stat. 598, relating to "all manufactures * * * of which silk is the component material of chief value."

Paragraph 412, 26 Stat. 598, referred to in the opinion below, relates to "suspenders, braces," etc., "of which silk is the component material of chief value."

Charles Duane Baker, Asst. U. S. Atty.

Curie, Smith & Mackie, for importers.

WALLACE, Circuit Judge. I shall sustain the collector's classification in this case, principally because of the effect which I think should be attributed to paragraph 412, Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule L, 26 Stat. 598. Now, by paragraph 414, this article would be

subject to 50 per cent. ad valorem duty, if it were not included under the enumeration "wearing apparel" in paragraph 413. The same would be true of suspenders and braces, probably, which are mentioned in paragraph 412. Congress, I think, by that paragraph has evidenced an intention of excepting some analogous articles out of the wearing-apparel clause, and they deemed it necessary to particularly specify suspenders, an article more clearly analogous to garters than perhaps anything else we can think of. If it had not been for paragraph 412, it might have been argued perfectly well that suspenders, like garters, were a part of wearing apparel, and therefore should be subject to 50 per cent. duty. It is a close question; but I think, taking the three sections together, I must hold that it was the legislative intent to include in "wearing apparel" articles similar to suspenders and garters.

SCHEU v. PENNSYLVANIA R. R.

(Circuit Court, W. D. Pennsylvania. December 5, 1905.)

No. 31.

DAMAGES—PERSONAL INJURY—EXCESSIVE VERDICT—REDUCTION BY CONDITIONAL ORDER.

A verdict awarding $15,000 damages to a young locomotive fireman, who was earning about $1,000 per year, for an injury resulting in the loss of his left hand, held excessive, and a conditional order made granting a new trial unless plaintiff should remit the excess above $10,000.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 383.]

At Law. On rule for a new trial on the ground that the verdict is excessive.

R. P. Marshall, for plaintiff.
Thomas Patterson, for defendant.

ARCHBALD, District Judge.[1] The verdict is for $15,000 for the loss by the plaintiff of his left hand. He was a locomotive fireman, earning about $1,000 yearly, with a chance of being advanced to the position of engineer, where he would get considerably more. In his present condition this occupation must be abandoned, but at the same time he is still young, and is by no means incapacitated for other lines of profitable labor. The amount of the verdict, however, is such that, if put at interest, it would yield almost, if not quite, as much as the plaintiff was getting at the time of the accident, and he has the capital in hand in addition, without any chance or contingency such as might come to him personally, like the accident out of which this controversy grows, by which his earning power would be correspondingly impaired. Under the circumstances the amount given by the jury is more than compensatory and thus becomes excessive and punitive. Evidently it is in part at least aimed at the retention by the defendant company in

[1] Specially assigned.

their employ of one who was considered by the jury as an incompetent, if not recklessly dangerous, employé, by whose negligence the accident was caused and which might bring about similar accidents to others.

It is somewhat difficult to say how much should be eliminated from the verdict on this account. Damages in such cases are peculiarly for the jury to fix; the court having only a general supervision of their action so that it may not go beyond bounds. It has even been held by the House of Lords in England, in the recent case of Watt v. Watt (1905) L. R. App. Cases, —, that there can be no interference by the court with the amount of damages awarded by a jury, the defendant being entitled to have them assessed by that tribunal; and that a reduction by the court on a rule for a new trial, on acceptance of which by the plaintiff and remission of the excess the rule is discharged, is without warrant of law, and cannot be sustained. But the cases in this country are not so (13 Cyc. 134), and the right is freely exercised by the courts in the way suggested. I have no hesitation in so acting here. Taking off one-third of the verdict, a very substantial amount is still left, which it seems to me will be full pecuniary compensation for the actual loss as ordinarily measured. 20 Am. & Eng. Encyc. Law (2d Ed.) 158, note 1. And a conditional order which will effect this will accordingly be made.

On condition that the plaintiff within 20 days by paper duly filed shall agree to a reduction of the verdict to $10,000, remitting the excess, the rule for a new trial will be discharged; but, otherwise, will be made absolute, and a new trial awarded.

BAGLIN et al. v. CUSENIER CO.

(Circuit Court of Appeals, Second Circuit. June, 1905.)

TRADE-MARKS—INJUNCTION AGAINST INFRINGEMENT—CHARTREUSE.

For many years the order of Carthusian monks, of the convent La Grande Chartreuse, in France, have made and sold a liqueur, under the name "Chartreuse," claimed to have been made by a secret process. Such liqueur has long been sold and has become well known under such name in the United States, where the name is registered as a trade-mark. The order having been expelled from France by the government, a receiver was appointed by a provincial court, who, under authority of the court, now carries on the business, putting up the product of his manufacture in the dress and under the labels and name formerly used by the monks, in which form it is sold in this country by defendant as agent. Meantime the monks re-established their business in Spain, where they make and sell a liqueur under a new trade-mark and labels, which set forth the facts with respect to the removal. No final adjudication of the rights of the parties has been had in France. *Held*, that a preliminary injunction restraining defendant from using in this country the bottles, labels, name, and trade-mark formerly used by the monks, based on affidavits largely made on information and belief, and which do not determine the question whether the product is the same originally sold under such trade-mark, was too broad in its terms, and should at least be modified by allowing sales by defendant, provided an additional label was attached to each package setting forth the facts with respect to the manufacture.

Townsend, Circuit Judge, dissenting, on the ground that the sale by defendant of the receiver's product under the name, labels, and trade-mark of the monks, without any distinguishing mark, was a fraud on the public, which should be enjoined, regardless of the quality of the article or the action of the French courts.

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

Frederic H. Betts, Charles Howson, and Hubert Howson, for appellant.

Philip Mauro, for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The questions involved in this appeal are interesting and novel. Many of the important facts, on both sides, are asserted on information and belief. The complainant's case rests solely upon the bill and two affidavits made by Herry Batjer, one of the agents for the complainant in the United States. The verification of the complaint is also by Batjer, who says:

"My information is gained from correspondence with European agents of said order, and from correspondence and conversations with local representatives of the same, and from general reading."

In short, the injunction was asked for upon the statements of one witness who has no actual knowledge of the more important facts upon which relief depends.

It is asserted by Batjer that the defendant is selling a "spurious article" in the United States, but he does not say in what particular it differs from the genuine Chartreuse, except that the latter is somewhat lighter in color. From the nature of the case proof by affidavit upon

this point is impossible. It is asserted that the complainant's product is made by a secret process; and the question whether defendant is selling a bogus liqueur can only be determined by cross-examination and careful chemical analyses. Hostetter v. Comerford (C. C.) 97 Fed. 585.

The defendant insists, also on information and belief, that the liqueur formerly made by the Chartreuse monks derived its value from the aromatic plants grown in the vicinity of the monastery of La Grande Chartreuse, and that the monks have always insisted that the genuine article cannot be made elsewhere. It is therefore argued that the liqueur made by the monks at Tarragona, Spain, is not and cannot be the genuine Chartreuse. In other words, each party contends that he is selling the genuine article and his adversary the bogus article.

Both parties agree, apparently, upon the following facts:

First. The order of Chartreuse monks had for many years occupied a monastery near Voiron, France, where they had manufactured and sold a liqueur known as "Chartreuse."

Second. This order was refused authorization under the French law of July 1, 1901, known as the "Associations Act," was judicially dissolved and its members expelled from France.

Third. A receiver of all the property of the said order was appointed, pendente lite, by a French court, having jurisdiction, and was duly authorized to carry on the business of La Grande Chartreuse, and to use the distillery fixtures, trade-marks and good will of the business which the monks were directed to turn over to him. The defendant here is the agent of the receiver, M. Lecouturier.

Fourth. After their expulsion from France the monks established a factory at Tarragona, in Spain, where they make the liqueur sold by Batjer & Co. in this country under a new label and trade-mark having no resemblance, from a legal viewpoint, to the trade-marks and labels used by them in France. The only person now using the old labels and trade-marks is the receiver appointed by the French court.

Fifth. When ordered to give up and assign their trade-marks the monks failed to do so, giving as an excuse that the trade-marks did not belong to the order, but to the Abbe Rey. The court, however, decided that this contention was not well founded, and that the trade-marks were held by Rey as trustee for the order.

Sixth. The legal aspect of the case in France has not, so far as appears from the record, been finally determined. As counsel for the complainant says:

"Even as to the extent of the liquidator's [receiver's] power in France the highest courts of that country have yet to be heard from."

"Even as to the extent of the liquidator's [receiver's] power in France the highest courts of that country have yet to be heard from."

Nothing further is needed to demonstrate the novelty and importance of the issues and the difficulty in deciding them upon a record so inconclusive and unsatisfactory. Indeed, we hesitate to express an opinion upon the law, as the cause may be brought here again upon a complete record, presenting the question in a wholly different aspect.

The injunction order is broad and unconditional. It enjoins the defendant, who is the agent here of the receiver appointed by the French

court, from using the botties, labels and trade-marks, which his principal is using under the protection of the law in France. In this connection, it should be remembered that the complainant is not now using these bottles, labels and trade-marks, and his right to use them has been denied. The financial responsibility of the defendant is not disputed. In these circumstances we are of the opinion that so sweeping an injunction should not have been granted upon ex parte affidavits, based largely upon information and belief. Stevens v. Missouri, 106 Fed. 771, 45 C. C. A. 611; Blakey et al. v. Nat. Mfg. Co., 95 Fed. 136, 37 C. C. A. 27; Air Brake Co. v. Westinghouse, 69 Fed. 715, 16 C. C. A. 371; Westinghouse Co. v. Montgomery Co. (decided by this court May 3, 1905, 139 Fed. 868).

In view of the fact that the record discloses instances where the public have been misled by the sale of the defendant's goods under the old labels without explanation, it may be that the Circuit Court will see fit to grant an injunction nisi. It would seem that pending final hearing all confusion might be avoided if the defendant should attach to its bottles labels similar to those adopted by the complainant, stating that:

"This liqueur is made at the Grande Chartreuse, in France, under the direction of M. Lecouturier, appointed liquidator of the property of the congregation of Carthusian monks after its dissolution and expulsion from France."

We are inclined to think that an order granting an injunction, unless a notice similar to the above is attached to each package offered for sale, would be within the discretion of the court.

The order is reversed.

TOWNSEND, Circuit Judge. I dissent from the opinion of the court. There is no uncertainty as to the material facts upon which the injunction was granted, namely, the validity of the trade-name "Chartreuse," complainant's title and long continued possession, and the infringement by defendant, and deception of the public. The only doubts raised are as to defendant's rights even in France. The judgment there is only that of an inferior court; it only applies to the judicial liquidation of complainant's property held in France; it states that "nothing is yet definitely adjudged * * * on the ownership," even in France; and it cannot have any extraterritorial force binding on our courts, nor can it bestow on its grantee in France any right to deceive the American public. In view of these doubts, it is clearly unjust to refuse protection to complainant until after defendant shall have removed said doubts and established some right to the interposition of the court.

Judge Story first laid down the rule, afterwards followed in England, and applied in Germany to the case of an alien enemy, that alien friends were entitled to claim the same protection of their rights as citizens. Complainant is an alien. His claim to the trade-name "Chartreuse" rests upon the fundamental doctrine of the law of trade-marks, the right of the public to be protected against deception. One of the chief objects of the law is to prevent the commission of a fraud on the public by the sale of an article with an imitated trade-mark in such a manner as to deceive purchasers. This trade-name, registered in the

patent office, is a right of property created by complainant in this country and repeatedly recognized by our courts. It is a personal property right, which cannot be confiscated by extraterritorial proceedings or divested or assigned in invitum, except in the methods pointed out by the decisions under our laws.

These elements of recognition, registration, and adjudication create a presumption in complainant's favor which cannot be overthrown by indefinite and uncertain assertions as to complainant's rights in France, but all such questions should be reserved until final hearing. The attempt to palm off on the American public a product of some decoction, the composition of which is unknown, manufactured by an assignee of a French liquidator, by the appropriation of complainant's labels, which falsely indicate to the American public that it is purchasing a well-known product made by a secret process by this order of monks, which labels are stamped with a counterfeit of the signature of the order, is an attempt by fraud to make a gain out of the confidence of the public in the individual skill of the members of said order, and to appropriate, in violation of law and without consideration, that intangible, and incorporeal, but no less sacred, right of property, the good will of the complainant.

This order should be affirmed.

WOOD v. DESKINS et al.

(Circuit Court of Appeals, Fourth Circuit. November 15, 1905.)

No. 579.

1. COURTS—FEDERAL JURISDICTION—ALIGNMENT OF PARTIES.

Where there was no controversy between one of the joint vendors in a contract for the sale of lands and the purchaser, but there was a dispute between her and the other vendors as to her share of the purchase money and the amount she should contribute toward clearing the title, and also between such other vendors and the purchaser with respect to taxes, interest, and other matters affecting the amount due under the contract which resulted in a suit by them for specific performance, the said vendor, who refused to join in such suit, was properly made a defendant, and cannot be aligned as a complainant in interest to defeat the jurisdiction of a federal court therein because of the fact that she was a citizen of the same state as the purchaser, although she was necessarily given a decree against him for the share of the purchase money to which the court determined she was entitled.

2. VENDOR AND PURCHASER—DELAY IN PERFECTING TITLE—LIABILITY OF PURCHASER FOR INTEREST.

Where a contract for the sale of a tract of lands, consisting chiefly of wild mountain land having only a prospective value on account of the timber thereon, required the vendors to make a clear title contemporaneously with the payment of the purchase money, which they were unable to do for a number of years, owing to litigation, the fact that the purchaser, who had already advanced a large part of the purchase price, was compelled to take possession of the lands, which had become vacant, to protect them from trespassers, did not render him liable for interest on the unpaid purchase money, where it was shown that the taxes which he paid in the meantime greatly exceeded the income derived from the land.

3. SAME—TAXES PAID BY PURCHASER IN POSSESSION.

A purchaser of lands under a contract, who took possession, although the sale had not been consummated, owing to delay caused by the inability of the vendors to perfect their title, is not entitled to credit on the purchase money for taxes paid pending such consummation, even though the income from the land was insufficient to pay such taxes.

Appeal from Circuit Court of the United States for the Southern District of West Virginia, at Charleston.

This is a suit in equity by vendors of land against the vendee to enforce the specific performance of the contract of sale and the payment of the balance of the purchase money. The contract was made April 15, 1889, between William H. Deskins, L. S. Deskins and his wife, and Anne Blackham and her husband, William Blackham, and Isabella Deskins, wife of James Deskins, all of the first part, and Stuart Wood, of the second part. By the contract the parties of the first part sold to Stuart Wood all the lands in Logan county, W. Va., on Miller's creek, formerly owned by James Deskins, containing 5,185 acres, more or less, at $4 per acre; also a tract adjoining near the mouth of Miller's creek containing from 150 to 200 acres at $20 per acre. Wood was to have both of said tracts surveyed so as to ascertain the acreage by May 15, 1889, and the title thereto was to be perfected by the parties of the first part on or before the said May 15, 1889, and if the title to the 150 to 200 acres could not be perfected by that time it was to be perfected within a reasonable time thereafter. The contract then recites that Wood had paid $1,000 on April 12th, and on April 15th an additional $2,000, on account of purchase price, and, subject to the provisions of the contract, was to pay the balance of the purchase money on May 15, 1889. The contract then provides that, if there should be any delay in perfecting title to the 150 to 200 acre tract at the time specified, reasonable additional time should be given to perfect the same before payment of the purchase money on that tract; but, in the words of the contract, "the payment of the balance of the purchase money on said 5,185-acre tract shall be made on said 15th day of May if the survey is then completed, and, if not completed, then shall be paid when the said survey is completed, which shall be completed as soon thereafter as it can by pushing the same with all reasonable dispatch. The settlement for said lands under this contract shall be made within five days after the completion of said survey at the First National Bank of Huntington, W. Va. If upon the delivery of such deed as hereinafter provided for said land or for the boundary of 5,185 acres (if the title to the other is not then perfected) to said party of the second part, or the same be ready for delivery at the place of settlement above specified and the balance of said purchase money is not then paid, this contract shall be void, and $1,000, part of said money already paid, shall be forfeited to the parties of the first part. And upon payment of the balance of the purchase money by said Stuart Wood to the said parties, then the said parties of the first part shall deliver a deed conveying said land with covenants of general warranty, free from all incumbrances or defects of title, including the release of the right of dower of the wife of James Deskins. A certificate of the clerk of the county court of Logan county showing the release of the liens against said land shall be procured, and, if not, then the party of the second part shall retain sufficient of the purchase money to satisfy the liens against said land appearing on the records of said county. Possession of said land shall be given on the 1st of March, 1890, but the parties of the second part shall have the right of ingress and egress for any purpose whatever; but if by reason thereof any damage should be done to the possession, the same shall be paid by said party of the second part, and while the said land is the possession of the said parties of the first part or their tenants proper care shall be taken of the premises."

Wood proceeded without delay to have the land surveyed and the surveys were completed in the latter part of June, 1889. In the meantime, before the survey was finished, a suit was entered in the circuit court of Logan county, W. Va., by Clay and Headley, attacking a sale by Special Commissioner Shumate to W. H. Deskins, by which he acquired title to the 5,185-acre tract, as fraudulent and void. Stuart Wood was made a party defendant. This suit

was proceeded with and the Logan county court pronounced a decree setting aside the judicial sale by which W. H. Deskins acquired title. The decree was entered October 19, 1889, and on March 18, 1891, W. H. Deskins appealed to the Supreme Court of West Virginia, and that court, at its April term, 1892, reversed the decision of the circuit court of Logan county and dismissed the bill. The said Clay and Headley, after the suit in the Logan county court had been finally decided against them, on December, 1892, entered another suit in equity in the United States Circuit Court for the District of West Virginia, against L. S. Deskins, W. H. Deskins, William Blackham, Anne E. Blackham, and Stuart Wood, praying a decree requiring Wood to pay the balance of purchase money for the 5,185-acre tract of land to Clay and Headley, and obtained a restraining order enjoining Wood from paying the balance of the purchase money to the extent of $7,240, which the complainants alleged belonged to them. On December 6, 1893, a decree was entered dissolving the injunction and dismissing the bill. An appeal was allowed upon giving bond for costs and damages, and the decree of the circuit court was affirmed by this court on October 2, 1894. It further appears that the 5,185-acre tract had been forfeited for the nonpayment of the taxes of 1885, and sold for said nonpayment and purchased by the sheriff for the state, and not redeemed within the time prescribed. Upon a bill filed to set aside the forfeiture upon the ground that the taxes for 1885 had been actually paid, a decree was entered January 15, 1897, annulling and setting aside the sale and forfeiture of the land. The land had been acquired by W. H. Deskins at a judicial sale made by W. K. Shumate, special commissioner, in a proceeding by Patton Bros. against L. S. Deskins and others; but it appears that no deed was executed by W. K. Shumate, commissioner, to William H. Deskins, until August 3, 1897. There were some judgments of record which were liens on the land, amounting to between $3,000 and $4,000, which Wood acquired and was entitled to deduct from the purchase money.

On July 6, 1889, Stuart Wood paid on account of the purchase money $8,000 and took the following receipt:

"Received July 6, 1889, of Stuart Wood, eight thousand dollars on account of purchase money on lands described in a certain contract of sale. * * * The balance to be paid and receipted for by me at a reasonable time after the disposition of the suit of Clay & Headley v. Deskins et al., and when the liens are removed from the land. The back taxes are to be paid by me out of the above amount. L. S. Deskins. [Seal.]"

On the same day Wood paid $2,000 to Mrs. Blackham, taking the following receipt:

"Received Logan, C. H., July 6, 1889, of Stuart Wood, his check for two thousand dollars on account of the purchase money coming to Anne E. Blackham, for her interest intended to be conveyed to said Wood in a certain contract for land on Miller's Creek. * * * The balance of the purchase money to be paid to and be receipted for by me at a reasonable time after the disposition of the suit of Clay & Headley v. Deskins et al., and when the liens are removed from the land. Anne E. Blackham, [Seal]
"By William Blackham."

In March, 1890, the lands being vacant or about to be left vacant, Wood assumed possession of them in order to protect them. The tract was nearly all wild mountain forest, not susceptible of cultivation and only valuable for the prospective value of the timber. The taxes paid by Wood from that time on were about $400 a year, and he did not receive from the property $50 a year. Mrs. Blackham, a daughter of James Deskins, the original owner of the tract, by an understanding with the other owners, was entitled to a certain portion of the 5,185-acre tract, which upon survey was found to contain 1,500 acres, and by reason of this ownership was made a party to the contract of purchase by Wood and was entitled to receive $6,000. Of this amount Wood had paid to her $4,800, but could not pay her the balance, because of a dispute between her and the other owners as to the proportion of certain expenses in clearing the title for which they contended she was liable. She and her husband had executed a deed for her interest to Wood and left it in escrow with Mr. Shumate to be delivered when the balance due her was paid. On the same

date on which the $2,000 was paid to her, July 6, 1889, Wood had signed and delivered to her attorney a statement that there remained due to her about $1,500, "payable when title is perfected and suits finally disposed of." She did not at any time demand of Wood the payment of interest on her share or the purchase money, but at all times expressed her willingness to waive any claim to interest, but did dispute the claim made by the other owners that out of her share of the purchase money she should refund them certain expenses connected with clearing the title of suits and incumbrances.

There was considerable correspondence during 1896 and 1897 between the attorneys of the Deskinses and Mr. Wood, or his attorney, Mr. Asbridge, each urging the other to bring about a final settlement but without practical result. The attorneys for the Deskinses urged that Wood should pay the balance of the purchase money, and Wood urged them to put the title in proper shape to give him a deed clear of defects of title or incumbrances, stating that he was anxious to get a final settlement and a deed conveying the land to him; but as Mr. Wood lived in Philadelphia, and only occasionally came to West Virginia, and the Deskinses were scattered in different places, it did not seem easy for them all to get together or arrange a settlement. In June, 1897, Deskins' attorney made a claim for interest on the unpaid purchase money. Wood offered to pay the full amount of the purchase price upon getting a deed, but refused to pay interest.

Thereupon this suit for specific performance was entered in the United States Circuit Court for the Southern District of West Virginia, on September 14, 1897, and service of process was accepted by Wood, who was then in Philadelphia. The answer of Stuart Wood to the bill sets forth that the total purchase price was, as claimed, $24,490.45, on account of which he had paid to the vendors $13,600; that, except the first $3,000 mentioned in the contract, he was not by the contract required to pay anything more until the vendors conveyed to him a perfect title, by a deed with covenants of general warranty; that the vendors had never put themselves in condition to convey the land free from all incumbrances or defects of title, but had involved the respondent in various suits and litigation growing out of their transactions concerning said lands; that before the survey was completed the suits of Clay and Headley had been instituted to annul the said contract of sale to the respondent; that while that suit was pending, upon assurances that the litigation would soon be terminated and the vendors be able to carry out their contract, respondent, although under no obligation to do so, did on July 6, 1889, pay to the vendors $10,000, of which they have ever since had the use; that the litigation between Clay and Headley and the vendors did not terminate until October, 1894, since which time respondent has been endeavoring to get the Deskinses to comply with the contract, but they have refused, setting up claims against Mrs. Blackham which are denied by her; that the Deskinses had also refused to settle unless respondent would pay for another tract of land which they falsely claim respondent had also purchased; that during the time since he took possession the taxes have been about $400 a year, while he has received but a trifling rent or profit from the land, not exceeding $50 per year, while the vendors have had the use of the $10,000 paid in advance by respondent. He denied that any interest was chargeable against him, as the vendors had failed to perform their contract, as they had never tendered him a deed, and had kept him waiting for years without a title, so that he could not avail himself of the benefit of his purchase, although he had advanced to the vendors large sums of money and always had been willing and able and anxious to have a settlement. On June 12, 1899, the case was referred to a master, to report, among other things, what amounts were still unpaid and to whom payable. On October 12, 1901, the master, having taken a great deal of testimony offered by the parties to this case, made a comprehensive report of all matters referred to him. He reported: That the total purchase money for the several tracts amounted to $24,490.45, of which Mrs. Blackham was entitled to $6,000, less $500 which by agreement she was to contribute as her share of the cost of clearing up the title, and that she had been paid by Stuart Wood in all $4,800. That Wood had made to L. S. and W. H. Deskins the following payments:

April 12, 1889	$ 1,000
July 6, 1889	8,000
May 20, 1895, paid to Watts & Ashby on order of Deskins	300
Total paid Deskins	$ 9,300
Paid Mrs. Blackham	4,800
Total paid by Wood on purchase money	$14,100

He reported that Wood had also acquired liens on the property which the Deskinses should have satisfied out of the money paid to them by Wood, and which they failed to do. The liens were as follows:

Trust debt of Julia A. Sheppard		$ 1,545 50
Interest from October 30, 1891, to October 30, 1901	$ 927 30	
Trust debt of James Starr		1,545 50
Interest from October 30, 1891, to October 30, 1901	927 30	
Judgment lien of James Starr		295 00
Interest from April 15, 1882, to October 31, 1901	345 89	
Interest	$2,200 49	
Principal		$ 3,386 00
Interest		2,200 49
Total		$ 5,586 49

The summary was as follows:

Due Mrs. Blackham, 1,500 acres at $4	$ 6,000 00
Amount to be paid by Mrs. Blackham for costs, expenses of making title	500 00
	$ 5,500 00
By amount paid	4,800 00
Balance due Mrs. Blackham	$ 700 00
Due L. S. and W. H. Deskins, 3,594 acres and 28¾ perches of land at $4	$14,376 70
205 acres 110 perches of land at $20	4,113 75
Amount charged to Mrs. Blackham for her share of costs, etc	500 00
	$18,990 45
Less amount paid	$ 9,300
Less liens paid and interest	5,586 49
	14,886 49
Balance due Deskins	4,103 96
Balance due Mrs. Blackham	700 00
Total amount to be paid by Wood October 1, 1901	$ 4,803 96

The master denied the claim of Wood to be reimbursed for taxes paid on his lands since he took possession in 1890. The master reported that in his opinion Wood was not chargeable with interest on the balance of purchase money yet to be paid, because in the opinion of the master the "proof clearly establishes the fact that the vendors have not yet put themselves in a position to demand the payment of the purchase money." L. S. and W. H. Deskins excepted to the report, contending that the master should not have allowed Mrs. Blackham $6,000, but only on account of 1,317 acres at $4 per acre, amounting to $5,216, and that Mrs. Blackham should be charged with the proper proportion of the expenses incurred by the plaintiff and not limited to the sum of $500; that L. S. and W. H. Deskins were entitled to $4 per acre for 3,715 acres and 33¾ perches of land; that Wood should not have been allowed interest on the sums paid out by him for the liens on the land acquired by him; that Wood should be charged interest on the balance of the purchase money yet to be paid by him. Wood excepted to the master's report because he was not allowed reimbursement for the taxes paid by him, for the reasons

that circumstances under which Wood took possession were not such as required him to bear the burden of taxes.

These exceptions came on for hearing before the Circuit Court, and the court sustained the plaintiff's exception to so much of the master's report as found that the plaintiffs were not entitled to interest, and ruled that the plaintiffs were entitled to receive $9,490.45 from Wood as the balance purchase money unpaid March 1, 1890, with interest at 6 per cent. from that date until paid, less the payments made thereon with interest on the same, and less the valid liens purchased by Wood, with interest on the same until the day of settlement; the said balance due amounting on June 23, 1904, to $11,037.19. The court sustained the master's report that Mrs. Blackham was entitled to the purchase money for 1,500 acres of land at $1, and was only to be charged with $500 in favor of the Deskinses for expenses. The court decreed that it was the duty of L. S. and W. H. Deskins, upon payment of the money, to execute to Wood a good and sufficient deed of general warranty for the portion of the land owned by them, free from dower and all incumbrances, and that no such deed had been executed and delivered by them. The court found that a good and sufficient deed of general warranty had been executed by the Blackhams and had been delivered in escrow and was filed in the case, and that there was due her $1,200, of which $500 was to be paid to the Deskinses, and upon which, by an agreement made long after the date of the original contract, no interest was to be paid to Mrs. Blackham on her part of the purchase money, and upon payment of the said balance Wood was authorized to withdraw the deed from the papers in the case. The decree then provided that, unless the sums found to be due were paid within 30 days from the date of the decree, the lands in respect to which the balance due should be in default should be sold. Wood appealed and assigned for errors that the court had no jurisdiction, for the reason that Mr. and Mrs. Blackham were really coplaintiffs and were citizens of the same state with the defendant Wood; that no interest should have been allowed against him on any unpaid purchase money, because no proper deed had ever been tendered to him; that the taxes he had paid should have been allowed him; that the separate deed decreed to be delivered to him by the Deskinses and the Blackham deed were not in accordance with the contract; and that the court erred in decreeing costs against Wood, when the plaintiffs had been in default; and, having made unfounded claims for interest, the other exceptions had reference to the terms of the sale decreed to be made in default of payment of the balances found to be due.

Malcolm Jackson (Brown, Jackson & Knight, on the brief), for appellant.

L. D. Vickers and C. C. Watts (Watts & Ashby, on the brief), for appellees.

Before GOFF and PRITCHARD, Circuit Judges, and MORRIS, District Judge.

MORRIS, District Judge. The first assignment of error questions the jurisdiction of the Circuit Court because of an alleged want of diverse citizenship between the complainants and defendants, if, as contended by the appellant, they were properly arranged according to their actual interests in the controversy. As arranged in this suit as instituted, W. H. Deskins, L. S. Deskins, and Eva, his wife, were complainants and were all citizens of West Virginia, and the defendants were Stuart Wood, William Blackham, and Anne E. Blackham, his wife, all citizens of Pennsylvania. The defendant Wood, the appellant, urges that Mr. and Mrs. Blackham were not properly made defendants, but were parties in whose behalf relief was prayed against him, and that as joint vendors they were necessary parties. It is the

existence of a controversy between citizens of different states that is the test of jurisdiction. If the relief prayed cannot be granted without the presence of other parties, and if by placing them on the side of the case to which they belong the diverse citizenship is defeated, then the Circuit Court cannot take jurisdiction; but it is the nature of the controversy, the real matter in dispute, which should determine how the parties are to be arranged.

The bill of complaint prays a decree for the specific performance by Wood of his contract of purchase and a decree against him for the balance of purchase money due to complainants by said contract. The bill contains these averments:

"That the defendant Anne E. Blackham was the owner of 1,317 acres of the 5,032-acre tract, and that, while the purchase was made in the name of W. H. Deskins, he recognized her interest, and she is entitled to share to that extent in the sale, subject to an equitable adjustment between herself and the said W. H. Deskins as to the expenses incident to said property. But the plaintiffs are informed and so aver that the said Anne E. Blackham and William Blackham are unwilling to commence legal proceedings against the said Stuart Wood, and that they have expressed their willingness to receive from said Wood their part of the purchase money without any interest, rather than litigate the question of interest, and they have been paid the greater part of the amount coming to them and said Wood has executed and delivered to them his note for the balance due them. Plaintiffs are further informed and so aver that by deed dated the 6th day of July, 1889, said Anne E. Blackham and William Blackham conveyed their interest in said lands to the defendant, Stuart Wood, which deed was left by them with their attorney, W. K. Shumate, to be delivered to said Stuart Wood upon certain conditions, of the full nature of which conditions they are not advised. The plaintiffs have no authority to make said Blackhams plaintiffs in this suit, that there is no privity between the said Anne E. Blackham and William Blackham and these plaintiffs in the matters involved in this suit, but they are advised that it is essential to have the title to the property in controversy before the court, and they therefore designate and ask that said Anne E. Blackham and William Blackham be treated and made defendants in this suit."

The answer of Mrs. Blackham affirms the essential allegations of the bill so far as they relate to her controversy with the Deskinses and the absence of any controversy between her and Wood. She asserts in substance that W. H. Deskins and L. S. Deskins had agreed with her that she should have $6,000 out of the sale to Stuart Wood, and that she was not to pay more than $500 towards the expenses of clearing the title, but that they had somehow set up an unwarranted claim that she should pay one-third the said expenses, which exceeded $500, but had not allowed her one-third of the purchase money, and she avers that she believes but that for this unwarranted claim on the part of W. H. and L. S. Deskins she would have been able to settle with Stuart Wood long ago for her share of the purchase money as ascertained and agreed between all the parties as hereinbefore stated. She states that she has had some correspondence with said Wood, and he has stated that he was willing to settle with her in full and take her said deed; but on account of complications and disputes with W. H. and L. S. Deskins, he is afraid he might be required to pay some of the money a second time. She further avers that on account of the institution of this suit she will probably be kept for a long time from receiving her money, and prays she

may be allowed interest, and if the delay is held to be caused by Wood he may be decreed to pay interest to her, or if it is held to have been caused by the neglect, default, or unreasonable claims of W. H. and L. S. Deskins that they should be decreed to pay interest to her. It is quite obvious, we think, that the parties to this suit were arranged, not arbitrarily, but according to their real interest and according to their attitude towards the real, substantial controversy in suit.

It is urged, however, against the jurisdiction, that the decree of necessity had to be a decree in favor of Mrs. Blackham against Wood for the payment of the balance of the money due her, as well as in favor of the Deskinses, and that to speak of two persons, one of whom obtains a decree against the other, as being on the same side of a controversy, is an absurdity. But this is not necessarily so. Jones v. Bolles, 9 Wall. 364–369, 19 L. Ed. 734. In the case just cited the complainant, Bolles, a citizen of Massachusetts, was a stockholder in the Mineral Point Mining Company, a corporation of Wisconsin, and charged Jones, a citizen of Wisconsin, with setting up a fraudulent claim against the company to the injury of the corporation and its stockholders. Bolles and the mining company were made defendants. On the allegations of the bill, the decree of necessity had to be in favor of the mining company; but the Supreme Court, through Mr. Justice Bradley, said:

"It is next objected that there is a misjoinder of defendants by reason of making the mining company a party. But the company was directly interested, and though no relief is prayed against it, but rather in its favor, it is eminently proper that it should be made a party complainant or defendant. It could not be made complainant against its will, and, besides, its own agents joined in the fraudulent representations that were made. As a separate and independent personality, distinct from the stockholder interest, there was propriety in making it a party defendant."

The suit now under consideration is similar. There was no controversy between Mrs. Blackham and Wood, and she had refused to institute any suit against him. There was a controversy between Mrs. Blackham and the plaintiffs as to the share of the purchase money to which she was entitled and to the amount she should contribute towards expenses, and she claimed that if by the suit she was longer kept out of her money Deskins should pay her interest for the delay. It appears to us that the parties were arranged according to their actual interest in the controversy and that the Circuit Court rightly retained jurisdiction. Hotel Co. v. Wade, 97 U. S. 13-20, 24 L. Ed. 917; Einstein v. Ga. South. & F. Ry. (C. C.) 120 Fed. 1008.

The substantial question brought to us by this appeal is whether the plaintiffs have shown themselves to be entitled to interest on the unpaid purchase money. The court below sustained their claim for interest upon the ground that a purchaser who takes possession of land under a contract of purchase is liable for interest on the purchase money even though by reason of defects in the title he is delayed in getting a good deed of conveyance, unless the vendee sets aside the purchase money, and notifies the vendors that it is set aside, and that the vendee is not deriving any benefit from it. This rule is based upon the inequity of allowing the purchaser to enjoy the use of the

land, or the rents and profits of it, and at the same time have the use of the purchase money to the loss of the vendor. The vendor should as a rule have either interest on the purchase money or the rents and profits of the lands.

But when the reason of the rule, based upon the beneficial use of the land, fails, then the reason for allowing interest fails, and a court of equity should look carefully into the circumstances to ascertain what is equity under all the facts of the case. It appears this large tract of land which was the subject of the contract of sale was very nearly all wild mountain land, of no present beneficial use. It was of value solely because of the prospect that in the future, by reason of railroads which might be built, the forest trees would be marketable for lumber. The few acres of bottom land were but of little rental value, far short of enough to pay the annual tax of $400 a year. It is clear, therefore, that by taking possession Wood's pecuniary situation was made much worse, and if the vendors are to be allowed interest on the unpaid purchase money, which could not be safely paid to them on account of the condition of their title, then they will be decidedly better off, notwithstanding their defaults and delays, besides being relieved of the burden of the possession. It appears that whoever it was that was living on the land at the time of the sale moved away in March, 1890. Wood had then paid $13,000 on account of the full purchase price of $24,490. He had a very vital interest in protecting the property from depredations by intruders and from squatters. He testifies that he took possession solely for the purpose of protecting the property, and that the possession was of no pecuniary benefit, but entailed upon him expense; and it cannot be doubted that the fact was so. There is no reason, therefore, for applying the rule exacting interest from the purchaser, because of any beneficial use which he has enjoyed by reason of his possession.

It then remains to consider whether Wood at any time neglected to pay the purchase money when it was due and demandable, and for that reason is liable for interest as damages for his breach of the contract. There is nothing in the contract entered into by the parties in this case on April 15, 1889, to indicate that it was intended to be an exception to the usual understanding that a purchaser of land contracts for a good marketable title clear of liens and incumbrances, and is not compellable to pay the purchase price until the vendor tenders him such a title. It would require most explicit wording in a contract to express a different intention, so unreasonable and so contrary to ordinary usage in the purchase of land. By the contract it was stipulated that:

"Both of the said tracts or boundaries of land are to be surveyed so as to ascertain the acreage by the said party of the second part by the 15th day of May, 1889, by surface measurement. Their title thereto is to be perfected by the parties of the first part on or before the said 15th day of May, 1889. If the title to the said 150 or 200 acres cannot be perfected by that time, the same shall be so perfected within a reasonable time thereafter."

The agreement then recites the payment of $3,000 by Wood on account and that Wood has agreed to pay the balance on or before May

15, 1889, if the survey is then completed, and, if not, then when the survey is completed, which shall be completed as soon as it can by pushing the same with all reasonable dispatch. It then provides:

"And upon payment of the balance of the purchase money by said Stuart Wood, then said parties of the first part shall deliver a deed conveying said land with covenants of general warranty, free from all incumbrances or defects of title, including the release of the right of dower of the wife of James Deskins. A certificate of the clerk of the county court of Logan county showing the release of the liens against said lands shall be procured, and, if not, then the party of the second part shall retain sufficient of the purchase money to satisfy the liens against said land appearing on the records of said county."

An earlier clause of the contract, referring to the deed to be given by the vendors, stipulates:

"And if upon delivery of such a deed as hereinafter provided for said land, or for the boundary of 5,185 acres (if the title to the other is not then perfected), to said party of the second part, or the same be ready for delivery at the place of settlement above specified, and the balance of the purchase money is not then paid, this contract shall be void, and $1,000 part of the purchase money already paid shall be forfeited to the parties of the first part."

The above stipulations clearly indicate that what was contracted for was a perfect title, clear of liens and incumbrances. The survey, without which the amount of the purchase money could not be calculated, was not ready until June 25, 1889, but it was never suggested that Wood was in default for not having it completed sooner. Before a settlement could be had, or a deed such as the contract called for could be tendered by the vendors, it became obvious, not only that the property was deeply incumbered, but that legal proceedings had been instituted, which threatened to destroy all interest which the vendors had in it. It was a fact also that the 5,185-acre tract had been forfeited and sold for the taxes of 1885, and had not been redeemed within the year allowed by law, and it was not until January 15, 1897, that the forfeiture and sale was set aside by a decree of the county circuit court. The 5,185-acre tract in 1866 had been conveyed by James Deskins (Isabella Deskins, his wife, not joining) to L. S. Deskins, and L. S. Deskins had acquired the 200-acre tract by deed from W. H. Deskins and wife in 1882, and had given a deed of trust on that tract to secure about $2,000. In 1889 L. S. Deskins had conveyed 1,500 acres, a part of the 5,185-acre tract, to Mrs. Blackham. In 1886, the firm of Patton Bros., having a judgment against L. S. Deskins and a lien on the 5,185-acre tract, filed a bill of complaint in the Logan county circuit court and obtained a decree for the sale of said tract to pay the liens existing against it. Such proceedings were had that the 5,185-acre tract was offered at public sale by Shumate, commissioner, and April 1, 1889, was sold to L. S. Deskins' son, Wm. H. Deskins, for $15,000, of which $370 was paid in cash, and notes at one and two years given for the balance. On July 3, 1889, Clay & Headley filed their bill of complaint against L. S. Deskins, Wm. H. Deskins, Stuart Wood, W. K. Shumate, and others to set aside the sale made by Commissioner Shumate to William H. Deskins, alleging that Clay & Headley had by contract dated May 25, 1888, purchased the said lands

from L. S. Deskins for $3 an acre, and that the said sale by Commissioner Shumate had not been fairly made, but was so managed as to defeat the just rights of Messrs. Clay & Headley. A decree was entered October 19, 1889, setting aside the sale to Wm. H. Deskins, and this decree stood until reversed by the Supreme Court of West Virginia at the January term, 1892. Thereupon the said Clay & Headley filed a suit in equity in the Circuit Court of the United States for the District of West Virginia against the parties to this cause to require Wood to pay the balance of purchase money to the extent of the excess over $3 an acre to the said Clay & Headley. This suit was not finally decided until the mandate of this court was entered in the United States Circuit Court November 7, 1894.

It thus appears that by reason of the Clay & Headley suits not being finally disposed of until November, 1894, and the tax forfeiture and sale not until annulled by the decree of January 15, 1897, the vendors had not perfected their title as required to do by the contract of sale and could not deliver a deed free from incumbrances or defects of title until these serious defects, which imperiled their ownership of the property, were got out of the way.

Commissioner Shumate was authorized by a decree entered August 3, 1897, to execute a deed conveying the 5,185-acre tract to Wm. H. Deskins, and the deed of that date was executed. So far as appears, the vendors were then for the first time in a position (Wood having in the meantime bought up the liens and incumbrances) where they could "deliver a deed conveying said land with covenants of general warranty free from incumbrances or defects of title," as stipulated by them in the contract of sale. They did not tender such a deed to Wood, but on September 14, 1897, filed this bill, on which no decree was entered until June 23, 1904. It is significant that in their bill of complaint the plaintiffs carefully abstain from alleging that they have ever tendered a deed. They allege in general terms that they have been at all times ready and willing to comply with the terms of the contract, and have so notified Wood, but that he has failed and refuses to carry out the contract. They do not in their bill tender a deed, but ask for a decree for sale of the land to satisfy the balance of purchase due to them. When two acts are to be done at the same time, neither party can maintain a suit against the other without alleging a performance or an offer to perform on his part. Waterman on Specific Performance, p. 576, § 425, note; Id. §§ 443, 448; Barrett v. McAllister, 33 W. Va. 750, 11 S. E. 220; Watson v. Coast, 35 W. Va. 463, 14 S. E. 249; Clark v. Gordon, 35 W. Va. 735, 14 S. E. 255.

We are of opinion that until August 3, 1897, the vendors were unable to give a title free from defects, and for that reason there could not be any balance of purchase money due as to which Wood was in default for not paying. The contract does not provide for any credit. On signing the contract $3,000 was paid down, and the balance, when ascertained by a survey, was to be paid as soon as the vendors had perfected their title and tendered for delivery a good deed conveying a title free from defects. So long as such a deed was not tendered no money was due. Notwithstanding this Wood did pay,

July 6, 1899, $10,000, of which the vendors had the use for about 16 years in advance of its being due to them, and this large sum was paid by Wood on a doubtful, litigated, and incumbered title, and during a long part of this period the vendors have had no title they could convey to Wood in gratification of the contract. That Wood under the contract was not in default in not paying until the title was perfected is corroborated by the receipts given to Wood when he made the large payment of $8,000 to L. S. Deskins and $2,000 to Mrs. Blackham. The receipt, signed by L. S. Deskins, contains this statement:

"The balance of the purchase to be paid to and receipted for by me at a reasonable time after the disposition of the suit of Clay & Headley v. Deskins et al., and when the liens are removed from the land. The back taxes are to be paid by me out of the above amount."

L. S. Deskins was the substantial vendor, principally, if not entirely, owning the lands; his son, William H. Deskins, the formal purchaser at the judicial sale, being a youth of only 21 years and without property, and owing all the purchase money except about $270 paid to the commissioner. The receipt for $2,000, signed on the same day by Mrs. Blackham, is in the same language. In further corroboration is the fact that Mrs. Blackham has always refused to make a claim for interest as against Wood, and that no one of the Deskinses nor their attorney, during this long delay until June, 1897, ever suggested that interest was running against Wood.

It is urged, however, that without regard to the terms of the contract of sale, and without regard to the fact that there never was any default in payment by Wood, the fact that he took possession in March, 1890, is of itself sufficient to charge him with interest. As we have already said, it is not disputable that, when the premises were being vacated and left open to depredations, Wood took such possession as can be taken of a large tract of mountainous forest, simply to protect the land and timber, because of his own very large interest, arising from his having advanced so considerable a sum on account of the purchase money not yet due or properly payable. As there was no contract for interest, and the purchase money was not due, interest must be chargeable, if at all, upon a contract implied from the circumstances attending the transaction, and it does not appear to us that such an implication arises out of the possession of wild mountainous forest lands, taken under the circumstances of this case and entailing only burdensome expense on the party who goes into possession.

The equities of the case are by no means in favor of the vendors. Wood, before it was due, paid into their hands $10,000 on a doubtful, litigated, and incumbered title, and they have had the use of that money during this long time, in which they were slowly and intermittently perfecting their title in order to comply with their contract of sale, and during that time Wood had no title which he could convey, and only a burdensome possession. In Stevenson v. Maxwell, 2 Sandf. Ch. 273–278, which was a case of a vacant city lot, and where the vendor was in default in not perfecting the title, and in not ten-

dering a deed, the purchaser, although in possession, was held not to be chargeable with interest. The vice chancellor said:

"In the case of a vacant city lot or of wild land, not bought for immediate improvement or cultivation, and where there is no express contract for interest, it would be repugnant to the moral sense to compel the purchaser to pay interest on the price, where through the default or negligence of the vendor he had not received a conveyance and thus had been for years prevented from disposing of the property. Nor would the fact that the buyer had taken all the possession he could of such property, and had not kept the money by him all the time in order to pay it on receiving the title, affect the natural equity of the case."

We think the present case is a very strong one for the disallowance of the claim for interest, and in some respects a peculiar one, the facts of which forbid any implication of a contract to pay interest. It appears that in September, 1897, when the bill for specific performance was filed, the defects of title had finally been cured, the lien incumbrances had been taken up by Wood, and the vendors had it then in their power to tender a deed to Wood. But they did not do it, because of the disputes among themselves, and because of the demands by the Deskinses for interest. They made no tender of a deed, and no suggestion of any method by which the deed could be delivered and the disputed matters arranged. Wood kept writing to the Deskinses' attorneys that he was anxious and impatient to get a deed, that he was ready with the balance of purchase money, had already suffered by the Deskinses' delay, and could not pay interest when the matter had been delayed solely by the Deskinses' failure to carry out their agreement as to title. In our opinion there was no default by Wood up to the time of filing the bill in this case, and he was not then chargeable with interest as claimed by the Deskinses. There has been a long delay in the prosecution of the present suit, but it does not appear that it is attributable to Wood. In our judgment the defendant Wood is not liable for interest on the unpaid purchase money; and he is not entitled to interest on any sums he has paid out. He is not to be allowed interest on the taxes paid by him while in possession, or on sums paid by him to take up incumbrances, but to be allowed only the sums actually paid out by him as a credit on the purchase money. We are of opinion that under all the facts of this case there has arisen no implied obligation upon either party to pay interest to the other.

The taxes paid by Wood while he had possession are not to be allowed at all as a credit on the purchase.

The decree should provide that the vendors make good their contract by executing, to be delivered to Wood on payment of the balance found to be due, a good deed with covenants of general warranty, free from dower and all incumbrances, and that the balance found to be due be paid within a reasonable number of days after such tender, default in payment to be enforced by sale under direction of the Circuit Court and by its further order. This suit for specific performance has accomplished nothing except to settle the controversy betwen the Deskinses and Mrs. Blackham and to determine the question of interest on the purchase money in favor of the defend-

ant. Therefore, the complainants should pay the costs in the court below and in this court.

The decree below is reversed, so far as inconsistent with the rulings of this court as expressed in this opinion, and the case is remanded, in order that said rulings may be carried into effect by suitable orders and decrees.

Decree modified.

WARREN FEATHERBONE CO. v. AMERICAN FEATHERBONE CO. et al.

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

No. 1,089.

1. TRADE-MARKS—NAME GIVEN TO PATENTED ARTICLE—"FEATHERBONE."
The patentee of a new product used as a substitute for whalebone, and made from the quills of feathers, gave the same in the specification the generic name of "Featherbone," by which name it was referred to by him in subsequent patents and became generally known; the word being so defined subsequently in dictionaries, both American and foreign, and used in foreign tariff laws, etc. *Held*, that on the expiration of the original patent the public had the right, not only to make the article, but to sell it by the name "Featherbone," and that such name could not be monopolized by the patentee as a trade-mark for his own manufacture.

2. SAME—UNFAIR COMPETITION.
Evidence *held* not to establish unfair competition by a defendant which engaged in the manufacture and sale of featherbone after the patent thereon expired, as against the owner of the patent, which had previously been the sole manufacturer, merely because defendant used the name "Featherbone," to which it had the right, and the articles themselves from their character were not distinguishable; there having been no attempt to imitate the dress or labels of complainant.

[Ed. Note.—Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

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

This is a bill in equity filed by the appellant July 9, 1903, for alleged violation of its trade-mark or trade-name "Featherbone," and also to enjoin unfair competition in trade. At the circuit the bill was dismissed for want of equity.

The facts are substantially these: Edward K. Warren, the appellant's predecessor, in the year 1883 invented an improvement in "corset-stiffeners," having for its object the utilization as a rib or stiffener for corsets and other articles of dress or fabrics, of the stalks, stems, or quill portions of feathers, and using them as a substitute for whalebone in corsets and other articles of dress, and in surgical appliances. For this invention letters patent of the United States were issued to him October 16, 1883, for a "corset-stiffener" formed of quills or quill splints stripped of the feathers and bound together, as shown and described. In the specification, he termed the improved bone or rib "featherbone."

On February 3, 1885, another patent, No. 311,621, was issued to him for "stiffening-strip and mode of producing the same," being an improvement upon the invention secured by the previous letters patent. In the specification to this patent he states: "By this method of proceeding I produce a firm flat strip of this material, which I have termed 'featherbone,' " etc. The first claim of this patent is for "an improved article of manufacture, the flat strip composed of two or more strands of featherbone cord," etc.

On October 6, 1885, another patent, No. 327,626, was issued to him for a

"method of attaching stiffenings to dress-waists." In the specification the following occurs: "The stiffening material preferred is made of what I call 'featherbone.'"

On September 25, 1888, another patent, No. 389,993, was issued to him for a "garment-stay." The following occurs in the specification: "Furthermore, the stiffening-strip, even when made of featherbone, may be made up," etc.

On May 12, 1896, there was issued to him and to Jonas H. Holden, patent No. 559,827, for "corset-stiffener and method of making same." In the specification to this patent occurs the following: "Our invention relates to improvements in 'featherbone' and in the method of manufacturing the same and to improved apparatus for the purpose. 'Featherbone' is a fanciful name given to the corset-stiffener, for which Edward K. Warren received letters patent No. 286,749, dated October 16, 1883, and letters patent No. 311,621, dated February 3, 1885, issued to him for a further improvement in the manufacture of said featherbone. * * * Our invention has for its objects improvements in featherbone and in the method of manufacturing the same," etc.

On August 17, 1897, another patent was issued to Warren, No. 588,301, for "woven stiffening fabric." In the specification occurs this: "These are preferably made of the fiber of quills of feathers, which are wound similar to the material composing my improved featherbone described in patent No. 286,749, dated October 16, 1883," etc.

On November 22, 1887, there was issued to one Edward B. Cady, letters patent No. 373,720, for "stiffening for corsets" in the specifications to which the following occurs: "In the drawings, A represents a small bundle of the filaments or fibers of sisal, reed, rattan, whalebone, or featherbone, or other equivalent material," and the term "featherbone" in the specifications and in the claims is used seven other times as the name of a material or product.

On August 5, 1884, Warren registered in the Patent Office the name "Featherbone" as a trade-mark, and in that year assigned the same and the business in which he was engaged and with which it was associated, to the appellant, who since has conducted the business referred to in the several patents. The appellant devised various uses for the material "Featherbone," to which it applied peculiar and particular designations, as follows: an "Eyelet Bone" for the foundation of eyelets at the back of dresses; a "Hook and Eye Bone" for the foundation of hooks and eyes in the front of dresses; a single cord "Skirt Bone" for a stiffening for wearing apparel; a double cord "Skirt Bone," a "Three Cord Tape," a "Five Cord Tape," a "Ten Cord Tape," for a variety of uses in stiffening various parts of garments; a "Piping Bone" for stiffening bonnets and for producing a shirring effect in dresses; a "Collar Bone" for stiffening tapes or cords and fabrics for wearing apparel. The words "Skirt Bone" and "Collar Bone" were duly registered as trade-marks. Standard lengths for these various descriptions of goods were adopted by the appellant, and the goods were contained in flat square pasteboard boxes appropriately labeled. The appellant also issued sample books displaying the articles so appropriately labeled. By reason of extensive advertising, and of the excellence of the article, a large trade has been established by the appellant, the sales increasing yearly, from 41,712 yards in the year 1888, to 9,942,104 yards in the year 1902. The article appears to have superseded to a great extent the use of whalebone as a stiffener for wearing apparel.

On April 16, 1901, the appellant filed and registered in the Patent Office, a statement and declaration of trade-mark, No. 36,248, in which it declared that it had adopted for its use a trade-mark for stiffening material, consisting of the representation of a turkey, and asserting that that trade-mark had been continuously used in its business since January 1, 1891; that the class of merchandise to which the trade-mark is appropriated is stiffening material, and the particular description of goods comprised in the class is stiffening tapes, cords, and fabrics for wearing apparel, and is usually displayed upon the box or package containing the goods, but may be affixed to the goods themselves in a suitable manner, and is also used in advertising matter, stationery, etc. The packages or boxes in which the appellant's goods are marketed have conspicuously upon the top, pictures of a feather with the words "Warren's Featherbone" and "Trade-mark," or the picture of a turkey, or of a barnyard containing turkeys, the goods themselves being unmarked.

The appellee, the American Featherbone Company, began in 1902, the manufacture of the article covered by the expired patent issued to Warren, applying thereto the name "Featherbone," but the goods sold by it bore no mark or device except the words, "Made by American Featherbone Company," or "Manufactured by American Featherbone Company," which inscription is stamped or printed upon the goods, or such of them as are capable of having such stamp. The packages containing them are of plain paper, having no pictures or advertisement, and having printed conspicuously upon them the words, "Featherbone —Manufactured by American Featherbone Company." The black goods manufactured by both parties are incapable of being legibly stamped or printed, by reason of their color, and cannot be distinguished from each other when out of the box. The boxes are conspicuously unlike in their markings. It is usual with manufacturers of dress-stays of various kinds to cover their strips with textile fabrics such as silk, satin, etc., in different colors, to ornament the edges with notches, pinking, etc., to ornament the covered strips with longitudinal lines of fancy stitching, and provide the covers with selvages with which to sew them to the garment. The appellant has placed upon the market many different grades of strips with different covers. The appellee company does the like, as do other manufacturers. These ornamental devices are not peculiar to the appellant's goods, but are matters of common usuage. The appellee makes several grades of stiffening strips for certain special uses, the boxes containing them being marked respectively "Featherbone for Skirts, Manufactured by American Featherbone Company"; "Silk Covered Featherbone for Collars. Manufactured by American Featherbone Company;" "Featherbone Cord for Piping. Manufactured by American Featherbone Company."

The Landauer Company were purchasers of goods of the American Featherbone Company.

Chas. K. Offield, for appellant.

John W. Hill and Jacob Rothschild, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts). That Warren was the inventor of a new and useful article may not be denied. The merit of his invention was recognized by the government and monopoly thereof granted to him by the patent of 1883. Warren then coined a new word, "Featherbone," which in the specification to that patent was first employed as descriptive of, and as the name of the article produced by his invention. In all subsequent patents, the name is so used, and it became generally known as the designation of the article itself. Thus in the Century Dictionary, edition of May, 1889, we find the word and its meaning:

"Featherbone. A substitute for whalebone, made from the quills of domestic fowls. The quills are split into strips, which are twisted, and the resulting cords are wrapped together and pressed."

In the Standard Dictionary, edition of 1894, we find:

"Featherbone. A substitute for whalebone prepared from the quills of feathers."

In Murray's English Dictionary, edition of 1901, we find:

"Featherbone. 1887, Chicago Advance, 17 Feb. 112, Featherbone—prepared from the quills of geese and turkeys, is largely taking the place of whalebone in the manufacture of whips."

In the Canadian tariff act of 1900, it is recognized as a known article of commerce, and a duty is imposed upon its importation in these words:

"Featherbone, plain or covered in coils, 20 per cent."

The term has thus become the name of the article produced from the quills of feathers and used as a substitute for whalebone. Indeed, as abundantly appears from the specifications to the various patents, the term was coined by Warren as a generic designation of the product, and not as indicating the origin of the manufacture. It was the name that in the patents he gave to the product of his invention. Under these circumstances the question occurs whether the name of a patented article at the expiration of the patent falls into the public domain with the patented article. We consider this question to be no longer an open one. It has been resolved by the ultimate tribunal (Goodyear Company v. Goodyear Rubber Company, 128 U. S. 598, 9 Sup. Ct. 766, 32 L. Ed. 535; Singer Manufacturing Company v. June Manufacturing Company, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; Elgin National Watch Company v. Illinois Watch Case Company, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; Holzapfel's Compositions Company v. Rahtjen's American Composition Company, 183 U. S. 1, 22 Sup. Ct. 6, 46 L. Ed. 49), and its ruling has been followed and applied by this court (Horlick's Food Company v. Elgin Milkine Company, 56 C. C. A. 544, 120 Fed. 264.)

It was sought at the bar to distinguish the Singer Case from the one in hand, upon the ground that in the former case the three patents covering distinct parts of the Singer machine had expired, while here some of the patents for improvements upon the original method of preparing the article have not expired, and it is said that all of these patents must expire before the public can take the name "Featherbone" for use in respect to the article produced. We think this contention cannot be upheld. The fact was as stated in respect to the Singer Case; but as we read that decision it does not proceed and is not based upon that ground. The general principle is declared and stated. The fact that the several patents had expired was an incident not affecting the decision. Indeed the contention could not well be upheld; for there would then be given to every patentee a monopoly limited in point of time only by the ingenuity with which improvements could be devised and patented. Upon the expiration of the patent, the public had the right to make the article named in the patent, and had the right to call it by the name which the patentee had given to the article. The point is well stated in Linoleum Manufacturing Company v. Nairn, L. R. 7 Ch. Div. 834. The action there was to restrain the use of the word "Linoleum" as applied to floor cloth, the name being given to the article by the patentee. It was a fanciful name and had not been previously used. Upon the expiration of the patent the defendants proposed to make and sell linoleum floor cloth, calling it by that name, and the court observed:

"In the first place, the plaintiffs have alleged, and Mr. Walton has sworn, that, having invented a new substance, namely, the solidified or oxidized oil, he gave to it the name of 'Linoleum,' and it does not appear that any other name has ever been given to this substance. It appears that the defendants are now minded to make, as it is admitted they may make, that substance. I want to know what they are to call it. That is a question I have asked, but I have received no answer; and, for this simple reason, that no answer could be given, except that they must invent a new name. I do not take that to be the law. I think that if 'Linoleum' means a substance which may be made by the defend-

ants, the defendants may sell it by the name which that substance bears. But then it is said that although the substance bears this name, the name has always meant the manufacture of the plaintiffs. In a certain sense that is true. Anybody who knew the substance, and knew that the plaintiffs were the only makers of this substance, would, in using the word, know he was speaking of a substance made by the plaintiff. But, nevertheless, the word directly or primarily means solidified oil. It only secondarily means the manufacture of the plaintiffs, and has that meaning only so long as the plaintiffs are the sole manufacturers."

The court concludes:

"That solidified or oxidized oil may be made by the defendants if they are minded to make it; and if they are minded to call it by the only name which it bears, I think they are at liberty so to do."

Upon the expiration of the first patent to Warren the public had the right to manufacture the article described in the patent and to sell it by the name by which in the patent it was designated, to wit, "Featherbone." If the appellees so exercising that right have infringed upon any subsequent and existing patent, they may be called to account for an infringement of that patented right; but they have the right to designate the article which they manufacture as described in the expired patents, and to call it by its legitimate name, "Featherbone"—a name given to the substance by the patentee.

The second question involved concerns the subject of unfair trade. Notwithstanding the appelleees have a right to the use of the word "Featherbone," they have no right to so disguise their goods that they may be mistaken by a purchaser exercising the ordinary care of purchasers, as and for the goods of the appellant. We have given careful scrutiny to the oral evidence bearing upon this question, and to the exhibits, and find no ground of support for the contention that there has been any unfair competition in trade. There is no proof of actual mistake, and we find no imitation of marks or names, tending to a confusion of goods. While the packages of the appellees bear the name of the article "Featherbone," and rightfully so, as we consider, there is nothing upon them to indicate that they contain goods manufactured by the appellant. To the contrary, there is an entire absence of all the distinguishing marks which appeal to the eye, to be found upon the packages of the appellant, and the name of the manufacturer, "American Featherbone Company," is plainly and unmistakably imposed thereon. In the one case, the covers of the boxes containing the product are covered with advertising matter relating to the article; in the other the cases are perfectly plain. We should not hesitate to restrain any attempt by the appellee to palm its goods upon the public as the goods manufactured by the appellant; but we fail to find in this record any evidence warranting the suggestion of such imposition. It may be that the goods themselves may not be distinguishable from the goods manufactured by the appellant. That arises from the character of the article and that it is incapable of distinguishment, except as the name of the manufacturer is stamped upon it; but the marks upon the packages which contain the goods and in which they are sold, bear no resemblance to each other, except in the use of the word "Featherbone."

The decree is affirmed.

CHICAGO MOTOR VEHICLE CO. v. AMERICAN OAK LEATHER CO. et al.

(Circuit Court of Appeals, Seventh Circuit. August 1, 1905.)

No. 1,175.

1. BANKRUPTCY—PROCEDURE—POWER TO PERMIT AMENDMENT OF PETITION.
A petition in involuntary bankruptcy alleged certain specific acts of bankruptcy, and also contained a general allegation of the giving of preferences to other creditors, whose names were unknown to the petitioners. No objection was made to the petition, issue was joined, a jury waived, and the cause sent to a referee as special master, before whom a large amount of testimony was taken, some of which related to preferential transfers not specified in the petition. No objection was made on that ground, but defendant also introduced testimony relating to the same transfers, which were found by the referee to constitute acts of bankruptcy. *Held*, that such findings were justified under the circumstances, and that the court had power to pass on the sufficiency of the petition, and in its discretion to permit an amendment, alleging such specific transfers as acts of bankruptcy, which amendment dated back to the filing of the petition.

2. SAME—INSOLVENCY OF CORPORATION—EVIDENCE CONSIDERED.
Evidence taken before a referee as special master on a petition in involuntary bankruptcy against a corporation, and the answer thereto considered, and *held* to sustain the referee's findings of insolvency and of the commission of acts of bankruptcy, under the rule that such findings are to be taken as presumptively correct.

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

This appeal is from an adjudication of involuntary bankruptcy against the Chicago Motor Vehicle Co., appellant, entered in the District Court February 3, 1905, upon report of a referee, as special master, and hearing upon exceptions. Petition by three creditors for such adjudication was filed October 12, 1903, averring insolvency of the appellant and the commission of acts of bankruptcy within four months. It specified three instances of alleged preference within four months, and while so insolvent, with intent to prefer the three creditors named, and avers that like preferences were given within such time "to certain of its creditors, whose names are at present unknown" to the petitioners, "to the amount of at least five hundred dollars." The appellant filed two answers—first, a denial of insolvency and of the commission of the acts of bankruptcy alleged, with demand of a jury trial, and, subsequently, specific denials of the several allegations, with various averments of matters not within the statutory issues. On the application of all parties, March 23, 1904, upon waiver of trial by jury, an order was entered in the District Court that the issues be "specially referred to Referee F. L. Wean, on the original petition and answer thereto, to hear, take proofs, and report his conclusions and recommendations." The hearing before the referee was extraordinary in the time occupied and the extent and diffuseness of the testimony upon these issues. The report of the referee was made September 30, 1904, reviewing the testimony at considerable length, and finding against the appellant upon the issues of insolvency and commission of acts of bankruptcy, which were the only contested matters. In substance, his conclusions upon the insolvency issue were: That the indebtedness was "at least $212,000;" that a fair valuation of the assets (consisting of a manufacturing plant, products, and materials, with accounts and bills receivable of doubtful value) is difficult to ascertain under evidence "almost irreconcilably conflicting," but that $150,123.56 is "the maximum that can be allowed as a fair valuation of all the property" on October 12, 1903; that the aggregate during the four months theretofore "was not, at a fair valuation, sufficient to pay all its

debts." Upon the issue of acts of bankruptcy, the referee finds preferential transfers and payments, within the four-months period, to three specified creditors, namely: (1) Donaldson, who was president of the appellant, (2) Worth, one of its officers, (3) Caldwell, an employé; also, a doubtful transaction with one Bronson, through Donaldson, and that others appeared of a similar nature, and all "constituted acts of bankruptcy." Neither of the preferences referred to is specifically mentioned in the original petition, nor is there any finding upon either of the preferences so specified. Both parties filed certain exceptions to the report, and hearing in the District Court occured, resulting in orders January 9, 1905, (1) overruling the exceptions and approving the report, and (2) adjudicating bankruptcy. On January 10, 1905, all parties appearing, the orders last mentioned were vacated, and new orders were entered, namely: (1) Granting leave to petitioning creditors (who had intervened, by leave of court, April 12, 1904) "to file instanter their amended petition," wherein the acts of bankruptcy so reported by the referee were specified; (2) the exceptions on the part of the bankrupt to the report were overruled, and the report approved, the bankrupt excepting, and praying an appeal, for which appeal bond was fixed; and (3) an adjudication of bankruptcy in a separate order of like date. Confusion appears to have arisen in the attempted appeal, and on February 3, 1905, the former adjudication of bankruptcy was vacated, and a new adjudication was then entered of that date, from which this appeal is prosecuted.

E. E. McKay and S. M. Meek, for appellant.

Jacob Newman and S. O. Levinson, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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

The only questions arising upon this appeal are a single one of bankruptcy practice and two issues of fact. Error is assigned upon various rulings of the referee in the admission or rejection of testimony, and these rulings are pressed in the argument for reversal; but we are of opinion that no reversible error appears in either, and that neither of such assignments touches the merits of the controversy or justifies discussion. While the question of practice is complicated in the methods pursued by both parties to the controversy, its solution is free from difficulty when the proceedings are considered as an entirety. The appellant contends, in effect, that the petition on which the issues were referred confers no authority to hear the testimony or find the acts of bankruptcy reported by the referee, and that the District Court was without jurisdiction to allow the amendment to take effect as of the date when the original petition was filed, or to adjudge bankruptcy upon the report. Neither of these propositions is tenable. It is true that the original petition was defective in the allegation of other acts of bankruptcy than those specifically described. On objection raised before answer, or in the course of hearing, under the well-recognized practice, the District Court would either have required specification of any further acts, by way of amendment, as a condition precedent to the introduction of proof, or stricken out the general averments. Instead of thus calling attention to the defect, the appellant elected to take issue upon this general allegation by express denial, and proceeded upon the hearing without an objection, even before the referee, which raises the question. Upon the oral argument counsel for the appellant reasserted, in substance, the statement which appeared in their brief, "that on every

occasion, when this class of proof was offered by petitioners, objection was made" (referring to pages of the record there cited), and leave was given to furnish any further citations from the record in a supplemental brief to be filed. That brief is at hand, but without supporting references. On examination of the pages relied upon, the objection appears, in like general form with those interposed to all classes of testimony, in remarkable frequency throughout the record, and in one instance, only, refers to the petition. A witness, who was the representative of the receiver, after mentioning property on hand, had testified that certain machines were not found which the books indicated to be in stock, and named as claiming their ownership two persons (Worth and Caldwell), both employés of the company; also, that witness had made demand of Caldwell, who refused to deliver the property. Upon inquiry as to the claim then made by Caldwell, one of the counsel for the bankrupt objected, "on the ground it is not based on the petition, and the further ground that it is not competent." The answer was received, and the examination proceeded, with much cumulative testimony introduced tending to prove preferential transfers within the four months to numerous persons not named in the petition, and it does not appear that the want of sufficient allegations in the petition was expressly called to attention at any stage, nor was the abovementioned form of objection renewed, and no motion appears to strike out testimony for such cause. Indeed, it appears that much testimony on the part of the appellant was directed to these unspecified transactions. No surprise is suggested, and it is obvious that ample time was afforded to meet the evidence received under the general allegation. The contention that the objection was well and seasonably raised before the referee is plainly without merit.

The evidence being thus received and reported to the court with the finding of facts, the doctrine is well settled that the jurisdiction of the District Court was complete, both to determine whether the petition was sufficient in form to cover these facts, and to allow amendment of the petition if deemed insufficient, and that an amendment so allowed and made "relates to and takes effect as of the date of the filing of the original petition." The case in that respect is ruled by the decision of this court in Re Shoesmith, of the present term (135 Fed. 684, 688, 68 C. C. A. 322), and the allowance was within the judicial discretion, whether necessary or unnecessary at that stage. See The Tremolo Patent, 23 Wall. 518, 527, 23 L. Ed. 97; Graffam v. Burgess, 117 U. S. 180, 194, 6 Sup. Ct. 686, 29 L. Ed. 839.

The questions of fact are: (1) Whether the findings of insolvency are established by the evidence, and (2) whether the preferential transfers found by the referee are alike well founded. The answer to the first question will dispose of the second, as the facts of the several transfers are substantially undisputed, and the further inquiries of insolvency in fact and imputed knowledge thereof in either instance are the only debatable element.

The issues were sent to the referee, as special master, "to hear, take proofs, and report his conclusions," on the application and consent of all parties. Thus the appellant waived its right to a jury trial, and

chose submission of the controversy to the master, not as the mere recorder of the testimony, but as the tribunal of first instance to determine the ultimate facts. In such case the findings "are to be taken as presumptively correct," and are reviewable only "when there has been manifest error in the consideration given to the evidence or in the application of the law." Kimberly v. Arms, 129 U. S. 512, 524, 9 Sup. Ct. 355, 32 L. Ed. 764; 11 Rose's Notes U. S. Rep. 713; Tilghman v. Proctor, 125 U. S. 136, 149, 8 Sup. Ct. 894, 31 L. Ed. 664; Callaghan v. Myers, 128 U. S. 617, 666, 9 Sup. Ct. 177, 32 L. Ed. 547. The rule so stated is plainly applicable for just consideration of the mass of conflicting testimony introduced upon this hearing to ascertain the value of the assets, on which the question of insolvency hinges. As the referee heard the witnesses, his judgment of the relative value and credibility of their testimony is entitled to affirmance under these conditions, unless it appears that it rests upon an erroneous theory of valuation, or controlling testimony was disregarded in his conclusions. The report of the referee contains a review of the testimony, and is convincing that there was no departure from the rule of fair valuation of assets, as defined under the bankruptcy act; that the findings are well supported by competent evidence; and that the valuations submitted on behalf of the appellant were generally excessive—grossly so in respect of patents and manufacturing plant in any view. This consideration of the findings is strengthened by their confirmation upon review and full hearing in the District Court. So, were it not for the contentions in argument and briefs on behalf of the appellant that both testimony and findings are erroneously and manifestly predicated upon "wrecker's prices" and "scrap values," and not upon fair valuations as a going concern, the general rule above cited would authorize affirmance of the report and order, without reviewing the testimony on valuations; and it may well be remarked that the briefs do not clearly point out the errors complained of.

On examination, however, of the testimony referred to, it satisfactorily appears that the evidence supports the finding of fair valuation of the aggregate of the appellant's property, and that the complaints so earnestly pressed are not well founded. These general facts unmistakably appear: That the corporation was organized and its operations carried on during its brief existence with insufficient capital to accomplish the business sought; that the patents, which entered largely into the capitalization, however valuable as contributions to the venture, were available only when sufficient cash, or other means, was contributed to manufacture and market the products, and their fair valuation was problematical; that the operations were hampered and success constantly threatened because available means were not at hand; that, whatever of promises in future business were thus far indicated in production and sales, a successful business was not well established and not well assured without further capital; and, finally, prior to October, 1903, creditors were pressing, and urgent demands for pay rolls and other needs were relieved only through temporary loans upon pledges of goods and like expedients of the debtor in a struggle to carry on business with insufficient cash and credit. The real estate, buildings, and fixed machinery

of the concern were purchased in the year 1900 for $30,000 (an old plant formerly used for other manufacturing purposes), but entered on the books of the appellant immediately at $150,000. Improvements and repairs made by the appellant aggregated less than $15,000, as indicated by the books. While it is generally difficult to fix the fair market value of such property—and plainly neither the purchase price nor the valuation placed upon the books of the corporation is controlling—the referee's approximation of $50,000 impresses us as reasonable and fair under the testimony, with reference to all the conditions existing October 12, 1903. For valuation of the patents, the testimony furnishes little aid, and from the nature of the property right, it is difficult, if not impossible, to fix any market value upon the patents mentioned. If credible testimony appears which tends to show the validity, utility, and intrinsic value of either, it is not referred to in the briefs. The testimony on the part of the appellant of purported offers made for certain of their patents was rightly disregarded by the referee, for the sufficient reason, if otherwise entitled to consideration, that neither bona fide intention to purchase nor ability to consummate was apparent; and the valuation stated by the witnesses for the appellant were neither well founded nor credible. Surely no ground appears to raise the estimate reported by the referee upon the patents. Other exceptions to the valuations so reported do not justify discussion in detail, as it is manifest that the aggregate valuation of the property, in any view of these minor valuations, was insufficient to pay the conceded indebtedness of the corporation. No reversible error appearing, the finding thereupon will not be disturbed.

So, in respect of the finding that acts of bankruptcy were committed, both the fact of insolvency and imputed knowledge, in three instances of preference, at least, unmistakably appear and sustain the finding.

The order of the District Court that the appellant be adjudged bankrupt accordingly is affirmed.

BANK OF HAVELOCK v. WESTERN UNION TELEGRAPH CO.

(Circuit Court of Appeals, Eighth Circuit. November 16, 1905.)

No. 2,143.

1. TELEGRAPH COMPANIES—NEGLIGENCE—CARE TO ASCERTAIN IDENTITY AND AUTHORITY OF SENDERS OF MESSAGES—EXTENT AND LIMIT.

In the absence of notice of facts or circumstances which would awaken inquiry and arouse suspicion in the mind of a person of ordinary prudence and intelligence in a like situation regarding the authority to send it of the party who presents a message for transmission, the exercise by a telegraph company and its operators of reasonable care to receive and transmit genuine and authorized messages only does not require them to investigate or ascertain the identity, or authority to send it, of the person who tenders a message for transmission, whether that message is in writing, or is spoken directly to the operator, or is communicated to him by telephone.

But, when such facts or circumstances come to the notice of the company, or of its acting operator, the exercise of reasonable care to transmit genuine and authorized messages only requires the party who receives the notice either to investigate and ascertain the authority of the sender be-

fore transmitting the message, or to communicate the facts and circumstances and the inquiry or suspicion to the addressee at or before its delivery.

2. SAME—FALSE REPRESENTATION BY UNAUTHORIZED TELEGRAM—DAMAGES.
Action by mortgagees against a telegraph company for loss of their lien on cattle worth $3,500, caused by the receipt over the telephone, from one whose voice was not known to the operator and who had no authority to send it, and the transmission to the plaintiffs to whom it was addressed, of this telegram: "We will pay Barnes' draft for thirty-five hundred. Bank of Denison." *Held:*
(1) The telegram was not so indefinite that reliance and action might not lawfully be based upon it.
(2) The loss of the lien upon the cattle was not an unnatural or improbable effect of the delivery of the telegram, and the damages resulting from this loss were not too remote to warrant a recovery.
(3) A draft by Barnes was not essential to the maintenance of the plaintiff's action for the false representation embodied in the telegram and the resulting damage.

3. SAME—ACTION FOR DIMINUTION OF LIEN—SUFFICIENCY OF REMAINING SECURITY NO DEFENSE.
It is no defense to an action by mortgagees against a stranger for causing the loss of their lien upon some of the mortgaged property that it still covers an amount sufficient to secure the payment of the mortgage debt.

4. APPEAL—REVIEW—DIRECTED VERDICT ON SPECIFIC GROUNDS—WHEN PREJUDICIAL.
When a verdict is directed on specific, but untenable, grounds, it may not be affirmed on other grounds, unless it is clear beyond doubt that the new grounds could not have been obviated if they had been called to the attention of the defeated party at the time the verdict was rendered.
But, when the defeated party has introduced at the trial all the legal evidence he offered and has rested his case, he has thereby estopped himself from denying that he can do no more to overcome the objection that the evidence is insufficient to sustain a verdict in his favor; and if the bill of exceptions contains all the evidence, and it is clear beyond doubt that it would not sustain a verdict in his favor, an instruction by the court to return a verdict against him upon some other, but untenable, ground is error without prejudice, and no ground for reversal.

5. PLEADING—TRIAL OF ISSUES NOT RAISED BY PLEADINGS WAIVES THE PLEADINGS.
The trial of issues tendered by a pleading as though they had been properly made, in the absence of any plea, answer, or replication which raises them, estops the parties from subsequently denying that the issues were duly made, and from taking any advantage of the lack of the plea, answer, or replication.

(Syllabus by the Court.)

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

D. M. Kelleher (F. H. Helsell and Healy Bros., on the brief), for plaintiff in error.

H. D. Estabrook, Asa F. Call, and Rush Taggart (George H. Fearons, Craig L. Wright, and John F. Dillon, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

SANBORN, Circuit Judge. The plaintiffs constituted a copartnership under the title of the "Bank of Havelock," and they sued the

Western Union Telegraph Company, a corporation, for damages in the sum of $3,500, because it received by telephone from some one at Denison, in the state of Iowa, who had no right to send it, and delivered to the plaintiffs, this telegram:

"Dated Denison, Iowa, Feb. 28, 1902.

"To the Bank of Havelock: We will pay Barnes' draft for thirty-five hundred. Bank of Denison."

At the time this telegram was received the plaintiffs had a chattel mortgage on some cattle of the value of $3,500, which Barnes had bought, and they were induced by the telegram to lose their lien upon and to surrender the cattle to him. On March 25, 1902, Barnes made a draft on the bank of Denison in favor of the plaintiffs for $3,500, but the drawee refused to pay it. The Bank of Denison was a copartnership, composed of Leslie M. Shaw and Carl M. Kuehnle. These partners, Charles E. Voss, the cashier, and A. B. Lorenson, were the only persons who had authority to send such a telegram, or to act for the bank in any way. E. G. Lyman was the operator of the defendant at Denison, who received the telegram over the telephone and sent it to the plaintiffs. He had been in his position from February 5, 1902. He did not know the voice of the person who gave him the telegram, but took it for granted that it was the voice of some one who had the right to send it. He knew Voss, the cashier, and did not think that the voice was his. He subsequently became acquainted with Barnes, but could not say that he recognized the voice as that of Barnes. He did not know who gave him the message, because he did not recognize the voice which communicated it to him. The foregoing facts were proved at the trial, and there was no evidence tending to prove any other facts which were material to the decision of the case before us.

At the close of the evidence counsel for the defendant made a motion, which the court granted, for an instruction to the jury to return a verdict for their client upon the specific grounds that plaintiffs had never taken or expended anything for any draft in reliance upon the telegram, that the telegram was so indefinite that they had no right to rely upon it, and that the plaintiffs had no right to recover for the surrender of the cattle, or for the loss of their lien upon them, because the telegram contained no agreement to indemnify them against any such loss, nor was the release of such security within the contemplation of the parties. This ruling is assigned as error. It is true that the plaintiffs never paid out or lost anything by taking or relying upon any draft of Barnes, and that they were not entitled to recover at the trial upon that ground. But the Bank of Denison refused to pay the draft of Barnes on March 25, 1902, and it would not have paid it at any time after the telegram was delivered, if it had been presented. The telegram was not so indefinite or uncertain that reliance and action might not have been lawfully founded upon it. It contained a direct promise to pay Barnes' draft for $3,500, and if it had been authorized by the Bank of Denison, and the plaintiffs had procured and paid value for a draft of Barnes for that amount, within a reasonable time after they received the telegram, they would have had a perfect cause of

action against the Bank of Denison for its amount. Coolidge v. Payson, 2 Wheat. 66, 4 L. Ed. 185; State National Bank v. Young (C. C.) 14 Fed. 889.

While the plaintiffs parted with no property in reliance upon the draft, they were induced by the telegram to surrender the cattle and to lose their lien by mortgage upon them, and they thereby lost $3,500 of their security for their claim against their debtor. Why were they not entitled to recover back this amount? Counsel for the telegraph company answer (1) because the plaintiffs surrendered the security on the cattle in reliance upon the promise of Barnes to make his draft on the Bank of Denison, and not in reliance upon the telegram; (2) because the failure of Barnes to make his draft was, and the telegram was not, the proximate cause of the loss; and (3) because the plaintiffs had ample security for their debt after the loss of their lien upon the cattle bought by Barnes, so that they never sustained any damage. The evidence, however, does not sustain these positions. It is that the plaintiffs refused to surrender the cattle or their lien upon them for the promise of Barnes to make his draft, or for the draft itself, and that they were induced to lose their lien by the telegram in evidence only. The failure of Barnes to make his draft was not the proximate or other cause of the loss of the plaintiffs, because the proof is that they would not have surrendered the cattle or their lien upon them upon the faith of it, and that the Bank of Denison would not have paid it in any event, so that its execution and presentation would have been nothing but one of those idle ceremonies which the law never requires. The proof is clear and convincing that the telegram was the proximate cause of the loss. Without it the plaintiffs would never have lost their lien upon the cattle without payment of their purchase price, and would never have suffered the damages they claim.

It is conceded that, if the telegram had been genuine, the plaintiffs could not have recovered of the Bank of Denison, unless they had purchased or discounted a draft of Barnes upon that bank for value. This, however, is because their cause of action against that bank would have arisen upon contract, if at all, and that contract would not have been made until the plaintiffs had accepted the offer tendered by the telegram, according to its terms. The action in hand, however, against the telegraph company, is not an action upon a contract, but is an action for a tort. The gravamen of this suit is false representation and resulting damage, and the acceptance of the apparent offer which the Bank of Denison never made neither conditioned nor limited it. The facts that the telegraph company, in violation of its duty of reasonable care, falsely represented to the plaintiffs that the Bank of Denison had promised to pay the draft of Barnes for $3,500, and that the plaintiffs, in reliance upon the truth of that representation, surrendered its lien upon cattle of the value of $3,500, constituted a perfect cause of action, and entitled the plaintiffs to a judgment. One who wrongfully deceives or misleads another, to whom he owes the duty of truthful statement, to his damage, is liable for the natural and probable consequences of his act. The natural and probable effect of the false telegram was the expenditure or the loss by the addressee of $3,500

upon the faith of it, and this loss by the surrender of the cattle, or of a lien upon them, was not so remote as to be either an unnatural or improbable effect of it. Marshall v. Buchanan, 35 Cal. 264, 95 Am. Dec. 95; Benton v. Pratt, 2 Wend. 385, 20 Am. Dec. 623; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30.

Nor can the defendant escape judgment for the loss inflicted because the plaintiffs have other security sufficient to satisfy their claim against the mortgagor. They had the right, as against the telegraph company, to all the security which they had obtained, and the depreciation or abstraction of any part of it by the latter was wrongful. It does not lie in the mouth of the telegraph company, after it has depreciated the security of the plaintiffs' $3,500, to say that it is not liable to make compensation for the loss because the plaintiffs have the power to inflict it upon the mortgagor. It is no answer to a suit by a mortgagee against a stranger for the removal of timber or houses or other valuable property from mortgaged lands, or for the conversion of mortgaged chattels, that the claim of the mortgagee is amply secured without the timber or houses taken or the chattels converted. And it is no defense to an action by a mortgagee for the loss of security caused by false representations that the plaintiff's claim is amply secured, notwithstanding the loss. A mortgagee is entitled to recover of a wrongdoer the value of the mortgaged property he has taken from the lien of the mortgage, although that lien still holds sufficient to secure the debt, and he is not required to inflict the loss upon the mortgagor. Shapard v. Hynes, 45 C. C. A. 271, 104 Fed. 449, 52 L. R. A. 675; Allen v. Butman, 138 Mass. 586, 587; Stevenson v. Lord (Colo. Sup.) 25 Pac. 313. The result is that the motion for a directed verdict should not have been granted for any of the reasons stated therein.

But counsel for the defendant insist that there was not sufficient evidence of the negligence of the defendant in the receipt of the telegram to sustain a verdict against it, and that the ruling of the court, if erroneous, was error without prejudice, and therefore no ground for reversal. The first paragraph of the argument of counsel for the plaintiffs is devoted to a discussion of the law and a citation of the authorities upon this question, but in their reply brief they insist that the sufficiency of the evidence of negligence is not open for consideration at this time (1) because that question was not presented by the motion or considered by the trial court, and (2) because after the defendant had answered the original petition, and had denied its material averments, the plaintiffs amended it by modifications of, and additions to, some of its allegations, and by adding to it a second count, wherein they set forth the same cause of action pleaded in the original petition in different and somewhat broader terms, and no answer to this amended petition was ever made. The presumption is that error produces prejudice, and it is only when it is clear beyond doubt that none resulted, or could have resulted, from an erroneous ruling that the judgment may be lawfully affirmed. Deery v. Cray, 5 Wall. 795, 807, 808, 18 L. Ed. 653; U. S. v. Gentry, 55 C. C. A. 658, 663, 119 Fed. 70, 75. Hence when a verdict is directed on limited, but untenable grounds, it may not stand on other grounds, unless it is clear beyond

doubt that the new grounds could not have been obviated if they had been called to the attention of the defeated party at the time the motion was made. Peck v. Heurich, 167 U. S. 624, 17 Sup. Ct. 927, 42 L. Ed. 302; Currier v. Dartmouth College, 117 Fed. 44, 47, 54 C. C. A. 430, 433. But where parties have produced all their evidence, and the court has received it, and they have rested their case at the trial, they have thereby admitted, and in that way estopped themselves from denying, that they can do no more to overcome the objection that the evidence is insufficient to sustain a verdict in their favor, because the question of the sufficiency of the evidence always arises in every case before its submission to a jury, and it is the province and duty of the court to determine it. Cole v. German Savings & Loan Soc., 59 C. C. A. 593, 602, 124 Fed. 113, 122, 63 L. R. A. 416; Brady v. Chicago & G. W. Ry. Co., 114 Fed. 100, 105, 52 C. C. A. 48, 52, 53, 57 L. R. A. 712; Railway Co. v. Belliwith, 83 Fed. 437, 441, 28 C. C. A. 358, 362; Commissioners v. Clark, 94 U. S. 278, 284, 24 L. Ed. 59; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 733, 8 Sup. Ct. 266, 31 L. Ed. 287; Railway Company v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213. In W. B. Grimes Dry Goods Co. v. Malcolm, 164 U. S. 483, 491, 17 Sup. Ct. 158, 41 L. Ed. 524; Id., 7 C. C. A. 426, 427, 58 Fed. 670, 671, the trial court directed a juror to consent to a verdict because he had once agreed to it, although he protested that it was not his verdict before the court had received it. But the Supreme Court and this court held that the error was not prejudicial, and affirmed the judgment, because the record clearly showed that the evidence warranted a peremptory instruction and would not have sustained any other verdict, although that question had not been presented to the trial court by motion or suggestion, and it had submitted the case to the jury. When a defeated party has been permitted to present, and has introduced, all the legal evidence which he offered, has rested his case, and the court has instructed the jury to return a verdict against him upon a specified, but untenable, ground, its action is error without prejudice, and will not warrant a reversal of the judgment, where it is clear beyond doubt from a bill of exceptions, which contains all the evidence, that it would not sustain any other verdict. Smiley v. Barker, 28 C. C. A. 9, 13, 83 Fed. 684, 687; Moffat v. Smith, 41 C. C. A. 671, 101 Fed. 771; Baker v. Kaiser, 61 C. C. A. 303, 305, 126 Fed. 317, 319. A consideration of the sufficiency of the evidence, therefore, cannot be avoided, because this was not one of the reasons for the directed verdict specified in the motion.

Nor does the absence of an answer to the amended petition relieve us from this duty. The material averments of the original petition were denied in due time by a proper answer. The amended petition pleaded the same cause of action. The failure to answer it entitled the plaintiffs to judgment by default. They never applied for such a judgment. They never suggested the absence of an answer, or the admission of the averments of the amended petition by the defendant, until their counsel filed their reply brief in this court. They appeared in the court below, introduced evidence and tried this action as though the averments of the amended petition had been denied by a formal

answer, and it is now too late for them to insist upon its absence for the first time in this court. Their silence upon this subject induced the defendant and the court below to expend time and labor in the trial of issues which they tendered in their amended petition in the belief that these issues were raised by the pleadings and that it was their duty to try them, and they are now estopped from denying that these conclusions were correct. The trial of issues tendered by a pleading, in the absence of a plea, answer, or replication which raises them, as though they had been thus presented, estops the parties from subsequently denying that the issues were properly made, and from taking any advantage of the absence of such a plea, answer, or replication. Keator Lumber Co. v. Thompson, 144 U. S. 434, 437, 12 Sup. Ct. 669, 36 L. Ed. 495; North Chicago St. Ry. Co. v. Burnham, 42 C. C. A. 584, 586, 102 Fed. 669, 671; Schuster v. Carson, 28 Neb. 612, 615, 44 N. W. 734; Wright v. Waddell, 89 Iowa, 350, 364, 56 N. W. 650; Anderson v. Independent School District (C. C.) 78 Fed. 750, 751; Loomis v. Riley, 24 Ill. 307, 309; Clark v. City of Austin, 38 Minn. 487, 38 N. W. 615. The record in this case contains all the evidence at the trial, and the question therefore becomes instant and unavoidable whether or not it is clear beyond doubt that the evidence of the negligence of the telegraph company was insufficient to sustain a verdict against it.

The question is essentially one of law. The action is for damages caused by the false representation of the defendant, contained in the telegram, that the Bank of Denison sent it. There was no actual intent by the defendant to deceive the plaintiffs and the sole basis of the action is that the deceit and damage were caused by the breach of the duty of the defendant and of its operator, Lyman, to exercise reasonable care to ascertain whether or not the person who spoke the telegram to the operator over the telephone was authorized by the Bank of Denison to do so. The facts are undisputed. There were three persons, Kuehnle, Voss, and Lorenson, who had lawful authority to telephone the message to the operator in the name of the bank, or to empower others to do so. Lyman subsequently became acquainted with Barnes, and could not say that the dispatch was communicated by his voice. He knew Voss, and thought that the message was not spoken by his voice. It might have been lawfully communicated by the voice of Kuehnle or of Lorenson, or of some other person whom one of them or the cashier directed to do so. Lyman did not recognize the voice of the person who sent it, and did not know whose it was. But he took it for granted that it was the voice of some one who had the right to communicate it and to direct its transmission. This is all the testimony upon this subject, and it discloses nothing in the situation or transaction to warn the operator, or to arouse his suspicion, that the telegram was not spoken to him by one who had the legal authority to send it on behalf of the bank. It presents this question: Does the discharge of the duty which a telegraph company owes to the addressee of a message to exercise reasonable care to receive and transmit it correctly and speedily, so that it will represent the truth, require its operators to investigate and ascertain the identity or authority of those from whom they receive messages by telephone or otherwise?

Our attention has been challenged to sections 2161–2164 of the Code of Iowa of 1897. Section 2161 provides that, if the proprietor of a telegraph company refuses to transmit messages "with fidelity and without unreasonable delay," it shall no longer have the right of eminent domain, or be protected by the laws relating to corporations. Section 2162 requires every person employed in transmitting messages by telegraph to do so "with fidelity and without unreasonable delay," and imposes a penalty for failure to do so and for "willfully and wrongfully" taking or receiving any such message. Section 2163 provides that the proprietor of a telegraph line—

"Is liable for all mistakes in transmitting or receiving messages made by any person in his employment or for any unreasonable delay in their transmission or delivery and for all damages resulting from failure to perform the foregoing or any other duty required by law."

Section 2164 declares that in any action against any telegraph company for damages caused by erroneous transmission of a message, or by unreasonable delay in delivery of a message, negligence on the part of the telegraph company shall be presumed upon proof of erroneous transmission or delivery. These provisions of the statutes are significant, both in what they contain and what they omit, and they indicate the true boundaries of the duties of telegraph companies. They prescribe their duty to exercise reasonable care to receive, transmit, and deliver messages speedily and without mistakes, and they impose penalties for failures to do so. But they do not charge upon such companies the duty to ascertain the identity or authority of those who tender messages to send them, nor do they impose any liability or penalty for a failure to do so. They recognize the fact that the business, and hence the duty, of telegraph companies, is to speedily and correctly transmit the messages presented to them, not to investigate, ascertain, or guaranty their truth, or the identity or the authority of those who send them. The act or the alleged neglect of which the plaintiffs complain in this case is not one of those denounced in these statutes, and they have no farther relevancy in this action. The defendant's alleged neglect is not a failure to transmit speedily or correctly, or to receive without mistake, the message tendered to the operator at Denison. The testimony is clear and undisputed that he received and transmitted without mistake the message which was spoken to him over the telephone. Did he fail to discharge his duty because he did not ascertain the authority of the person who spoke it to send it in the name of the bank?

The great purpose of telegraphy is the quick transmission of messages from senders to addressees. In the conduct of this business all other considerations are subordinate. The telephone furnishes the most speedy and convenient means of communicating these messages from the senders to the offices of the telegraph companies, and from these offices to the addressees of the messages. For this reason its use for this purpose has become general throughout the land. The persons who operate the telephones are not generally the business men or officers of corporations in whom the authority to send the telegrams is vested in the first instance, but young men and women to

whom this authority is delegated by parol, frequently through several intermediaries. An inquiry and decision by telegraph operators of the identity and authority of those who speak the messages over the telephone are utterly incompatible with their rapid receipt and transmission, and a new duty to investigate and determine this authority before sending the messages, a duty which would be so deleterious to the prime object of the business of telegraphy, ought not to be imposed without great hesitation. It is true that the use of new inventions often creates new rights and imposes new duties. But the duty was never imposed upon telegraph companies before the use of telephones to ascertain the genuineness of the signatures to written messages, and the authority of those who presented them to direct their transmission, and no reason occurs to us why a duty of this nature should now be imposed upon them in receiving messages by telephone.

Moreover, the imposition of such a duty by the decision, which counsel for the plaintiffs seek, that the exercise of reasonable care in the receipt of messages by telephone requires inquiry and determination of the identity and authority of those who communicate them, would be violative of the basic principle of business and judicial action. Such a rule must be founded upon the erroneous presumption that men are generally deceitful and dishonest, and it would be destructive of itself. If the telegraph operator must presume that one, with whose voice he is not familiar, who speaks a message to him over the telephone or otherwise, is deceitfully impersonating another, or is without authority to send it, then by the same mark he must presume that the statements of those who identify the sender, or vouch for his authority, are also false and fraudulent, and his investigation would be both tedious and futile. The truth is that the great majority of private citizens and public officials alike are honest and truthful, and that the entire civic fabric rests upon the fundamental presumption that they are so. Business cannot be transacted, contracts cannot be made and enforced, the rights of citizens cannot be measured and protected by the courts upon any other presumption than that men and women are honest, truthful, and innocent of wrong until the contrary appears. The telegraph company and its employés may, like all others, safely rely upon this presumption in receiving messages either in writing or by parol. In the absence of notice of facts or circumstances which would suggest or arouse suspicion in the mind of a person of ordinary caution of false impersonation, or of want of authority, the exercise of reasonable care by a telegraph operator to receive messages from those only who have authority to send them does not require him to investigate the identity or authority of those who present them, whether the messages are in writing, or are spoken directly or over the telephone by unfamiliar voices. He may take it for granted that those who present them have the right to send them. Western Union Tel. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1. A care which would delay messages presented to the operator by a person, or by a voice unknown to him, until he could inquire and ascertain the identity and authority of the persons who present them, would not be ordinary, but extraordinary, care, for it would be a care

which persons of ordinary caution and intelligence do not exercise in similar situations. It would not be reasonable, but unreasonable, care, because it would prevent the speedy transmission of messages and thwart the main purpose of telegraphy.

But notice of facts and circumstances which would put a person of ordinary caution upon inquiry is notice of all the facts to which a reasonably diligent inquiry would lead. And, whenever facts or circumstances come to the notice of a telegraph company, or of its operators, which would arouse the suspicion of a person of ordinary prudence and intelligence in a like situation, and would suggest to his mind that the party who presents the message is not authorized to send it, the exercise of reasonable care requires them either to investigate and ascertain his authority before transmitting it, or to communicate the facts and circumstances and the suspicion to the addressee at or before the delivery of the message. Elwood v. Western Union Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140; McCord v. Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315, 1 L. R. A. 143, 12 Am. St. Rep. 636; Pacific Postal, etc., Co. v. Bank of Palo Alto, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711; May v. Western Union Tel. Co., 112 Mass. 90; Bank of California v. Western Union Tel. Co., 52 Cal. 280.

Many authorities have been cited and considered in reaching these conclusions. Cases which involve mistakes in the transmission of messages, like Strause v. Western Union Tel. Co., 8 Biss. 104, Fed. Cas. No. 13,531, and Fererro v. Tel. Co., 9 App. D. C. 455, have little relevancy to the question here in hand, because the law is well settled that it is the duty of a telegraph company to exercise reasonable care to correctly communicate the messages it receives to those to whom they are addressed. Nor is the case of Western Union Tel. Co. v. Uvalde National Bank (Tex. Civ. App.) 72 S. W. 232, Id. 77 S. W. 603, 606, 65 L. R. A. 805, either material or persuasive. In that case a telegraph operator gave the call for a certain town to a member of his union, who tapped one of the company's wires and sent such forged messages to a bank that it cashed a worthless draft. The courts of Texas held that the company was negligent, either because the operator gave out the call or because the company had not used some unknown means that they did not specify to prevent scoundrels from tapping its wires. If no such means were shown by the record or were known to, or suggested by, the court, and there was no evidence that telegraph companies had ever used such means, how could it be a lack of ordinary care to fail to do so? The cases that are pertinent to the question before us have been cited above under the rules which they respectively illustrate. In Elwood v. Western Union Tel. Co., 45 N. Y. 549, 556, 6 Am. Rep. 140, the operator received and transmitted to a bank a message dated at another station, which held out the person who tendered the message as worthy of credit, and bore the forged signature of the cashier of another bank, who, the operator knew, was not the person who presented the message for transmission. In McCord v. Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315, 1 L. R. A. 143, 12 Am. St. Rep. 636, and Pacific Postal,

etc., Co. v. Bank of Palo Alto, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711, the operators themselves forged and transmitted telegrams which induced the payment of money to those who had no right to it. In Bank of California v. Western Union Tel. Co., 52 Cal. 280, the operator employed a subagent to send messages, and he forged and transmitted a message to a bank which induced it to pay $1,200 to himself; and in May v. Western Union Tel. Co., 112 Mass. 90, the company delivered a telegraphic order for 325 brass tubes a second time five days after its first delivery, and the addressees filled the order a second time in the belief that it was a second order. These are the strongest cases in support of the contention of counsel for the plaintiffs, and they fall far short of sustaining their position. In three of them the acting operators themselves made the deceitful messages and perpetrated the fraud, and in each of the others the employés of the telegraph company were aware of facts and circumstances which would have led a person of ordinary caution to an inquiry which would have prevented the injury.

On the other hand, in Western Union Tel. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1, one Max Reis was the nephew of the plaintiff, Meyer, who resided in Selma, Ala. A person unknown to the telegraph operator at Cincinnati, and who was not Max Reis, presented to him for transmission a message to Meyer, signed "Max Reis," wherein Meyer was requested to send him money by telegraph immediately. Meyer complied with the request, and the telegraph company paid the money to the person who presented the message. Meyer brought an action against the company for the money he had lost, and the Supreme Court of Alabama denied a recovery upon the ground that the defendant had been guilty of no breach of duty. No decision of any court has been cited or discovered which is inconsistent with the rule that in the absence of notice of facts or circumstances which would awaken inquiry and arouse suspicion in the mind of a person of ordinary prudence and intelligence in a like situation, regarding the authority of the party who presents a message for transmission to send it, the exercise by a telegraph company and its operators of reasonable care to receive and transmit genuine and authorized messages only does not require them to investigate or ascertain the identity or authority to send it of the person who tenders a message for transmission, whether it is in writing or is spoken directly to the operator, or is communicated to him by telephone; and the conclusion is that this is the law which ought to govern, and which does govern, this subject.

Tried by this rule there is no evidence in this case of any negligence of the defendant or of its operator, Lyman. There were three persons who had original authority to send the message, and they had power to direct others to do so. It came to the operator in a voice which he did not recognize, and that he thought was not the voice of the cashier, and that he could not say was the voice of Barnes. There is no evidence that he could have recognized the voices of Kuehnle or Lorenson or of others to whom they might have delegated the power to send the message, and the natural and legal

presumption was that it was spoken by some of those who had authority to send it. The operator relied upon that presumption, as he had a right to do, in the absence of suspicious facts or circumstances, and neither he nor the company was guilty of any negligence or breach of duty to the plaintiffs.

The result is that it is clear beyond doubt that no verdict or judgment in favor of the plaintiffs could have been sustained in this case, and as the erroneous ruling of the court below did not prejudice, and could not have prejudiced, the plaintiffs, the judgment must be affirmed. It is so ordered.

WESTERN UNION TELEGRAPH CO. v. TOTTEN et al.

(Circuit Court of Appeals. Eighth Circuit. November 16, 1905.)

No. 2,175.

1. DAMAGES—PROOF MUST SEPARATE LEGAL FROM ILLEGAL.
   Proof in an action of tort of a certain amount of loss, which includes both legal damages and those too remote to warrant recovery, in the absence of any evidence from which the jury can determine the amount of either, will not sustain a verdict for more than nominal damages. Courts and juries may not lawfully transfer the property or money of one citizen to another by guess.

2. TELEGRAPH COMPANIES—NEGLIGENCE—DUTY TO EXERCISE REASONABLE CARE TO ASCERTAIN IDENTITY OF SENDERS OF MESSAGES.
   In the absence of notice of facts or circumstances which would awaken inquiry and arouse suspicion in the mind of a person of ordinary prudence and intelligence in a like situation regarding the authority to send it of the party who presents a message for transmission, the exercise by a telegraph company and its operators of reasonable care to receive and transmit genuine and authorized messages only does not require them to investigate or ascertain the identity or authority to send it of the person who tenders a message for transmission, whether that message is in writing, or is spoken directly to the operator, or is communicated to him by telephone.
   But, when such facts or circumstances come to the notice of the company or of its acting operator, the exercise of reasonable care to transmit genuine and authorized messages only requires the party who receives the notice either to investigate and ascertain the authority of the sender before transmitting the message, or to communicate the facts and circumstances and the inquiry or suspicion to the addressee at or before its delivery.

3. SAME—RECEIPT, WITHOUT INVESTIGATION—EVIDENCE OF NEGLIGENCE.
   The receipt and transmission to the addressee of a message to the effect that a bank, in whose name it is telephoned, will honor the checks or drafts of a beneficiary, by an operator who knows the message is telephoned to him by either the beneficiary or by the cashier of the bank, but who does not know by which one, without inquiring into the identity or authority of the sender, constitutes substantial evidence for the consideration of the jury, upon the question whether or not the operator exercised reasonable care to receive and transmit genuine and authorized messages only.

(Syllabus by the Court.)

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

Henry D. Estabrook, James P. Hewitt, and Rush Taggart (George H. Fearons, George H. Carr, A. C. Parker, Craig T. Wright, and John F. Dillon, on the brief), for plaintiff in error.

John L. Stevens and H. E. Fry, for defendants in error.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

SANBORN, Circuit Judge. The plaintiffs below, W. H. Totten and H. C. Totten, who were copartners under the style of the Bank of Gilbert, sued the Western Union Telegraph Company for moneys they were induced to pay upon the checks of Barnes and the orders of his agent, by these telegrams:

"Denison, Ia., Mch. 5th, 1902.

"Bank Gilbert, Ia.: Will honor Barnes checks three cars stock.

"Bank of Denison."

"Denison, Ia., Mch. 8th, 1902.

"Bank Gilbert, Ia.: Will honor Barnes checks three cars stock.

"Bank of Denison."

"Denison, Ia., Mch. 11th, 1902.

"Bank Gilbert, Ia.: We will honor draft of E. S. Barnes for three cars stock.

"Bank of Denison."

—which the defendant received by telephone from either Voss, the cashier of the Bank of Denison, or from Barnes, and transmitted to the plaintiffs. The plaintiffs alleged, and there was evidence tending to prove, that these telegrams were neither sent nor authorized by the Bank of Denison. The evidence at the trial tended to prove these facts: A year or more prior to the dates of the messages, which have been quoted, the Bank of Denison had recommended Barnes to the plaintiffs as an honest man of small means, and he had been buying cattle at Gilbert in this way: He gave to the vendors his checks upon the plaintiffs for the purchase price of the stock. It was not the practice of the plaintiffs to pay these checks until the Bank of Denison, which was a copartnership, had telegraphed to them that they would honor them. Voss, the cashier of the Bank of Denison, testified that for several months prior to February, 1902, they had sent telegrams of the character of those above to the plaintiffs, but that, without notifying the plaintiffs, they had ceased to do so in January, 1902. In reliance upon such telegrams the plaintiffs had paid the checks of Barnes for, and the Bank of Denison had reimbursed them for, about 60 car loads of stock before the telegrams involved in this action were sent. When the plaintiffs received these telegrams they do not appear to have telegraphed an acknowledgment of them to the Bank of Denison or to have attempted in any way to verify them, but they proceeded to pay checks of Barnes for cattle which his agent bought and then to draw upon the Bank of Denison for the amounts they expended. Barnes procured and sold the cattle before these drafts reached the drawees, who refused to pay them.

Nearly all the messages received by the telegraph operator at Denison came to him over the telephone. The Bank of Denison sent most of their messages in this way, and Barnes many of his. The bankers

frequently sent messages concerning the business of Barnes, and they had arranged with the defendant that all their telegrams about his business should be paid by Barnes. One Lyman was telegraph operator at Denison. He had held this position from February 5, 1902. The telegraph office was at the railroad station. Mahoney was the station agent, and he had told Lyman that, when Barnes had telephoned a certain message in the name of the bank concerning the latter's payment of his drafts a month or two before, he had informed the assistant cashier of the fact that Barnes was sending telegrams about money in the name of the bank, and the bank officer had replied that he guessed it was all right. Lyman testified that almost all the messages sent by Barnes, while he was the operator at Denison, were sent in the name of the bank, that no one but Voss or Barnes ever sent any messages to him about the business of Barnes, and that he received the telegrams involved in this action by telephone from either Barnes or Voss, but he did not know which one of them sent them. There was conflicting testimony upon the question whether or not the bankers were informed by the telegraph company before these messages were sent that Barnes was sending telegrams in the name of the bank, and there was no evidence that they had ever objected to that course of action.

In this state of the case, the question whether or not the operator at Denison exercised reasonable care to receive and transmit genuine and authorized messages only was for the jury, and the motion to direct the return of a verdict for the defendant upon the ground that there was no substantial evidence of its negligence was properly denied. A consideration of the reasons and a review of the authorities pertinent to the question has led to the conclusion that the legal measure of reasonable care in cases of this kind is expressed in these rules:

In the absence of notice of facts or circumstances which would awaken inquiry and arouse suspicion in the mind of a person of ordinary prudence and intelligence in a like situation regarding the authority to send it of the party who presents a message for transmission, the exercise by a telegraph company and its operators of reasonable care to receive and transmit genuine and authorized messages only does not require them to investigate or ascertain the identity, or authority to send it, of the person who tenders a message for transmission, whether that message is in writing, or is spoken directly to the operator, or is communicated to him by telephone. But, when such facts or circumstances come to the notice of the company or of its acting operator, the exercise of reasonable care to transmit genuine and authorized messages only requires the party who receives the notice to investigate and ascertain the authority of the sender before transmitting the message, or to communicate the facts and circumstances and the inquiry or suspicion to the addressee at or before its delivery. Bank of Havelock v. Western Union Telegraph Co., 141 Fed. 522.

The facts that the telegrams in this case were for the benefit of Barnes and promised the payment of his checks for considerable amounts of money by the Bank of Denison, and that the operator knew that they were communicated to him in the name of the bank either by their beneficiary or by the cashier of the apparent obligor in them,

and that he did not know which one spoke them to him, constitute substantial evidence for the consideration of a jury, upon the question whether or not these facts and all the other pertinent facts and circumstances of this case would have awakened inquiry and aroused suspicion in the mind of a person of ordinary prudence and intelligence in a like situation regarding the identity and the authority to send them of the party who presented these messages. Elwood v. Western Union Tel. Co., 45 N. Y. 549, 556, 6 Am. Rep. 140. It may be that the presentation for transmission of a message in the name of a bank, which may charge it with liability for a considerable sum of money by one for whose benefit it is evidently sent, would naturally raise a suspicion and awaken inquiry in the mind of a reasonably prudent man as to his authority. And if he knew that such a message was spoken to him over the telephone by either the cashier of the bank or its beneficiary, it may be that it would cause him to inquire into the identity of the sender. There was sufficient evidence here to warrant the submission to the jury of the question whether or not the telegraph operator exercised reasonable care in the receipt and transmission of these messages. The telegrams were sufficiently definite to warrant reliance and action upon them. That is certain which may be made certain, and the purchase price of the cars of stock specified in the messages was not so uncertain that rational action might not be based upon them.

But this is an action for damages for the alleged false representations embodied in the telegrams, and those damages only may be recovered which were the natural and probable effect of the deceit they produced. Those representations were limited to the statement that the Bank of Denison would pay the checks and a draft of Barnes for a certain number of cars of stock. The proof at the trial was that the plaintiffs in reliance upon the telegrams paid out a certain sum for the cars of stock, for the wages of the agent of Barnes, for the hire of livery teams, for exchange, and for some incidental expenses of the bank. But there was no evidence of the amount paid for the cars of stock or for the other items, respectively. The defendant requested the court to instruct the jury that the plaintiffs were not entitled to recover more than nominal damages because there was no proof by means of which they could distinguish the amount paid by the plaintiffs for the cars of stock from the amounts they expended for the other items. The court refused this request and instructed the jury that, in case they found for the plaintiffs upon other issues, they might return a verdict in their favor for the amount paid for the stock, but that they could allow nothing to them for the amounts paid to the agent of Barnes for his wages or for exchange or for the expenses of yarding the stock. The payment by the plaintiffs of the agent of Barnes, of the hire of the teams, of exchange, and of "some incidental expenses of the plaintiffs," which are neither itemized nor aggregated, was not the natural or probable effect of the false representations embodied in the telegrams; the loss occasioned by that payment was too remote to constitute legal injury, and, as the court below well said, the jury could not legally allow the plaintiffs to recover the amounts expended for these purposes.

The burden was upon the plaintiffs to prove the extent of their legal injury and to separate it from that damnum absque injuria for which courts and juries alike are forbidden by the law to grant relief. They failed to bear this burden. They failed to produce any evidence of the amount which they expended for the cars of stock without the payments for the hire of the livery teams, the wages of the agent, the exchange, and the incidental expenses. It may be said and it is probably true that the larger part of their expenditures was made to pay for the stock, and, if there were in the record competent evidence of even the approximate amount of the other items or lawful testimony that they did not exceed a certain sum, the error of this ruling might be corrected by a reduction of the judgment by that amount. The record, however, is barren of all evidence of this nature, and there is no way but by conjecture by which the jury could have determined the amounts which the plaintiffs paid for the cars of stock, or the amounts which they paid for the other items which have been mentioned, and neither courts nor juries may lawfully transfer the property or money of one citizen to another by guess. The ruling constitutes a fatal error, and the judgment must be reversed.

In view of this fact a discussion and decision of each of the other questions presented by the many objections at the trial would be useless. The opinion of this court in Bank of Havelock v. Western Union Telegraph Co., 141 Fed. 522, and a brief reference to the nature of this action and of the proof necessary to sustain it will constitute a sufficient guide for the second trial. This action is for damages for false representations. Those damages only which were caused by the representations may be recovered. Payments for stock by the plaintiffs which were not made in reliance upon, and induced by, the telegrams, are not recoverable by them in this action. The burden is upon them to prove the specific amounts they were induced to pay by the telegraphic messages, and general statements of witnesses that a certain amount in the aggregate was paid or lost, or that certain sums were within the amounts indicated by the telegrams, are not competent evidence to establish the damages, in view of the facts that the payments induced by each telegram were made in small amounts at different times on checks of Barnes or upon orders of his agent.

The payment by the plaintiffs of the checks of Barnes or of money for the purchase by Barnes of cars of stock after they had received the telegrams and in reliance upon them was the natural and probable effect of their transmission, and the loss sustained by such payments is not too remote to constitute resulting legal injury. The existence of a state of facts which would have created a cause of action by the plaintiffs against the Bank of Denison, if the telegrams had been genuine, is not a condition precedent to the existence of a cause of action in favor of the plaintiffs against the telegraph company for the damage which was caused by the false representations contained in the telegrams. Bank of Havelock v. Western Union Telegraph Co., 141 Fed. 522.

The plaintiffs may not lawfully recover of the telegraph company, if the Bank of Denison authorized Barnes, or estopped themselves

from denying his authority, to send the messages in their name. They may not recover if the plaintiffs contributed to their own loss by their failure to exercise in the transaction that degree of care to prevent their loss which bankers of ordinary caution and prudence in similar circumstances ordinarily use. A trial of the case in accordance with these views will probably result in a just and final verdict.

The judgment below is reversed, and the case is remanded to the Circuit Court with instruction to grant a new trial.

WESTERN UNION TELEGRAPH CO v. SCHRIVER et al.

(Circuit Court of Appeals, Eighth Circuit. November 16, 1905.)

No. 2,156.

1. TELEGRAPH COMPANY—LIABILITY TO UNDISCLOSED PRINCIPAL OF ADDRESSEE.
A telegraph company owes no duty to the undisclosed principal of the addressee of a telegram to exercise reasonable care to receive and transmit authorized messages only, because injury to him cannot be reasonably anticipated as the consequence of the lack of such care, and because such injury is the effect of an independent intervening cause—the act of the addressee.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 37.]

2. ACTION—TORT FOR NEGLIGENT MISREPRESENTATION AND NOT CONTRACT.
The action for damages for such an injury is an action of tort for a false representation in the nature of a false warranty caused by the breach of the duty to exercise reasonable care to receive and transmit authorized messages only. It is not an action on a contract.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 48.]

3. TELEGRAPH COMPANY—NEGLIGENCE—CARE OWING TO ADDRESSEES, SENDERS, AND UNDISCLOSED PRINCIPALS.
The telegraph company owes the duty to exercise ordinary care to receive and transmit genuine messages correctly to senders, to addressees, and to those who appear in the telegrams to be beneficiaries thereof, because injury to them may be reasonably anticipated as the probable consequence of negligence. It owes a like duty to the undisclosed principals of senders, because the law charges it with knowledge that these principals are in privity with it, through contracts made by the senders, and injury to them from its negligence may be reasonably anticipated.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 26, 37.]

4. NEGLIGENCE—LIMIT OF ACTIONABLE DAMAGES.
An injury that could not have been foreseen or reasonably anticipated as the probable consequence of negligence is not actionable.
An injury that is not the natural consequence of an act of negligence, and that would not have resulted from it but for the interposition of some new independent cause that could not have been anticipated, is not actionable.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 71–73.]

5. SAME—DUTY TO PLAINTIFF INDISPENSABLE.
A duty of care owing by the party who occasions the loss to him who suffers it is an indispensable element of actionable negligence. The breach of such a duty owing to others is immaterial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 3.]

6. DECEIT—FALSE REPRESENTATIONS—PARTIES WHOSE KNOWLEDGE OF THEM IS NOT TO BE REASONABLY ANTICIPATED—LIABILITIES.

One who makes a false representation owes no duty of care to tell the truth to those to whom he does not communicate it and to whom he does not anticipate that it will be conveyed, and a person of ordinary prudence and intelligence would not anticipate that it would be conveyed, and such parties have no cause of action against him for injuries they sustain in reliance upon it.

7. DECEIT—LIABILITY OF INNOCENT PARTY FOR FRAUD OF A THIRD PARTY.

The rule that, where one of two innocent parties must suffer from the fraud of a third, he who furnishes the means to commit it must bear the loss, is limited in its application to cases in which the party chargeable makes the third party his real or apparent agent, cases in which he provides the means intentionally, or for a dishonest purpose or negligently, and cases in which he derives a benefit from the fraud of the third party.

It does not govern the great majority of cases where one innocently, for an honest purpose and with reasonable care, furnishes to a third party the means by which he perpetrates a fraud from which he who provides the means derives no benefit.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, § 188.]

8. APPEAL—PRESUMPTIONS.

The absence of reported judgments and decisions sustaining an alleged liability under a given state of facts raises a strong presumption that no such liability exists.

(Syllabus by the Court.)

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

H. D. Estabrook, Asa F. Call, and Rush Taggart (George H. Fearons, Craig L. Wright, and John F. Dillon, on the brief), for plaintiff in error.

D. M. Kelleher (John A. Senneff, M. F. Healy, Thomas D. Healy, and Robert Healy, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

SANBORN, Circuit Judge. This is an action against the Western Union Telegraph Company for damages caused by its receipt and delivery of an unauthorized message. There was substantial evidence at the trial of these facts: Schriver Bros., the plaintiffs below, sold cattle to one Barnes for $8,972, and took his check for the purchase price upon the Bank of Denison for that amount. They refused to surrender the cattle without some assurance that the check would be paid. Barnes promised that he would have the Bank of Denison send a guaranty of payment of the check by telegraph. The plaintiffs directed him to have the message sent to the Commercial Bank of Britt. Barnes went to Denison and without authority from the bank telephoned to the defendant's operator in that town this message:

"Denison, Ia., March 14, 1902.

"To Commercial Bank, Britt, Iowa: We will honor Barnes' draft for eighty-nine hundred seventy-two dollars. Bank of Denison."

The operator at Denison ordinarily received by telephone messages to be sent by telegraph. Both the Bank of Denison and Barnes had sent messages in that way concerning the business of Barnes, and had arranged with the operator that such telegrams should be charged

to Barnes. Sometimes the bank had telephoned messages of this nature in its own name and sometimes Barnes had telephoned them in the name of the bank, and there had been no repudiation of them, or objection to them by the bank, although many such messages had been sent before that of March 14, 1902, was received. This message was sent to Britt and delivered to the Commercial Bank. One of the plaintiffs saw it, and in reliance upon it delivered the cattle to Barnes. Neither the check which they took from Barnes nor the purchase price of the cattle was ever paid. The court charged the jury, over the objection and subject to the exception of the defendant, that, if the Commercial Bank of Britt was the agent of the plaintiffs to receive the message, they might recover of the telegraph company the loss which they had sustained by their reliance upon the telegram, and there was a verdict and judgment in their favor.

May the undisclosed principal of the addressee of a message recover of the telegraph company the damages he sustains from the failure of its operator to exercise reasonable care to receive and transmit authorized messages only? A telegraph company is not liable for the lack of such care to one of whose interest in the telegram it has no notice, and who is neither the principal of the sender nor of the addressee. McCormick v. Western Union Tel. Co., 25 C. C. A. 35, 79 Fed. 449, 38 L. R. A. 684; Morrow v. Western Union Tel. Co. (Ky.) 54 S. W. 853; Western Union Telegraph Co. v. Kirkpatrick, 76 Tex. 217, 218, 13 S. W. 70, 18 Am. St. Rep. 37; Western Union Tel. Co. v. Carter, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826.

The undisclosed principal of the sender of a message may recover for negligence in its transmission or delivery, because the company makes a contract with the sender which that knowledge of the law it may not deny notifies it inures to the benefit of any undisclosed principal whom the sender may have. But neither the sender nor his principal can recover for negligence of the company in the receipt or transmission of a message which the sender forges or fraudulently signs without authority, because the contract of transmission is voidable for the fraud of the sender, and neither he nor his principal can take advantage of his wrong. A telegraph company owes the duty to exercise reasonable care to receive and transmit authorized messages only to the addressees of messages, and to those persons who, the telegrams inform it, have a beneficial interest in the dispatches it transmits. It owes this duty to these parties because injury to them is the natural and probable consequence of its want of care, an effect which it may reasonably anticipate from its notice of the fact that they are interested in the messages. But does it owe this duty to the undisclosed principal of an addressee of a message of whose interest it has no notice?

Reference has been made to the statutes of Iowa (Code Iowa, 1897, §§ 2163, 2162, 2161, 2164), but they give no direct or inferential reply to this question (Bank of Havelock v. Western Union Telegraph Company, 141 Fed. 522), and it must be answered by a consideration and application of the general principles and rules of the law. The arguments at the bar and in the briefs have traversed a wide field, and it is indispensable to a judicious consid-

eration and a just decision of the issue in hand that before entering upon its discussion the true foundation and the real nature of the cause of action presented and the rules of law which must govern it shall be clearly in mind. The cause of action is for the false representation that the Bank of Denison signed the message. It is not an action for deceit, because the intent to deceive or knowledge of the falsehood or a reckless misrepresentation in ignorance of the fact is indispensable to an action of deceit. Union Pac. Ry. Co. v. Barnes, 64 Fed. 80, 83, 12 C. C. A. 48, 51; Kahl v. Love, 37 N. J. Law, 5, 6, 7; Polhill v. Walter, 3 Barn. & Adolph. 114, 124. There was no such intent, knowledge, or recklessness in this case. The operator did not intend to deceive any one. He did not know that Barnes was not authorized to send the message in the name of the bank. He undoubtedly believed that he had this authority, and not without some reason; for he had repeatedly sent messages in its name, and no repudiation by the bank or other objection had been made. His only fault was his failure to make inquiry or to notify the addressee regarding the questionable authority of Barnes in the light of facts and circumstances which might naturally have aroused the suspicion of a person of ordinary prudence and intelligence in a like situation and have suggested an investigation of that authority. Western Union Tel. Co. v. Totten, 141 Fed. 533. The action is not founded upon a false warranty or upon any contract. Conceding, without deciding, that the addressee and the apparent beneficiary of a genuine message honestly sent may recover in an action upon the contract for a failure to transmit or to deliver it speedily and correctly, the only basis of such a recovery is that the telegraph company and the sender have made the contract for the transmission for the benefit of the addressee or of the apparent beneficiary. But the only contract which the telegraph company made in this case was with Barnes. He induced the agreement by the fraudulent representation that he was authorized to send the message in the name of the Bank of Denison. If the plaintiffs or the Bank of Denison have any contract rights here, they derive them from Barnes as the beneficiary of his agreement. But neither they nor he can enforce that contract because it is voidable by the company for the fraud of Barnes and because neither they nor he can take advantage of his wrong.

There remains but one ground upon which this action may stand, and that is the breach of the duty which the telegraph company, in common with every other party, owes to those to whom it makes representations, which it may reasonably anticipate that they may rely and act upon, to exercise reasonable care to make those statements true. This is an action for the breach of this duty. It is an action of tort for a false representation in the nature of a false warranty caused by failure to exercise reasonable care to receive and transmit authorized messages only. Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240; May v. Western Union Tel. Co., 112 Mass. 90, 95. But a duty of care owing by the party who occasions the loss to him who sustains it is an indispensable element of actionable negligence. "If the defendant owed a duty, but did not owe it to the plaintiff, the action will not lie." 1 Shearman & Redfield on Negligence, § 8;

Bishop on Noncontract Law, § 446; Savings Bank v. Ward, 100 U. S. 195, 202, 25 L. Ed. 621; Slade v. Little, 20 Ga. 371, 374; Kahl v. Love, 37 N. J. Law, 5, 8; Winterbottom v. Wright, 10 M. & W. 109; Longmeid v. Holliday, 6 Exch. 764, 765; Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865, 868, 57 C. C. A. 237, 240, 61 L. R. A. 303; McCormick v. Western Union Tel. Co., 79 Fed. 449, 452, 25 C. C. A. 35, 39, 38 L. R. A. 684; Western Union Tel. Co. v. Schriver, 129 Fed. 344, 346, 64 C. C. A. 96, 97, 98. One who makes a representation owes no duty of care to tell the truth to those to whom he does not communicate it and to whom he does not anticipate that it will be conveyed, and a person of ordinary prudence and intelligence in his situation would not anticipate that it would be conveyed, and such parties have no cause of action against him for injuries they sustain by reason of the falsity of the representation. "Courts will give appropriate redress or relief for actionable misrepresentation to anyone to whom the same was made or for whom it was intended, and only to such." 1 Bigelow on Fraud, p. 197, § 2; Slade v. Little, 20 Ga. 371, 374; Henry v. Dennis, 95 Me. 25, 49 Atl. 58, 85 Am. St. Rep. 365; Carter v. Harden, 78 Me. 528, 7 Atl. 392. The reason is that the loss to him to whom the party who makes the misrepresentation does not communicate it, and cannot reasonably anticipate that it will be communicated, is not the natural or probable consequence of his act. It is the effect of an independent cause—of the unexpected conveyance of the misrepresentation to the third party by the person to whom it was originally made. Without this new cause, the injury to the third person would not occur and the intervention of this new agency, as Wharton felicitously expresses it, "insulates" the original act of negligence from the injury. Wharton on Negligence, (2d Ed.) § 134; Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865, 867, 57 C. C. A. 237, 239, 61 L. R. A. 303.

Let us now turn to the consideration of the immediate question in the light of these indisputable rules of law. There is a sentence in section 427 of Thompson on Electricity where he is discussing the liability of a telegraph company to the addressee of a message in which it is written that:

"The true view * * * is one which elevates the question above the plane of mere privity of contract and places it where it belongs, upon the public duty which the telegraph company owes to any person beneficially interested in the message, whether the sender, or his principal, where he is agent, or the receiver, or his principal where he is agent."

This sentence is quoted with apparent approval in Western Union Tel. Co v. Mellon (Tenn.) 33 S. W. 725, 726, a case in which one who appeared on the face of a message to be its beneficiary secured damages for delay in its delivery, and it is urged upon our attention with much force by counsel for the plaintiffs. But the law is settled beyond dispute that one who has a beneficial interest in a telegram of which the company has no notice has no cause of action for the loss he sustains by the negligence of the company in its receipt or transmission, because the company cannot anticipate his injury, and owes him no duty. McCormick v. Western Union Tel. Co., supra,

and other cases cited under it. No authority is cited by Mr. Thompson, the diligence of counsel has presented, and our research has discovered no decision of any court, except the judgment of the court now under review, which has ever sustained an action or a judgment against a telegraph company for loss inflicted upon the undisclosed principal of an addressee by reason of the negligence of the telegraph company in handling the message. This pregnant fact raises a strong presumption that, when this message was received and transmitted, it was not the law that the company was liable for negligence to the undisclosed principal of the addressee. If it had been, judgments founded upon it would probably not have been lacking. Moreover, in an action wherein an addressee, who was the agent of the undisclosed principal, was the plaintiff, he was met by the defense that the right of action was in the principal, and the St. Louis Court of Appeals sustained his action and said:

"We rest our conclusion upon the ground that the telegram in which the mistake occurred was not directed to the J. I. Case Threshing Machine Company; that there was nothing on the face of it which apprised the defendant that it related to the business of the J. I. Case Threshing Machine Company; that it therefore does not appear that, in transmitting it, the defendant undertook any duty in behalf of the J. I. Case Threshing Machine Company. The mere fact that it was addressed to the plaintiff in care of the J. I. Case Threshing Machine Company does not raise any duty on the part of the defendant in behalf of that company." Lee v. Western Union Tel. Co., 51 Mo. App. 375, 382.

In this way it appears that at the time the telegram was sent the declared law upon this subject had been for 10 years that a telegraph company was not liable for negligence to the undisclosed principal of the addressee. The contention now is that this declaration and the practice in accordance with it are erroneous, and analogous cases, maxims, and general rules of law are brought to our attention to sustain this position. Counsel say that the defendant made its representation and owed its duty to a class of persons, that this class included all who might take the check or draft described in the message in reliance upon the telegram, and that the defendant is a member of this class. They cite in support of this contention these cases: Swift v. Winterbotham, L. R. 8 Q. B. Cas. 244, 253; Bedford v. Bagshaw, 29 L. J. (Ex.) 65; Polhill v. Walter, 3 Barn & Adolph, 114; North Atchison Bank v. Garretson, 51 Fed. 168, 2 C. C. A. 145; Garrettson v. North Atchison Bank (C. C.) 47 Fed. 867, 871; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82; and Bank of Montreal v. Thayer (C. C.) 7 Fed. 622. But the class, if any, to which a telegraph company owes this duty in regard to the transmission of messages concerning commercial paper, does not include all who may see the messages and take the paper in reliance upon them. McCornick v. Western Union Tel. Co., 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684. If the concession were made that the representation here was made, and that the duty was owing to a class, that class would necessarily be limited by the general rule that it was those only to whom the company might reasonably have anticipated that the representation would be conveyed that its duty was owing. Con-

cede that the company might have reasonably anticipated that the addressee would purchase or discount the draft, and that it would thereafter in the ordinary course of business indorse and transfer it with the telegram to a purchaser for value, and that in this way the draft and the message might pass to remote indorsees or purchasers, the addressee and the indorsees or purchasers under the addressee might then constitute a class to which the company might owe the duty of truthful representation. But the plaintiffs are not of this class, and it could not include them or others than those who purchased the draft directly or remotely from the addressee, because a person of ordinary prudence and diligence in the situation of the company could not have reasonably anticipated that any but the addressee and its immediate and remote indorsees and purchasers would see or act upon the telegram. In the ordinary course of commercial business no others would become aware of or act upon it. Much less could such a person have anticipated that the plaintiffs without the purchase of any draft from the addressee would take an original draft from Barnes to themselves, would go to the addressee and read a telegram which disclosed no interest in them, and then in reliance upon it would deliver cattle and lose their price. The remarks of Judge Van Devanter in the opinion of this court upon the former hearing of this case are pertinent here. He said:

"It is true that checks and drafts are, for purposes of collection, frequently committed by the payee or holder to a bank under circumstances where the bank does not become the owner, risks nothing upon the probability of payment by the drawee, and is not influenced by information upon that subject; but this telegram contains nothing which suggests that it relates to such a transaction. In the absence of anything to the contrary, the inference to be properly drawn from the face of a telegram or other communication of this nature is that it relates to a matter which concerns the one addressed, and that it is his action, and not that of another, which is to be influenced. That no inference of its relation to a transaction like that between plaintiffs and Barnes properly or reasonably arises from the face of this telegram is quite manifest when it is considered that the telegram does not make the slightest reference to any past or prospective sale of cattle or other property, or to any person other than the addressee, the sender, and Barnes, or to an absence of interest on the part of any one of them in the information given." Western Union Tel. Co. v. Schriver, 129 Fed. 344, 346, 64 C. C. A. 96, 98.

The authorities cited are not inconsistent with this view. They are cases in which indorsees or purchasers of notes or bills in the ordinary course of business from those to whom the representations were made, or persons to whom such representations were directly made, had lost in reliance upon them, or cases in which the communication of the representations to third parties and the loss upon it were its natural and probable effect. Polhill v. Walter, 3 Barn. & Adolph. 114, 123, and Lobdell v. Baker, 3 Metc. (Mass.) 469, are typical and perhaps the strongest authorities in support of the contention of the plaintiffs. In the former the remote indorsee of the payee of a draft recovered from one who accepted it in the name of the drawee without authority. In the latter the remote indorsee of a note from one to whom the owner had sold it under a representation that a prior indorsement was valid, which had been made by a minor and which he knew to be void,

obtained a judgment against the original owner. The case of Swift v. Winterbotham, L. R. 8 Q. B. Cas. 244, 253, is of a different character, but it is wide of the mark in this action. In that case one bank inquired of another the financial standing of Sir W. Russell and received an answer that it was good, when the second bank knew that it was bad. The inquiry had been made for a customer of the first bank to whom the latter communicated the answer upon which he relied to his injury. He recovered of the second bank because a custom of the banks in England was proved to make such inquiries for their customers, and it was held that the second bank might have reasonably anticipated, in view of this custom, that its answer would be conveyed to, and acted upon by such a customer. The evidence discloses no custom in this country that the telegraphic acceptance of a draft that is directed by one bank to another which has not requested it, or inquired for it is communicated to, and acted upon by a customer of the addressee, to his injury. The telegraph company could not have reasonably anticipated such a result as the probable effect of the delivery of a telegram to the Bank of Britt. It is not here decided that the immediate and remote purchasers of commercial paper in the ordinary course of business from the addressee of a telegram, which contains a misrepresentation relative to the paper, may recover of the telegraph company any losses they sustain thereby. If they may, the plaintiffs do not belong to that class. The conclusion here is that a telegraph company does not owe the duty to exercise ordinary care to make truthful representations only in the transmission of telegrams concerning commercial paper to those who acquire the paper, but who are neither addressees of the telegrams nor the immediate or remote indorsers or purchasers of it from the addressees, in the absence of any notice that they have an interest in such messages.

Counsel invoke the rules that where one supplies another with the means of perpetrating a fraud against one person, and it is inflicted upon another by the use of those means, he is liable for the loss, and that, where one of two innocent persons must suffer from the fraud of a third, that one should bear the loss who enabled the third party to inflict the injury. They argue that because the telegraph company furnished the telegraph and the operator by means of which Barnes was enabled to defraud the plaintiffs the company is liable to the latter, although it acted without fault or negligence. But the rules upon which reliance is here placed are not of universal or even of general application. Their effect is limited to cases in which the party charged has by fraud or through negligence, or by his actual or apparent authority to an agent, provided the third party with the opportunity to commit the wrong, and to cases in which he has derived benefit from the loss inflicted upon another by the fraud of the third. Cases of the first class are Wilson's Adm'r v. Green, 25 Vt. 450, 60 Am. Dec. 279; Bauman v. Bowles, 51 Ill. 380; Walters v. Western & A. R. Co. (C. C.) 56 Fed. 369, 371. Cases of the second class are Bridegman v. Green, Wilmot's Reports, 64; Huguenin v. Barclay, 14 Ves. 288, 289; Gordon v. McCarty, 3 Whart. 407, 411; Commonwealth v. Call, 21 Pick. 515; Tuckwell v. Lambert, 5 Cush. 23. Wilson v. Green is

typical of its class. A creditor who held the unpaid note of his debtor, signed by two sureties, delivered it to the debtor to enable him to defeat a trustee process by producing the note in support of his testimony that it was paid. While the debtor had the note for this purpose, he exhibited it to the sureties and led them to believe that he had paid it, to their injury. The court held that the creditor was chargeable with the loss sustained by the sureties, because he delivered the note to the debtor for a dishonest purpose. But it expressly decided that, if he had intrusted it to his debtor for an honest purpose, he would not have been liable for the loss. The rules have no application to the vast majority of cases in which one of two innocent parties suffers from the fraud of a third. One furnishes writing materials to another who forges a note and defrauds an innocent third party; one delivers a check to another in the ordinary course of business in the payment of a debt, the payee raises it and sells it to an innocent purchaser; one purchases transportation of a railroad company and travels to a distant city and defrauds a stranger; one personates another and by means of the telegraph and operator sends a forged telegram. Western Union Tel. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1. But in these cases and in the vast majority of cases in which an innocent party furnishes to a third person the means to commit a fraud he incurs no liability to the victim. Real or apparent agency, fraud, negligence, or the derivation of benefit from the fraud are indispensable conditions of a liability under the rules invoked here. Friedlander v. Texas, etc., Ry. Co., 130 U. S. 416, 424, 9 Sup. Ct. 570, 32 L. Ed. 991, is an illustration of the limitation of these rules. A station agent fraudulently made a bill of lading in favor of one Lahnstein when the railway company had received none of the merchandise described therein. Lahnstein attached the bill to a draft and obtained $8,000 from Freidlander & Co. upon it. The railway company had provided the railroad, the station agent, and the blank bill of lading, by means of which Lahnstein was enabled to perpetrate the fraud. But the Supreme Court denied a recovery because the station agent was without authority to issue the bill in the absence of the goods, although the railway company had furnished him with the means which he and his confederates used to commit the fraud.

Cases of the second class rest upon the proposition that whoever receives money, property, or benefit from another through the fraud of a third person should make restitution. "Let the hand receiving it be ever so chaste, yet, if it comes through a corrupt polluted channel, the obligation of restitution will follow it." Bridgeman v. Green, Wilmot's Rep. 64. "The damages which ground the action follow the property." 1 Am. Lead. Cas. 643. The case in hand comes within neither class, but falls beyond the limitation of liability under these rules. Barnes was neither the real nor the apparent agent of the defendant. It supplied its telegraph and operator without negligence, for an honest purpose, and it derived no benefit from the loss of the plaintiffs. It is not liable to them under the rules cited.

It is contended that because the telegraph company owes the duty of care to receive and transmit messages correctly to the addressees,

to the senders, and to the undisclosed principals of the senders, it therefore owes it to the undisclosed principals of addressees. But the duty to the undisclosed principals of senders rests on the fact that contracts have been made between the senders and the telegraph company, and that in the negotiation and enforcement of contracts the law places undisclosed principals in the shoes of their agents, so that the telegraph company, which must know the law, is charged with notice and may reasonably anticipate that its misrepresentations may affect them. It has no contracts with addressees, and hence it is not charged by the law with notice that their undisclosed principals or others to whom they may display the messages will probably be affected by them. For the same reason the case of Culliford v. Gadd (Super. Ct. N. Y.) 17 N. Y. Supp. 457, and others of like character, which are pressed upon our attention with great force, are neither controlling nor persuasive. In that case an agent of an undisclosed principal was induced by misrepresentations made to him to purchase an interest in a syndicate and to pay for it with money of his principal. The latter was permitted to recover. The duty to the undisclosed principal in that and other cases of like character is founded on the contracts. As there are no such contracts with addressees, no such duty to their unknown principals arises. Nor is the case of Perkins v. Evans, 61 Iowa, 35, 36, 15 N. W. 584, more pertinent. In that case the undisclosed principal of an agent who had been induced to purchase property, to his injury, by a false entry knowingly made by the auditor on the books of the county was permitted to recover his damages in an action on the bond of the auditor. The books were public records. The entries on them were representations to all who might lawfully examine and rely upon them, and the natural and probable effect of false entries in them was the deceit and injury, not only of those who personally examined them, but also of their undisclosed principals as well, because it is common knowledge that those who make such examinations are generally the agents of others. The message in this case was a private communication. It was directed to a single addressee. The company was forbidden by law to disclose it to others (Code Iowa 1897, § 2162), and such messages are generally intended for and acted upon by those to whom they are directed, and not by others. There is no persuasive analogy between these cases.

An argument by analogy is drawn from actions against transportation companies. It is said that the duties and liabilities of telegraph companies are like those of common carriers, and that, as owners of property who are neither consignors nor consignees and whose interest is unknown to a carrier may recover for an injury or loss to their property during its transportation, any one interested in a telegram should be permitted to recover for negligence in its receipt or transmission. The argument proves too much. It proves that telegraph companies are liable for injuries to strangers to the telegrams, their senders, and addressees, while the undisputable law is the contrary. Moreover, carriers are insurers of the safe transportation of goods. Telegraph companies are not guarantors of the correct receipt and transmission of messages. Actions for loss or injury

to property in transportation rest upon the ownership and loss or injury, actions for misrepresentations of messages through negligence, upon the duty to exercise care to tell the truth, upon the breach of that duty, upon reliance upon the misrepresentation and upon resulting injury. The bases of the actions and the rules of law which govern them differ so widely that this argument by analogy fails to convince.

The telegraph cases are cited and exhaustively reviewed. But, when the opinions in them are carefully read and analyzed, they recognize and affirm the rule that a company owes a duty and incurs a liability to those parties only of whose interest it has notice and for those injuries only which it might reasonably anticipate. The pertinent cases fall into four classes: (1) Those which assert a duty and liability to the undisclosed principal of the sender. Milliken v. Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; Harkness v. Western Union Tel. Co., 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; Leonard v. Telegraph Co., 41 N. Y. 544, 1 Am. Rep. 446; Cashion v. Western Tel. Co., 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; Western Union Tel. Co. v. Morris, 28 C. C. A. 56, 83 Fed. 992; Western Union Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; Western Union Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; Western Union Tel. Co. v. Church (Neb.) 90 N. W. 878, 57 L. R. A. 905. (2) Those which recognize a duty and liability to a person who appears on the face of the telegram to be its beneficiary although neither the sender nor the addressee. Western Union Tel. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; Western Union Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; Telegraph Co. v. McKibben, 114 Ind. 511, 14 N. E. 894. (3) Those which deny any duty or liability to those who do not appear from the message to have any interest in it. McCormick v. Western Union Tel. Co., 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684; Western Union Tel. Co v. Kirkpatrick, 76 Tex. 217, 218, 13 S. W. 70, 18 Am. St. Rep. 37; Western Union Tel. Co. v. Carter, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; Morrow v. Western Union Tel. Co. (Ky.) 54 S. W. 853. (4) The decision which denies any liability to the undisclosed principal of the addressee. Lee v. Western Union Tel. Co., 51 Mo. App. 375. In the cases of the two latter classes the duty and liability are denied on the ground that the company received no notice from the telegrams of their probable existence, and hence could not have anticipated injuries to those who did not appear to be beneficiaries of the messages or to be likely to incur the damages which were sought. In Western Union Tel. Co. v. Kerr (Tex. Civ. App.) 23 S. W. 564, 565, the court refused to permit the undisclosed principal of a sender to recover damages for mental anguish on the ground that such damages could not have been reasonably anticipated and were not the natural consequence of the negligence, although the right of such a principal to maintain the action for such damages as appeared from the telegram to be likely to result to her was conceded. The same ruling may be found in Pacific Express Co. v. Redman (Tex.

Civ. App.) 60 S. W. 677. In Cashion v. Western Union Tel. Co., 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; Western Union Tel. Co. v Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843, and Western Union Tel. Co. v. Church (Neb.) 90 N. W. 878, 57 L. R. A. 905, all the damages which the undisclosed principal of a sender may suffer are held to have been reasonably anticipated by the telegraph company and recoverable. In Western Union Tel. Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706, the addressee of a telegram was denied damages for mental suffering and for a failure to attend to business before a person named in the message died, because the telegram did not indicate any relationship or business between the addressee and the deceased. A more extended review of cases would be futile. Suffice it to say that through them all the line of demarcation between legal injury and that damnum absque injuria for which courts may not grant relief is the answer to the question whether the message gave such notice of the interest and probable injury of the plaintiff that the company might reasonably have anticipated the latter as the natural and probable effect of its negligence.

The arguments and briefs in this case seem to have invoked with rare ability and persuasive power every reason and decision that makes for the contention of either of the parties. An endeavor has been made to consider them with patience and deliberation but nothing has been presented which conclusively answers the question whether a telegraph company is liable to the undisclosed principal of an addressee in favor of the plaintiffs. That answer must therefore be deduced from the general rules of law which govern actions for negligence and misrepresentation to which reference was made in the earlier part of this opinion. One who makes a false representation owes no duty of care to tell the truth to those to whom he does not communicate it, to whom he does not anticipate that it will be communicated, and to whom a person of ordinary prudence in his situation would not have anticipated that it would be conveyed. The message was directed to the Commercial Bank of Britt. It was a private communication. The company was prohibited from disclosing it to others than the addressee. The presumption was that it was intended for and would be permitted to affect the addressee only. The plaintiffs were not mentioned in it, and it contained nothing from which a person of reasonable prudence could have anticipated that it would be communicated to them. When, therefore, the telegraph company delivered it to the Bank of Britt, it made no representation to the plaintiffs, it intended to make none, and it could not have anticipated that any would be made. A person of ordinary prudence and intelligence in its situation would not have anticipated that this telegram would be conveyed to them. Witness the fact that no report of final judgment for the breach of this duty of truthful representation to the undisclosed principal of an addressee of a telegram has been found in the books, and that the decision of the Missouri court in 1892 that such an action may not be maintained still stands unchallenged by the decision of any appellate tribunal. In Slade v. Little, 20 Ga. 371,

the undisclosed principal of an agent sued the defendant for damages which resulted to him from a misrepresentation regarding the solvency of a third party which the defendant had made to the agent. The court denied recovery and said, speaking of the plaintiff:

"And, lastly, how can Little say that this representation was made to him? The proof is that it was made to McCoy. It is true that the proof also is that McCoy was his agent; but there is no proof that Slade knew this. And it is simply impossible that Slade could have intended to deceive Little, if he did not know that McCoy was representing Little."

Again the limitation upon actions for damages for negligence, which has been adopted by the Supreme Court, and generally approved and quoted throughout the land, was expressed by Chief Justice Beasley in these words:

"It is not every one who suffers a loss from the negligence of another that can maintain a suit on such ground. The limit of the doctrine relating to actionable negligence is that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies, if the ill effects of the negligences of men could be followed down the chain of results to the final effect." Kahl v. Love, 37 N. J. Law, 8.

An injury that is the natural and probable consequence of an act of negligence is actionable. One that could not have been foreseen or reasonably anticipated as the probable effect of such an act will not sustain an action. An injury is not actionable which would not have resulted from the act of negligence except for the interposition of an independent cause. The injury to the plaintiffs in this case could not have been reasonably anticipated as the probable consequence of the defendant's negligence. It was not the natural or probable effect of that negligence. It would not have resulted without the intervention of an independent cause, without the communication of the telegram to the plaintiffs by the responsible human agency of the Commercial Bank of Britt, an intervention which could not have been reasonably anticipated and which interrupted and turned aside the natural sequence of causation and relieved the defendant from the subsequent results of its act. Wharton on Negligence, § 134; Bishop on Noncontract Law, § 42; Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865, 867, 57 C. C. A. 237, 239, 61 L. R. A. 303.

For these reasons, the conclusion is that a telegraph company does not owe the duty to exercise reasonable care to receive and transmit authorized messages only to the undisclosed principal of an addressee of a message, and the judgment below is reversed, and the cause is remanded to the Circuit Court, with instructions to grant a new trial.

REYNOLDS et al. v. GENERAL ELECTRIC CO. GENERAL ELECTRIC CO. v. REYNOLDS et al. REVENUE TUNNEL MINES CO. v. GENERAL ELECTRIC CO. GENERAL ELECTRIC CO. v. REVENUE TUNNEL MINES CO.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1905.)

Nos. 2,261—2,264.

1. SALES—CONTRACTS—CONSTRUCTION—CAPACITY—WARRANTY OF EFFICIENCY.
A contract by a dealer to furnish to a purchaser a definite pump of known manufacture, "having a capacity of 300 gallons per minute against a head of 350 feet," which has been selected by the purchaser and is to be built by the manufacturer, is not a warranty of the size, design, construction, materials, efficiency, and endurance of the pump, but is, like its name, descriptive, and limited in effect to a warranty of the quality of size.

2. SAME—IMPLIED WARRANTY OF FITNESS—ARTICLE OF KNOWN MANUFACTURE.
Where a purchaser buys of a dealer a definite machine or article of a described manufacture, which has been or is to be made by a builder who is not the vendor, and the vendee knows this fact, there is no implied warranty by the dealer against latent defects, or that the machine or article will be suitable for the purposes for which such articles are commonly used, because the purchaser has the same knowledge and means of knowledge on these subjects as the seller.

3. SAME—IMPLIED WARRANTY OF QUALITIES—EXCLUSION.
An express warranty of one of the qualities of a machine or article excludes implied warranties of other qualities of the article of a similar nature.

(Syllabus by the Court.)

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

The General Electric Company, a corporation, brought two actions in the Circuit Court to enforce its claim for a balance of account of $10,000, which was due to it for machinery which it had sold and delivered to the Revenue Tunnel Mines Company, another corporation. One of these actions was against the mines company for the balance of the account. The other was against Albert E. Reynolds and others, who were directors of the mines company, and was founded upon the indebtedness of the latter company, and upon the fact that it had failed to file its annual report within 60 days after the 1st day of January in the years 1902 and 1903, and had thereby charged its directors with liability for its debts, under Sess. Laws Colo. 1901, p. 121, c. 52, § 11. The two actions were tried together. The same defenses were interposed in each. They were: (1) That the plaintiff in the year 1902 warranted a pump which it sold to the mines company to have a capacity of 300 gallons per minute against a head of 350 feet; and (2) that the plaintiff warranted this pump to be reasonably fit and proper for the use of pumping water in the shaft of a mine, and it was so defective that it was unsuitable for this purpose. These were the material facts established at the trial: The plaintiff was a manufacturer of electrical machinery, and it was a dealer in pumps, but it did not manufacture them. The mines company inquired of the plaintiff for the cost of an electric pump to force 300 gallons of water per minute to a height of 350 feet, with a direct current of 800 volts. The machinery requisite for this purpose consisted of a pump, an electric motor to drive it, and a starting rheostat. The plaintiff was the manufacturer of electric motors, but it was necessary to have the pump constructed by a builder of pumps. It wrote to the mines company that it assumed that it would require a standard stationary pump, and that it was taking the matter up with the pump builders.

A few days later it quoted prices on its motor and rheostat, (1) with a Knowles horizontal triplex 8x8 single acting power pump, (2) with a Knowles vertical triplex power pump, and (3) with a Worthington vertical triplex 8x2 power pump, and the mines company selected the Worthington pump. Thereupon the plaintiff agreed to furnish a Worthington pump "having a capacity of 300 gallons per minute against a head of 350 feet," and one of its motors with a starting rheostat to drive the pump. It promised to ship the motor to the works of the Worthington company, and to deliver the outfit, after testing it, free on board the cars at that place. No complaint was ever made of the motor or rheostat. The International Steam Pump Company owned the Worthington works and the Deane works. All the Worthington pumps were manufactured at the Deane works at that time, and the pump in question was made there from Worthington patterns. The dimensions and cubical capacity of the pump were sufficient to receive and discharge 300 gallons of water per minute against a head of 350 feet, and this task was accomplished by means of it for two or three days at a time. But, through some defect of materials, of workmanship, or of installment, its cylinders repeatedly leaked and broke, it became useless while attempts were being made to replace them and to repair it in other ways, and the mine became flooded before it was finally repaired by the use of steel cylinders so that it would perform the work the mines company desired of it. The latter company and the directors offered to prove, as damages sustained by the company from the alleged breach of the warranties, the increased cost of the power which the mines company had used during the repair of the pump, the salaries paid to its general and executive officers while the pump was disabled, the cost of removing the water from the shaft after it was flooded, and its loss from its interruption of its general mining operations while it was impossible to use the pump, but the court refused to allow them to do so, and they have sued out writs of error to review this and other rulings which present similar questions relative to the measure of damages. These writs present cases numbered 2,261 and 2,263.

The plaintiff requested the court to instruct the jury that the mines company was not entitled to maintain its counterclaim, and that they should return a verdict against it for $10,000 and interest. The court refused this request, instructed the jury that "express warranty means that the warranty is expressed in the contract, and implied warranty means that it is not expressed, but is inferred or implied by the law upon certain facts, and in either event the warranty is in this case that the machinery was made of reasonably suitable materials, that it could be operated for the usual lifetime of such machinery, that it would last whatever the usual life of such machinery would be—such a period of months or years, as the case might be"; and submitted the questions whether or not there was a breach of this covenant, and, if so, the amount of the damages. The plaintiff specifies this ruling as error, and cases numbered 2,262 and 2,264 are presented by its writs of error. There was a verdict and judgment in each case for $8,123.26.

Gerald Hughes (Charles J. Hughes, Jr., on the brief), for Revenue Tunnell Mines Co. and Albert E .Reynolds and others.

Henry F. May (John S. Macbeth and John F. Truesdell, on the brief), for General Electric Co.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

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

If the plaintiff below was entitled to a directed verdict because it was guilty of no breach of any warranty, as its counsel assert, the alleged errors in the refusals of the court to receive evidence, and to submit instructions relative to the amount of damages of which the defendants complain, were not prejudicial, and will require no consid-

eration. The contention of the plaintiff will therefore first be considered. The only express warranty, which was in reality a condition and not a warranty, because the contract was executory, was that the pump should be a Worthington pump, and should have "a capacity of 300 gallons per minute against a head of 350 feet." The pump was a Worthington pump. It was made from Worthington patterns by the owner of the Worthington plant at the Deane works, where all Worthington pumps were then manufactured. It was of sufficient size, and it included ample space for 300 gallons per minute against a head of 350 feet, and that quantity was actually thrown through it for two or three days at a time before it was finally repaired. But either on account of latent defects in materials, in construction or in installation, parts of it gave way from time to time, so that it could not be used continuously until it was finally repaired by the use of steel cylinders. These facts did not constitute the breach of the express warranty alleged in the answer. That breach was that the pump never at any time had a capacity to exceed 120 gallons per minute against a head of 350 feet, and that after an attempt to increase its capacity above that amount some of the parts broke and disabled it until they were replaced.

It is now contended, however, that the warranty was that the pump "could be operated for the usual lifetime of such machinery, and that it would last whatever the usual lifetime of such machinery would be," and that, as it did not do so, the contract was broken. In other words, the claim is that the description of capacity was a warranty of performance, efficiency, and endurance. Counsel declare that they rely upon McGowan v. American Pressed Tan Bark Co., 121 U. S. 575, 602, 604, 7 Sup. Ct. 1315, 30 L. Ed. 1027, to support this position. In that case the defendants, who were manufacturers, made a written agreement to construct for the plaintiff a machine for the purpose of pressing bark. They described the various parts of the machine in the contract and expressly agreed (1) that the entire machine should be constructed "in a workmanlike manner and of first-class material"; (2) that it should "have a sufficient capacity to do the requisite work"; (3) that it could be "used up to fifteen hundred tons pressure"; and (4) that they guarantied "the whole." The Supreme Court held that by this agreement they guarantied that the machine could be used up to 1,500 tons pressure, not once only, but during the time such a machine would ordinarily wear under prudent management. Now, the question in the case at bar is whether the word "capacity," in the contract before us, was a mere description of the size, or of the room in the pump, made for the purpose of identifying it, as was the name "Worthington," or is a warranty of all its essential qualities, including size, space, design, strength, and endurance. The McGowan Case does not rule this question, either directly or inferentially, because the agreement in that case contains three express warranties that are not found in the case at bar: (1) That the machine should be constructed "in a workmanlike manner and of first-class material"; (2) that it could "be used up to 1,500 tons pressure"; and (3) that the manufacturers guarantied "the whole." If the word "size" were substituted for the word "capacity" in that contract, these three warranties would compel

the same construction which was given to it by the Supreme Court. The question at issue is therefore not determined by the McGowan Case.

The word "capacity" has many meanings. It means size, space, or compass. It means power or force. It means intellectual capability, both to receive and to perform. But its primary significance is passive. It is the ability to receive. Its secondary meaning is active. It is the ability to do or to resist. Century Dictionary, "Capacity." The seating capacity of a hall is its size, its ability to permit people to be seated within it. The capacity of a dynamo electric machine is its ability to produce power. In which sense did the parties to this contract use this word? The vendor was not the manufacturer, but was to become the purchaser from the manufacturer and the seller to the mines company of this pump, which the latter had selected, and all this the purchaser knew. While the pump was a machine that it was necessary for the manufacturer to build pursuant to the order of the plaintiff, it was still a definite and standard article of a character presumably known, from the name of its manufacturer, to the purchaser, who selected it from the three pumps that were offered to it, as well as to the dealer who procured it. A manufacturer knows, or ought to know, the design, materials, and workmanship of the machines he produces, while a trader in them, who has no connection with their manufacture, is chargeable with no such knowledge. For this reason the contracts of sale made by manufacturers are construed more strongly against them than are those which are made by dealers. Thus, in Cosgrove v. Bennett, 32 Minn. 371, 374, 20 N. W. 359, a manufacturer who undertook to construct a mill in first-class shape, which should have a capacity of 100 barrels per 24 hours, was held to have agreed that this mill would ordinarily turn out that amount of flour under proper management. The contract in that case, however, differs from the one before us, not only in the fact that the seller was the manufacturer, but also in the fact that he covenanted to construct the mill "in first-class shape."

A contract should have a natural and rational construction, if possible, one in accord with the course of action usually pursued by those of ordinary prudence under like circumstances, rather than one that is unnatural, unreasonable, and contrary to the customary course of action of men in situations similar to that of the contracting parties. It is not reasonable to suppose that a trader who is selling to a customer by description a machine of known manufacture, which the latter selects and the former purchases or orders for him, would guaranty that the article purchased would endure and do the work of similar machines as long as articles of that character ordinarily last. Such an obligation is out of proportion to the consideration which the dealer obtains from the sale, out of the ordinary course of business, and it should not be imposed upon and enforced against him unless it is clearly expressed in his contract, or may be fairly implied from it.

The contract in this case is evidenced by letters. It included a motor manufactured by the plaintiff, and a Worthington pump made by the owner of the Worthington works and patterns. After the plaintiff

had offered its motor and a choice of three standard pumps at specified prices, and the mines company had selected the Worthington pump, it made its final proposition, which, with an immaterial modification, was accepted. It was in these words: "In accordance with conversation we beg to make you the following quotation of electrically driven pump having a capacity of 300 gallons per minute against a head of 350 feet," followed by a specific description of the pump and motor. It does not appear from these words that the parties intended to use them to warrant all the essential qualities of the pump, its size, design, construction, materials, efficiency, and endurance; yet this is in effect the claim of counsel for the defendants. The interpretation that these words were used, like the word "Worthington," to describe or identify the pump by a description of a single quality of it, the size, or its receiving capability, is not inconsistent with any of the terms of the contract. The primary signification of the word "capacity" is passive, and in accord with this construction. In this contract it relates to a passive machine, one that does not drive, but is to be driven, by electricity. The passive meaning of the word is more appropriate to such an article than its active significance. The plaintiff was not a manufacturer of, but a dealer in, the pump made by another and selected by the vendee. Plain and simple terms which would occur to the mind of any business man were available to the parties to express with clearness and certainty a guaranty of the design, construction, materials, efficiency, or endurance of this pump, but the contracting parties did not use them. From this state of facts it is so difficult to logically deduce the conclusion that these parties intended to embody a guaranty of this nature in their contract by the use of the simple word "capacity," whose primary significance is limited to the quality of size, and does not include others, that we are unable to agree that such was the intention of the parties to the contract. Our conclusion is that a contract by a dealer to furnish to a purchaser a definite pump of a known manufacture, having a capacity of 300 gallons per minute against a head of 350 feet, which has been selected by the purchaser and is to be built by the manufacturer, is not a warranty of the efficiency, performance, or endurance of the machine, but a description of the pump, like the name it bears, and it is limited in its effect as a warranty to the quality of size. As this was the extent of the express warranty, the plaintiff was not guilty of any breach of it.

It is said that an implied warranty arose from the sale, to the effect that the pump should be fit and proper for the pumping of water in the shaft of a mine, and that this covenant was broken. If the pump was unfit to do the work which machines of that nature ordinarily perform, that condition arose from latent defects in the material of which it was constructed, or in the workmanship bestowed upon it, of which the plaintiff had no notice. The electric company secured and delivered the article of the known manufacture which the mines company had selected, and which was described in the contract. A manufacturer is charged by the law with notice of latent defects in the design, materials, and construction of the machines he makes which unfit them to perform the ordinary work of such articles, because he fur-

nishes the design, the materials, and the workmanship, and thus either causes or permits the defects. Out of this state of facts and an agreement of sale an implied warranty arises on the part of the manufacturer that the machines he makes are suitable for the general purposes for which such articles are commonly used. Goulds v. Brophy, 42 Minn. 109, 112, 43 N. W. 834, 6 L. R. A. 392. But where such a purchaser buys of a dealer a definite machine of known manufacture, which has been, or is to be, made by a builder who is not the vendor, and the vendee knows this fact, there is no implied warranty by the dealer, either against latent defects or that the machine or article will be suitable for the purposes for which such articles are commonly used, because the purchaser has the same knowledge and means of knowledge of these subjects as has the dealer. The vendee knows that they both rely on the character and reputation of the manufacturer. Bragg v. Morrill, 49 Vt. 45, 47, 24 Am. Rep. 102; American Forcite Powder Mfg. Co. v. Brady, 4 App. Div. 95, 97, 38 N. Y. Supp. 545; Gardner v. Winter (Ky.) 78 S. W. 143, 63 L. R. A. 647, 649.

Again, the parties to this sale put their contract in writing, and embodied in their writing an express warranty of one of the qualities of the pump essential to its fitness for the general uses for which such pumps are designed. Where parties have deliberately put their engagements in writing in such terms as import plain legal obligations, it is conclusively presumed that the whole engagement of the parties and the manner and extent of their undertaking were embodied in the writing. McKinley v. Williams, 74 Fed. 94, 101, 20 C. C. A. 312, 319. The contract of these parties was of this character. Its subject was the pump that was sold, and the expressed warranty of one of its qualities, of its size, which is contained in the description, raises the conclusive implication that other qualities requisite to its fitness for the general use of such pumps were not warranted. An express warranty of one of the qualities of an article excludes an implied warranty of other qualities of a similar nature. The exaction or acceptance by the purchaser of personal property of a warranty of one quality raises a conclusive presumption that he did not desire, or could not secure, or the parties agreed that he should not have, the warranty of others of the same character. Benjamin on Sales (7th Am. Ed.) 672; Carleton v. Lombard, Ayres & Co., 72 Hun, 254, 260, 25 N. Y. Supp. 570; Jackson v. Langston, 61 Ga. 392; Baldwin v. Van Deusen, 37 N. Y. 487, 489; Deming v. Foster, 42 N. H. 165, 175; De Witt v. Berry, 134 U. S. 306, 313, 10 Sup. Ct. 536, 33 L. Ed. 896; Seitz v. Brewers', etc., Machine Co., 141 U. S. 510, 517, 12 Sup. Ct. 46, 35 L. Ed. 837; Buckstaff v. Russell & Co., 79 Fed. 611, 615, 25 C. C. A. 129, 133; International Pavement Co. v. Smith, etc., Machine Co., 17 Mo. App. 264, 269; Chandler v. Thompson (C. C.) 30 Fed. 38, 46; J. I. Case Plow Works v. Niles & Scott Co., 90 Wis. 590, 604, 63 N. W. 1013; McGraw v. Fletcher, 35 Mich. 104, 106; Mullain v. Thomas, 43 Conn. 252, 254. There was no implied warranty of the fitness of the pump to do the work for which pumps of its nature are designed, and there was no breach of the express warranty contained in the contract.

The judgments below must accordingly be reversed, and the cases must be remanded to the court below, with instructions to grant new trials. The writs of error in cases numbered 2,261 and 2,263 challenge no rulings that are prejudicial to the defendants in the cases below, and they must be dismissed at their costs. It is so ordered.

TULL et al. v. NASH et al.

(Circuit Court of Appeals, Ninth Circuit. November 13, 1905.)

No. 1,189.

1. APPEAL—NECESSARY PARTIES.
An appeal will not be dismissed because of the failure to bring in by citation parties who have no interest in the decree appealed from.
[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1815.]

2. SAME—REVIEW—REFUSAL TO PERMIT INSPECTION OF DOCUMENT.
A party cannot assign as error that he was not permitted an inspection of a contract which had been introduced in evidence by the adverse party, who had been permitted to withdraw it from the records on substituting a copy, where he took no steps in the trial court to obtain such inspection.

3. ATTORNEY AND CLIENT—CONTRACT FOR FEES.
The fact that attorneys, who have contracted with a client to represent her interest in litigation for the recovery of certain property for a contingent fee based upon the amount recovered, made such client a defendant in the final partition suit relating to the property, for the sole purpose of having the amount of their fee, which was in dispute, determined, did not amount to a repudiation of the contract, nor deprive them of the right to recover the fee stipulated therein.

4. SAME—SERVICES RENDERED TO MINOR.
Attorneys representing certain heirs in litigation respecting real estate, who obtained the appointment of a guardian ad litem for another heir, who was a minor and was made a defendant, such attorney ad litem appearing on behalf of his ward and being allowed a fee therefor by the court, cannot thereafter claim compensation from the minor on the ground that their services inured to his benefit.

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

The appeal in this case brings before the court a branch of the case which was here on appeal and decided in German Savings & Loan Society v. Tull (C. C. A.) 136 Fed. 1. The appeal involves the claims of Lucius B. Nash and Lucius G. Nash, copartners as Nash & Nash, against the three Tull children, William L. Tull, Dora May Seeley (formerly Dormitzer), and Ernest B. Tull, for attorneys' fees. In 1897 Nash & Nash, as attorneys for Dora May Dormitzer and William L. Tull, brought suit in the superior court for Spokane county, state of Washington, against the German Savings & Loan Society and others, making Ernest B. Tull, a minor, a party defendant. The object of the suit was to obtain a decree restoring one-half of certain property to the three children. W. M. Murray, an attorney at law, was appointed guardian ad litem for Ernest B. Tull. The case was decided against the three children, but on appeal to the Supreme Court of the state of Washington the decree was reversed, and the children were held to be entitled to an unincumbered, undivided, one-half interest in the property. The German Savings & Loan Society took the case by writ of error to the Supreme Court of the United States, where the decree of the Supreme Court of the state of Washington was af-

firmed. German Savings & Loan Society v. Dormitzer, 192 U. S. 125, 24 Sup. Ct. 221, 48 L. Ed. 373. In the year 1901, Dora May Dormitzer, William L. Tull, Lucius B. Nash, and Lucius G. Nash, as plaintiffs, brought a second suit in the state court of Washington against the German Savings & Loan Society, Ernest B. Tull, a minor, and others, for the partition of the property and an accounting. The suit was removed to the Circuit Court of the United States for the District of Washington, and a decree therein was rendered for the complainants, but on appeal to this court it was held that the cause had been improperly removed from the state court, and it was ordered remanded to that court. In June, 1902, the present suit for partition and accounting was brought in the Circuit Court of the United States for the District of Washington. The complainants were William L. Tull and Nash & Nash; William L. Tull appearing therein by Nash & Nash. The defendants were the loan society, Dora May Seeley, and Ernest B. Tull. In the bill of complaint, in addition to the relief which was sought against the German Savings & Loan Society, Nash & Nash set up their claim for attorney's fees against their client William L. Tull for 50 per cent. of the amount recovered for him in the litigation, their claim against Dora May Seeley for 35 per cent. of the amount recovered for her, and their claim for such amount as the court might decree them to be entitled to as attorneys' fees for services rendered to Ernest B. Tull. F. W. Dewart was appointed guardian ad litem for the minor, Ernest B. Tull. He appeared also as attorney for Dora May Seeley, and represented William L. Tull as against the claim of Nash & Nash. Testimony was taken on the subject of the employment and the amount of the attorney's fees of Nash & Nash. The Circuit Court, without making findings of fact or filing an opinion, rendered a decree awarding Nash & Nash 50 per cent. of the property recovered by William L. Tull, 35 per cent. of that recovered by Dora May Seeley, and $2,000 from that recovered on behalf of Ernest B. Tull. The present appeal brings before the court the question whether the court erred in so awarding attorney's fees.

The bill of complaint had for its primary purpose the decision of the question of the claim of lien of the German Savings & Loan Society for improvements placed upon the property. That question was determined on the prior appeal to this court. On the subject of their attorney's fees the bill of complaint on behalf of Nash & Nash alleges that they undertook the original litigation for William L. Tull and Dora May Seeley under agreements by which they were to receive fees contingent upon success therein, amounting to 50 per cent. of the amount recovered for William L. Tull, and 35 per cent. of the amount recovered for Dora May Seeley. On February 5, 1903, Nash & Nash, by leave of court, filed an amendment to the bill of complaint, in which it is alleged that at the time of their employment as counsel for William L. Tull and Dora May Seeley the latter requested and employed them to take charge of and secure the rights and interests of said Ernest B. Tull, upon an understanding between all parties that said Ernest B. Tull should make such compensation as their services and the results should justify, and that by the diligence and care and labor of said attorneys a guardian ad litem was appointed for Ernest B. Tull in the present suit, and that the said Ernest B. Tull accepted their work and labor. They allege, further, that they represented the interest of said Ernest B. Tull in the suit in the Supreme Court of the United States above referred to, and that a reasonable compensation for their services for him is the sum of $5,000. To that amendment Ernest B. Tull, by his guardian ad litem, F. W. Dewart, made answer, alleging his minority, and submitting his rights and interests to the protection of the court.

Frederick W. Dewart, for appellants.
Nash & Nash, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

The appellees interpose a motion to dismiss the bill, on the ground that no service of the citation was made on certain of the parties defendant who had asserted claims against the Tull heirs and their estate, and as to whom there was no severance and summons, and no appearance or representation on the appeal. The appellees cite Davis v. Mercantile Trust Co., 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563, as authority for the rule that all parties to the record, who appear to have any interest in the order or decree challenged, must be given an opportunity to be heard on the appeal. The answer to the motion to dismiss is that it does not appear from the record that the omitted parties have any interest in the decree which is appealed from. The decree does not affect them or their claims. They could have no standing to appear in this court and object to the relief which the appellants seek, nor could they have any interest in appearing here to ask the court to sustain the decree of the court below. The motion must be denied.

A motion is made to strike from the files of this court the record, and the certificate thereto of A. Reeves Ayres, the clerk, for the reason that said clerk was not the legal or actual custodian of the record and proceedings in the cause; said record and proceedings being in the custody of the clerk of the Circuit Court of the Eastern District of Washington. The cause was tried in the late Circuit Court for the District of Washington, Eastern Division. The act of Congress dividing the state into two districts went into effect on March 2, 1905. The decree in the court below was entered May 23, 1904. The appeal was allowed November 18, 1904. Before the transcript was certified the law dividing the district had gone into effect. The certificate was made by the clerk of the Western District of Washington, who had been also the clerk of the former Circuit Court for the District of Washington. The time to file the transcript was extended by orders duly made until March 30, 1905. Before that time expired the transcript was filed, but, question having arisen as to the due certification of the transcript, on March 24th an order was made extending the time to file the transcript, which was duly followed by another order extending the time until July 1, 1905. On May 8, 1905, an order was made permitting the appellants to withdraw the transcript for further certification. It was so withdrawn, and certified by the clerk of the Eastern District of Washington, and returned to this court. Thereafter, on July 1, 1905, was filed the motion to strike, which is under consideration. It is not necessary for us now to pause to determine by which clerk the transcript should have been certified. It is sufficient to say that it was certified by both, and is therefore properly here for our consideration. The motion is denied.

Concerning the award to the attorneys Nash & Nash for services to Wm. L. Tull, we find no ground to question the correctness of the decree of the Circuit Court. Nash & Nash produced in evidence a written instrument signed by William L. Tull in April, 1897, in which he agreed to pay them 50 per cent. of the sum recovered in any litigation upon the claim which was then pending in the suit in the superior court of Spokane county, Washington. The deposition of Wil-

liam L. Tull was taken concerning his contract with Nash & Nash. It appeared that at the time of making the contract he was in the penitentiary in California, and that the agreement was made at the instance of Nash & Nash, who sent an agent to him for that purpose. He testified that the agreement was that he was to pay the attorneys one-third of the amount recovered, and that, if the contract which was signed provided for the payment of a larger percentage, it was procured by fraud practiced upon him by the agent. The paper plainly calls, however, for 50 per cent. of the amount recovered, and we find no evidence, other than the bare statement of William L. Tull, that fraud was practiced upon him. His counsel in this case objects to the evidence of the contract, on the ground that it is a copy, and not the original instrument. It appears that the contract was offered in evidence before the examiner at a time when William L. Tull was not represented by counsel, and that after exhibiting the original contract Nash & Nash requested that the examiner make a copy to take the place of the original in the record. Subsequently counsel for William L. Tull demanded that the original contract be produced and filed in evidence. Nash & Nash declined to surrender it. Counsel for William L. Tull said.

"I don't ask you to surrender it to me. I ask you to put it in the case. I object to a copy of the contract going in; it is not the best evidence. If you have the original, that has to go in."

Judge L. B. Nash, who was then on the witness stand, said:

"If you want any papers, you can take the legal steps to secure them. If that contract has got to go in evidence, it can go in. Anybody can look at it."

Counsel for William L. Tull now complains that he was not allowed an inspection of the original contract. This does not appear to be sustained by the evidence. The objection of Nash & Nash was not to an inspection of the contract by opposing counsel, but to the surrender of it as evidence in the case. Counsel for William L. Tull had his remedy to obtain an inspection of the paper. Not having pursued that remedy, he cannot now complain that it was not submitted to his inspection.

As to the attorney's fees to be paid by Dora May Seeley, her testimony is direct and positive that she was given to understand, and always understood, that Nash & Nash were to receive one-fourth of her estate for their services, and that she had an arrangement with them to that effect: She said:

"I knew Judge Nash and his family intimately when I was a girl in Spokane, and I therefore put a great deal of confidence in him, and when I was assured my portion of the case would be handled for 25 per cent., did not think a contract was necessary, and, as before stated, in all my conversations with Nash & Nash it was always expressed and implied that they were to receive 25 per cent. of my interest in the suit, if it was won."

She deposed further that she never knew they claimed any more than that amount until in January, 1901, while she was living in Chicago, she learned that they had filed an attorney's lien for 35 per cent., and that then, on January 29th, she wrote them a letter of protest. She said:

"I wrote them that I had just learned from a Spokane newspaper that they had filed a lien against my interest for 35 per cent. I wrote them that I did not understand why they had done this; that I had agreed to give them a smaller sum, which was a good and fair fee; that I wanted to treat them fairly, and I wanted to know at once why they had named 35 per cent., and to give me also a complete statement of the case. I received a letter from them saying there was a good deal more work to be done in the case, and asking me what compensation I considered proper, and what I was willing to give. I have never heard from them since."

Judge Lucius B. Nash testified that the agreement and understanding with Dora May Seeley was that they should receive from her 35 per cent. of the amount recovered in her behalf. Lucius G. Nash testified that that agreement was reduced to writing and signed by Dora May Seeley at her house in April, 1897, he and she only being present, but that the contract had been lost and could not be found. Neither Lucius B. Nash nor Lucius G. Nash denied that they had received from Dora May Seeley her letter of January 29, 1901, in which she had protested against the amount they claimed in their attorney's lien, nor that they had written her in response thereto asking what compensation she considered proper, and was willing to give. As far as the evidence goes, that correspondence stands admitted. In view of that fact and the fiduciary relation already existing between Dora May Seeley and her attorneys at the time when the agreement was made, we are of the opinion that the court erred in allowing Nash & Nash more than 25 per cent. of the amount recovered on behalf of Dora May Seeley, and that probably the attorneys were in error in their recollection as to the terms of their contract; it not having been shown that their memory had been refreshed by an inspection of the written contract testified to by Lucius G. Nash at any time after its execution. They urge that the denial of the execution of the contract by Dora May Seeley in her deposition is a qualified one. She was asked, "Did you, in the Spring of 1897, execute a contract with Nash & Nash to represent you in that litigation?" to which she answered, "To the best of my recollection, I never executed any such contract; and, if such a contract was executed, I think I would remember it." The question propounded to her was not whether she had executed a contract for 35 per cent., but whether she had executed any contract; and her answer must be considered in the light of that question. She testified to numerous conversations with Nash & Nash about the matter of fees and to the general understanding as to what the amount of the fees should be, and it might well be that her memory was not very clear as to whether or not that general understanding had been reduced to writing. But we are not warranted in construing her answer as an admission that she might have signed a written contract providing for the payment of 35 per cent.

It is urged by counsel for Dora May Seeley that Nash & Nash cannot recover the full amount of the 25 per cent. agreed to be paid by her, for the reason that said attorneys did not represent her in the present suit, which is a part of the litigation contemplated in the agreement, but made her a party defendant, thereby compelling her to employ other counsel to represent her herein. So far, however, as the principal object of the present suit was concerned, the deter-

mination of the claim of the German Savings & Loan Society, the services of Nash & Nash inured to the benefit of all the Tull heirs. It is not shown that Dora May Seeley objected to the arrangement by which she was made a party defendant. At that time she had an interest in the suit antagonistic to Nash & Nash, inasmuch as she questioned the amount which they claimed as attorney's fee. For that reason it was proper that she should be represented by other counsel. We do not think that the fact that she was represented by other counsel in the present suit, or the fact that she was made a party defendant herein, amounts to a repudiation of the original contract on the part of Nash & Nash, or affords ground to reduce the amount of the compensation which they were to receive from her.

At the beginning of the litigation Ernest B. Tull was a minor. In their amendment to the bill Nash & Nash alleged that Dora May and William requested and employed Nash & Nash to look after the interests of Ernest B.; that they secured the appointment of a guardian ad litem in the state court and in the former suit which was removed to the United States court, and that they will secure one for him in the suit in the United States Supreme Court. Nash & Nash both testified that Dora May, William, and their father, F. M. Tull, engaged them to look after the interests of Ernest B., and that they acted as attorneys for W. M. Murray, the guardian ad litem. It is clear, however, that such an employment by the relatives of the minor could not bind his estate. So far as asking the court to appoint a guardian ad litem for Ernest B., a defendant in the original suit or in the succeeding suit in the United States court, is concerned, the services of Nash & Nash cannot be regarded as services to be compensated out of Ernest B.'s estate. He being a defendant in the suit, it was necessary that a guardian ad litem be appointed to represent his interest, and it was in the ordinary course of business and for the advantage of the complainants to ask for such an order. W. M. Murray, the guardian so appointed, was an attorney at law, and the testimony shows that he actively participated in the litigation on behalf of his ward. At the termination of the litigation in the state court, a final decree was rendered by the superior court of Spokane county, in accordance with the mandate of the Supreme Court of the state of Washington, in which it was recited as follows:

"Lucius G. Nash, of the firm of Nash & Nash, being present and participating in the hearing and testifying therein at his own request, and the said Nash & Nash not having presented to said guardian ad litem, or filed with the court, any claims for fees or expenses as attorneys for said guardian ad litem, and said L. G. Nash having refused to present any such claim at the hearing, and having heard proofs in the matter, the court finds that $5,000 is a reasonable sum to be allowed to said William M. Murray for his compensation as guardian ad litem, and for all charges, expenses, and obligations incurred by him in the discharge of his duties as such guardian ad litem, including any claim which Nash & Nash may have for fees or expenses as attorneys."

And the court adjudged and decreed that said William M. Murray be allowed the sum of $5,000 "as compensation for his services as guardian ad litem for Ernest B. Tull in this cause, and for all expenses, charges, and liabilities incurred by him in the discharge of his

duties." That decree effectually precludes Nash & Nash from claiming any allowance as attorney's fees in connection with litigation which terminated in the decree so rendered. We find no evidence whatever in the record that they have performed services for Ernest B. Tull since the date of that decree, such as to justify the court in awarding them compensation from his estate. They made him a party defendant to this suit. A guardian ad litem was appointed to represent him, and in all the litigation of this suit that guardian ad litem, as an attorney at law, has appeared on behalf of Ernest B. Tull, and no one else has appeared as his attorney. It is true that for themselves and William L. Tull, Nash & Nash sought relief which has resulted in benefit to the estate of all the Tull children, but the fact that the benefit obtained by attorneys on behalf of their clients operates to the advantage of other parties not represented by them is of itself no ground for charging such other parties with attorney's fees. Especially is this true where such other party is a minor. In their amendment to the bill Nash & Nash refer to services for Ernest B. Tull in the case which was taken to the Supreme Court of the United States. Issue was taken upon that allegation, and no evidence whatever was offered to sustain it. This court is in possession of no information as to services rendered in that suit by said attorneys as representing Ernest B. Tull or his guardian ad litem. We are of opinion, therefore, that that portion of the decree which awards Nash & Nash $2,000 for services rendered to Ernest B. Tull is not sustained by any proof, and must be reversed.

The decree is affirmed as to William L. Tull, is modified as to Dora May Seeley so as to charge her estate with but 25 per cent. thereof in favor of Nash & Nash, and as to Ernest B. Tull it is reversed.

UINTA TUNNEL, MIN. & TRANSP. CO. v. AJAX GOLD MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. October 25, 1905.)

No. 1,811.

1. MINES AND MINERALS—ENTRIES AND PATENTS—LODE CLAIMS—ESTOPPEL OF OWNER OF PRIOR TUNNEL CLAIM.

   Entries and patents of lode mining claims, in proceedings to which a claimant of a tunnel site located across them prior to the entries was not, and was not required to be, a party, will not estop him from establishing by the testimony of witnesses who know and by other customary evidence the fact that no discoveries of mineral in rock in place had been made in the lode claims before the claim for the tunnel site was located across them.

2. SAME—WORD "LOCATION" HAS TWO MEANINGS.

   The word "location," in its application to mining claims, has two distinct meanings: First, all the acts, including discovery, requisite to perfect the right of possession; and, second, the placing of the claims, the posting of the notice, and the marking of the boundaries, excluding discovery.

3. CONTRACTS—CONSTRUCTION—ASCERTAINING INTENTION.

   One of the fundamental rules for the interpretation of a contract is that the court should place itself as near as may be in the situation of

the contracting parties at the time the agreement was made, and should then endeavor to ascertain from the contract, in the light of the surrounding facts and circumstances, what the parties actually intended by their agreement.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 730.]

4. SAME—INTENTION TO BE DEDUCED FROM ENTIRE AGREEMENT.

This intention must be deduced, not from specific provisions or fragmentary parts of the instrument, but from the entire context, because the intention is not evidenced by any part or provision of it, or by the agreement without any part or provision, but by every part so construed as to be consistent with every other part and with the entire contract.

Every provision of the instrument should be given its ordinary meaning and effect, if possible, and no part should perish by construction.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 734.]

5. SAME—INTERPRETATION OF PARTIES—TEST OF INTENTION.

The practical interpretation of the contract by the parties, while they are engaged in its performance and before any controversy concerning it has arisen, is one of the most satisfactory tests of its meaning, and courts may generally adopt that construction with safety.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 753.]

6. SAME—INTENTION WHEN ASCERTAINED MUST PREVAIL.

When the actual intention of the parties is ascertained, it must prevail, regardless of the dry words, inapt expressions, or careless recitations in the instrument.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 730.]

7. MINES AND MINERALS—LOCATION—DISCOVERY—STATEMENT OF FACTS.

An agreed statement of facts, which stipulated that the lode claims of the plaintiff were "located in compliance with law" at dates anterior to the location of the defendant's tunnel site, and that as to the issue made in the pleadings upon the question whether mineral in rock in place was discovered in the plaintiff's claims before the location of the tunnel site the defendant offered testimony tending to negative such discovery, which is on plaintiff's objection ruled out by the court, and such ruling is excepted to by the defendant, used the word "location" in its more restricted sense, excluding discovery, and did not estop the defendant from litigating the issue relative to the discovery of mineral in rock in place in the plaintiff's claims prior to the location of the defendant's tunnel site.

(Syllabus by the Court.)

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

Charles J. Hughes, Jr. (Scott Ashton, on the brief), for plaintiff in error.

Wm. W. Field and J. C. Helm (J. F. Vaile, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

SANBORN, Circuit Judge. In the year 1901 two actions were pending in the court below against the Uinta Tunnel, Mining & Transportation Company, one by the Creede & Cripple Creek Mining & Milling Company, and the other by the Ajax Gold Mining Company. The former action involved the right to the possession of the space within the bore of the tunnel of the defendant where it passed through two lode mining claims owned by the Creede Company,

which were entered for patent on August 5, 1892, and were patented on December 21, 1892. The Creede Company alleged that the discovery and location of these claims were made on January 2, 1892. The defendant located its tunnel site on January 13, 1892, and it denied that any discovery of mineral in rock in place had been made in the lode claims of the plaintiff prior to its location of its tunnel site. The action of the Ajax Company, which is now before us for consideration, involved the right to the possession of the space within the bore of the tunnel where it passes through the Mammoth lode mining claim and the Apex lode mining claim, which were the property of the Ajax Company, were entered for patent respectively on May 9, 1893, and March 31, 1893, and were patented on September 6, 1895, and April 22, 1895. The Ajax Company alleged that a discovery and location of the Mammoth mining claim was made on September 25, 1891, and of the Apex mining claim on December 29, 1891. The defendant denied that any discovery of mineral in rock in place had ever been made in either of these claims before the location of its tunnel site on January 13, 1892.

In each of these cases counsel for the respective plaintiffs insisted that the patents to the lode claims conclusively estopped the defendant from proving by parol testimony, or otherwise, that no discovery of mineral had been made upon them before the location of the tunnel site, and one of the most important questions in the cases was this: When the claim to a tunnel site has been located before the entry of the conflicting lode mining claims which have subsequently passed to patents, is the question whether discoveries of mineral were made within the lode claims before the location of the claim to the tunnel site open to determination by means of testimony dehors the patents? The court below answered this question in the negative. This court and the Supreme Court answered it in the affirmative. 119 Fed. 164, 57 C. C. A. 200; 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501. The question was presented to the court below in this way: A motion was made in each case to strike out portions of the answer which denied the discoveries in the lode claims before the location of the tunnel claim. The motions in the two cases appear to have been considered together, for the orders of the court which granted them were both made on December 6, 1901. There remained, however, in the Ajax Company's case, after the motion was granted, an averment by the defendant that there had been no discovery in the lode claims of the plaintiff before the location of the tunnel site.

In this state of the cases the action of the Creede Company was tried in January, 1902, and the court rejected evidence offered by the defendant to prove that no discovery had been made in the lode claims before the location of the tunnel site, there was a judgment for the Creede Company, and the defendant sued out a writ of error from this court to reverse it. While that action was pending here and in June, 1902, the case of the Ajax Company was tried in the Circuit Court. That court made the same ruling upon the trial which it made in the Creede Case. A judgment was rendered against the defendant, a writ of error to reverse it was sued out of this court

on June 27, 1902, and the parties to this action stipulated in writing that this case should be continued until the Supreme Court decided the case of the Creede Company. That case has been determined and the judgment of the Circuit Court has been reversed, because that court refused to permit the defendant to prove that there were no discoveries in the lode claims before the location of the tunnel site.

A like ruling of the Circuit Court in the Ajax Company's case is assigned as error here, and the facts which have been recited seem to render it fatal to the judgment below. Counsel for the Ajax Company, however, contend that the defendant is estopped from reviewing this ruling, and from litigating the question it determines, by a written stipulation of agreed facts, which was made and introduced in evidence at the trial in the Circuit Court. This stipulation consists of 17 numbered paragraphs. The clause which counsel for the Ajax Company insists creates this estoppel is found at the commencement of the fourth paragraph and is in these words:

"That said Mammoth Pearl * * * and Apex lode mining claims were located in compliance with law, on, to wit, the 22d day of January, 1891, * * * and the 2d day of October, 1891, respectively."

And the argument is that a location in compliance with law necessarily includes a discovery of mineral in rock in place in the claim, and that this concession is therefore in reality a stipulation that discoveries had been made in these claims at the dates of their respective locations, which were prior to the location of the tunnel site. There is no doubt that a location of a lode mining claim in compliance with law, which has been so perfected as to vest a complete right of possession in the locator, cannot be made without a discovery of mineral in the claim; and the reasoning of counsel here might be conclusive if the clause quoted constituted the entire agreement of the parties upon the subject. The agreed statement of facts, however, contains the further stipulation that the tunnel was located on the 13th day of January, 1892, and the sixteenth paragraph reads:

"That as to the issue made in said pleadings upon the question whether mineral in place was discovered on plaintiff's * * * Mammoth Pearl and Apex lode claims, or in the discovery shafts thereof, prior to the date of the location of the said Uinta tunnel site, defendant offers testimony tending to negative such a discovery, which testimony is, on plaintiff's objection, ruled out by the court; such ruling being duly excepted to by the defendant."

The purpose of a written contract is to express the concurring intention of the minds of the parties when it is made. Hence the object of its construction or interpretation is to ascertain the actual intent and meaning of the parties when they executed it. Familiar and serviceable rules of interpretation of agreements are that the court may place itself as near as may be in the situation of the parties to the agreement at the time it was made, and may then endeavor to ascertain from the terms of the contract, in the light of the surrounding facts and circumstances, the actual intent and meaning of the parties; that this intention must be deduced, not from specific provisions or fragmentary parts of the instrument, but from its entire context, because the intention is not evidenced by any part or

provision of it, or by the instrument without any part or provision, but by every part and term so construed as to be consonant with every other and with the entire agreement; that every provision of the instrument should be given its ordinary meaning and effect, if possible, and no part should perish by construction; and that the actual intention of the parties, when ascertained, must prevail, regardless of dry words, inapt expressions, or careless recitations in the contract.

Now, while it is true that a location of a lode mining claim, adequate to perfect the possessory right of the locator, includes within its legal and primary meaning a discovery of mineral in the claim, because no such location is possible without a discovery, it is also true that this word "location" is frequently used in this connection in another and more restricted sense to portray the placing of the claim, the posting of the notice containing the name of the lode, the name of the locator, and the alleged date of the discovery, and the marking of the boundaries of the claim, without the discovery. It is used in this sense in Morrison's Mining Rights (11th Ed.) at page 32, in Snyder on Mines, at section 354, in the case of In re James Mitchell, 2 L. and Dec. Dep. Int. 752, in Reins v. Raunheim, 28 L. and Dec. Dep. Int. 526, 529, and in Erwin v. Perego, 35 C. C. A. 482, 485, 93 Fed. 608, 611, where the claim was made that a title to a lode mining claim was invalid because the discovery followed, instead of preceded, the posting of the notice and the marking of the boundaries; and this court said:

"There is no reason to be deduced from the acts of Congress, or from the nature of the case, why a claim upon which the location was made before the discovery should be held void, while one upon which the discovery was made before the location should be held valid."

A location in this latter sense of a lode mining claim in compliance with law, in the terms of the agreed statement of facts, was permissable without any discovery, if a discovery was subsequently made before another located the claim. Creede, etc., Milling Co. v. Uinta., etc., Transportation Co., 196 U. S. 337, 350, 25 Sup. Ct. 266, 49 L. Ed. 501; Erwin v. Perego, 35 C. C. A. 482, 93 Fed. 608. If, therefore, the parties to the agreed statement of facts used this word "location," where they wrote concerning the location of the lode mining claims, in this restricted sense, to indicate the posting of the notices and the marking of the boundaries, without the discovery, the defendant was not estopped by his stipulation from proving that there had been no discovery in the lode claims before the tunnel site was located. In which sense did they use it?

One of the main issues, perhaps the most important question, raised by the pleadings was whether or not any discoveries in the lode claims had been made before the location of the tunnel site. The defendant had tendered this issue in the Creede Company's Case, had been defeated upon it by the ruling of the court that the patents of the lode claims estopped it from litigating this issue, had sued out a writ of error to reverse that ruling, and the question of law thus raised was awaiting decision in this court. In this state of the facts

the Ajax Company's case was tried. An agreement should receive a natural and reasonable construction, one in accord with the course of action commonly pursued by men of ordinary judgment and prudence under like circumstances, rather than one that is unreasonable and contrary to the usual course of action of sensible men in like cases, and it is not reasonable to suppose that the parties to this action who insisted upon its trial, intended to make an agreement to extract from the case one of its main issues which they were so vigorously contesting in both the circuit court and this court. The sixteenth paragraph of the agreed statement amounts to a demonstration of the fact not only that they had no such purpose, but that they intended to, and did retain this issue in the case, try it, take the ruling of the court upon the question of law it presents, and preserve it for determination by the higher courts. That paragraph expressly provides that the defendant offers testimony tending to negative a discovery in the lode mining claims prior to the location of the claim for the tunnel site, that this testimony is on plaintiff's objection ruled out by the court, and that this ruling is excepted to by the defendant. The interpretation of the contract for which counsel for the plaintiff contend would render this paragraph nugatory and would fly in the teeth of the rule that meaning and effect should be given to every part of a contract, if possible. On the other hand, if the word "location" is given its more restricted, but permissible, definition of posting the notices and marking the boundaries of the claims, all the parts of the stipulation have their normal meaning and effect, and it becomes a consistent and rational whole. This was the construction which the parties to the agreement gave to it before this controversy arose; and where the execution of a contract involves a practical construction of it, and the minds of the parties agree upon it while they are engaged in its performance and before any controversy has arisen concerning its interpretation, that construction is one of the best indications of their true intent. City of Chicago v. Sheldon, 9 Wall. 50, 54, 19 L. Ed. 594; Long Bell Lumber Co. v. Stump, 30 C. C. A. 260, 264, 86 Fed. 574, 578; Fitzgerald v. First National Bank, 52 C. C. A. 276, 280, 114 Fed. 474, 478.

After the agreed statement of facts had been received in evidence, the defendant produced witnesses and inquired of them whether there was any discovery of mineral in the discovery shafts of the Mammoth and Apex claims "prior to January 2, 1892, which was after the location of the Uinta tunnel." The plaintiff objected to this testimony, not, as it now objects, because it claimed that the defendant had agreed that discoveries had been made at the stipulated dates of the locations, but because it appeared from the stipulation that the lode claims were patented, that their locations were prior to the time fixed in the question and prior to the location of the tunnel, and because the patents related back to the dates of the locations of the claims and "the presumption of the discovery of mineral at that time was conclusive." The offer of the testimony and the objections are alike inconsistent with the theory that the parties had agreed that discoveries had been made in the lode claims and that the locator's right of

possession of them had been perfected before the tunnel site was located. The stipulation in this court to continue this case until the Supreme Court decided the case of the Creede Company betrays a similar inconsistency. The plain truth is that the contention of counsel for the plaintiff here is an afterthought, inspired by commendable zeal and anxiety to escape from the effect of the decision in the case of the Creede Company. The sixteenth paragraph of the agreed statement of facts, which, under the plaintiff's interpretation would be avoided, and which expressly reserves for review the ruling of the court below which was reserved in the Creede Case, the entire agreement, when all its provisions are read and construed together and the practical interpretation of the parties before this controversy arose, all converge to show that the meaning of the word "location" in the stipulation was the placing of the claims, the marking of their boundaries, and the posting of the notices, and not the perfecting of the right of possession, and that the true intent and meaning of the parties was to retain in the case the issue of the discovery and to preserve for review in this court the legal question which conditioned the right of the parties, in this case and in the case of the Creede Company alike, until that question was finally decided in the latter case by the Supreme Court. This intention is so clearly evidenced by the agreement that it must prevail.

It is said that the question addressed to the witnesses of the defendant relative to the discoveries in the lode claims was irrelevant, because it confined their testimony to a time prior to January 3, 1892, while the tunnel site was not located until January 13, 1892. But that objection was not made in the court below. It might have been removed, if it had been suggested. The defendant's testimony was not excluded upon that ground, and the legal question in this case is adequately preserved and presented to this court by the sixteenth paragraph of the agreed statement of facts, approved and embodied in the bill of exceptions by the judge who tried the case, as it was, regardless of the subsequent offers of and rulings upon the testimony. The defendant is not estopped by the stipulation of the agreed facts from challenging the ruling of the court below which excluded its testimony to the effect that no discovery had been made in the lode claims before the tunnel site was located.

That ruling was erroneous, and the judgment below must be reversed, and the case must be remanded to the Circuit Court for a new trial, upon the authority of Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel, Mining & Transportation Co., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501, and Uinta Tunnel, Mining & Transportation Co. v. Creede & Cripple Creek Min. & Mill. Co., 119 Fed. 164, 57 C. C. A. 200. And it is so ordered.

AMMONS v. BRUNSWICK-BALKE-COLLENDER CO.

(Circuit Court of Appeals, Eighth Circuit. October 26, 1905.)

No. 2,154.

1. PROCESS—SUFFICIENCY OF SUMMONS—FORMAL DEFECTS.

A summons duly served on a defendant, which notifies him of the court, term, time, and place where he is required to appear and that he is required to answer the claim of plaintiff, is not fatally defective because it omits to state the penalty for his failure to appear as specified in the statute; the defect being one of form and not of substance, and especially where defendant appeared, and in a stipulation signed by the parties waived all irregularities in the process served.

2. CORPORATIONS—FOREIGN CORPORATIONS CARRYING ON BUSINESS IN INDIAN TERRITORY—CONSTRUCTION OF STATUTE.

Under Act Feb. 18, 1901, 31 Stat. 794, which provides that "before any foreign corporation shall begin to carry on business in the Indian Territory" it shall file a certificate designating a resident agent on whom process may be served, and also stating its principal place of business in the territory, and that if it fails to comply with such provisions all of its contracts with citizens and residents of the territory shall be void and shall not be enforced in its favor by any of the courts therein, proof that a foreign corporation, having no place of business in the territory, in a single instance completed an executory contract of sale therein by delivery of the property and taking notes and a mortgage for the purchase price through a local bank acting as its agent, is not sufficient to subject it to the penalty for "carrying on business" by rendering its notes and mortgage nonenforceable, though it never filed the statutory certificate.

[Ed. Note.—Foreign corporations "doing business" in state, see note to Wagner v. J. & G. Meakin, 33 C. C. A. 585.]

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

For opinion below, see 82 S. W. 937.

This was a suit in replevin instituted in the United States Court of the Indian Territory, Central Division, by the Brunswick-Balke-Collender Company, defendant in error, hereinafter called plaintiff, against J. H. Ammons, plaintiff in error, hereinafter called defendant, to recover possession of certain pool tables, bar furniture, mirrors, and other personal property which plaintiff alleges it sold and delivered to defendant, taking back a chattel mortgage conveying the same to it as security for payment of the purchase price. It is alleged that plaintiff is entitled to possession of the property in question because of breach of condition in the mortgage requiring payment within a specified time. Defendant for his answer admits the sale, mortgage, and condition broken, but alleges that plaintiff, at the time the property was purchased by him, was a foreign corporation carrying on business in the Indian Territory without having complied with the provisions of the act of Congress requiring it to file its certificate designating an agent upon whom summons and other process might be served. The parties waived a jury and submitted their cause to the trial court on the complaint and answer, together with the following agreed statement of facts: "On January 9, 1902, the defendant, J. H. Ammons, wrote to the plaintiff, asking it to send him a catalogue for bar fixtures, pool and billiard tables, saying that he was going to open a new house; that the plaintiff mailed the defendant a catalogue on 11th of January, and that on January 14, 1902, defendant acknowledged receiving catalogue by letter to plaintiff, and in same letter asked plaintiff if it could furnish a 14-foot Twentieth Century outfit, and asked for lowest cash figures on a 14-foot Model outfit, also pool and billiard tables; that plaintiff wrote a reply giving prices of different outfits, which was received by defendant,

and defendant then ordered part of the goods sued for in this suit, and sent two notes and a cash payment; asking that the goods be shipped to Hartshorn, and in the same letter ordered more of the goods by way of a postscript, and inclosed $10 cash, and promised to send time notes for balance. In reply to this plaintiff mailed defendant time order blank to be signed by defendant, making order for the goods, and stating the price, and also returned to defendant the notes sent by him, and on February 14, 1902, defendant wrote plaintiff a letter and inclosed the time order signed by him. This time order stipulated that defendant agreed to execute notes and a mortgage to secure the balance of the purchase price and that title to the property should remain in plaintiff until said mortgage upon said property was given, and by correspondence it was agreed that the notes be made payable at the First National Bank in South McAlester. That on the 5th day of March, 1902, defendant wrote plaintiff and asked prices on Southern pool table and New York combination billiard and pool table. On March 7th plaintiff answered by mail, giving prices. On March 10, 1902, defendant ordered from plaintiff Southern pool table with complete outfit, $150, Delaware combination billiard and pool table with ivory balls, $225, and signed up the time order for these goods, and asked that the plaintiff ship goods to Hartshorn. That all the property sued for in this action was ordered by defendant on the time order blanks mailed defendant by the plaintiff. And that the plaintiff made out two mortgages, one dated on the 26th of February and the other March 31, 1902, upon printed mortgages in blank used by plaintiff, covering the property sold defendant, and notes for balance of purchase money, and mailed the same in Chicago, Ill., the general office of plaintiff, to the First National Bank of South McAlester, to be signed and executed by the defendant. That plaintiff, under the terms of the order of defendant, was to ship goods and send bill of lading (B. L.) to First National Bank, with said notes and mortgages, the bank to deliver the B. L. when notes and mortgages were executed by defendant. The defendant signed both notes and mortgages, and acknowledged execution of mortgages before E. T. Bradley, a notary public at said bank, and left same with Mr. Bradley, cashier of First National Bank, who delivered to the defendant, the B. L. for goods. That when the notes became due the defendant failed and refused to pay them or any part thereof, and demand was made to defendant for the possession of the property covered by mortgage, and defendant refused to surrender property, and this suit was brought for the possession of the property by plaintiff as mortgagee; the mortgage giving the plaintiff right of possession upon default of payment of any note. Defendant gave retaining bond and kept the property. That there is still due plaintiff on the notes secured by mortgage from defendant $443. That the plaintiff is a corporation created under the laws of Ohio, doing business in Chicago as headquarters, and also in St. Louis. That it has no office in the Indian Territory, and only sells goods to parties on order in the Indian Territory, and that all letters from defendant were addressed to the plaintiff, either to St. Louis or Chicago office, and that all replies were made by the plaintiff from the said office in St. Louis or Chicago, and property was shipped from Chicago, Ill. That the cashier of the bank, Mr. Bradley, received no pay for his services. The plaintiff had never designated an agent in the Indian Territory upon whom service of process may be made. That defendant is a resident of the Indian Territory. That the value of each article of property is one-fifth less than amount set out in affidavit by plaintiff, and the total value of $443."

The trial court rendered judgment for the plaintiff. This in due course of procedure was affirmed by the United States Court of Appeals in the Indian Territory. To reverse this judgment the defendant brings the case here by writ of error. The following errors are assigned: First, that the lower court erred in not quashing the summons and order of delivery, and the Court of Appeals erred in not reversing the judgment for that reason; second, the lower court erred in finding the issues of fact and law in favor of plaintiff, and in holding that plaintiff was not doing business in the Indian Territory within the intent and meaning of the act of Congress, and the Court of Appeals erred in not reversing the judgment for that reason.

J. E. Whitehead, for plaintiff in error.
T. C. Humphrey and Horton & Brewer, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

The contention that the summons was void merits little consideration. Section 5658 of Sandels & Hill's Digest of the Statutes of Arkansas, relating to summons in civil actions, is as follows:

"The summons shall be directed to the sheriff of the county and command him to summon the defendant or defendants named therein, to answer the complaint filed by the plaintiff (giving his name) at the time stated therein, under the penalty of the complaint being taken for confessed, or of the defendant being proceeded against for contempt of court on his failure to do so. The summons shall be dated the day it is issued and signed by the clerk."

The summons in this case was embraced in and constituted a part of the order of delivery of the property. After commanding the officer to take from the defendant the possession of the property, the summons proceeds as follows:

"You are also commanded to summons the said J. H. Ammons to appear in the United States Court in the Indian Territory, Central District, at South McAlester, in said Indian Territory, on the first day of the next January, 1903, term thereof, the same being on the 5th day of January, 1903, to answer the claim of said plaintiff for said property and also for damages amounting to fifty dollars ($50.00) for the detention thereof, and notify the said J. H. Ammons of the time and place of trial and then and there make due return of this order."

Defendant claims that this summons was defective, because it failed to embody the words found in section 5658, supra, namely, "Under the penalty of the complaint being taken for confessed." We cannot agree with this contention. The summons was explicit with respect to the court, term, time, and place at which defendant was required to appear. The summons also notified the defendant that he was required to answer the claim of the plaintiff, not only for the property, but also for the damages for detention thereof. The mere fact that the summons did not contain a statement of the consequence following a failure to appear does not avoid the summons itself. The omission of these words was, at most, an irregularity—a defect in form, not of substance.

In the case of Rice Stix Co. v. Dale & Richardson, 45 Ark. 34, the Supreme Court of Arkansas had occasion to construe the section of the statute in question. The court there says:

"The process served upon him [the defendant] distinctly shows that an action had been instituted against him and that he was required to answer it. This is a special office of a summons. * * * The statutory form of writs and process should be strictly observed, but the court is required to disregard any defect which does not affect the substantive rights of a party."

We are of opinion that the omission of the words in question in no manner affected the substantive rights of the parties. The summons performed its function. It brought the defendant into court, and in due time thereafter the defendant and the plaintiff entered

into a stipulation continuing the case until the next term, and in doing so made use of the following words:

"We agree that the summons and the order of delivery was served upon the defendant on the 26th day of May, 1902, by delivering to him a true copy of the annexed, which is by this agreement made the original, order herein on said day, and defendant waives all irregularities in the same, and it is further agreed that the case be continued until next term of this court."

Language cannot more clearly express a thought than does this language express the thought that all irregularities in the summons and order of delivery were waived by the defendant. The word "same" in the concluding clause of the agreement grammatically and naturally refers to the subject of the sentence in which it appears, namely, to the "summons and the order of delivery." For both reasons, therefore, because the summons was not substantively defective on account of the omission of the words in question, and because the defendant, in order to secure a continuance of the case, agreed to waive all irregularities in the summons, we conclude that there is no merit in the first assignment of error.

We are now brought to consider the question whether the failure to file the certificate as alleged in the answer and as admitted in the agreed statement of facts constitutes a defense to plaintiff's action. The law making provision for the certificate is found in an act of Congress, entitled "An act to put in force in the Indian Territory certain provisions of the laws of Arkansas relating to corporations and to make said provisions applicable to said territory," approved February 18, 1901, 31 Stat. 794. Section 4 (page 795) of this act reads as follows:

"That before any foreign corporation shall begin to carry on business in the Indian Territory it shall, by its certificate, under the hand of the president and seal of such company, filed in the office of the clerk of the United States Court of Appeals for the Indian Territory, designate an agent, who shall reside where the United States Court of Appeals for the Indian Territory is held, upon whom service of summons and other process may be made. Such certificate shall also state the principal place of business of such corporation in the Indian Territory. Service upon such agent shall be sufficient to give jurisdiction over such corporation to any of the United States Courts for the Indian Territory. If any such agent shall be removed, resign, die or remove from the Indian Territory or otherwise become incapable of acting as such agent, it shall be the duty of such corporation to appoint immediately, another agent in his place as hereinbefore provided."

Section 5 of this act reads as follows:

"That if any foreign corporation shall fail to comply with the provisions of the foregoing sections, all its contracts with citizens and residents of the Indian Territory shall be void as to the corporation, and no United States Court in the Indian Territory shall enforce the same in favor of the corporation."

The defendant invokes these provisions of law for his protection. In so doing he pleads affirmatively that plaintiff was a foreign corporation at the time it sold him the goods in question, and was carrying on business in the Indian Territory without having filed the certificate required by the act of Congress. The burden of proof was on him to sustain this plea. This he sought to carry by the use of the

agreed statement of facts. This agreed statement is the equivalent of a special finding of facts. Supervisors v. Kennicott, 103 U. S. 554, 26 L. Ed. 486; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373. Accordingly, no question is or can now be raised except the one question whether the facts found in the special finding or its equivalent, the agreed statement, are sufficient to support the judgment. Lehnen v. Dickson, supra; Citizens' Bank v. Farwell, 11 C. C. A. 108, 63 Fed. 117, and cases there cited. The facts disclose, without doubt, that plaintiff was a foreign corporation, and had not filed the certificate required by the act of Congress, but the question is still open whether the defendant has shown that the plaintiff was carrying on business within the true meaning of the act of Congress in the Indian Territory at the time it sold the goods to the defendant.

The purchase of the goods was the result of correspondence between plaintiff and defendant. The goods were paid for partly in cash, and the balance was to be paid at some later day; the payment of the same being secured by a chattel mortgage. Plaintiff, whose general office was in Chicago, prepared the note and mortgage for execution by defendant and sent them, together with a bill of lading for the goods which it cotemporaneously shipped, to the First National Bank of South McAlester, Ind. T., with instructions to secure the execution of the note and mortgage by defendant, and upon so doing to deliver to him the bill of lading, which constituted a symbolical delivery of the goods themselves. These instructions were followed, and defendant, upon executing the note and mortgage at South McAlester, delivered the same to the cashier of the First National Bank of South McAlester for plaintiff, and at the same time received from him the bill of lading entitling him to take possession of the goods purchased. It thus appears that the transaction between plaintiff and defendant was concluded at South McAlester. It was there that plaintiff delivered the goods to the defendant, and that defendant settled for the same by executing his note and mortgage and delivering the same to the cashier of the bank for plaintiff. The cashier was plaintiff's agent to perform the executory contract entered into by prior correspondence, and this performance constituted a business transaction between plaintiff and defendant within the Indian Territory. But this is the only transaction which defendant has shown, to bring plaintiff within the denunciation and penalty of sections 4 and 5 of the act of Congress of February 18, 1901, supra. The language of the agreed statement of facts that plaintiff "only sells goods to parties on order in the Indian Territory" is quite too indefinite and uncertain as proof of such actual transactions to subject plaintiff to the highly penal provisions of the act in question. The language of the agreed statement just quoted could obviously be truthful if the transaction between plaintiff and defendant was the only one which plaintiff had ever conducted in the Indian Territory. If there had been business transactions between plaintiff and citizens and residents of the Indian Territory besides the one between plaintiff and defendant which affords the occasion of this suit, or if other such transactions had been contemplated, such facts could doubtless

have been readily shown; but, whether so or not, the burden was on defendant to establish his defense, and if he failed to do so for want of proof it was his own misfortune.

We consequently have the question presented whether proof of one business transaction in the Indian Territory, with nothing more, without filing the certificate required by the act of Congress, is sufficient evidence of a purpose "to carry on" a business, to subject plaintiff to the provisions of the act in question. An analysis of the act, in our opinion, discloses that Congress had in mind the conduct of some regular or systematic business. The requirement for filing a certificate is predicated upon the existence of a purpose to "carry on business." To "carry on" means, according to lexicographers, to "promote," "advance," or "help forward" (Webster). "Business" means (1) "That which busies" or "that which occupies the time, attention, or labor of one as his principal concern, whether for a longer or shorter time." (2) "Any particular occupation or employment engaged in for a livelihood or gain, as agriculture, trade, art, or a profession." (3) "Mercantile transactions or traffic in general." (Webster.) All these definitions imply, if not express, the idea of some permanency or durability; something more than a single temporary or spasmodic undertaking. This thought, in our opinion, is involved in that portion of the act providing what the certificate shall contain. It says:

"Such certificate shall also state the principal place of business of such corporation in the Indian Territory."

This necessarily implies that the business of a foreign corporation before the filing of the required certificate becomes imperative, shall have become of such serious contemplation that it has some principal place in the Indian Territory where it is to be carried on. The foregoing considerations seem to strongly indicate that a single transaction like that disclosed in the agreed statement of facts was not intended by Congress to subject the actor to the confiscation denounced by section 5 of the act. In this view of the statute we are supported by abundant authority.

The case of Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137, was one involving a statute of the state of Colorado similar to the act of Congress now under consideration. The Legislature of that state, with a view of carrying into effect a constitutional provision, enacted that:

"Foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate, * * * designating the principal place where the business of such corporation shall be carried on in this state and an authorized agent or agents in this state residing at its principal place of business upon whom process may be served."

It appears that a foreign corporation, having its principal place of business in Ohio, entered into a contract with the defendants, citizens of Colorado, by which it was agreed that the corporation should sell and deliver to the defendants, a steam engine and other machinery, in consideration whereof the defendants were to pay the corporation the price stipulated in the contract. The machinery was de-

livered and the purchasers refused to pay, pleading, among other defenses, that when the contract was entered into the plaintiff corporation had not made and filed the certificate required by the statute of Colorado already quoted. Mr. Justice Woods delivered the opinion of the court. He observes as follows:

"Reasonably construed, the Constitution and statute of Colorado forbid, not the doing of a single act of business in the state, but the carrying on of business by a foreign corporation without the filing of the certificate and the appointment of an agent as required by the statute. The Constitution requires the foreign corporation to have one or more known places of business in the state before doing any business therein. This implies a purpose at least to do more than one act of business. For a corporation that has done but a single act of business, and purposes to do no more, cannot have one or more known places of business in the state. * * * The statute passed to carry the provision of the Constitution into effect, makes this plain, for the certificate which it requires to be filed by a foreign corporation must designate the principal place in the state where the business of the corporation is to be carried on."

Then, after defining some words employed in the act, he continues:

"The obvious construction, therefore, of the Constitution and the statute, is that no foreign corporation shall begin any business in the state, with the purpose of pursuing or carrying it on, until it has filed a certificate designating the principal place where the business of the corporation is to be carried on in the state, and naming an authorized agent, residing at such principal place of business, on whom process may be served. To require such a certificate as a prerequisite to the doing of a single act of business when there was no purpose to do any other business or have a place of business in the state, would be unreasonable and incongruous."

To the same effect, also, is the case of Florsheim, etc., Co. v. Lester, 60 Ark. 120, 29 S. W. 34, 27 L. R. A. 505, 46 Am. St. Rep. 162. The Legislature of that state passed an act to carry into effect a constitutional provision of the state that:

"Before any foreign corporation shall begin to carry on business in the state, it shall, by its certificate * * * filed in the office of the Secretary of State, designate an agent * * * upon whom service, summons and other process may be served."

Plaintiff in that case had taken a mortgage from the defendant in the state of Arkansas to secure payment of money which the defendant owed for the purchase price of goods sold him on credit. Suit was brought to foreclose the mortgage. A defense was interposed that the plaintiff, a corporation, had failed to file a certificate pursuant to the provisions of the Arkansas statute. The Supreme Court of that state in its opinion says:

"The only question in this case is whether the taking of a single mortgage in this state, by a foreign corporation, for a past-due indebtedness for goods sold in the foreign state, the domicile of the foreign corporation, is doing business in this state within the meaning of the Constitution and the act of the General Assembly above quoted. * * * There is a division of authorities on this question. But we think the better view of the question is presented in Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137."

After quoting generously from the opinion in the last-mentioned case, the Supreme Court of Arkansas follows it, and rules accord-

ingly. Of similar import are the following cases: Steam Heating Co. v. Gas Fixture Co., 60 Mo. App. 148; Gates Iron Works v. Cohen, 7 Colo. App. 341, 43 Pac. 667; Potter v. Ithaca Bank, 5 Hill, 490; Suydam v. Morris Canal & Banking Company, 6 Hill, 217; Milan Milling, etc., Co. v. Gorten, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135; Babbitt v. Field (Ariz.) 52 Pac. 775; Gilchrist v. Helena H. S. & S. R. Co. (C. C.) 47 Fed. 593.

The foregoing would seem to be decisive of the present case; but counsel for defendant insists that the case of Chattanooga Building, etc., Association v. Denson, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870, is inconsistent with the views so far expressed, and fully sustains him in his contention. That case arose in Alabama, and turned upon the proper interpretation of a constitutional and legislative provision of that state. Article 14 of its Constitution (1875) ordains that no foreign corporation "shall do any business" in that state without having at least one known place of business and an authorized agent or agents therein. Section 1316 of the Code of Alabama of 1896, enacted in execution of the constitutional provision, provides that every foreign corporation, "before engaging in or transacting any business" in the state, shall file a statement in writing, designating its place of business and appointing an agent. It cannot escape observation that these constitutional and statutory provisions are more restrictive than the act of Congress now in question. In Alabama the certificate is required to be filed by foreign corporations before "engaging in or transacting any business" in the state. In the Indian Territory the certificate is required to be filed before the "foreign corporation shall begin to carry on business in the Indian Territory." The Supreme Court of Alabama had, before that suit was instituted, placed its own construction upon the constitutional and statutory provisions referred to. In Farrior v. New England Mortgage Security Co., 88 Ala. 275, 7 South. 200, it held that these provisions were violated by the doing of a single act of business by a foreign corporation in the exercise of its corporate functions. See also, Ginn v. New England Mortgage Security Co., 92 Ala. 135, 8 South. 388, and Sullivan v. Sullivan Timber Co., 103 Ala. 371, 15 South. 941, 25 L. R. A. 543.

It is a well settled rule that the construction placed upon local laws by the highest court of the state which enacted them is followed by the National courts; and this rule seems to have been followed in the Chattanooga Building, etc., Association Case. After discussing the Farrior Case and the other Alabama cases just cited, the Supreme Court uses the following language:

"These cases constitute an interpretation of the constitutional and statutory provisions, and clearly hold that any act in the exercise of corporate functions is forbidden to a corporation which has not complied with the Constitution and statute."

For the reasons, therefore, that the phraseology of the act of Congress applicable to the Indian Territory is essentially different from that employed in the Alabama Constitution and statutes, and for the further reason that the Supreme Court of Alabama had placed an interpretation upon its own laws which was necessarily followed in the Chat-

tanooga Building, etc., Association Case, we are of opinion that the last-mentioned case is not controlling authority in favor of the defendant in this case, and, for the same reasons, that it is not inconsistent with the doctrine of Cooper Manufacturing Co. v. Ferguson, supra.

It results that the judgment of the United States Court of Appeals in the Indian Territory was correct. It is therefore affirmed.

SOUTH DAKOTA CENT. RY. CO. v. CHICAGO, M. & ST. P. RY. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 20, 1905.)

No. 2,268.

1. REMOVAL OF CAUSES—CIVIL SUITS—CONDEMNATION PROCEEDINGS.
   A proceeding by a railroad company to condemn right of way under the statutes of South Dakota is a civil suit, within the meaning of the federal judiciary act (Act March 3, 1887, c. 373, § 1, 24 Stat. 552; Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), and is removable where the requisite diversity of citizenship exists and the jurisdictional amount is involved.

2. SAME—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.
   A proceeding by a railroad company to condemn right of way under the statutes of South Dakota against a number of defendants owning land in severalty presents a separable controversy with respect to each owner, and is removable by a defendant, who is a citizen of another state, where the requisite amount is involved to give the federal court jurisdiction.

   [Ed. Note.—Separable controversy as ground for removal of cause to federal court, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.]

3. SAME—AMOUNT IN DISPUTE.
   An allegation, in a petition for removal, that the amount in dispute exceeds $2,000, exclusive of interest and costs, is sufficient to give the federal court jurisdiction, although there may be no proof given on the trial to sustain it.

   [Ed. Note.—Jurisdiction of federal 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.]

4. SAME—TIME FOR FILING PETITION.
   Where a summons served on September 16th required defendant to appear and plead within 20 days, exclusive of the day of service, a petition for removal filed on October 6th was in time.

5. EMINENT DOMAIN—RAILROADS—RIGHT TO APPROPRIATE RIGHT OF WAY OF ANOTHER COMPANY.
   The statutes of South Dakota conferring the power of eminent domain on railroad companies (Civ. Code, §§ 488, 505), while authorizing one railroad company to "cross, intersect, join and unite its road with the railroad of any other company," do not authorize it to build its road longitudinally upon the right of way of another company, and in the absence of such statutory authority it cannot condemn a right of way to do so.

6. SAME—PROCEEDINGS TO CONDEMN CROSSING—CONDITION PRECEDENT.
   Under Civ. Code S. D. § 488, which confers upon a railroad company the right to cross with its tracks the road of any other company, and provides that, if the two companies are unable to agree as to the compensa-

tion to be made or the point or manner of crossing, the same may be determined by condemnation proceedings, an effort to make an agreement is a condition precedent to the right to maintain condemnation proceedings.

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

Joe Kirby for plaintiff in error.

H. H. Field (Porter & King, on the brief), for defendants in error.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

RINER, District Judge. The South Dakota Central Railway Company, a corporation organized under the laws of South Dakota (hereinafter called the "Central Company"), filed its application in the circuit court of Minnehaha county, S. D., to condemn, for its use as a right of way, a strip of land lying within the right of way of the Chicago, Milwaukee & St. Paul Railway Company (hereinafter called the "Milwaukee Company"), in the city of Sioux Falls, S. D., and also for the condemnation of a right of way to cross the right of way and railroad of the Milwaukee Company. The amended petition was filed on the 15th day of September, 1904, and a summons was issued, which was served on the Milwaukee Company September 16, 1904, requiring it to appear in the proceeding within 20 days from the service of the summons, exclusive of the date of service. On the 5th of October the Milwaukee Company presented to the judge of the circuit court of Minnehaha county its petition for removal, accompanied by a bond, in due form. On the 6th day of October the petition was filed and an order made for the removal of the cause to the federal court, as provided by law. Simultaneously with the filing of the petition, bond, and order of removal the Milwaukee Company served its objections and answer upon the attorneys for the Central Company.

The petition for removal set forth the diversity of citizenship between the companies, alleging that the Central Company was a corporation and citizen of the state of South Dakota, and that the Milwaukee Company was a corporation and citizen of the state of Wisconsin; that the Milwaukee Company was the exclusive owner of the right of way sought to be condemned; that no other party to the action had any title or interest therein, or claim, or right to the damages or compensation that might be allowed, and that the amount in controversy exceeded the sum of $2,000, exclusive of interest and costs. The answer of the Milwaukee Company to that portion of the petition, filed by the Central Company, which sought to condemn that part of the land lying within the right of way of the Milwaukee Company, set forth and alleged its ownership of the right of way sought to be condemned, and that it had used and occupied it for railroad purposes for more than 20 years; that the Central Company had no right or authority, under the laws of South Dakota, to acquire this right of way by condemnation proceedings; and that the Milwaukee Company was entitled to the sole and exclusive possession thereof, for the operation of its railroad. For answer to that

portion of the amended petition, which sought to condemn the right to cross the right of way and railroad of the Milwaukee Company, it was alleged that the Central Company had made no effort to agree with the Milwaukee Company as to the amount of compensation to be made for the right to cross, or as to the point and manner of such crossing. Pursuant to the order of removal, a transcript of the proceedings was filed in the federal court. The Central Company thereafter filed a motion to remand, which was overruled, and on the 21st day of October, 1904, the case came on for trial before the court and a jury. At the close of the evidence offered by the Central Company, a motion was made by the Milwaukee Company to dismiss, upon the ground that no case had been made out for the condemnation of the property sought to be acquired. This motion was sustained by the court, and a judgment entered dismissing the proceedings upon the merits and for costs.

The first assignment of error challenges the correctness of the ruling of the circuit court denying the motion made by the plaintiff in error to remand the case to the state court. In determining this question, we must consider (1) whether the proceeding in the state court was a suit or controversy to which the judicial power of the United States extends; (2) if a suit or controversy, was it removable to the Circuit Court of the United States; (3) if removable, was it in law removed? We are of the opinion that the proceeding in the state court was a suit or controversy to which the judicial power of the United States extends, and that it was removable to the federal court. "It related to property rights, the parties are corporate citizens of different states, and the value of the matter in dispute exceeds the amount required to give jurisdiction to the circuit court." It falls, therefore, clearly within the provisions, both of the constitution and the judiciary act of 1887-88. Judiciary Act March 3, 1877, c. 373, § 1, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508] declares:

"That the Circuit Court 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, * * * in which there shall be a controversy between citizens of different states."

Chief Justice Marshall, in Weston v. City of Charleston, 2 Pet. 464, 7 L. Ed. 481, in considering what constituted a suit, said:

"The term 'suit' is certainly a very comprehensive one and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. Modes of proceeding may be various; but, if a right is litigated in a court of justice, the proceeding by which a decision of the court is sought is a suit."

The statutes of South Dakota provide that where a corporation, invested with the power of taking private property for public use, desires to do so, it shall file a petition in the circuit court of the county in which the property is situated, and that the party filing the petition shall be named therein as the plaintiff and all persons affected by the proceeding shall be named as defendants, and the petition must contain a description of the property to be taken. It

is further provided that a summons may issue which shall be entitled in the action or proceeding and which shall state the time and place of filing the petition, the nature of the proceeding, and contain a notice to the effect that if the defendants do not appear in said proceeding within 20 days from the service of the notice, exclusive of the day of service, the plaintiff will apply to the court to impanel a jury and ascertain the compensation. Provision is also made for the publication of the summons on defendants who are nonresidents as in other actions. It is further provided that upon affidavit of the default of the defendants the plaintiff may apply to the court to draw and summon jurors, and that the proceedings of impaneling the jury and rendering a verdict may be had during a regular term of the court, or in case of default that a special term of court shall be held at which the proceedings in impaneling a jury, trial, and rendering the verdict shall be conducted in the same manner as trials of actions in the circuit court, giving to defendants the right to challenge jurors and the right to examine and cross-examine witnesses. It is further provided that the jury shall ascertain and return in their verdict the compensation to be paid for each lot or parcel of land or property taken or damaged. It is also provided that the only issue or question to be tried by the jury shall be the amount of compensation for the property taken or damaged, and that upon the return of the verdict the same shall be recorded and a judgment entered thereon. Provision is also made for appeal the same as in other actions.

Proceedings under these statutes are, we think, civil suits within the meaning of the act of 1887, and where the necessary diverse citizenship exists and the amount in controversy is sufficient are removable under the provisions of that act. But it is insisted that the proceeding is an exercise, by the state, of its sovereign right of eminent domain, and can only be maintained as authorized by the laws of the state, and could not, in the first instance, be brought in the federal court. This position, in our judgment, cannot be sustained; for, notwithstanding the right is one that appertains to sovereignty, yet, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance, and, if that inquiry take the form of a proceeding before the courts between the parties, there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the state. In Colorado Midland Ry. Co. v. Jones (C. C.) 29 Fed. 193, Mr. Justice Brewer said:

"I do not suppose that a state can, by making special provisions for the trial of any particular controversy, prevent the exercise of the right of removal. If there was no statutory limitation, the Legislature could provide for the trial of many cases by less than a common-law jury, or in some other special way. But the fact that it had made such different and special provisions would not make the proceeding any the less a trial, or such a suit as, if between citizens of two states, could not be removed to the federal courts. If this were possible, then the only thing the Legislature of a state would have to do to destroy the right of removal entirely would be to simply change and modify the details of procedure."

Union Terminal Railway Co. v. Chicago, B. & Q. Co. (C. C.) 119 Fed. 209; Madisonville Traction Company v. St. Bernard Mining Company, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462, and cases there cited.

It is also insisted that the controversy was not separable as to the Milwaukee Company, and for that reason jurisdiction of the federal court does not attach. The Milwaukee Company was the exclusive owner of the strip of land lying within its right of way which was sought to be condemned, and alone entitled to the entire compensation for the taking, if it could be taken at all. We think it requires no discussion to show that there was clearly a separable controversy as between the Central Company and the Milwaukee Company which was properly removable to the federal court, notwithstanding the presence of other defendants owning an interest in other property sought to be acquired. Pacific Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319; Chicago v. Hutchinson (C. C.) 15 Fed. 129; Railroad Co. v. McKell (C. C.) 75 Fed. 34.

With reference to the question sought to be raised, that it was not made to appear that the amount in dispute was sufficient to give the federal court jurisdiction, it is only necessary to say that the petition for removal expressly stated that the amount in dispute in said controversy exceeds in value the sum of $2,000, exclusive of interest and costs. This allegation is sufficient, although there may be no proof given upon the trial to sustain it. Stockyards v. Railroad Co., 67 Fed. 35, 14 C. C. A. 290; Pine v. N. Y. (C. C.) 103 Fed. 337; Lord v. DeWitt (C. C.) 116 Fed. 713; King v. Railway Co. (C. C.) 119 Fed. 1016.

Neither is there any merit, we think, in the suggestion that the removal was not taken in time. The summons which was issued and served on the 16th day of September contained a notice to the effect that if the defendant did not appear in the suit within 20 days from the service thereof, exclusive of the date of service, plaintiff would apply to the court to impanel a jury to assess the compensation. The 20 day period expired on the 6th of October, and included the whole of that day. The petition for removal having been filed and the order made within the 20 days, it was in time. Groton Bridge & Man. Co. v. American Bridge Co. (C. C.) 137 Fed. 284; A. K. & N. Ry. Co. v. So. Ry. Co., 131 Fed. 657, 66 C. C. A. 601. The answer of the Milwaukee Company denies the right of the Central Company to have the land condemned to its use on the ground that the Milwaukee Company is the owner of the right of way sought to be acquired, and is entitled to the sole and exclusive possession thereof for the operation of its railroad. The record shows that the located center line of the Central Company lies wholly upon the right of way of the Milwaukee Company, from the place of the proposed crossing, southerly for a distance of a half mile and 700 feet. This located line is from 16 to 22 feet distant from the center line of the Milwaukee road, and the Central Company proposed to take 33 feet on the east side of this located line and on the west side; the strip lying between the located line and the Milwaukee track as now used. For a portion of

this distance the Milwaukee road is constructed through a cut, which at places is 24 feet deep, and because of the usual slope of the banks of the cut the entire width of the right of way, 100 feet, is occupied by the cut. The distance between the two center lines is 13 feet and the width of the Milwaukee roadbed is 16 feet, so that the 33 feet which the Central Company sought to take lies wholly within the 100 feet of right of way of the Milwaukee Company, and, if appropriated, will exclude that company therefrom and prevent it from constructing any additional tracks on the east side of its present track.

Reference is made to sections 4 and 16, art. 17, and section 13, art. 6, of the Constitution of South Dakota, which reads as follows:

Section 4, art. 17: "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the Legislature from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals. * * *"

Section 16, art. 17: "Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and shall receive and transport each the other's passengers, tonnage and cars. * * *"

Section 13, art. 6: "Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained and before possession is taken. * * *"

The laws of South Dakota, conferring the power of eminent domain upon a railway company, are found in subdivision 6 and 7 of section 488 and in section 505 of the Civil Code, and read as follows:

"(6) To cross, intersect, join and unite its railroad with any railroad heretofore or hereafter constructed, at any point on its route and upon the grounds of such railroad corporation, with the necessary turnouts, sidings and switches, and other conveniences in furtherance of the objects of its connections. And every corporation whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined in the manner provided by law for the ascertainment and determination of damages for the taking of real property."

"(7) To have and to use equal room, ground, rights, privileges and conveniences for tracks, switches, sidings and turnouts upon any levee, river bank or front, steamboat or other public landing, and upon any street, block, alley, square or public ground within any incorporated town or city, any charter or ordinance of any such city or town to the contrary notwithstanding; and to accomplish this, may adjust, with other corporations, the ground to be occupied by each with such tracks, switches, sidings and turnouts; and if such corporations cannot agree upon such adjustment, and the amount of compensation to be paid for the purchase or necessary change of location and removal of any track previously laid, the same shall be ascertained and determined, and the common, mutual and separate rights adjusted in the manner provided by law for the ascertainment and determination of damages for the taking of real property."

"Sec. 505. Every railroad corporation incorporated under this act, and any railroad corporation authorized to construct, operate or maintain a railroad within this state, has power and is authorized to enter upon any land for the purpose of examining and surveying its railroad, and to take, hold and appropriate so much real estate as may be necessary for the location, construction and convenient use of its road, including all necessary grounds for buildings, stations, work shops, depots, machine shops, switches, side tracks, turn tables, snow defenses and water stations; all materials for the construction of such road and its appurtenances, and the right of way over adjacent land

sufficient to enable such corporation to construct and repair its road and the right to conduct water to its water stations, and to construct and maintain proper drains, and may obtain the right to such real estate by purchase or condemnation in the manner provided by law."

Whether the provisions of the Constitution, above referred to, can be given a construction sufficiently broad to authorize the Legislature to provide for the taking of the right of way of one railroad by another railroad company; it is unnecessary to decide. It is sufficient, for the purposes of this case, to say that in our judgment the provisions of the Constitution are not self-executing, and that the statute above cited does not authorize it. The statute does authorize one railroad company to cross, intersect, join, and unite its railroad with any railroad heretofore, or hereafter constructed, at any point on its route and upon the grounds of such railroad corporation, with necessary turnouts, sidings, switches, and other conveniences, in furtherance of the objects of its connections, but does not authorize one railroad to build its road longitudinally along the right of way of another railroad company, and in the absence of express authority or clear necessity this cannot be done. The rule is stated by Circuit Judge Dallas, of the Third Circuit, in the case of Western Union Telegraph Company v. Penn. Co., 59 C. C. A. 117, 120 Fed. 362, in the following words:

"It is well settled that the right of eminent domain may be exercised by a corporation in any case, only when granted in express terms or by necessary implication and that property held and applied by one corporation for a public use, cannot be appropriated by another for its use without authority clearly expressed or which may be implied from the fact that the use claimed is absolutely necessary to the accomplishment of the purpose for which the claimant corporation was created." Penn. Railroad Companies' Appeal, 93 Pa. 150; Glover v. Boston, 14 Gray (Mass.) 292; Groff's Appeal, 128 Pa. 621, 18 Atl. 431; Cinn. S. & C. R. Co. v. Village Belle Center (Ohio) 27 N. E. 464; Lake Erie & W. Rd. Co. v. Board of Co. Com'rs (C. C.) 57 Fed. 945.

Although corporations engaged in business of a nature which requires them to serve the public are said to be public corporations, they are, in fact, but private enterprises inaugurated for the benefit of their stockholders. While railroads are subject to use for the public benefit, they are owned, not by the public, but by corporations, which so far at least as ownership is concerned are private corporations. And if one such corporation may take the property of another, so as to deprive the latter of the use to which it was devoted, except in cases expressly authorized by the statute, or where public necessity demands such taking, there would be no reasonable limit to the conditions under which the power of eminent domain might be exercised. The full extent to which any of the courts have gone upon this subject is that the land appropriated to a particular public use is not, under all circumstances, withdrawn from liability to be taken by legislative authority in the exercise of the power of eminent domain for another public use, with this qualification, that a special grant cannot be construed to authorize subversion of the former use, unless such appears, by express words or by necessary implication, to be the legislative intent. As there is no statute in the state of South Dakota which authorizes the taking by one railroad

of the right of way of another longitudinally, but the power granted is limited to the crossing or intersection of the right of way of another company and the uniting with its railroad, the attempted condemnation proceeding of a portion of the right of way of the Milwaukee Company longitudinally cannot be sustained.

One further question may be briefly noticed. Section 488, subd. 6, of the Civil Code, confers upon a railroad the right to cross another railroad at any point on its route and grounds, and provides that when the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings or connections, the same shall be ascertained and determined in the manner provided by law, for the ascertainment and determination of damages for the taking of real property. The amended petition for condemnation did not allege, nor did the evidence show, that the Central Company had ever applied to the Milwaukee Company for the right to cross its road, or that the two companies had been unable to agree upon the compensation or upon the point and manner of crossing. This, we think, is a condition precedent to its right to condemn the crossing, and that the ruling of the circuit court was right.

The judgment of the Circuit Court is affirmed.

MACON, D. & S. R. CO. et al. v. SHAILER et al.

(Circuit Court of Appeals, Fifth Circuit. December 5, 1905.)

No. 1,504.

1. CORPORATIONS—SUITS BY STOCKHOLDER—RIGHT TO MAINTAIN.

Under equity rule 94 a stockholder cannot maintain a suit to set aside a sale of property by the corporation which was not ultra vires, on the ground of fraud on the part of the president or directors, unless his bill shows that he applied to the stockholders to take action in the matter, setting forth the efforts made by him and the cause of their failure.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 791–796, 816, 817.]

2. SAME—SUIT TO SET ASIDE SALE.

A minority stockholder has no standing in equity to maintain a suit to set aside an executed sale of assets of the corporation by a pledgee, made under authority given by the pledge, after maturity of the debt secured and with the approval of the officers of the corporation, where the pledge was within its powers and it is not alleged that the directors or a majority of the stockholders disapprove of the sale, or that they would not ratify the same, and especially where it appears from the evidence that since the filing of the bill the sale has been ratified and approved by the stockholders by a large majority.

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

The bill in this case was filed November 26, 1904, by Robert A. Shailer, a citizen of Massachusetts, as a minority stockholder of the Illinois & Georgia Improvement Company, on behalf of himself and other stockholders similarly situated, etc., to set aside a sale of the stocks and bonds of the Macon, Dublin & Savannah Railroad Company, incorporated under the laws of Georgia, made

by said improvement company to the Atlantic Coast Line Company, a corporation of the state of Connecticut, for the sum of $1,000,000, to enjoin the Coast Line Company from voting the stock or controlling the said railroad company, to appoint a receiver for the said railroad, and to foreclose the first mortgage of the said railroad company. The Illinois & Georgia Improvement Company was incorporated in the state of Illinois with a capital of $1,000,000, divided into 10,000 shares of $100 each. Shailer alleges himself to be the holder of 126 shares. To the bill Ira E. Dupree became by intervention a party plaintiff, claiming to own 40 shares. The Macon, Dublin & Savannah Railroad Company (called herein "railroad company") is a Georgia corporation owning and operating a railroad from Macon, Ga., to Vidalia, Ga. The Illinois & Georgia Improvement Company is chartered as a construction company, with power, among other things, to build railroads, receive railroad securities therefor, and sell the same, and repeat like operations of construction and dealing in securities. The improvement company, pursuant to its chartered powers, became and was at the times hereinafter stated the owner of $2,040,000 par value of the shares of the capital stock, and $1,380,000 par value of the first mortgage and $500,000 par value of the second mortgage bonds of said railroad company. Said stocks and bonds were all of the stocks and bonds of said railroad company. In order to raise money which was expended in building and equipping parts of the railroad of said railroad company, said improvement company made two loans, one for $750,000, secured by a collateral trust agreement conveying to the American Trust & Savings Bank, an Illinois corporation (called herein "Savings Bank"), $2,040,000 of the capital stock, and $1,380,000 of the first mortgage bonds of said railroad company, and one for $150,000, secured by a like agreement conveying to said savings bank the entire issue, $500,000, of second mortgage bonds of said railroad company. Said securities were delivered to said savings bank in pledge under the terms of said collateral trust agreements, and were thereafter so held by the said bank.

The debts secured were represented by a series of negotiable notes of $1,000 each, held by a number of bona fide purchasers for value before maturity, and the holders thereof were entitled to the security of the trust deed and pledge held by said savings bank. The earnings of the railroad company never were sufficient to pay the interest maturing on either issue of the bonds. By agreement with the improvement company, the coupons on said railroad company's bonds were not detached or presented for payment. The improvement company kept the interest paid up on its outstanding notes which were secured by said collateral trust and pledge. The improvement company had for a considerable time been endeavoring to sell the stocks and bonds of said railroad company. January 15, 1901, the stockholders of the improvement company, in a meeting at which complainants' stock voted affirmatively, directed the board of directors to either sell or pledge these securities to raise money. February 14, 1901, the stockholders again authorized the directors to sell these securities. The ineffectual efforts of the president to sell the securities were from time to time reported to the stockholders. In May, 1904, the loans of the improvement company were maturing, and it was necessary that something should be done to raise money to meet its debts. Its creditors had notified the improvement company that the debts could not be extended. Ineffectual efforts were made to get the stockholders to put up the money on the credit of the securities of the railroad company. The savings bank, as trustee, after waiting until September 23, 1904, filed its bill in the circuit court of Cook county, Ill., to foreclose its collateral trust agreements, alleging that disputes existed between the holders of the notes evidencing the debts secured, as to certain priorities of payment claimed by some of said holders. This bill prayed an ascertainment of said debts and the sale of the pledged securities by a public judicial sale. On September 27, 1904, G. D. Mackay, a member of the firm of Vermilye & Co., brokers, offered W. G. Elliott, who was president of the Coast Line Company, to sell to him and associates the entire stocks and bonds of said railroad company for $1,000,000 cash. Mackay was authorized to make the sale by Joy Morton, president of the improvement company, and the sale was made on September 27, 1904, at the price named.

September 28, 1904, a check for $50,000 was deposited to the order of said savings bank with the North American Trust Company in New York. October 5, 1904, a memorandum of sale was drawn up, reciting the sale of said securities to said Coast Line Company by said improvement company for $1,000,000. This was signed by the improvement company, the owner and pledgor, through its president, and a consent thereto, so far as it had any interest, was signed by said savings bank, the pledgee. October 27, 1904, the balance of said purchase money was paid. November 30, 1904, the board of directors of the improvement company ratified and approved said sale and the disposition of said securities. On October 31, 1904, the aforesaid bill, filed by the savings bank in the circuit court of Cook county, was dismissed.

The bill attacks said sale of said securities and seeks to set it aside upon the grounds, to wit, that the sale was made by the savings bank, the pledgee at private sale, at an inadequate price, and that said pledgee occupied a dual position as trustee and creditor (being the owner of some of the aforesaid notes), and especially after filing its bill in Cook county circuit court could not in equity make such sale; that the sale as made or consented to by the improvement company was illegal, because a private sale for inadequate consideration made by the president, who was also vice president of the savings bank, without authority from either the stockholders or directors of the company; that the sale was of all the assets of the improvement company, and could not be made, except by unanimous consent, as it was a practical dissolution of the company; that, if such sale was necessary to pay debts, it must be by a vote of shareholders and at public auction. It is charged that the Coast Line Company knew all the facts before it finally paid for said securities. Subsequent to the filing of the bill, to wit, on February 20, 1905, the annual meeting of the shareholders of the improvement company was held. At said meeting complainant sought to have the shareholders disapprove said sale and direct the recovery of said securities. This was voted down, and, instead thereof, the sale was in all things ratified and approved by the shareholders by a vote of 4,498 $^{4}/_{10}$ shares for, to 641 shares against; the total shares outstanding being 7,146 $^{3}/_{4}$. On July 11, 1905, the presiding judge passed an order continuing a restraining order previously issued, in force until the final hearing and refusing to appoint a receiver.

The appellants took an appeal and assign errors as follows:

"(1) Because it appears by the bill of complaint that complainant Shailer is the owner of only 126 shares, and intervener Ira E. Dupree of only 40 shares, of stock out of a total of 7,000 shares of stock in the improvement company; that the matters and things complained of set forth a sale of property as the property of said corporation; that any cause of action that may exist to set aside or revoke said sale, or in anywise interfere therewith, is a right of action belonging to said corporation; that complainant does not set forth in his said bill any demand made upon said corporation or its board of directors to bring this suit, or any good and sufficient reason in law why such demand hath not been made, neither does said bill show any effort to obtain any action on the part of the shareholders of said company in regard to the alleged wrongs complained of, and complainant therefore hath no standing in this court to maintain this suit.

"(2) Because the said matters and things complained of, to wit, the sale of said stock and securities, are not an act ultra vires of the corporation, but are acts intra vires, and the said bill of complaint doth not show that the said corporation, or its said stockholders, if application were made to them, would not ratify such act if otherwise without authority, or any effort by complainant to ascertain whether the said stockholders would or would not ratify the said act; wherefore the said complainant is without any standing in this court in equity.

"(3) Because the court erred in rendering the said order and decree of July 11, 1905, for that it appears by said bill of complaint that the acts complained of are acts within the power of said corporation, and such which, if not authorized, can be ratified by the said corporation and its stockholders, and that it appears that said sale has been fully completed and consummated and the proceeds thereof collected, and a large part applied to the corporate

uses of the said Illinois & Georgia Improvement Company, and it doth not appear that any person, save the complainants in this bill, have ever dissented therefrom, but that all the rest of said stockholders in said corporation have acquiesced in, ratified, and approved the same, and that the same is such an action as is lawful when approved by such number of such stockholders of said corporation; wherefore the said complainants have no standing in this court.

"(4) Because the court erred in rendering the said order and decree of July 11, 1905, for that it appears by the allegations of said bill of complaint that the said securities sold were transferred to the American Trust & Savings Bank under lawful authority of said Illinois & Georgia Improvement Company, under a contract permitting the same to be sold by said savings bank, at public or private sale; that the said debt due to said savings bank by said improvement company was in default, and that the said savings bank, with the assent, consent, and knowledge of the said pledgor, sold said securities; and that the proceeds thereof were lawfully and properly applied to the payment of said debt of the said Illinois & Georgia Improvement Company, and no fact is alleged showing that the purchaser of said security had any knowledge of any defect of authority in said pledgee to sell said securities, or any objection on the part of said pledgor to their said sale. Wherefore this defendant saith that it appears upon the bill of complaint that it as said purchaser of said securities stands in the position of an innocent purchaser, for value, from the person clothed with the legal title and power of sale, and without notice of any equities which would impair power of said vendor to make said sale, and that therefore there is no equity in said bill to set aside the purchase of this defendant.

"(5) Because the court erred in rendering the said order and decree of July 11, 1905, for that the complainants seek to set aside an executed sale whereby respondent has purchased the said stock and bonds of the Macon, Dublin & Savannah Railroad Company and pledged by it to the American Trust & Savings Bank, and the said complainants have made no tender to this respondent of the said sums of money paid by it on said purchase, although averring that the same have been received by the said improvement company and have gone to the payment of its debts and other corporate purposes.

"(6) Because the court erred in rendering the said order and decree of July 11, 1905, for that the bill is multifarious and contains a misjoinder of causes of action, in this: the cause of action to set aside and annul the sale of said securities to this defendant from the American Trust & Savings Bank, together with suit to foreclose a mortgage executed to said savings bank by the Macon, Dublin & Savannah Railroad Company, and to appoint a receiver for the property of said railroad company.

"(7) Because the court erred in rendering the said order and decree of July 11, 1905, for that there is in said bill a misjoinder of parties defendant, to wit, the joinder of the Macon, Dublin & Savannah Railroad Company with the other parties defendant in said bill, the said Macon, Dublin & Savannah Railroad Company having no interest in who may be the owner or be entitled to own the stocks and bonds issued by it, and to which it has no title; and a further misjoinder of parties, to wit, the joinder of the defendants Joy Morton, J. P. Soper, E. P. Ripley, W. S. North, William A. Fuller, William P. Smith, and A. T. Ewing, against whom no relief whatever is prayed, and from whom no answer under oath or answer to interrogations is sought.

"(8) Because the court erred in rendering the said order and decree of July 11, 1905, for that the said complainant has a full, complete, and adequate remedy at law for his alleged grievances.

"(9) Because the court erred in rendering the said order and decree of July 11, 1905, for that the said bill of complaint contains no equity.

"(10) Because the court erred in rendering the said order and decree of July 11, 1905, for that the evidence showed without dispute that the sale made was a lawful sale, and that the complainants as stockholders had no right to object thereto.

"(11) Because the court erred in rendering the said order and decree of July 11, 1905, for that the evidence showed that the sale was made by au-

thority of the corporation Illinois & Georgia Improvement Company and was binding on the complainants.

"(12) Because the court erred in rendering the said order and decree of July 11, 1905, for that the evidence showed that said sale was fully ratified by the Illinois & Georgia Improvement Company before suit brought and was binding on complainants.

"(13) Because the court erred in rendering the said order and decree of July 11, 1905, for that the evidence showed that the sale of said stock, if without authority, was not void, but voidable; that no attempt was made by complainants before said bill was filed to have the Illinois & Georgia Improvement Company, its directors, or shareholders bring such suit or disaffirm said sale; and that subsequently said corporation, through its stockholders, fully and lawfully ratified the same sale.

"(14) Because the court erred in rendering the said order and decree of July 11, 1905, for that the facts in said case showed that complainant had no right to any equitable relief of any sort.

"(15) Because the court erred in rendering the said order and decree of July 11, 1905, for that the same is contrary to law.

"(16) Because the court erred in rendering the said order and decree of July 11, 1905, for that the same is contrary to the principles of equity."

W. E. Kay, Alex C. King, Minter Wimberly, and Frank H. Scott, for appellants.

Marion Erwin, M. P. Callaway, Saml. Bosworth Smith, and W D. Carswell, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

After stating the facts above, the opinion of the court was delivered by PARDEE, Circuit Judge.

The bill in this case is brought by a stockholder of an incorporated company in his own name, to prosecute and vindicate the rights of the corporation, and, of course, the ninety-fourth equity rule must be complied with or a case made showing such compliance unnecessary. The pledge to the savings bank and the subsequent sale complained of were within the chartered powers of the improvement company—in no sense ultra vires. The bill charges that the president of the improvement company, without any authority from any meeting of the stockholders, and without any authority conferred upon him at any meeting of the board of directors, ratified the sale complained of, giving details of the bargaining and ratification. The thirteenth paragraph of the bill is as follows:

"Your orator further avers and charges that during the time of the occurrence of the matters herein complained of the following named persons, named as defendants to this bill, constituted, and still constitute, the board of directors of the said improvement company, to wit: Joy Morton, president, and J. P. Soper, E. P. Ripley, W. S. North, William A. Fuller, William P. Smith, A. T. Ewing. Your orator avers and charges, on information derived from a certain bill hereinafter more particularly referred to, filed by said the American Trust & Savings Bank, as trustees for said certificate holders and in its own behalf, and on information and belief, that each and all of said persons constituting the said board of directors of the improvement company were at the time of the matters herein complained of large holders of said collateral trust certificates, and indorsers on said obligations of the said company of the said railroad company, by reason of which their individual interests as such certificate holders became antagonistic to the interests of your orator and other

stockholders of said improvement company who were not holders of said collateral trust certificates. Your orator further avers and charges that during the time of the occurrence of the matters herein complained of the said Joy Morton, president of said improvement company, was also first vice president of the said the American Trust & Savings Bank, by reason of which his interests became and were still more antagonistic and adverse to the interests of the stockholders of the improvement company."

In the nineteenth paragraph it is said:

"Your orator further avers and charges that by reason of the premises the said sale made by said the American Trust & Savings Bank of said collaterals to the said Atlantic Coast Line Company was unfair and unjust, and constitutes a fraud upon the rights of the said improvement company and upon the rights of your orator and other stockholders thereof similarly situate, and that the attempted ratification of said sale made by said Joy Morton on behalf of the said improvement company was without authority, and void."

The affidavit verifying the bill recites:

"Deponent further says that he was a shareholder of the stock of the Illinois & Georgia Improvement Company (owning the shares of said stock stated in said bill as owned by him) at the time of the transactions of which he complains in said bill, and that he still owns said stock, and that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which he would not otherwise have cognizance."

It is claimed that these matters so alleged in connection with the whole case made by the bill dispensed the complainant from applying to the board of directors and to the stockholders for relief.

In the leading case of Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827, which was immediately followed by the ninety-fourth equity rule, it is laid down:

"We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction completed or contemplated by the acting managers in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. Possibly other cases may arise in which, to prevent irremediable injury or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases. But, in addition to the existence of grievances which call for this kind of relief, it is equally important that, before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action

by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it."

In Corbus v. Goldmining Company, 187 U. S. 455–463, 23 Sup. Ct. 157, 160, 47 L. Ed. 256, the court, after quoting approvingly the above from Hawes v. Oakland and reciting the ninety-fourth equity rule, says:

"It must not be understood that a mere technical compliance with the foregoing rule is sufficient and precludes all inquiry as to the right of the stockholder to maintain a bill against the corporation. This court will examine the bill in its entirety and determine whether, under all the circumstances, the plaintiff has made such a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit. The directors represent all the stockholders, and are presumed to act honestly and according to their best judgment for the interests of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder, or at his instance submitted for review to a court of equity. The directors may sometimes properly waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a court of equity may not be called upon at the appeal of any single stockholder to compel the directors or the corporation to enforce every right which it may possess, irrespective of any considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs. As said in Dodge v. Woolsey, 18 How. 344, 15 L. Ed. 401: 'The circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought.'"

If we assume that under the facts averred in the thirteenth paragraph of the bill given above the complainant gives some reason for not applying to the managing directors of the improvement company and from setting forth with particularity his efforts to secure such action as he desires, yet we find nothing in the bill to excuse him from failure to apply to the shareholders. Counsel argues that complainant was excused from applying to the shareholders because the bill charges fraud; but the fraud charges are general and do not reach the shareholders as parties thereto. If for no other reason, it would seem that the bill should be dismissed on this ground.

If we pass by the ninety-fourth equity rule we find that the bill is without sufficient equity to warrant relief to the complainant. This want of equity is particularly pointed out in the second, third, fourth, and fifth assignments of error, each one of which seems to be well taken. There can be no doubt that under the chartered powers of the improvement company the assets acquired from the Macon, Dublin & Savannah Railroad Company could be lawfully pledged and sold as required to meet the business management or the necessities of the company. The improvement company did pledge the assets in question in the regular course of business. The bill neither attacks the pledge nor suggests bad faith in relation thereto. Three years after the pledge, and after long standing default, the pledgee, with the consent of the managers of the improvement company, sold the assets to pay the secured debt. The complaint is that this sale was

made without due corporate consent of the pledgor. The articles of pledge granted to the pledgee the power to sell on default at public or private sale, and, if they had not so provided, the sale as made, if wrongful, was one that could be validated by the ratification of the improvement company. It is not alleged that a majority or even a considerable minority of the improvement company's shareholders disapprove. As counsel well say:

"This bill is not brought to enjoin the consummation of any sale or the carrying out of an alleged unauthorized act. It avers the act complained of to have been completed, the property delivered, proceeds of sale received, and all but a small part thereof to have been applied to the payment of the corporate debts. It is brought avowedly to set aside the executed sale, no matter what the board of directors or any majority of the stockholders, however large, may think. There is no pretense in the bill that the directors and a great majority of the stockholders do not approve and ratify the sale and would so vote on a submission to them. The bill practically charges that they would approve. No averment is made why the stockholders, other than complainants or the board of directors, should not exercise their judgment and ratify the act if they deem that course wisest. The act complained of being one capable of authorization by the board or a given majority of the shareholders, a minority who would be bound by such action, if taken, cannot, under the allegations of this bill, have the sale set aside."

See Foss v. Harbottle, 2 Hare, 461–488; MacDougal v. Gardiner, 1 L. R. Ch. Div. 13; Flagg v. Manhattan Railway Co. (C. C.) 10 Fed. 413; North American Land & Timber Co. v. Watkins, 109 Fed. 104, 48 C. C. A. 254; Metcalf v. American School Furniture Co. (C. C.) 122 Fed. 115.

In MacDougal v. Gardiner, supra, James, L. J., said:

"I am of opinion that this demurrer ought to be allowed. I think it is of the utmost importance in all these companies that the rule which is well known in this court as the rule in Mozley v. Alston, 1 Phil. Ch. 790, and Lord v. Copper, Miners' Company, 2 Phil. Ch. 740, and Foss v. Harbottle, should be always adhered to; that is to say, that nothing connected with internal disputes between the shareholders on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent, unless there is something ultra vires on the part of the company qua company, or on the part of the majority of the company, so that they are not fit persons to determine it, but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company, there may be claims against directors, there may be claims against officers, there may be claims against debtors, there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done."

And Mellish, L. J., said:

"In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that, if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed? If it is a matter of

that nature, it only comes to this: that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly, and that, as I understand it, is what has been decided by the cases of Mozley v. Alston and Foss v. Harbottle."

Now, in this case, it appears by the record that since the bill was filed and before the hearing in the Circuit Court at an annual meeting held on February 20, 1905, after full report and discussion, the stockholders of the improvement company by a large majority in number and stock voted down a motion to disapprove the sale complained of, and, instead, voted to ratify and approve the same. The facts asserted in the bill and shown on the hearing do not show fraud nor negligence and mismanagement equivalent to fraud, nor the doing of any act ultra vires, nor even any unwise or injurious act, though as to this last opinions may differ. The pledge was valid, the debt was due, the pledgee would not renew, the pledgor was unable to pay, except through an advantageous sale of the pledged assets, and to secure and effectuate such sale the directors of the pledgor company did the best they could under the circumstances. The complainant as a minority stockholder has no just and equitable ground of complaint nor any equitable right to represent the company in a suit attacking the sale satisfactory to the majority and by which the company is unquestionably bound.

In North American Land & Timber Co. v. Watkins, supra, this court (Shelby, J.,) said:

"Even where the management of the majority appears to be unwise and injurious, equity will not interfere if such management be not dishonest or ultra vires, but will require the complaining stockholder to seek relief within the corporation. When the management is not shown to be fraudulent or dishonest, and when it is a matter of opinion whether it is wise or unwise, advantageous or disadvantageous, if the acts complained of be intra vires, there is no authority for equity to interfere. To do so would be to place the control indirectly in the hands of the minority whenever interference removes from control the officers selected by the majority. There is certainly no presumption that a minority stockholder is right, and a majority stockholder is wrong, in opinion as to the values and the management of the corporate property."

We find no equity in complainant's bill. None developed on the hearing. There is no case for an injunction to preserve the status of assets.

The interlocutory decree of the Circuit Court granting an injunction is reversed, and the cause is remanded, with instructions to dismiss the bill.

JOHNSON v. GEORGIA LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Fifth Circuit. December 5, 1905. On Rehearing, January 30, 1906.)

No. 1,497.

VENDOR AND PURCHASER—SUBSEQUENT PURCHASER FROM VENDOR—RIGHT TO PROTECTION.

To entitle a defendant to protection as a bona fide purchaser for value and without notice of lands which had previously been conveyed by the grantor, he must allege and prove, not only want of notice, but also actual

payment of the purchase money, independently of the recitals in his deed, which do not constitute proof of such payment.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 568.]

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

The following is conceded to be a substantially correct statement of the case:

Elizabeth Johnson, a citizen and resident of the state of New York, brought her bill in equity against the Georgia Loan & Trust Company, a Georgia corporation, with its principal domicile in Bibb county, Ga., and against E. C. Armistead and the other appellees, who are citizens and residents of the Northern district of Georgia. The purpose of the bill was: (1) To establish a constructive or implied trust as against the defendant the Georgia Loan & Trust Company relative to certain property, the subject-matter of the cause. Complainant contended, and set out facts sufficient to establish her contentions, that the lands in question in equity belonged to her, the legal title, however, being in the Georgia Loan & Trust Company, who by construction or implication was complainant's trustee, holding a mere naked legal title. Complainant contended that in equity she was to be regarded as the true owner of the lands, although the legal title was outstanding in the Georgia Loan & Trust Company. (2) Complainant sought to have her right and equitable title to the lands in question set up and established, as against the defendant E. C. Armistead, who claimed title adversely, and as against the other defendants, who were mere tenants of Armistead in possession, and to recover of said defendants the actual possession of the lands.

Complainant's bill showed all necessary jurisdictional facts. It set up that the principal defendant, E. C. Armistead, and his tenants in possession, claimed title to the lands in question, the nature, character, and extent of which claim was unknown to complainant; that such claim was without validity, and was subordinate to the right, title, and claim of complainant; that the claim of the said Armistead and others was under a common propositor, namely, A. D. Martin. The bill further averred that on the 2d day of December, 1889, the said A. D. Martin conveyed the lands in question to the defendant the Georgia Loan & Trust Company by deed duly executed and recorded, for a consideration of $6,000; that the Georgia Loan & Trust Company was the agent and representative of the said A. D. Martin for the purpose of securing a loan of money, and as such agent and representative applied to complainant for said loan; that complainant paid over to the Georgia Loan & Trust Company, for said Martin, in pursuance of the application aforesaid, the sum of $6,000, the consideration of the deed above referred to from Martin to the Georgia Loan & Trust Company; that the defendant the Georgia Loan & Trust Company, instead of taking the deed to said land to complainant, Elizabeth Johnson, took the same directly to itself, as grantee. The bill alleges that, the money—the consideration of the deed aforesaid—having been furnished by complainant, and the defendant the Georgia Loan & Trust Company having taken title to the lands in question to itself, said Georgia Loan & Trust Company became and was a mere naked trustee, holding said lands for the benefit and on behalf of complainant, and should be required to convey the legal title to said lands to complainant. It appeared from the allegations of the bill that the deed aforesaid from Martin to the Georgia Loan & Trust Company was made pursuant to an act of the Legislature of the state of Georgia, as codified in section 1969 of the Code of 1882 of said state, the pertinent portion of which is as follows: "Whenever any person in this state conveys any real estate by deed to secure any debt to any person loaning or advancing said vendor any money, or to secure any other debt, and shall take bond for title back to said vendor upon the payment of such debt or debts, such conveyance of real property shall pass the title of said property to the vendee." It was conceded (that is to say, no issue was made in this regard) that under the statute law of Georgia and the decisions of the Supreme Court of the state a deed of the character indicated

conveyed to the vendee absolute title to the property, and did not constitute a mere lien thereupon; that an action of ejectment, or other proper procedure for recovery of the actual possession of the property, could be based upon such a deed, just as well as upon an ordinary warranty deed. Complainant's bill described the property in question, waived discovery, and prayed specific and general relief; and the averments of the bill clearly showed that there was no adequate remedy at law. There was no demurrer or plea filed to the bill by either one of the defendants, and no answers filed by the Georgia Loan & Trust Company or W. B. Patrick, and orders pro confesso were duly entered in the cause as to these defendants. The principal defendant, E. C. Armistead, and the defendants Jep Perry, Willis Whitehead, and C. C. Brazil, filed answers; and, the complainant having in due time filed her general replications to these several answers, the cause was referred to the standing master of the court, and further procedure was had as is usual in such matters.

It is not material to a proper consideration of the cause upon this appeal to summarize the answers of E. C. Armistead and the other defendants. It is only necessary to say that the principal defendant, E. C. Armistead, claimed title to the lands involved in the cause under the following deeds of conveyance: Deed from A. D. Martin to Jesse White, dated 26th day of July, 1892; deed from Jesse White to F. L. Norville, dated 29th day of November, 1892; and deed from F. L. Norville to E. C. Armistead, dated 14th day of August, 1893. It will be observed that the first of these deeds, namely, from A. D. Martin to Jesse White, is subsequent in date to the deed upon which complainant relies, namely, the deed of the 2d of December, 1889, from A. D. Martin to Georgia Loan & Trust Company, which latter deed had been duly recorded at the time of the alleged deed from A. D. Martin to Jesse White. Armistead's contention in this regard was that the deed from Martin to the Georgia Loan & Trust Company did not describe the lands in question with sufficient accuracy to constitute notice to a subsequent grantee from Martin. While there were attached to Armistead's answer copies of the chain of deeds upon which he relied, as a matter of fact the alleged deed from Martin to Jesse White was not put in evidence by him, and the certificate to the copy which was attached to his answer was made by the clerk of the superior court of Pike county, Ga., whereas the deed itself was alleged to have been recorded where it should have been recorded under the laws of Georgia, namely, in the clerk's office of the superior court of Jackson county, the county in which the lands were located. After taking evidence, considering the pleadings and argument of counsel, the master duly filed his report in the cause. Although there was no special plea or demurrer in the case, certain questions of law, some affecting the jurisdiction of the court, were raised by the defendants ore tenus upon the hearing before the master. Each and all of these questions were determined by the master in complainant's favor. The report of the master in this particular is quite elaborate, and he cites a number of authorities in support thereof. The master also determined all questions of fact raised by the pleadings in complainant's favor, among other things deciding that the defendant the Georgia Loan & Trust Company was a naked trustee for complainant; that complainant advanced the purchase money for the property, which was paid over to Martin, and which furnished the consideration for the deed of December 2, 1889, from Martin to the Georgia Loan & Trust Company; that in equity the complainant, Elizabeth Johnson, was the true owner of the land, so far as the Georgia Loan & Trust Company was concerned, or any other person or persons having notice, actual or constructive, of the deed from Martin to the Georgia Loan & Trust Company, and whose claims or rights were acquired from Martin subsequent to the execution of said deed; that the constructive or implied trust insisted upon by complainant should be decreed; that the cause was cognizable in equity, and by the Circuit Court of the United States, etc. Among other things, the master found that E. C. Armistead claimed title to the property under A. D. Martin, by virtue of a chain of deeds from Martin down to the said Armistead, the first of which was executed by the said Martin subsequent to the execution of the deed by him of December 2, 1889, to the Georgia Loan & Trust Company, under which complainant claimed; but he assumed as a fact that in the ab-

sence of evidence to the contrary (and there was no evidence on the subject) the consideration expressed in the deeds under which Armistead claimed was actually paid for the land. The result of the master's entire report and findings was adverse to complainant; for that the master found that Armistead's title, although based upon a junior deed from A. D. Martin, had priority to the title or right of complainant, in that the said Armistead was a bona fide purchaser without notice, actual or constructive, of the previous deed from A. D. Martin to the Georgia Loan & Trust Company. The complainant presented to the master her exceptions of fact and of law to his findings and report, which exceptions were overruled, and were duly filed as a part of the record in the cause. Upon consideration of said exceptions, the Circuit Court overruled each and all of the exceptions and confirmed the report and findings of the master in toto, and thereafter entered up a final decree in the cause accordingly.

J. L. Anderson, for appellant.

George Westmorland, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

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

There is evidence in the record, pointed out in the briefs of appellant, tending very strongly to show that Armistead had actual notice of the conveyance under which appellant claims, and a very strong argument is presented to show that he was charged with constructive notice; but on both propositions the master and the Circuit Court found in Armistead's favor. If the fact that Armistead was a purchaser without actual or constructive notice gave him title to the lands in controversy as against the prior conveyance to the Georgia Loan & Trust Company, we should, under the evidence and the perhaps misleading mistake in the description in the deed, feel concluded from going into the matter. But the absence of notice will not alone protect Armistead as a purchaser. He must be a bona fide purchaser for value. In his answer he says that Jep White bought the land of Martin for the price of $20 per acre, allowed as a credit on a note held by White against Martin, and entered in his own right, having bought said land bona fide, for full value, without notice, etc., and that Jesse White sold the land to Norville for full value bona fide and executed deed therefor, and that Norville bought said land bona fide, for full value, in the utmost good faith, etc., and that he (Armistead) bought the land from Norville in the utmost good faith, bona fide, and for full value. Nowhere in his answer does Armistead aver that either he or White or Norville ever paid any actual price or consideration in any of the several alleged purchases. He attaches to his answer certified copies of a warranty deed from Martin to White, reciting a consideration paid of $1,500, and a "quitclaim and forever defend" deed from Norville to Armistead, reciting a consideration of $1,500. The record does not show that on the hearing before the master the above-mentioned deeds were offered in evidence, but the appellees' counsel claims that copies of the deeds attached to the answer were by agreement used in lieu of originals, and the master in his report treats the said copies as in evidence.

If the said copies were duly offered in evidence or were put in by agreement, no effort was made or evidence offered to supplement them with proof as to any actual payment of any consideration. In his findings of facts, the master says that "in the absence of evidence to the contrary it is assumed that the consideration expressed in the deeds was actually paid for the land," evidently considering that the recitals in the deeds imported full proof. In his third conclusion of law the master finds that the defendant Armistead is a bona fide purchaser, for a valuable consideration, without notice, etc.

In Boone v. Chiles, 10 Pet. 177, 211, 9 L. Ed. 388, an elaborately argued and considered case, it was held that a bona fide purchaser will not be protected on mere averment or allegation. "The answer setting it up is no evidence against the plaintiff, who is not bound to contradict or rebut it. [Simon v. Hart] 14 Johns. 63, 74; [Payne v. Coles] 1 Munf. 396, 397; [Clason v. Morris] 10 Johns. 544, 548; [Leeds v. Ins. Co.] 2 Wheat. 383 [4 L. Ed. 266]; [Lenox v. Prout] 3 Wheat. 527 [4 L. Ed. 449]; [Hughes v. Blake] 6 Wheat. 468 [5 L. Ed. 303]; [Smith v. Bruch] 1 Johns. Ch. 461. It must be established affirmatively by the defendant, independently of his oath. [James v. McKernon] 6 Johns. 559; [Green v. Hart] 1 Johns. 590; [Skinner v. White] 17 Johns. 367; [Anderson v. Roberts] 18 Johns. 532 [9 Am. Dec. 235]; [Hart v. Ten Eyck] 2 Johns. Ch. 87, 90; 4 Bro. C. C. 75; Amb. 589; 4 Ves. 404, 587; [Huntington v. Nicoll] 3 Johns. 583. In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seized in fee and in possession; the consideration must be stated, with a distinct averment that it was bona fide and truly paid, independently of the recital in the deed. Notice must be denied, previous to and down to the time of paying the money and the delivery of the deed; and, if notice is specially charged, the denial must be, of all circumstances, referred to, from which notice can be inferred; and the answer or plea show how the grantor acquired title. Sugden, 766, 770; 1 Atk. 384; 3 P. Wms. 2801, 243, 307; Ambl. 421; 2 Atk. 230; [Wormley v. Wormley] 8 Wheat. 449 [5 L. Ed. 651]; [Potter v. Gardner] 12 Wheat. 502 [6 L. Ed. 706]; [Potter v. Gardner] 5 Pet. 718 [8 L. Ed. 285]; [Jewett v. Palmer] 7 Johns. Ch. 67 [11 Am. Dec. 401]. The title purchased must be apparently perfect, good at law, a vested estate in fee simple. [Wilson v. Mason] 1 Cranch, 100 [2 L. Ed. 29]; [Lambert v. Paine] 3 Cranch, 133, 135 [2 L. Ed. 377]; [Hurst v. McNeill] 1 Wash. C. C. 75 [Fed. Cas. No. 6,936]. It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. [Shirras v. Caig] 7 Cranch, 48 [3 L. Ed. 260]; [Vattier v. Hinde] 7 Pet. 271 [8 L. Ed. 675]; Sugden, 722. Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser without notice. The case stated must be made out. Evidence will not be permitted to be given of any other matter not set out. [Vattier v. Hinde] 7 Pet. 271 [8 L. Ed. 675]."

Boone v. Chiles has been cited, approved, followed, and distinguished in a long line of cases running through federal and state Reports to the present time (volume 3, Rose's Notes, 559 et seq.), and the ruling above quoted has been particularly followed. Id. 562. Some of the cases are directly in point.

In Smith v. Orton, 131 U. S. Append. lxxviii, it was held:

"But, secondly, the rule which affords protection to a bona fide purchaser without notice has no application to this case. To bring the defense within it, it must be averred in the plea or answer, and proved, that the conveyance was by deed, that the vendor was seized of the legal title, and that all the purchase money was paid and paid before notice. There must not only be a distinct denial of notice before the purchase, but a denial of notice before payment. Even if the purchase money has been secured to be paid, yet if it be not in fact paid before notice, the plea of purchase for a valuable consideration will be overruled. Jewett v. Palmer, 7 Johns. Ch. 65, 11 Am. Dec. 401; Vattier v. Hinde, 7 Pet. 252, 271, 8 L. Ed. 675; Boone v. Chiles, 10 Pet. 177, 211, 9 L. Ed. 388; Story, Eq. Pl. §§ 805, 806."

In Simmons Creek Coal Co. v. Doran, 142 U. S. 437, 12 Sup. Ct. 239, 35 L. Ed. 1063, it was held that the recitals in deeds cannot be relied upon as proof of the payment of purchase money, citing Boone v. Chiles, and numerous other cases. In United States v. California, etc., Land Co., 148 U. S. 41, 13 Sup. Ct. 458, 37 L. Ed. 354, again Boone v. Chiles is approved. In Secombe v. Campbell (C. C.) 2 Fed. 358, the plea of innocent purchaser was held bad for not setting forth the amount of the consideration. In Morse v. Godfrey, 3 Story, 364, Fed. Cas. No. 9,856, it was held "that a transfer of property to secure an old debt will not make a party a bona fide purchaser." In Curts v. Cisna, 7 Biss. 265, Fed. Cas. No. 3,507, it was held "that a purchaser under a contract for a deed is not protected as a bona fide purchaser." In Nickerson v. Meacham (C. C.) 14 Fed. 884, Lakin v. Sierra Buttes Gold Mining Co. (C. C.) 25 Fed. 342, and Davis v. Ward, 109 Cal. 189, 41 Pac. 1010, 50 Am. St. Rep. 29, it was held that actual payment before notice must be shown. In Watkins v. Edwards, 23 Tex. 447, it was held that proof of the payment of purchase money apart from the acknowledgment in deed must be made. See, also, Brown v. Welch, 18 Ill. 346, 68 Am. Dec. 549; Richards v. Snyder, 11 Or. 510, 6 Pac. 186.

As Armistead failed to aver the payment of the purchase money within the rule laid down in Boone v. Chiles, and as he failed to prove such payment under any of the deeds relied on by him, he cannot be held to be an innocent purchaser for value in bar of appellant's equities, although he may have had no notice, actual or constructive, of the prior deed to the Georgia Loan & Trust Company.

J. J. Perry, claimant of 40 acres of the land in controversy, in an unsigned and unsworn answer, pleads a purchase from Armistead, "in the utmost good faith, bona fide, and paid full value for it without notice of any equity or claim of complainant or the Georgia Loan & Trust Company," etc.; but he makes no proof to support his answer.

The decree of the Circuit Court is reversed, and the cause is remanded, with instructions to decree for the complainant below, appellant here, substantially as prayed for in the bill, and against all the appellees in this appeal.

On Rehearing.

PER CURIAM. On the showing made in this court by E. C. Armistead, appellee, it is ordered that our former decree herein rendered December 5, 1905, be and the same is amended so as to read as follows: The decree of the Circuit Court is reversed, and the cause is remanded with instructions to decree for the complainant below, appellant here, substantially as prayed for in the bill and against all the appellees in this appeal, unless upon due cause contradictorily shown the Circuit Court shall consider that equity requires a reopening of the reference and a recommittal to the master for further evidence and report. All the costs of this court to be paid by the appellee.

DENVER CITY TRAMWAY CO. v. NORTON et al.

SAME v. FRENCH et al.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1905.)

Nos. 2,140, 2,141.

1. TRIAL—CONSOLIDATION OF SUITS.
   Where separate actions are brought by separate plaintiffs against the same defendants, pending in the same court, for personal injuries sustained in the same accident, depending upon the same evidence, with the only difference in the extent of the injuries to the respective plaintiffs, the causes, under section 921, Rev. St. U. S. [U. S. Comp. St. 1901, p. 685], are properly consolidated for trial.

   [Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 3.]

2. COURTS—JURISDICTIONAL AMOUNT.
   Under the judiciary act the amount in dispute or matter in controversy, determining the jurisdiction of the court, is the amount demanded in the petition in good faith, and not the amount ultimately recovered.

   [Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 890–897.

   Jurisdiction of federal 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. APPEAL—REVIEW—JOINT ACTION AGAINST TWO DEFENDANTS.
   In a joint action against a street car company and an omnibus company for personal injuries to a passenger, resulting from a collision at a street crossing, tried to a jury, with a verdict of not guilty as to the omnibus company and guilty as to the street car company, on writ of error sued out only by the street car company, no error committed by the trial court in favor of the omnibus company can avail the plaintiff in error, except in so far as it may have prejudiced the defense of the plaintiff in error in showing that the injury resulted from the negligence of the omnibus company without the concurring negligence of the plaintiff in error.

4. STREET RAILROADS—VEHICLES—RELATIVE RIGHTS.
   While street cars and drivers of vehicles, equestrians, and pedestrians, as a general rule, have concurrent rights to occupy the public street crossings in a city, the right of the railroad at such point is superior, in the sense that it is preferential, as to the right of way.

   [Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 193.]

5. SAME--NEGLIGENCE OF MOTORMAN.
Facts reviewed as to whether or not the motorman was guilty of negligence in approaching a street crossing, and *held* to be a question for the jury.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 251, 253.]

6. SAME—SOUNDING OF GONG ON CAR PURSUANT TO CITY ORDINANCE.
Where a city ordinance requires the motorman of a street car on approaching a street crossing to sound a gong within 60 feet of the crossing, and the evidence tends to show that the gong was not so sounded, but that the driver of the coach approaching the crossing in fact saw the car more than 60 feet from the crossing, *held*, that the court erred in its charge in directing particular attention to the failure to give the signal as required by ordinance.

7. WITNESSES—INSTRUCTION—INTEREST OF PLAINTIFF.
Where the plaintiff in an action for damages on account of personal injuries testified to material facts respecting the character and extent of such injuries, and especially in contradiction of other witnesses, *held*, that the defendant was entitled to an instruction to the effect that while under the statute the plaintiff is permitted to testify in her own behalf, yet in considering such evidence the jury may take into consideration the fact that she is directly interested in the result of the suit. *Held*, further, that the duty to so charge is not met by a general instruction to the effect that the jury are the judges of the credibility of the witnesses and the weight to be given to the testimony of each.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 490, 493.]

8. SAME—CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.
While the court does not assent to the proposition that in all given cases contributory negligence may not be attributed to a person riding in a vehicle with a driver, not the passenger's servant, yet, where the passenger is riding in a coach, the driver not being her servant or under her control, on a seat several feet from the driver and at an elevation of seven feet from the ground, *held*, that contributory negligence is not attributable to her for either failing to warn the driver of danger, or in not leaping from the coach under the circumstances.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 142, 143.]

9. DAMAGES—PERSONAL INJURIES—PERSONAL EXAMINATION OF PLAINTIFF.
In the federal jurisdiction, in an action for personal injuries, in the absence of some enabling statute of the state, the plaintiff cannot, by order of court, be required to submit to a personal examination by a surgeon. All the right the defendant in such instance has is to make request upon the plaintiff to consent to such examination, and in case of refusal the defendant should be permitted to disclose such refusal on the trial, and comment thereon to the jury, to the plaintiff's prejudice.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 924.]

(Syllabus by the Court.)

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

Albert Smith (Charles J. Hughes, Jr., and Gerald Hughes on the brief), for plaintiff in error.

Horace N. Hawkins (Baldrige & De Bord, and Edmund F. Richardson, on the brief), for defendants in error, Norton and French.

William P. Malburn (Charles S. Thomas and W. H. Bryant on the brief), for defendant in error, Denver Omnibus & Cab Company.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

PHILIPS, District Judge. On the 30th day of July, 1902, the defendant in error Anna C. Norton, a citizen of the state of Nebraska, and the defendant in error Mary B. French, a citizen of the state of Texas, were visiting in the city of Denver, Colo. In connection with a number of other persons, they hired of the Denver Omnibus & Cab Company, a tallyho coach, and rode out in the nighttime to a suburban hotel or resort, where they attended an entertainment. On returning to the city about 11:30 p. m., the said coach approaching on Logan avenue, at its intersection with Alameda street, was struck by a street car of the Denver City Tramway Company running on said Alameda street, whereby the coach was overturned and the said defendants in error received personal injuries. They brought separate actions, jointly against the two said companies, for damages. Over the objection of the plaintiff in error the two causes of action were consolidated by order of court for the purposes of trial. On trial to a jury, the jury returned a verdict in favor of the defendant the Denver Omnibus & Cab Company, and separate verdicts against the Denver City Tramway Company, assessing the damages in favor of the defendant in error Anna C. Norton in the sum of $1,200, and in favor of the defendant in error Mary B. French in the sum of $2,500. To reverse these judgments the said tramway company prosecuted writs of error to this court, citing the defendants in error and said omnibus and cab company. There are a large number of assignments of error on this record, but we will discuss only such of them as we deem material.

Complaint is made of the action of the court in directing a consolidation of the two cases for trial. The two actions grew out of the same accident, with the same defenses, and depended on the same evidence. The only difference being in the matter of damages dependent upon the extent of the injury sustained by the respective plaintiffs. Such a consolidation was clearly within the judicial discretion reposed in the court by section 921, Rev. St. U. S. [U. S. Comp. St. 1901, p. 685]. The incidents of the trial disclose no foundation for the contention that the trial of the two cases to the same jury operated injuriously to either party.

Error is assigned to the alleged action of the court, in impaneling the jury, in not allowing the defendant tramway company more than three peremptory challenges. This assignment must fail, for the reason that the bill of exceptions does not show what in fact was the action of the court in this particular, or that any exception thereto was saved.

It is also assigned for error that the court did not dismiss the action in the case of the defendant in error Anna C. Norton, on the ground that the amount really in controversy did not exceed the sum of $2,000, exclusive of interest and costs. The amount of damages sued for was $10,000. Under the judiciary act the amount in dispute or matter in controversy which determines the jurisdiction of the

circuit court in suits for the recovery of money is the amount demanded by the plaintiff in the petition in good faith, and not the amount ultimately recovered. Peeler v. Lathrop 48 Fed. 780, 1 C. C. A. 93; Ung Lung Chung et al. v. Holmes (C. C.) 98 Fed. 323. We cannot say, on this record, that the amount demanded by the plaintiff below was not in good faith. This must be so, where, had the jury rendered a verdict on the evidence for a sum exceeding $2,000, it could not be said there was not some evidence to support the verdict, although in the judgment of the court the sum found by the jury might be excessive.

As the verdict of the jury was in favor of the Denver Omnibus & Cab Company, and the defendants in error did not sue out any writ of error thereon, the judgment in its favor is not here for review. Only in so far as any misdirection of the court in respect of the liability of the omnibus company for the injury in question may relate to and affect the responsibility of the tramway company, is it important to consider the contribution of the driver of the coach to the accident. The two companies being sued as joint tort-feasors, if the negligence of each contributed thereto, they are jointly and severally liable for the damages. And as, in the absence of any statute changing the rule, there could be neither any apportionment nor contribution among the wrongdoers of the damages, the tramway company is not entitled to a reversal of the judgment on account of any error committed by the court in favor of the omnibus company, although it might appear that such ruling tended unduly to prejudice the defense of the tramway company.

It must be conceded, we think, that there was a failure in the court's charge to direct the attention of the jury to some most inculpatory acts of negligent omissions of duty on the part of the driver of the tallyho coach. A careful reading of his testimony tends to show that he entertained the idea that the sounding of the bugle, by the bugler on the coach, on its approach in the block next to the intersection of Logan and Alameda streets, was a sufficient warning to any street car that might be approaching said crossing of the coming of the coach; and that the duty was thereby laid upon the motorman of the street car to heed the approach of the coach, and to see to it that no collision occurred, even if it necessitated the stopping of the car to give the coach the right of way, notwithstanding the fact, as his evidence tends to show, he knew that his view for a considerable distance up Alameda street would be interrupted by a building near the corner of the two streets. When interrogated by counsel as to whether or not he stopped his coach, or got down himself or sent forward the bugler to reconnoiter to see if the way was safe, or whether he had any directions from the omnibus company in regard to crossing the car tracks, his answer was, "When you have a bugler they are supposed to blow the danger signal." And further on he said that he supposed the car would stop. The clear intendment is that he understood that in blowing the bugle he had performed his duty, so as to put the motorman on the defensive, and that he had a right to go heedlessly ahead onto the crossing, without more. The charge of the

court in this aspect of the case did not contradict clearly the notion of the driver. As if defining the sole duty of the coachman in this respect, the charge was:

If he "approached the place of the accident in a careful manner, slackening the speed of the horses and blowing the customary notes of warning on the horn, and when the horses were on the track the driver acted in the most careful manner possible under the circumstances—and when I refer to circumstances here, I refer to the condition of the street, the distance from the street to the car track—you cannot hold the defendant the Denver Omnibus & Cab Company liable for injuries received by its passengers in the accident. In other words, if the driver of the coach was a person of competent skill, and in every respect qualified and suitably prepared for the business in which he was engaged (and I think the evidence in this case shows that he was), and the accident in which his coach was overturned was not occasioned by any fault or want of skill on his part, but by the negligence of the other defendant, then the defendant the Denver Omnibus & Cab Company would not be liable for injuries sustained by a passenger. The car company, however, would be liable, if you find from the evidence the injury resulted from the failure of the motorman in charge of the car to exercise ordinary or reasonable care in the management of the car."

The minds of the jury were not specifically directed to the exercise of that vigilance and caution which the law imposed upon the driver in entering upon the railroad track. The law laid upon him, as the driver of a coach bearing passengers for hire, a high degree of care and circumspection to safeguard them from accidents. This is so much so that, where an accident occurs to the passenger during the carriage, the law makes it prima facie evidence of liability on the part of the carrier, and the burden of proof then shifts to the carrier to show the absence of negligence. Knowing, as the driver did, that his view up Alameda street was obstructed by the building on the corner; knowing, as he did, that he was handling 4 horses, drawing a coach filled with 17 people, extending over 30 feet along the street; and knowing, as he claims in his testimony, that on account of a ditch near the side of the street it would be impracticable for him to turn his horses up or down Alameda street upon the sudden approach of a street car—it was his plain duty to have approached that crossing in the exercise of the utmost vigilance and cautiousness. While the general rule in respect of the driver of a vehicle in approaching a railroad crossing, a known place of danger, to stop and listen where his view is cut off, may not generally apply to the use of such crossings in a city, yet, under the circumstances of this case, it was the driver's imperative duty, where, as his evidence tends to show, the heads of the lead horses would almost reach the railroad track before the car came into full view from his seat, to at least so slacken the speed and so slowly approach it that with his horses well in hand he could at once bring them to a standstill or turn them, in the event of the approach of a street car. On the contrary, his evidence is that he did not slacken the speed of the horses, but went in a jogging trot onto the track, so that it was impossible to have stopped the vehicle readily on the approach of the car. If he judged for himself that he could clear the track before the car reached him, and that was a reasonable judgment, how can the motorman be condemned if he, viewing the same situation, reached the same conclusion?

The plaintiffs themselves testified that they saw the car at least a half a block down Alameda street as it approached. As they sat on the rear seat of the long coach, from his position the driver, had he eagerly looked, as he was required to do, should have seen the car earlier, and necessarily before the lead horses reached the car track. If, then, he calculated that he could beat the car across the point of intersection and lost the race, he was nevertheless responsible to his passengers for his misjudgment. And it would have been for the jury to say, under proper instructions from the court covering the facts aforesaid, whether or not the driver's negligence did not occasion the injury without the concurring negligence of the motorman. On this state of facts the court instructed the jury as follows:

"A street car company operating its cars, with electricity or other motive power, upon the streets of a city, does not have the exclusive right to occupy the streets or its own tracks, and at a crossing of a street there is no prior or higher right in the street car company for the passage of its cars than there is for the passage of any other vehicle. Persons traveling along the street have the same right to cross the street that a street car has, and all persons at such crossings are bound to use reasonable care, to see that they get across without interfering with the rights of other parties."

While this declaration, abstractly considered, contains some legal truths, it was essentially misleading. It is true that a street car company, operating its cars with electricity, has not the exclusive right to occupy the streets for its own tracks. But it does have a prior right, in the sense of a preferential right of way, over a street crossing as against the pedestrian, the equestrian, and the driver of a vehicle. Regard must be had to the respective motive powers of the two occupants of the street, their relation to the public, and their means of more or less easily avoiding collision at such junction. A street car propelled by electricity or steam is a ponderous machine. It can only move on two rails in a direct line. It cannot be turned to either side to avoid a collision in front. Its very construction and the principle on which it operates are intended for rapid transit. It carries the public under demand that it proceed as rapidly as possible, having regard to the public welfare and safety. It cannot, therefore, be expected or required, every time it approaches a public crossing, to stop or check up and take observation as to the approach of vehicles, equestrians, and pedestrians before it can proceed. It has a right to proceed in the use of its tracks on the assumption that the drivers of vehicles and others approaching such crossings will take heed of the known hazards of such a place; the reasonable, usual speed at which such car runs, and the impossibility of its deflection from its single course, or of making a sudden stop.

In Davidson v. Tramway Company, 4 Colo. App. 283, 286, 35 Pac. 920, 921, the court said, in respect of the easement enjoyed by the railroad company, that:

"It is always conceded not to be exclusive, but is generally held to be superior. Whether or not this is an accurate description of their right, their privilege is undoubtedly a preferential one as against all other modes of locomotion along that part of the highway occupied by the track. This concession is absolutely essential to the preservation of the rights conferred by their franchise, the development of the objects for which they were organized, and

for the great benefit of a very large proportion of the population of the cities, which must make use of it for the purposes of business and travel. It is evident from the later decisions that the preferential use of the lines of their track by cable and electric companies closely proximates the right of exclusive use granted or conceded to steam railways. All the courts agree, however, that there still remains with the pedestrian, the users of vehicles and of horses, the old right which they always enjoyed—to use all of the King's highway at their pleasure and for their convenience. It is only insisted that they shall yield the track to the railway company, and shall keep out of the way of the cars so far as may be possible, barring the accidents of sudden emergency."

In Ehrisman v. East Harrisburg, etc., Railway Company, 150 Pa. 180, 24 Atl. 596, 17 L. R. A. 448, the court, speaking of the right of the general public in common with the railway company to use the crossing, said:

"While this common use is conceded and is unavoidable in towns and cities, the railway companies and the public have not equal rights. Those of the railway companies are superior. Their cars have the right of way, and it is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars. This results from two reasons: First, the fact that the car cannot turn out, or leave its track; and, secondly, for the convenience and accommodation of the public. These companies have been chartered for the reason, in part, at least, that they are a public accommodation. The convenience of an individual, who seeks to cross one of their tracks, must give way to the convenience of the public. It would be unreasonable that a car load of passengers should be delayed by the unnecessary obstruction of the track by a passing vehicle."

In Wilson v. Minneapolis Street Railway Company, 74 Minn. 436, 77 N. W. 238, it was held that street cars are not confined merely to equal rights with the traveling public to use the track, but that "the necessary modifications of the general rule, growing out of the difference in the nature of the two classes of vehicles, such as the construction, motive power, mode of operation, and speed," must be taken into account. So it was said in Brown v. Wilmington Railway Company, 40 Atl. 936, 1 Pennewill (Del.) 332:

"It is the duty of the people using the highway in common with a street railway company to use reasonable care, stopping, and, if need be, turning out, and keeping off the tracks in the presence of danger."

The superior or preferential right of the street car company to the right of way was recognized in Clark v. Bennett, 123 Cal. 279, 55 Pac. 908; and also in Commonwealth v. Temple, 14 Gray, 69. It is to be conceded that while the street railroad company has this preferential right of way, it has no right to proceed upon the assumption that it may take no heed of the probability of encountering, at such crossings in a city, vehicles and the like, which have the right to use the crossing as a common highway. The motorman, in control of the operation of his car, must at all times, in approaching such crossings, proceed with such care and caution as, while subserving the public in rapid transit, he can reduce to the minimum the danger to others entitled to its contemporaneous use. The law of Colorado did not undertake to define the rate of speed at which a street car may run. It did exact of the motorman a degree of vigilance commensurate with the probable danger to others using the crossing at

that hour of the night. While the evidence in this case tends to show that at the time of night when this accident occurred this crossing was infrequently used by vehicles, and this fact should be taken into consideration by the jury in determining the question of the motorman's negligence, the fact that vehicles were liable to use the crossing at any time laid upon him the duty of keeping a lookout for their approach, and to so have his car under such control, with the appliances at his command, that he could stop it within a reasonable time to avoid collision with a vehicle driven with reasonable care.

We think that, under the facts and circumstances disclosed by this record, it was a question of fact to be submitted to the jury whether or not the motorman's negligence contributed directly to this injury. While the evidence on the part of the defendants in error tended to show that the car was running at a very rapid rate of speed, the judgment of the motorman was that he was not exceeding 12 miles an hour, and that he was running, within the regulation of the schedule time, at the customary rate at the time and place; and that he thought at the rate of speed he was running he could stop his car within about 40 feet. His testimony further is that when he first became aware of the approach of the vehicle he saw the heads of the lead horses as they emerged from behind the building. He did not know, and had no fact to excite an apprehension, that behind the leading horses were coming two other horses and a long tallyho coach. As the driver of an ordinary two-horse vehicle, if on the lookout, as he should be, might well be assumed to see the approach of the car, and therefore could either clear the track or check up or turn aside his horses, so as to avoid an accident, the motorman might not unreasonably proceed upon the assumption that the driver, in the performance of his duty, would keep out of the way. And therefore, until the situation of the vehicle became apparently such as to place the motorman under a reasonable apprehension of danger of collision, it was a question for the jury to determine whether the motorman was quilty of culpable negligence in not reversing the current and applying the brakes the instant he discovered the approach of the horses. The evidence does not show that the motorman had any knowledge of the presence of a ditch at the intersection of the two streets which might prevent the turning of the heads of the horses up or down Alameda street when the driver saw the car approaching.

There is another conspicuous fact in this case. The testimony shows, without contradiction, that at or near the street or block immediately next to the way the car was coming, it stopped to throw the switch and reverse the direction of the car, at which point the gong was sounded, and the car had to run only one block before it reached the point of accident. The rate of speed which the car gained in running the half block before it was seen by the driver necessarily could not have been very great, there being no special incline of the street towards the place of accident. The headlight of the car, as well as the lights in the car, were ablaze, affording the driver of the coach a much better opportunity to observe the approach of the car than the motorman had to observe the approach and position of the ve-

hicle. The driver was rather relying on his bugler, while the passengers, or some of them, were merrily singing.

It is true that the evidence shows the physical fact that after the collision the car ran about 60 feet before it was brought to a standstill, indicating a high rate of speed. The further physical fact appears that the horses and the entire coach, save the rear wheels, had cleared the track before the car reached the point, leaving it a debatable matter whether or not it was unreasonable for the motorman, up to the time he became aware of the imminence of the danger, to assume that the coachman was on the lookout and safely calculating that he would clear the track. The motorman furthermore testified that as soon as he discovered there was danger he put forth every appliance and exertion at his command to stop the car, and expressed the opinion that in about 4 feet further his car would have been brought to a standstill. In explanation of why his car traveled 60 feet after the collision, he testified that the contact with the coach broke the glass in the front of the car, pieces of which flew into and cut his face, when he fell backward, loosening his hold on the brake, which threw the force of the car against the reverse current and sent the car on by its own momentum. Whether or not this explanation was intelligent and satisfactory was properly a matter for the judgment of the jury. Kellegher v. Railway Co., 171 N. Y. 309, 63 N. E. 1096.

In its charge to the jury the court called attention to the ordinance of the city of Denver, which requires the motorman to sound the gong within 60 feet of the crossing; and the evidence tended to show his failure to do so. It refused the following instruction requested by the tramway company:

"You are instructed that the object of the ordinance requiring the ringing of a gong or bell is to give the drivers of vehicles and persons about to cross the track of the Denver City Tramway Company warning that the car is approaching upon said track, and if said driver or person about to go upon the track sees the car and knows of its approach as early as they would have known of such approach if the bell had been rung, then the reason or necessity for the ringing of the bell does not exist, and the failure to ring it cannot be the cause of the accident; and if in this case you find from the evidence that the driver of the vehicle and the plaintiffs herein saw and knew of the approach of the car as early as they would have known of it if the bell had been rung, as required by the ordinance, then you cannot find that the failure, if any existed, to ring the bell, was the proximate cause of the injury."

This instruction should have been given. The petition charged negligence "in not sounding a gong or bell or giving any other signal prior to reaching said crossing at said time, and plaintiff alleges that no gong or bell was sounded by the said defendant prior to reaching said crossing." The ordinance only required the sounding of the gong within 60 feet of the crossing. The sole purpose of this requirement is to give warning to persons about to enter upon such crossing of the approach of a car. When, therefore, it appears that the person approaching the crossing in fact saw the coming of the car beyond the 60-foot limit, he has all the notice and warning the sounding of the gong could possibly give. In such case no actionable negligence is predicable of the failure to sound the gong. When the reason of the rule does not exist the rule itself ceases to have any application.

Griffith v. Denver Tramway Company, 14 Colo. App. 504–515, 61 Pac. 46; Anderson v. Metropolitan Street Railway Company (Sup.) 61 N. Y. Supp. 899; Frank v. Metropolitan St. Ry. Co. (Sup.) 60 N. Y. Supp. 616; Smith v. Day et al. (C. C.) 117 Fed. 956; Langlois v. Dunn Worsted Mills (R. I.) 57 Atl. 910–911; Schulman v. H. W. S. & P. F. Ry. Co. (Super. Ct.) 36 N. Y. Supp. 439–440; Wood v. Pennsylvania R. R. Co. (Pa.) 35 Atl. 699–700, 35 L. R. A. 199, 55 Am. St. Rep. 728. The evidence of the plaintiffs themselves is that they saw the car from half to three-quarters of a block from the crossing, a block being 264 feet; and the driver testified that he saw it about 200 or 250 feet away. It is quite evident that it was prejudicial error for the court, under such circumstances, to direct special attention to the requirement of the ordinance and a failure of the tramway company to sound the gong within the 60 feet. The evidence of the motorman was that the gong was sounded as soon as he became impressed with the imminent danger of a collision.

The court refused to give the following instruction requested by the tramway company:

"You are instructed that in Colorado the plaintiff is by statute permitted to testify in her own behalf, but that in considering such evidence you are to bear in mind the fact that she is directly interested in the result of the action."

As the court gave no equivalent for this in its charge, we are of opinion that it was error to refuse the request. Section 858, Rev. St. U. S. [U. S. Comp. St. 1901, p. 659], simply declares that:

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried."

It leaves such party, when he does testify, still subject to the common-law rule of having his testimony weighed by the jury in the light of his interest in the case, and to what extent that interest may affect his credibility. It is not only proper and usual for the trial court to direct attention to such fact (Stewart v. Kindel, 15 Colo. 539, 25 Pac. 990), but in this case the tramway company was entitled to such instruction. The plaintiffs were claiming damages for personal injuries which were more or less occult, the character and extent of which depended much upon the testimony of the plaintiffs. More than that, in the case of the defendant in error Mrs. French, when on the witness stand she was interrogated as to whether or not she had not been treated or operated upon for some internal disorder prior to this accident. The inquiry bore directly upon the matter in issue as to whether her present disability was traceable wholly to the injury complained of, or whether it might not, at least in part, be traced to an antecedent infirmity. The court, on objection of her counsel, refused to compel an answer. It is true that this error was measurably cured by allowing the plaintiff in error afterwards to read the deposition of the surgeon who had treated and operated upon her. The plaintiff in error was entitled, however, in the first instance, to have her answer the question, so that, if she had denied the fact, her contradiction by the deposition of the surgeon might have subjected her testimony to a general discredit by the jury. After the surgeon's

deposition was read she again took the stand, and, in many material respects, contradicted the testimony of this surgeon. Under such conditions, the plaintiff in error was entitled, as a matter of justice, to have the attention of the jury drawn directly to her personal interest in the result of the case, as affecting her credibility, as it bore upon the important issue of the amount of damages. While the court, in a general way, told the jury that they were the judges of the credibility of the witnesses, and the weight to be given to the testimony of each, this did not sufficiently invite the attention of the jury to a consideration of the witness' special interest in the verdict. Chicago & Grand Trunk Railway Company v. Spurney, 69 Ill. App. 551.

The tramway company complains of the charge of the court which, in effect, advised the jury that, as the defendants in error had not control of the coach or the driver, no contributory negligence was imputable to them for the act of the driver in going upon the street car track in front of the car. Without assenting to the proposition, as a general rule, that contributory negligence may not be attributed to a person riding in a vehicle with a driver not the passenger's servant, as applied to the facts of this case there was no basis for attributing to either of the plaintiffs any negligence contributing to the injury. They were riding on the rear seats of the coach, four seats back of the driver. They were not directing the movements of the coach. They did not apprehend any unusual danger until the car was so near as to have rendered unavailing any warning they might have given the driver. The seat on which they were riding was elevated about seven feet above the ground. Any attempt, therefore, by them to leap from their perch, might, and probably would, have been more disastrous to them than to retain their position. No matter, therefore, how broad or favorable the charge of the court respecting the rule of contributory negligence, no injury resulted therefrom to the plaintiff in error.

Complaint is made of the ruling of the court in the progress of the trial in refusing the request of the plaintiff in error to permit it to have the defendants in error examined by a surgeon of its selection or by indifferent surgeons selected by the court. Before the conclusion of the trial, however, counsel for defendants in error consented in open court to submit their clients to such examination. Under the ruling of the Supreme Court in Union Pacific Railway Company v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734, and Camden, etc., Railway Company v. Stetson, 177 U. S. 173, 20 Sup. Ct. 617, 44 L. Ed. 721, it is held that in an action for personal injuries, in the absence of some enabling statute of the state, the plaintiff cannot by order of court be required to submit to a personal examination by any surgeon. All the right the defendant has in such instances is to make the request upon the plaintiff to consent to such examination, and in case of refusal the defendant should be permitted to disclose such refusal on the trial and comment thereon to the jury to the plaintiff's prejudice. Turquand v. Strand Union, 8 Dowling, 201; Bryant v. Stilwell, 24 Pa. 314, approved in Union Pacific Ry. Co. v. Botsford, 141 U. S. 254-255, 11 Sup. Ct. 1000, 35 L. Ed. 734.

It results that the judgments against the plaintiff in error must be reversed, and the causes remanded for new trial in conformity with this opinion. The writs of error sued out against the Denver Omnibus & Cab Company are dismissed, at the cost of the plaintiff in error.

CAMPBELL et al. v. GOLDEN CYCLE MIN. CO. et al.

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

No. 2,280.

1. COURTS—CIRCUIT COURT OF APPEALS—JURISDICTION—DISMISSAL FOR LACK OF JURISDICTION BELOW.

Where the jurisdiction of the Circuit Court is in issue, and is decided in favor of the defendant, the Circuit Court of Appeals has no jurisdiction to review the decision, since it disposes of the case, and the plaintiff must have the question certified and take his appeal or writ of error to the Supreme Court.

[Ed. Note.—Review of jurisdiction of Circuit Courts, see note to Excelsior Wooden-Pipe Co. v. Bridge Co., 48 C. C. A. 351.]

2. SAME—IT HAS JURISDICTION OF DISMISSAL ON THE MERITS.

Where the question of jurisdiction is in issue, and the jurisdiction is sustained, and a judgment or decree is rendered in favor of the defendant upon the merits, the Circuit Court of Appeals has jurisdiction to review it.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 1099.]

3. SAME—GENERAL DECREE OF DISMISSAL.

A decree of dismissal without more is a decree that the court has jurisdiction, and that there are no merits in the case. It renders every issue in the suit res adjudicata, and is reviewable by the Circuit Court of Appeals.

4. SAME—FEDERAL COURT—JURISDICTION—SUIT IN EQUITY.

A suit in equity, dependent upon a former suit of which the federal court had jurisdiction, may be maintained in that court, without diversity of citizenship or a federal question, (1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; or (3) to enforce or adjudicate liens upon or claims to property in the custody of the court in the original suit.

5. SAME—DEPENDENT CAUSE OF ACTION ESSENTIAL TO JURISDICTION.

A dependent cause of action, a cause of action for one of the purposes above specified, is indispensable to the jurisdiction of a dependent suit, although after jurisdiction is acquired by means of such a cause the court may determine in a proper case the entire controversy between the parties relating to its subject-matter.

6. SAME—DEPENDENT SUIT—PARTIES WHO MAY AND MAY NOT BE JOINED.

A dependent suit cannot be maintained to adjudicate the claims of those who were not parties to or in privity with the original suit, except in the case of those who claim an interest in the property in the custody of the court.

With this exception the claims of those who are not parties to the original suit, which accrued before its commencement, may be lawfully adjudicated in an original suit only, to the jurisdiction of which diversity of citizenship or a federal question is indispensable.

7. INJUNCTION—PROSECUTION OF ACTIONS—ESTOPPELS IN PAIS—WHEN AVAILABLE AS DEFENSES AT LAW IN FEDERAL COURT.

Estoppels in pais are available at law in the federal court in defense of actions of ejectment, trespass, and conversion, and form no basis for the prohibition of the prosecution of such actions.

(Syllabus by the Court.)

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

The Theresa Gold Mining Company, a corporation of the state of Colorado, was the owner of the Theresa lode mining claim. The Golden Cycle Mining Company, a corporation of the state of West Virginia, was the owner of the Legal Tender and La Bella lode mining claims. The Theresa Company claimed that four veins of ore, whose apexes were within the surface lines of the Theresa mining claim, passed through the vertical side line of the Cycle Company's claims on their dip, and that the Cycle Company had removed ores therefrom. Thereupon the Theresa Company brought an action at law against the Golden Cycle Company for the possession of those portions of these four veins which were within the vertical side lines of the Legal Tender and the La Bella mining claims, and for $250,000 damages for ore, which the plaintiff alleged the Cycle Company had broken down and removed from these parts of the veins. After this action had been commenced Frank J. Campbell and others, who held a minority of the stock of the Cycle Company, exhibited a bill in equity in the court below against both corporations, John T. Milliken, L. E. Hill, and others to enjoin the prosecution of the action at law, to compel the Theresa Company and L. E. Hill to set forth in the suit in equity and have adjudicated all their claims to any interest in the Legal Tender and the La Bella lode mining claims and in the ores that had been removed therefrom, to enjoin the holders of the majority of the stock of the Cycle Company from taking any part in the litigation regarding these claims, and for further relief that was not specified. The bill was voluminous. It covers 32 printed pages of the record, and contains averments of many facts and circumstances, which it is unnecessary to recount. It is sufficient to say that the alleged grounds for the relief sought by the bill are that the defendant, Milliken, who is the president of the Cycle Company, and one Logan, each own stock in each corporation; that they control a majority of the stock of the directors and officers of each corporation; that they and the two corporations have conspired together to transfer to the Theresa Company the property of the Golden Cycle Company by means of the action at law; that Milliken and the majority of the board of directors of the Cycle Company will not interpose or prove the defenses to that action which that company has, and will not permit the complainants to do so; that the Cycle Company has equitable defenses to the action which are not available at law; that the defendant Hill held a lease for the term commencing October 6, 1902, and ending October 7, 1906, of the Theresa mine, and a privilege of working it through the shafts, levels, and cross-cuts of the Cycle Company, by virtue of which he was entitled to 85 per cent. of the smelter returns from his operations; that for a large portion of the time he was also an officer of the Cycle Company; that the defendant Holman was superintendent of Hill's operations under the lease, and also of the operations of the Cycle Company; that under Hill's lease he was entitled to 85 per cent. of the ore taken from the ground of the Cycle Company which belonged to the Theresa Company; and that Milliken, Hill, and Holman, as officers of the Cycle Company, had used its money, with the knowledge of the Theresa Company, to develop in the ground the appearance of a longitudinal discovery vein in the Theresa claim, and of a valid claim against the Cycle Company for the relief sought in the action at law, when, in truth and in fact, there never was any such discovery vein, or any ground for any such claim. The Theresa Company, Milliken, and other defendants demurred to this bill upon many grounds; and the error specified upon this appeal is that this demurrer was sustained and the bill was dismissed.

Charles J. Hughes, Jr. (Branch H. Giles, K. C. Schuyler, and Charles F. Potter, on the brief), for appellants.

Tyson S. Dines and W. H. Bryant (H. McGarry, E. E. Whitted, O. L. Dines, P. H. Holme, Joel F. Vaile, and C. W. Waterman, on the brief), for appellees.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

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

The bill in equity which was exhibited in this suit disclosed no federal question and no diverse citizenship of a nature to give to the Circuit Court jurisdiction of the parties and the subject-matter, and these facts furnish one of the grounds of the demurrer which was sustained by the Circuit Court. If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, the Circuit Court of Appeals has no jurisdiction to review the decision, because it disposes of the case, and the plaintiff must have the question certified and take his appeal or writ of error to the Supreme Court. U. S. v. Jahn, 155 U. S. 109, 114, 15 Sup. Ct. 39, 39 L. Ed. 87. Counsel for the appellees moved to dismiss this appeal upon this ground. But an examination of the record has brought to our attention the fact that, after the court had entered a decree that the demurrer should be sustained and that the bill should be dismissed for want of jurisdiction, it set that decree aside, and rendered another to the effect that the demurrer be sustained and the bill be dismissed out of court at the cost of the complainants. A general decree of dismissal without more is a decree that the court has jurisdiction, and that there are no merits in the case, and it renders every issue in it res adjudicata. Indian Land & Trust Co. v. Shoenfelt, 68 C. C. A. 196, 198, 135 Fed. 484, 487. The conclusion is unavoidable that the bill in this case was dismissed by the court below, not because it was of the opinion that it was without jurisdiction to hear and determine upon their merits the questions which the bill presented, but because it did hear and consider them, and determined that there were no merits in the case of the complainants. The suit falls in the second class of cases specified in U. S. v. Jahn, where the question of jurisdiction is in issue and the jurisdiction is sustained, and then a judgment or decree is rendered in favor of the defendants upon the merits. In that class of cases the Circuit Court of Appeals has jurisdiction to review the decision below. The motion to dismiss the appeal must accordingly be denied.

The suit in hand cannot stand as an original suit, because no federal question is involved in it and the requisite diversity of citizenship does not exist. But a suit in equity, dependent upon a former suit of which the federal court has jurisdiction, may be maintained in the absence of a federal question and of diversity of citizenship (1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; or (3) to enforce or obtain an adjudication of liens upon, or claims to, property in the custody of the court in the original suit. Such a suit is but the continuation in a court of equity of the original suit, to the end that more complete justice may be accomplished thereby. A defendant may maintain a suit in equity of this nature against a plaintiff and those in privity with the original action to enjoin the prosecution

of an action at law or the enforcement of a judgment at law until an equitable defense, which is not available at law, has been determined. Logan v. Patrick, 5 Cranch, 288, 3 L. Ed. 103; Dunn v. Clarke, 8 Pet. 1, 8 L. Ed. 845; Cortes v. Thannhauser (C. C.) 9 Fed. 226; Johnson v. Christian, 125 U. S. 642, 8 Sup. Ct. 1135, 31 L. Ed. 820; Aldrich v. Campbell, 97 Fed. 663, 38 C. C. A. 347; Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167. The stockholders of a defendant corporation, which has fraudulently permitted a decree against it, may sustain a dependent suit against the complainant and other parties interested in the fraudulent decree to set it aside. Carey v. Houston & Texas Railway, 161 U. S. 115, 16 Sup. Ct. 537, 40 L. Ed. 638. A party to an action at law may successfully exhibit a dependent bill to avoid fraudulent conveyances made to prevent the collection of his claim from his debtor, who was a party to the original action. Dewey v. West Fairmount Gas Coal Co., 123 U. S. 329, 8 Sup. Ct. 148, 31 L. Ed. 179. A bill to construe orders and decrees in a former suit in equity is a dependent bill, and may be sustained against those who claim under, or are interested in, the orders or decrees whose interpretation is sought. Minnesota Co. v. St. Paul Co., 2 Wall. 609, 634, 17 L. Ed. 886. And parties who claim property or liens upon, or interests in, property which is in the custody of a federal court in a former action may bring a dependent suit in equity against the parties to such an action and those claiming under them to enforce their claim. Freeman v. Howe, 24 How. 450, 460, 16 L. Ed. 749; McBee v. Railway Co. (C. C.) 48 Fed. 243, 246; Widaman v. Hubbard (C. C.) 88 Fed. 806.

But a cause of action in equity either to aid, restrain, or regulate an original action or suit of which the federal court has acquired jurisdiction, or the judgment or decree therein, or to determine claims to property in the custody of the court in such an original suit or action, is indispensable to the maintenance of a dependent suit. When a cause of action of this nature exists, and a court of equity has acquired jurisdiction of the subject and of the parties by means of it, it may undoubtedly draw to itself and decide all the issues between the parties, relative to the subject-matter, and determine the entire controversy. But without such a dependent cause of action it has no jurisdiction in equity, and, in the absence of diversity of citizenship or a federal question, it can grant no relief. In Johnson v. Christian, 125 U. S. 642, 643, 8 Sup. Ct. 1135, 31 L. Ed. 820, for example, Johnson had obtained a judgment in ejectment for the possession of the land of Christian, when the latter brought suit in equity to enjoin the enforcement of this judgment on the ground that he had an equitable defense to it, of which he was not permitted to avail himself at law, and he also prayed to remove the cloud of a deed of the land to Johnson. The court granted the entire relief sought, but it would have had no jurisdiction to remove the cloud of the deed or to quiet the title to the premises, unless there had been a good cause of action to restrain the enforcement of the judgment in ejectment. Dunn v. Clarke, 8 Pet. 1, 3, 8 L. Ed. 845. Does the bill in the suit under consideration state facts sufficient to constitute such a cause

of action? For the purpose of the decision of this case the proposition is conceded that the complainants have set forth facts sufficient to entitle them to interpose and to prove the defenses which are pleaded to the action at law by means of counsel of their own selection, and that they have every claim to the relief they seek in this suit that the Cycle Company itself would have. In the suit in hand they do not seek any order or decree that they may be permitted to defend the action at law. The only relief they ask is (1) the prohibition of the prosecution of the action at law by the Theresa Company; (2) the quieting of the title of the Cycle Company to all the ores that were or are within the vertical side lines of its lode mining claims; and (3) the inhibition of the Golden Cycle Company, its officers and the majority of its stockholders and directors, from taking any part in the litigation of any claims made by any of the parties to this suit to the property in controversy, and permission for the complainants to absolutely control and direct, on the part of the Cycle Company and those interested in it, all the litigation that may arise in this suit.

The second and third divisions of the relief which they seek depend in no way upon the action at law, but are justifiable in an original suit between the parties, regardless of the further prosecution or defense of the action between the corporations. They are conditioned, not by the prosecution or the stay of the action at law, but by the possession of the property by the Cycle Company, by the assertion of invalid claims to it by the Theresa Company and Hill, and by the collusive or fraudulent refusal of the Cycle Company, its directors and officers, to proceed faithfully and vigorously to defeat these claims. The relief sought in these two divisions of the prayer may undoubtedly be granted, if a cause of action for the other relief prayed, the inhibition of the prosecution of the action at law, as stated in the bill, be proved, upon the ground that whenever a court of equity has acquired jurisdiction of the subject-matter and the parties it may determine all the controversies between the latter, relative to the subject of the litigation. But the causes of action for the quieting of the title to the property and for the exclusion of the Cycle Company, its officers and the majority of its stockholders and directors, from taking any part in the conduct of this suit, form no basis for a suit dependent upon the original action at law. The only foundation for such a suit is the alleged cause of action for the prohibition of the prosecution of the action at law. That the nature and purpose of the suit under consideration have not been misapprehended appears from one of the opening statements of counsel for the complainants in their brief. They write:

"The primary purpose of the complainants in commencing the suit was to restrain the Theresa Company, one of the appellees herein, from prosecuting further a suit pending at law in the Circuit Court aforesaid, and instituted by that company against the Cycle Company, another of the appellees herein, and to litigate and settle finally in the equity suit, where the complainants as stockholders, could properly appear, the claims of the Theresa Company to the property of the Cycle Company involved in the suit at law."

The question therefore becomes whether or not the complainants have stated facts in their bill sufficient to entitle them to an injunc-

tion against the prosecution of the action at law by the Theresa Company at the hands of a court of equity. The issue in that action is clear and single. It is whether or not veins of ore, whose apexes are within the surface boundaries of the Theresa Company's lode mining claim, pass on their dip through the vertical side line between its claim and the lode mining claims of the Cycle Company, so that the ores in those veins between the vertical side lines of the Cycle Company's mining claims were and are the property of the Theresa Company. This is a simple question of fact. The Theresa Company has the right, under the common law, and under the Constitution of the United States, to its trial by jury in the action it has commenced, unless there is some reason why, in equity and good conscience, it should not be allowed to exercise its right to such a trial. Const. U. S. Amend. art. 7. The only ground for the inhibition of this trial by the jury, and the decision of the question of fact in issue by a court of equity, which the bill in this case discloses, is that the complainants and the Cycle Company have two alleged equitable defenses, of which they contend they may not avail themselves in the action at law. These defenses are that the Theresa Company is estopped from asserting its claim to the ores in the portions of these veins within the vertical side lines of the Cycle Company's mining claims (1) because Hill and Holman, while they were officers of the Cycle Company, unlawfully devoted their time and energies, and the shafts, levels, cross-cuts, and money of the Cycle Company to work under the lease which Hill had obtained from the Theresa Company, and to the development of the unfounded claim of the Theresa Company to these ores, which is the basis of the action at law, and (2) because Hill, Holman, Milliken, and McGarry conspired with the Theresa Company to use, and did use, the money, shafts, levels, and cross-cuts of the Cycle Company to develop the claims of the Theresa Company which are the foundation of the action at law; that these claims are baseless and would never have had even the appearance of claims without the unlawful action of the officers of the Cycle Company; and that the Theresa Company has accepted the benefit of their acts.

There are several reasons why these alleged estoppels furnish no tenable ground for the prohibition of the prosecution of the action at law. In the first place they rest on the allegation and the assumption that the claim of the Theresa Company to the ore in the ground of the Cycle Company is baseless. If the Theresa Company was or is the owner of these ores, if these ores were or are in veins whose apexes run longitudinally along the surface of the Theresa Company's claim, there is no foundation for the estoppels, and the question whether or not these ores were or are in such veins is a question of fact, of which the Theresa Company has the right to a trial by jury in the action at law. If, upon such a trial, the jury find that these ores were or are the property of the Theresa Company, the fact that the officers of the Cycle Company conspired with the Theresa Company to demonstrate this fact, and used the money or property of the Cycle Company to disclose the truth, cannot estop the Theresa Company from asserting this truth and recovering the property, for it

was the duty of both companies alike to ascertain the fact, to make it known, and to respect and protect the rights of each other. If, on the other hand, the jury find that there were or are no ores in the ground of the Cycle Company in veins whose apexes were in the Theresa claim, the Theresa Company will be entitled to no recovery, and the alleged estoppels become immaterial. Again, the bill does not contain averments of the indispensable elements of an equitable estoppel. These are knowledge and misrepresentation of facts by the parties to be estopped, ignorance of the facts, and injurious change of situation by the victim in reliance upon the misrepresentation. There is no allegation that either the Cycle Company or the complainants were ignorant of the alleged fact that the claim of the Theresa Company was baseless or of any injury, action, or change of position by any of them in the mistaken belief that the representation by any one of the validity of that claim was true. And finally, if the averments of the bill were sufficient to raise the estoppels claimed, they would be no more than estoppels in pais, and would be as available in defense of the action at law as in support of a suit in equity. Dickerson v. Colegrove, 100 U. S. 578, 584, 25 L. Ed. 618; Kirk v. Hamilton, 102 U. S. 68, 78, 26 L. Ed. 79. The bill presents no equitable defense to the action of the Theresa Company which is not available at law to defeat it, and it discloses no other ground for the prohibition of its prosecution.

Not only this, but the complainants have joined in this bill, and they seek affirmative relief against L. E. Hill, who is not a party or a privy to the original action at law, and whose claims, if any, accrued prior to its commencement. Persons who are not parties to the original action, but who claim some lien upon, or interest in, the property in the custody of the court, and those who come into privity with the parties to the original action after its commencement, may properly be made parties to a dependent bill, and their claims and rights may be adjudicated thereunder. But a federal court may not lawfully determine the rights of those who do not fall within these classes otherwise than by an original suit, to its jurisdiction of which diversity of citizenship or a federal question is indispensable. There is no property in the custody of the court in the action between the corporations. All the rights and claims of the defendant Hill arose under a lease from the Theresa Company, made more than two years before the action at law was commenced. He was therefore neither a party to that action, nor has he come into privity with it or with any party to it since its commencement. So far as the bill sets forth and seeks the adjudication of his claims, it is therefore an original, and not a dependent, bill, and for that reason it cannot be sustained. In Dunn v. Clarke, 8 Pet. 1, 3, 8 L. Ed. 845, a judgment in ejectment had been rendered in favor of Graham, and Dunn held the land recovered as a trustee under the will of Graham, who had died. A dependent suit against Dunn and others to enjoin the execution of this judgment and for other relief was exhibited. The court said:

"If Graham had lived, the Circuit Court might have issued an injunction to his judgment at law, without a personal service of process, except on his

counsel; and, as Dunn is his representative, the court may do the same thing as against him. The injunction bill is not considered an original bill between the same parties, as at law; but if other parties are made in the bill, and different interests involved, it must be considered, to that extent at least, an original bill, and the jurisdiction of the circuit court must depend upon the citizenship of the parties. In the present case several persons are made defendants who were not parties or privies to the suit at law, and no jurisdiction as to them can be exercised by this or the Circuit Court."

The facts set forth in this bill are insufficient to sustain a dependent suit, because they disclose no equitable ground for the prohibition of the prosecution of the action at law, which is the only alleged basis for such a suit presented by the bill, and because those who are neither parties nor privies to the action at law are joined as parties in the bill, and an adjudication is sought in this suit of rights and interests not involved in the action at law, in the absence of diversity of citizenship, or of a federal question, the indispensable conditions of jurisdiction to determine rights and interests of this character. For these reasons the demurrer was rightly sustained. Since, however, the complainants have not here sought permission to present and prove in the action at law in behalf of the Cycle Company, by counsel of their own choice, any defenses which that company may, in their opinion, have to the claim of the Theresa Company, and as they may yet desire to do so, the decree below is modified so that it shall read:

"It is ordered, adjudged, and decreed by the court that the demurrer to the bill of complaint herein be, and the same is hereby, sustained, and that the bill of complaint herein be, and the same hereby is, dismissed out of this court at the costs of the complainants, without prejudice to their right to apply to the court in the action at law, or by a bill in equity, for permission to plead and prove in the action at law, by means of counsel of their choice, any defenses which the Cycle Company may, in their opinion, have to that action."

And, as thus modified, the decree below is affirmed, with costs against the appellants.

LUHRIG COAL CO. v. JONES & ADAMS CO.

(Circuit Court of Appeals, Sixth Circuit. December 20, 1905.)

No. 1,423.

1. CONTRACTS—LEGALITY OF PROVISIONS—HOW DETERMINED.
   The legality of a provision of a contract is to be determined by its terms and character, and not by what the parties did or attempted to do thereunder, and evidence of an attempt to take action thereunder which was fraudulent or illegal is not necessary to support a finding of the illegality of the agreement.

2. SALES—CONTRACT—CONSTRUCTION—SALE OF COAL FOR FUTURE DELIVERY.
   A coal company owning mines contracted to sell to a customer a large quantity of coal, a specified quantity to be delivered on cars at the mines each month in substantially equal daily amounts. The contract provided that the company should use every effort to secure sufficient cars for the shipment of all the coal required by the contract, and that, "if it fails to secure sufficient cars to do so, it agrees to load and deliver to the party of the first part a part of the cars it may receive in the proportion that the coal called for under this contract each day bears to the total pro-

duction of coal from mines of the party of the second part for such day." It was known by both parties that the company had no storage, but that coal was loaded from the mines into cars, and that the production was therefore limited by the supply of cars, and there was evidence that it was also understood that the company would have other contracts to fill. *Held*, that such provision should be construed in the light of such known facts and of the whole contract, and that it required the company, in case there were insufficient cars to enable it to fill all of its contracts, to give the purchaser its proportionate share of the coal produced and shipped, without discrimination in favor of any other customer.

3. SAME—DELIVERY TO CARRIER.

Cars of coal which were loaded by the company at the mines and billed to the purchaser in its shipping orders to the railroad company in compliance with the contract, but which the railroad company refused to ship and appropriated to its own use under plea of necessity, are to be considered, as between the parties to the contract, as having been delivered to the purchaser in fulfillment of the contract.

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

The Jones & Adams Company, defendant in error, a dealer in coal at Chicago, brought this suit against the Luhrig Coal Company, the plaintiff in error, a proprietor of coal mines at Luhrig, Ohio, to recover damages for the breach by the latter of the contract following:

"This agreement made this 31st day of May, A. D. 1902, by and between the Jones & Adams Company, a corporation of the state of Illinois, party of the first part, and the Luhrig Coal Company, a corporation of the state of Ohio, party of the second part, witnesseth, that:

"(1) The party of the second part agrees to sell and furnish to the party of the first part, seventy-five thousand (75,000) tons of lump coal from its mines and on cars at its mines at Luhrig, O., during the period from June 1st, 1902, to March 31, A. D. 1903, and the party of the first part agrees to buy and receive such coal.

"(2) Shipments of said coal shall be made at times and quantities as follows:

"2,500 tons during the month of June, 1902.
"2,500 tons during the month of July, 1902.
"5,000 tons during the month of August, 1902.
"7,000 tons during the month of September, 1902.
"10,000 tons during the month of October, 1902.
"11,000 tons during the month of November, 1902.
"11,000 tons during the month of December, 1902.
"11,000 tons during the month of January, 1903.
"8,500 tons during the month of February, 1903.
"6,500 tons during the month of March, 1903.

"Said deliveries for each month shall be made in substantially equal daily amounts.

"(3) The party of the first part agrees to pay on the 15th of each month for all coal shipped under this contract during the calendar month preceding at the following prices:

"For coal shipped in June, July and August, $1.15.
"For coal shipped in September, October and November, $1.25.
"For coal shipped in December, January, February and March, $1.35.
"All per net ton of 2,000 lbs., f. o. b. cars at the mine.

"(4) It is mutually agreed that the screen used in preparation of this coal shall be of regular dimensions stipulated in the Miners and Operators' Agreement of Ohio, screen to be of not less than 1¼ inch diamond bar, and should the party of the second part desire to use a larger screen at any time it shall have the privilege of so doing.

"(5) The quality, preparation and appearance of the coal furnished here-

under by the party of the second part shall be equal in every way to standard Hocking Lump Coal furnished for the Chicago market by the Sunday Creek Coal Company, and the party of the first part shall have the right to rescind and annul the unexecuted portion of this contract if the quality and preparation of the coal is at any time not such that it can be sold in the Chicago market as Standard Hocking Coal.

"(6) The party of the second part shall use every reasonable effort to secure sufficient cars for the shipment to the party of the first part of all the coal called for by this contract, and if it fails to secure sufficient cars to do so, it agrees to load and deliver to the party of the first part a part of the cars it may receive in the proportion that the coal called for under this contract each day bears to the total production of coal from mines of the party of the second part for such day.

"(7) It is understood by both parties that this contract is subject to strikes, contingencies of transportation and other causes beyond the control of either party.

"(8) During the continuance of this contract, the party of the second part shall sell coal from mines for the Chicago market and for the northwestern territory supplied with said coal through Chicago and Peoria, only to the party of the first part, intending hereby to give the party of the first part exclusive right to sell in said Chicago and northwestern market, coal mined from mines of the party of the second part.

"(9) It is further agreed that if the party of the first part fails during any month to take the coal called for in this contract during such month, the party of the second part shall be excused from furnishing such deficit of coal thereafter, unless it desires to do so.

"Witness the signatures of the parties hereto this 31st day of May, A. D. 1902.

The Jones & Adams Company,
"By H. C. Adams, Its Vice President.
"The Luhrig Coal Company,
"By A. Cunninghame, Its President."

The breach of the contract alleged consisted in the failure of the coal company to furnish the coal contracted for in this agreement; the plaintiff averring that only 14,126 tons thereof was in fact furnished by the defendant during the whole period prescribed for delivery. The plaintiff further alleged that the market value of such coal increased during that period to such an extent that the damages suffered by the plaintiff were as much as $120,144.15. By leave of the court an amended petition was subsequently filed, wherein the plaintiff, instead of setting forth the contract in hæc verba, alleged the substance of it as interpreted by the pleader. The answer of defendant admitted its failure to deliver all the coal contracted for, but denied that the failure ensued from any fault on its part, and proceeded to state several defenses, which for the present purpose may be summarized under two heads: First, that by reason of strikes among its miners, and by reason of smallpox at its mines, its inability to obtain cars, the refusal and delays of railroad lines in handling the coal, and other contingencies of transportation, accidents at its mines, and other causes beyond its control, it was prevented from delivering to the plaintiff more coal than it did deliver; second, that the said contract was illegal and void, in that by one of the stipulations thereof (the fifth clause being the one referred to) the plaintiff contracted for the means whereby it would be able to sell in the Chicago market the Luhrig Company's product as and for "Standard Hocking Coal" from the mines of the Sunday Creek Coal Company, whereas, in fact, it was not such, but of a lower grade, and thereby deceive the public, who would be induced to purchase the coal upon the faith that it was standard Hocking coal from the mines of the Sunday Creek Coal Company. Upon the trial evidence was given directed to both of these defenses. The jury rendered a verdict for the plaintiff in the sum of $63,108.

Upon this writ of error the defendant below complains of certain rulings of the court on the trial relating to the construction of the contract and the defenses above specified.

Edward Colston and S. M. Johnson, for plaintiff in error.
C. B. Matthews and Wm. Burry, for defendant in error.
Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

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

It seems preferable to consider first the rulings of the trial court upon the question of the legality of the stipulation contained in clause 5 of the contract, concerning the manner in which the coal should be prepared for delivery. Generally a question of this sort is one appearing upon the face of the contract, and is one for the court. But sometimes it may be necessary, in order to determine the meaning of the parties, to resort to facts in pais, to be ascertained from evidence of extraneous circumstances. The court below evidently regarded this case as belonging to the latter class, and the trial proceeded upon that understanding. It became the duty of the court to instruct the jury in respect to the law applicable to the case upon the facts as the jury should find them, and it became the duty of the jury to determine the facts and apply the law as it should be given them by the court. The court, in giving instructions upon this point which seem otherwise unobjectionable, gave the jury to understand that it was necessary to make out this defense, that it should be made to appear that the plaintiff had attempted to carry out the objectionable purpose by actually attempting to sell the Luhrig Company coal as standard Hocking coal, such as that furnished by the Sunday Creek Coal Company. The court said to the jury:

"Before you can find that this contract was one against the public policy, or one intended to deceive the public of Chicago in buying coal, the defendant must show, by a preponderance of the testimony, that that was the purpose of the plaintiff and the object of making the contract; and there should be some evidence to show that there was an attempt to put it upon the market as Sunday Creek coal; in other words, there should be some evidence before you to show that they did intend to deceive the public."

This was misleading. The legality of the contract was to be judged of by its character, and not by what the plaintiff might do, or should attempt to do, with the fruits of it. Church v. Proctor, 33 U. S. App. 1, 66 Fed. 240, 13 C. C. A. 426; McMullen v. Hoffman, 174 U. S. 639, 648, 19 Sup. Ct. 839, 43 L. Ed. 1117 (where Mr. Justice Peckham said: "The vice is inherent in contracts of this kind, and its existence does not in the least depend upon the success which attends the execution of any particular agreement"); Weber v. Shay, 56 Ohio St. 116, 46 N. E. 377, 37 L. R. A. 230, 60 Am. St. Rep. 743; Materne v. Horwitz, 101 N. Y. 469, 5 N. E. 331; Harriman on Cont. (2d Ed.) 271.

Elsewhere in its charge the court instructed the jury correctly by stating that the purpose of the plaintiff in requiring this stipulation must have been to enable it to deceive the public. But the error was not thereby cured. The jury might well have inferred that, in order to prove the unlawful purpose, it was necessary to prove that the plaintiff attempted to carry it out. Durant Mining Co. v. Percy Consol.

Mining Co., 93 Fed. 166, 35 C. C. A. 252; Standard Life & Accident Ins. Co. v. Sale, 121 Fed. 664, 57 C. C. A. 418, 61 L. R. A. 337; 11 Encycl. of Pl. & Pr. 148, where a great number of cases to the same effect are cited.

The other question involves the construction of the sixth clause of the contract. It will be convenient to repeat it in this connection.

"(6) The party of the second part shall use every reasonable effort to secure sufficient cars for the shipment to the party of the first part of all the coal called for by this contract, and if it fails to secure sufficient cars to do so, it agrees to load and deliver to the party of the first part a part of the cars it may receive in the proportion that the coal called for under this contract each day bears to the total production of coal from the mines of the party of the second part for such day."

It is urged by defendant in error that no question arose under this clause because there was at all times a sufficiency of cars. But it quite clearly appears that this assumption of fact is not well founded. It is seen that it was anticipated that there might be occasions when there would be a shortage of cars, and there was evidence tending to show that on many days, notwithstanding the efforts of the Luhrig Coal Company to procure them, there was a shortage of cars available for shipping coal. There was evidence also tending to show that the Luhrig Coal Company had no storage ground, and that their coal was directly loaded upon the cars as it was brought out of the mine, and therefore that the production of the mine was restricted to the capacity of the cars available for receiving it, and that these conditions and methods of mining and shipping at the Luhrig Company's mines were known and understood by the officers of the Jones & Adams Company when the contract was made. There was evidence from which it might be inferred that the coal company would have other contracts for the sale and delivery of coal to other parties, and that the Jones & Adams Company knew this and expected that such would be the fact. In the light of these facts, what is the proper construction to be put upon clause 6, which was to govern the execution of the contract upon days when there should be a shortage of cars? It must be confessed the language is obscure. Counsel have differed in its construction, and the court below did not agree to the contention of either. It cannot be taken literally to any sensible result. Resort must therefore be had to settle rules of construction. The leading one is that, when the court can discern the main purpose of the parties, it will construe the words and clauses of the instrument in a way to effectuate the main purpose if that can be done without doing violence to the language employed, and considerable latitude is justifiable if the main purpose is clear. Upon the authority of a great number of cases, English and American, state and federal, it is stated in 17 Am. & E. Encl. of L. 4, 5, that:

"One of the rules of interpretation most frequently referred to is to the effect that the intention must be determined by a consideration of the whole instrument rather than of any particular clause; the theory being that the parties presumably had the same general purpose and object in view in all parts of the instrument, and consequently, if some of the stipulations are more

obscure than others, or one part is seemingly inconsistent with another, the main purpose and object, as collected from the whole instrument, may be so clear and distinct as to throw light upon such obscure or inconsistent parts."

In Tennessee v. Whitworth, 117 U. S. 129, 137, 6 Sup. Ct. 645, 648, 29 L. Ed. 830, Chief Justice Waite said:

"In construing statutes which are binding on states as contracts, the words employed are, if possible, to be given the same meaning they had in the minds of the parties to the contract when the statute was enacted. In this respect there is no difference between a contract of a state and a contract of a natural person. If the words employed are capable of more than one meaning, that meaning is to be given them which, taking the whole statute together, it is apparent the parties intended they should have."

And see Chesapeake, etc., Canal Co. v. Hill, 15 Wall. 54, 21 L. Ed. 64; and O'Brien v. Miller, 168 U. S. 287, 296, 297, 18 Sup. Ct. 140, 144, 42 L. Ed. 469, where Mr. Justice White brought very distinctly into view the grounds which support his statement that:

"The elementary canon of interpretation is not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them. Boardman v. Reed, 6 Pet. 328, 8 L. Ed. 415; Canal Co. v. Hill, 15 Wall. 94, 21 L. Ed. 64."

This canon has a very direct application to the expressions "and if it fails to secure sufficient cars so to do," and "total production of coal," in the sixth clause of this contract.

It seems to us that here the dominating idea was that, in the event of an insufficient number of cars to supply the coal company's demands on any day when coal should be shipped, the Jones & Adams Company should be accorded their proportionate share of the cars which could be secured, and that there should be no discrimination in favor of other parties. Upon this construction the proper formula in case of the shortage would consist in the following proportion; that is to say, the part of the cars due plaintiff each day is to the whole number of cars available for shipping coal that day, as the number of car loads due the plaintiff by the terms of the contract that day is to the number of car loads due all parties for that day. The contract says that party shall have "a part of the cars," evidently recognizing that the other cars are to be given to others; and what others could be intended than the customers of the coal company? We are confirmed in this interpretation of the contract by the letters of the Jones & Adams Company to the coal company written during the period fixed for the delivery of the coal. On October 4, 1902, the Jones & Adams company wrote a letter to the coal company, in which, after calling attention to the contract and complaining that the coal company was "shipping large amounts to other places and practically none to us," they say:

"We understand you receive all the cars you need. Even if that was not so, we desire to call your attention particularly to clause 6 of the contract, which requires you to ship us a proportion of your output."

And in the letter of President Jones to the coal company on January 19, 1903, after referring to a letter from the coal company, he says:

"You seem to insist in your letters that the railroad company must be taken care of before our contract with you is considered. We do not care anything about where you put your coal, our contract is based upon the supply of cars for loading coal to everybody, including the railroad, and we must insist upon it being carried out on these lines when the proper time comes.

"Yours very truly, J. S. Jones, President."

These letters plainly show that the Jones & Adams Company understood that the coal company would be delivering to other parties, and that the former expected to share with such parties in the deliveries. The practical construction which parties put upon their contract during its operation, where its meaning is doubtful, is of much weight in settling its construction. And this shows what was meant by the preceding clause, where it is said "and if it [the coal company] fails to secure sufficient cars to do so" that is, to furnish all the coal called for by the contract—then, etc., and indicates not that the sufficiency of cars intended was merely a sufficiency of cars to supply the Jones & Adams Company the coal due to that company, but to supply them and others with whom they expected to share. So, also, it fixes the meaning of the words "the total production of coal," in the latter part of the clause, to be the total expected production; that is to say, what would be necessary to meet all the engagements of the coal company. The criticism made by counsel for the defendant in error is that under this construction the Jones & Adams Company would be at the mercy of the coal company, for the latter might contract for the delivery of coal beyond the capacity of the mines. A sufficient answer to this objection would be that such overcontracting would be in violation of the spirit of the contract and the coal company would not be allowed to take advantage of any excess arising from overcontracting for deliveries of coal.

Again, the regular and established method of conducting a business is of significance in construing a contract relating to it. In the case of Western Hardware Mfg. Co. v. Bancroft-Charnley Steel Co., 116 Fed. 176, 53 C. C. A. 548, it was held by the Circuit Court of Appeals for the Seventh Circuit that, when a contract relating to the furnishing of certain articles of machinery was obscure, the kind of business in which the seller was engaged was important in determining whether the contract was one of bargain and sale, or for the manufacture and sale, of such articles. In Lillard v. Kentucky Distilleries, etc., Co., 134 Fed. 168, 67 C. C. A. 74, we held that a contract for a sale and delivery of refuse of a distillery to a feeding lot raised a strong presumption that there was some usage with reference to which the parties made their contract, and that, when proved, such usage became a part of it. And in McKeefrey v. Connellsville Coke Co., 17 U. S. App. 35, 56 Fed. 212, 5 C. C. A. 482, it was held by the Circuit Court of Appeals for the Third Circuit that a contract for coke, deliverable daily, which stated that the seller should not be held responsible for the railroad company's failure to supply transportation, but was silent as to the consequences if the cars furnished were insufficient to supply all the seller's customers, should be construed by reference to a usage among dealers (which was proven in that case) to apportion the in-

sufficient supply of cars among all the customers of the seller equally in proportion to their contracts. As we have said, in that case such a usage was proved. But here that which was there a usage is recognized in the contract as the basis of the stipulation. As the court there said, "in contemplation of law, the usage is written into the contract." Here it is actually written in.

But there is another factor to be reckoned with. It appears that during a part of the time prescribed for making deliveries the only railroad company running to the mines refused to bill out to Jones & Adams cars of coal which were loaded and billed to them in the shipping orders of the coal company, and altered the bills so as to make the railroad company consignee at such places on the railroad company's lines as it might require coal for its own use. Finally the railroad company refused altogether to furnish cars for transporting coal to any other party than itself. The excuse assigned for this action of the railroad company was that on account of a strike or strikes of miners in the great coal mines in the East the railroad company was compelled to lay hold of any coal within reach, in order to keep its lines in operation. It is contended for plaintiff in error that coal once loaded and billed to Jones & Adams Company should be regarded as delivered to them. We think this is correct, and it seems to have been the understanding of the Jones & Adams Company, for in President Jones' letter to the coal company of December 24, 1902, he says:

"In several of your letters you speak of your coal being confiscated by the railroad. We know nothing about your arrangements with the railroad company. The contract only requires that you load the coal on cars at your mines for us. If you do that, the coal is ours. If it is confiscated, we will deal with the railroads in regard thereto."

Again on February 26, 1903, in another letter to the coal company, President Jones says:

"We are surprised at your letter and cannot agree with you that you were to ship the coal anywhere. Our contract calls for delivery to us on cars at your mines, and that we will attend to the shipping."

The court below was requested to charge the jury that such would be the effect of loading and billing the cars to the Jones & Adams Company. But the court refused to give this instruction, and error is assigned thereon. We think the instruction should have been given. Such car loads of coal as were not billed, but which the railroad company seized in excess of its rights by contract with the coal company, should not be included in determining the number available to the coal company for the daily shipments to the Jones & Adams Company and its other customers. The court below appears to have taken a different view in respect to the proper construction of clause 6. The coal company called Mr. Cunninghame, the president of the company, and put to him this question:

"During this period from June 1st to April 1st what was the amount of your contracts that you had to fulfill, of all the contracts, including the railroad, and including Jones & Adams?"

This was objected to by counsel for the plaintiff upon the ground thus stated:

"The proportion we were to get was from the proportion of the output, not from a proportion of the contracts."

The court sustained the objection and excluded the evidence, observing that in its judgment the "total production of coal" in the last part of clause 6 meant the actual production, and the effect of the ruling was that the volume of the coal company's contracts was not a factor in determining the proportion of cars to which the plaintiff was entitled in case of shortage. We are not quite clear what the court meant by "actual production," but we will consider this question further when reviewing the court's instructions to the jury. In explaining this sixth clause of the contract to the jury, the court said:

"Now, I do not know whether the jury have fully understood just what that provision means, and, lest you might not fully understand it, for the purposes of illustration and for purposes of illustration alone, I will suggest or call attention to the method of arriving at what was meant by this clause: In October, for instance, under the contract, 10,000 tons of coal were to be delivered. Now, if we assume that the working days in that month were 25, that the daily output of the mine for each working day was 1,200 tons, and that the cars that had been secured and were ready to receive coal, would average 24 for each working day, then we would reach this result: The 10,000 tons divided by 25 will give 400 tons, which the plaintiff would be entitled to receive each working day during that month. The daily output being 1,200 tons, the 400 tons which the plaintiff would be entitled to receive would be one-third of that amount. Now, assuming that there were 24 cars on hand for each working day, the plaintiff's proportion, being one-third, would be 8 cars, and the plaintiff would be entitled to have 8 cars loaded with coal each working day of that month."

By the "daily output of the mine" the court evidently meant the same thing as the "actual production" the court had in mind in excluding the testimony above mentioned which may have been the coal produced that day, the normal daily production, or the daily production of which the mines were capable. And, again, it is seen that the court entirely ignores the extent of the claims of other customers upon the mine. The actual daily output of the mine was often much less than enough to satisfy all the customers, and the effect of this illustration would be to give Jones & Adams Company an undue proportion on such occasions. Thus in the case supposed they would get 8 of the 24 cars, because that is the proportion of the 400 tons due them to the 1,200 tons, and the other customers would get exactly 16 cars, no matter how large their contracts were. If the total amount due to all parties were just 1,200 tons, the result would happen to be the same as in the illustration of the court. But suppose the amount due all parties was 1,600 tons, and the amount due Jones & Adams Company was 400, their share of the cars would be one-quarter of the 24—6 cars. If the amount due all was 2,000 tons, their share of the cars would be one-fifth of the number available. If it be once admitted, as we think it must be, that the contract contemplated that there would be other purchasers of coal who would share with these purchasers in case of shortage of cars, it is difficult to believe it to have been intended that the ratio of sharing as between

the several purchasers should change from day to day. The fair inference is that the customers were expected to stand upon a footing of equality at all times when there should be a shortage of cars. It follows from what we have said relative to the meaning of this contract that this instruction was erroneous, as was also the exclusion of the testimony of the witness Cunninghame relating to the same subject.

There are some subordinate questions presented by the record, but it is believed the most important are covered by the conclusions already stated, and the others may not arise on the new trial in the same form. The judgment must be reversed and a new trial awarded.

HARPER v. RANKIN.

(Circuit Court of Appeals, Fourth Circuit. November 9, 1905.)

No. 584.

1. JUDGMENT—MATTERS CONCLUDED—NATURE OF BANKRUPT'S INDEBTEDNESS.
A judgment of a court of competent jurisdiction in favor of the receiver of a national bank and against a defendant who was duly served, based upon findings that such defendant, while an officer of the bank, embezzled and misappropriated its funds, where unreversed, is conclusive of the character of the indebtedness upon an issue as to whether the debt is one from which such defendant would be released by a discharge in bankruptcy.

2. BANKRUPTCY—DISCHARGE—DEBTS CREATED BY FRAUD OR EMBEZZLEMENT.
An indebtedness created by the embezzlement and misappropriation of the funds of a bank by the debtor while acting in the capacity of vice president of the bank and having full control of its affairs is one created by his fraud, embezzlement, and misappropriation while acting in a fiduciary capacity, within the meaning of Bankr. Act July 1, 1898, c. 541, § 17a (4), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], and from which he is not released by a discharge in bankruptcy.

Petition for Revision of Proceedings of the District Court of the United States for the Western District of Virginia, at Abingdon, in Bankruptcy.

For opinion below, see 133 Fed. 970.

R. A. Ayers, for petitioner.

W. C. Herron, for respondent.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. On the 18th day of May, 1904, Edward L. Harper was, upon his own petition, adjudged bankrupt by the District Court of the United States for the Western District of Virginia sitting in bankruptcy. At the time of the said adjudication there was pending, in the Circuit Court of the United States for the Southern District of New York, an action brought against the said Harper by George C. Rankin, receiver of the Fidelity National Bank of Cincinnati, to recover the sum of $2,500,000. On the 18th of October, 1904, Harper, the bankrupt, filed his petition in the District Court for the

Western District of Virginia, praying that Rankin, receiver as aforesaid, to be enjoined from further proceeding in his action, under the provisions of section 11 of the bankruptcy act of July 1, 1898, 30 Stat. 549, c. 541 [U. S. Comp. St. 1901, p. 3426]; and on the same day the court made and entered the order contemplated by the said section. On the 21st of November Rankin, the receiver, filed his petition in the case, alleging that the claim upon which his suit was pending was not one from which a discharge in bankruptcy would release the bankrupt; it being alleged by Rankin that the debt upon which he was suing was one of those excepted by section 17 of the bankruptcy act. 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]. Accompanying Rankin's petition as an exhibit was a certified copy of a bill of complaint, in chancery, filed in the Circuit Court of the United States for the Southern District of Ohio on the 19th of September, 1887, in the name of David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, against Briggs Smith, Edward L. Harper, William H. Chatfield, Henry Pogue, Albert B. Gahr, James H. Mathews, Eugene Zimmerman, Ammi Baldwin, and Benjamin E. Hopkins; also the findings of fact and entry made against the said Edward L. Harper in the said case at October term, 1903, of the said Circuit Court for the Southern District of Ohio. Harper demurred to the petition of Rankin, and on the 20th of December, 1904, the court of bankruptcy overruled the demurrer, and upon consideration of Rankin's petition and the exhibits therewith filed entered an order annulling and setting aside the restraining order of October 18, 1904. The case is certified, upon the exception of the bankrupt, to this court for a review of the decision of the bankruptcy court.

In the bill filed by Armstrong, receiver, in the Circuit Court for the Southern District of Ohio, it is charged, among other things, in substance, that Briggs Swift was president of the Fidelity National Bank, of Cincinnati, Ohio, and that Edward L. Harper was vice president, Ammi Baldwin, cashier, and Benjamin E. Hopkins, assistant cashier, and that the other defendants in the case were directors of the said bank. It is also charged that Harper had the active management and control of the affairs of the said bank, and that he was permitted by the directors of the bank to loan its money to himself and to a firm of which he was a member, and to various corporations named in the bill, of which he was principal owner; that, in the course of these transactions Harper, as vice president, misappropriated the funds of the bank, violated the law in respect to the affairs of the bank, and in substance it is charged that he fraudulently diverted, appropriated to his own use, and embezzled the bank's money to the extent of $2,500,000, and thus became indebted to it in that sum.

The findings of fact and judgment entered in the case at October term, 1903, are as follows:

"The United States of America, Southern District of Ohio, Western Division—ss.:

"At a stated term of the Circuit Court of the United States of America within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the court-rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of

October, being also the 6th day of that month, in the year of our Lord 1903, and of the American Independence the one hundred and twenty-eighth.

"Present: The Honorable Albert C. Thompson, District Judge, sitting and holding Circuit Court:

"On Saturday, the 10th day of October, A. D., 1903, among other proceedings had, were the following, to wit:

"George C. Rankin, Receiver of the Fidelity National Bank of Cincinnati, v. Edward L. Harper, Impleaded with Briggs, Swift, and Others. No. 4,054.

"This cause came on for hearing at the October term of 1903 of this court, and the court thereupon find as follows: That since the bringing of this suit David Armstrong, receiver of the Fidelity National Bank, and the original plaintiff in this case, has resigned, and that George C. Rankin has been appointed such receiver by the Comptroller of the Currency, and is now acting as such, and has been made plaintiff in this case by order of this court; that said Edward L. Harper has been personally served with process in this case, and has filed no answer to the allegations of the bill of complaint, and is in default, and has been notified, as ordered by the court, of the setting of this cause. And on consideration thereof the court find that the defendant, Edward L. Harper, was vice president, and in general charge of the affairs of the said Fidelity National Bank from its organization until its failure, and that during said time he embezzled large sums of money of the funds of said bank; that he loaned large sums of money to firms and corporations in which he was interested, without authority and contrary to law, and that the proceeds of said loans were taken by him from said bank for his personal use, and that the said firm and corporation became insolvent, and the sums so loaned were entirely lost to the bank; that he used the funds of said bank in large amounts in personal speculations, and which sums were wholly lost to the bank; that the allegations contained in the bill of complaint in reference to said several matters are true as therein set forth. By reasons of which illegal acts of the said Harper the said bank was damaged in more than the sum of $2,500,000, for which sum said Harper is liable to the bank. It is therefore ordered, adjudged, and decreed by this court that the said plaintiff recover for the use of said bank of the said defendant, Edward L. Harper, the sum of $2,500,000, with interest from June 20, 1887, the date of the failure of said bank, together with the costs of suit to be taxed, and that execution issue therefor."

The cause of action in the case of Rankin, Receiver, etc., v. Edward L. Harper, in the Circuit Court of the United States for the Southern District of New York, in which the injunction is sought, is the above judgment. The grounds of Harper's demurrer to Rankin's petition are these:

"(1) On the face of the petition it appears that the judgment enjoined was not for a debt created by respondent's fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity, and the petition does not allege any other ground for bringing the debt within any of the exceptions set out in section 17 of the national bankruptcy act. (2) The bill filed with the petition, as part thereof, shows on its face that a considerable portion of the judgment sought to be enforced by petitioner was not founded on liabilities arising out of fraud, embezzlement, misappropriation, or defalcation; and, since the petition does not show what part of said judgment is so founded, the petition must be dismissed. (3) The said petition is otherwise defective, inconsistent, and insufficient."

The single question involved in this case is whether a discharge in bankruptcy would operate as a release of the debt due from Harper, for the recovery of which the suit in the Circuit Court for the Southern District of New York was brought and is pending. In order to present the question fully, we copy so much of the two sections of the bankruptcy act as relates to the controversy in this case:

"Section 11. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then, until the question of such discharge is determined.

"Sec. 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The Supreme Court of the United States, in Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, has construed the last clause of section 17 of the bankruptcy act of 1898 to mean that, in order to bring a debt within the exception, it must be created by the bankrupt's fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. This decision divests the present case of all considerations save these: First, was the debt claimed by Rankin as receiver, upon which his suit is founded, created by Harper's fraud, embezzlement, misappropriation, or defalcation? and, second, if the debt was thus created, was Harper, at the time, acting as an officer or in any fiduciary capacity?

By his demurrer the bankrupt confesses the facts as stated in Rankin's petition to be true, but insists that the debt claimed by Rankin, upon these facts, does not come within the exception provided in section 17 of the bankruptcy act. The bill of complaint in the case of Rankin, Receiver, v. Harper and Others, and the findings of fact and judgment of the Circuit Court for the Southern District of Ohio, attached as an exhibit to the petition, constitute a part of its allegations, and in this exhibit the bill charges that Harper, as vice president of the Fidelity National Bank of Cincinnati, Ohio, had control and management of its affairs, that in this position, by his fraud, he destroyed the assets of the bank, that he embezzled its funds, and that he misappropriated the same by making loans to copartnerships and corporations in which he was interested, and which were totally insolvent, which loans were wholly lost to the bank; and the court, in its judgment, declares and finds as facts that the defendant, Edward L. Harper, was vice president and in general charge of the affairs of the Fidelity National Bank from its organization until its failure; that during the time he embezzled large sums of money of the funds of the bank; that he loaned large sums of its money to firms and corporations in which he was interested, without authority and contrary to law, and that the proceeds of said loans were taken by him from the bank for his personal use; that said firms and corporations became insolvent, and the sums so loaned were entirely lost to the bank; that he used the funds of the bank, in large amounts, in personal speculation, which were wholly lost to the bank; and that by reason of these unlawful acts he became liable to the bank in the sum of $2,500,000. And judgment was entered against him for the said sum, with interest on it from July 20, 1887, and costs.

If the allegations in the bill of complaint and the findings of fact by the court are true, it seems to us that the character of the debt in

controversy is fully established. The question then presents itself whether we have the power to go behind this judgment and the recitations of fact therein to inquire further as to the cause of action upon which the suit was brought, or the evidence upon which the court based its findings and conclusions. The case of Rankin, Receiver, v. Harper and Others, was pending in a court of competent jurisdiction. Harper was duly served with process, and had his day in court. The judgment was regularly entered against him, and he took no proceeding to annul or to modify it. "Where a court has jurisdiction, it has the right to decide any question which occurs in the cause, and, whether its decisions be correct or otherwise, its judgments, until reversed, are regarded as binding in every other court" (Elliott v. Peirsol, 26 U. S. 329, 7 L. Ed. 164); and the same doctrine is upheld in McGoon v. Scales, 76 U. S. 23, 19 L. Ed. 545. "The question of the conclusiveness of records most frequently arises on judgments. The doctrine is well established that a cause of action once finally determined, without appeal or some proceeding for the annulment of the judgment between the parties, on its merits by any competent tribunal, cannot afterwards be litigated by a new proceeding, either before the same or any other tribunal." A. & E. Ency. vol. 2, p. 390, and authorities cited in note. "It is a rule of common law that the record of a court imports such absolute verity that, as a general rule, no person against whom it is producible is allowed, in collateral proceedings, to aver or prove as error in fact a matter contrary thereto." A. & E. Ency. vol. 2, p. 389. "Judgments of a court in a case properly constituted before it, and where it has jurisdiction of the parties and the subject-matter of the controversy, are deemed to be valid, and will be upheld until impeached by a direct proceeding for that purpose." Morris v. Gentry, 89 N. C. 248. The bill of complaint charged fraud, misappropriation, and embezzlement on the part of Harper. The court so found, and entered a judgment as above stated. For the purposes of the present proceeding, we are of the opinion that the judgment of the Circuit Court for the Southern District of Ohio is conclusive; and, if this position is correct, then the debt upon which the receiver's suit is pending, in its creation, contained all three of the elements of fraud, embezzlement, and misappropriation.

The rights and powers of a vice president of a bank, having the management and control of its affairs, are such as he is bound to exercise for the benefit of others. His relation to the funds of the bank is that of a fiduciary, and an indebtedness arising from the embezzlement or misappropriation of such funds by him is incurred in that capacity. This being our conclusion, we hold that the debt upon which Rankin, as receiver, is suing in the Southern District of New York, is one which comes within the exception provided in section 17 of the bankruptcy act, and that therefore the bankrupt was not entitled to the restraint provided in section 11 of the said act. The question was discussed in the bankruptcy court, and also here, as to whether or not Harper was an officer, as contemplated by section 17 of the act of 1898. The argument in support of the position that he was is based largely upon the fact that in the provision of the act of 1867,

relating to the same subject, the term "public officer" is used, whilst in section 17 of the present law the word "public" is left out. In the case of Crawford v. Burke, supra, in which a construction of section 17 of the present bankruptcy act was under consideration, in passing upon the difference between the terms of that section and the section pertaining to the same subject in the act of 1867, the court says: "Our own view, however, is that a change in phraseology creates a presumption of change in intent." But this language of the court had reference to the circumstances under which the debt was created, and not to the official or fiducial character of the debtor. The judge of the bankruptcy court was of the opinion that this change in phraseology by the substitution of the word "officer" for the term "public officer" had the effect to enlarge the scope of the law, so as not only to include within its meaning public officers, but also officers of private corporations; and he supports his decision by forceful argument. However, in order to dispose of this case, we do not deem it necessary to pass upon this point, it being our opinion, upon the facts, that the debt involved was by the fraud, embezzlement, and misappropriation of the funds of the bank by Harper, and that he was, at the time, acting in a fiduciary capacity.

The judgment of the bankruptcy court is affirmed.

AGNEW, Collector of Internal Revenue, et al. v. HAYMES.

(Circuit Court of Appeals, Fourth Circuit. November 9, 1905.)

No. 576.

1. INTERNAL REVENUE—LIABILITY OF OFFICER FOR WRONGFUL SEIZURE.

Rev. St. § 970 [U. S. Comp. St. 1901, p. 702], provides that where, in any prosecution on account of the seizure of any vessel or goods by any collector or other officer of the government, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause for the seizure, it shall so certify, and in such case the claimant shall not recover costs, nor shall the person who made the seizure be liable to suit on account of it, provided that the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant. Section 989 [U. S. Comp. St. 1901, p. 708] provides that "when recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him * * * in the performance of his official duty, and the court certifies that there was probable cause for the act, * * * or that he acted under the directions of the * * *, proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall * * * be paid * * * from the treasury." *Held*, that such two sections are not inconsistent, nor does section 989 authorize a recovery against a revenue officer for a wrongful seizure, when made upon probable cause, and when the goods are returned intact; but their effect, when construed together, is to limit the claimant in such case to an action for loss or damage to his property while in the custody of the officer, and to convert the judgment recovered therefor into a claim against the government, where the court certifies that the officer acted either upon probable cause or under the directions of a superior officer.

2. SAME—ACTION FOR WRONGFUL SEIZURE—DEFENSE OF PROBABLE CAUSE.

In an action against an internal revenue officer for a wrongful seizure of property which has been returned to the claimant intact, proof of prob-

able cause for such seizure is a complete defense, and may be made, although the court, in rendering judgment for the claimant in a proceeding for the forfeiture of the property, failed to make the certificate of probable cause provided for by Rev. St. § 970 [U. S. Comp. St. 1901, p. 702]; and where the proof shows that defendant made the seizure by direction of the Commissioner of Internal Revenue, based upon information received from his special agents which justified a suspicion that the plaintiff was violating the law, the court is warranted in charging the jury as matter of law that there was probable cause.

In Error to the Circuit Court of the United States for the Western District of Virginia, at Danville.

For opinion below, see 132 Fed. 525.

In the year 1901 T. J. Haymes, the plaintiff below, was operating a registered grain distillery at Elba, in the county of Pittsylvania, Sixth collection district, Va. The distillery had a surveyed capacity for the consumption of three bushels of material a day, and a required yield of 3½ gallons of distilled spirits per bushel. In the month of June, 1901, the distillery was examnied by Rives and Shelly, officers of the internal revenue, and also by Revenue Agent C. H. Ingram, who, on the 19th of that month, made his report in writing to the Commissioner of Internal Revenue, advising the latter of various conditions and circumstances in and about the distillery which indicated that the same was being operated with intent to defraud the United States of the tax upon spirits distilled there, and of nonpayment of the taxes on spirits already produced and removed from the distillery. Acting upon the information derived from this report, and also from reports of Rives and Shelly, on the 28th of June, 1901, the Commissioner of Internal Revenue, by letter, advised Park Agnew, the collector of the Sixth Virginia district, that, in the opinion of his office, the circumstantial evidence was sufficient to warrant the seizure of Haymes' distillery, and directed the collector to take such action. In obedience to this instruction, the collector, on the 9th of July, 1901, through his deputy, John R. Brown, made a seizure of the distillery and fixtures, together with the spirits on hand, as forfeited to the United States for violations of the internal revenue laws. After the seizure, the case was transmitted to the United States attorney for the Western District of Virginia, for proceedings in rem against the property, under the statute, and thereupon, on the 26th of October, 1901, an information was duly filed, in the District Court of the United States for the Western District of Virginia, against the said property, alleging its forfeiture to the United States under the provisions of section 3257 of the Revised Statutes [U. S. Comp. St. 1901, p. 2198]. Haymes filed his bond, as required by statute, in the sum of $250.00, for costs, and was allowed to intervene as claimant of the property. We assume, also, that he, by some form of pleading, denied the cause of forfeiture alleged in the information, although this does not appear in the record. The case was continued until the 15th of April, 1902, when, at the regular term of the United States District Court, at Danville, Va., without a trial of the issue or hearing upon the merits, this order was entered:

"United States, Plaintiff, v. 1 Still, etc., claimed by T. J. Haymes, Defendant. In Rem.

"This day came the United States attorney, and came also the said claimant, defendant in this case. Whereupon, on motion of said United States attorney, for good cause shown, it is ordered that this case be dismissed, and stricken from the docket of this court."

No certificate of reasonable cause of seizure was entered by the court. The record does not show that the property was restored to Haymes, but it is evident from what took place afterwards that it was, or at least so much of it as was still in the custody of the officers at the time the proceeding in rem was dismissed. It appears from the record that soon after the seizure and the transmission of the case to the United States attorney, the property under seizure went into the custody of the United States Marshal for the Western

District of Virginia. On the 20th of August, 1902, Haymes brought the present suit in the circuit court of Pittsylvania county, Va., against Park Agnew, collector of internal revenue, and John R. Brown, his deputy who made the seizure, for the recovery of damages alleged to have resulted from the seizure of the property. Upon petition of defendants, the case was removed for trial to the Circuit Court of the United States for the Western District of Virginia. Haymes filed his declaration in his suit against the defendants, in which he alleged, in substance, as his grounds for damages, that they had, on the 9th of July, 1901, unlawfully, wrongfully, and without any reasonable or probable cause, and against his will and protest, seized and taken possession of his distillery, distillery premises, distillery apparatus, tools and fixtures, together with 295½ gallons of distilled spirits, and had unlawfully held and detained the same for one year from the date of the seizure. That whilst the said property was so unlawfully and wrongfully in the possession and control of the said defendants, they negligently, carelessly and wrongfully broke, damaged, injured, and destroyed the same, so that 110 gallons of the distilled spirits were entirely wasted, and the machinery and tools rendered unfit for use. There is a further allegation that, by reason of the seizure and detention of the property, etc., the plaintiff was greatly injured in his credit and reputation, and brought into public scandal, disgrace, and infamy among his neighbors and business men, and that for this cause, he has not been able to secure the credit necessary for the conduct of his business; and, as an additional ground for damages, that he had been obliged to lay out and expend the sum of one hundred dollars, in order to secure the release of his property. And for these causes he demanded damages in the sum of nineteen hundred ($1,900) dollars. In connection with this declaration, the plaintiff filed an amended bill of particulars, as follows:

"T. J. Haymes v. Park Agnew, Collector. Amended Bill of Particulars.

"To damages sustained by plaintiff by closing up his business from July 9, 1901, to April 1, 1902	$ 950 00
"To damage to credit and reputation of plaintiff	900 00
"To amount paid out in having property released from seizure	50 00
"Making a total damage claimed of	$1,900 00"

A demurrer filed by defendants for misjoinder of causes of action was overruled by the court, to which the defendants excepted. The defendants then entered a plea alleging that plaintiff had recovered damages against S. Brown Allen and the Fidelity & Deposit Company, in a suit originally brought by the plaintiff in the circuit court of Pittsylvania county, Virginia, and afterwards removed for trial to the Circuit Court of the United States for the Western District of Virginia, upon the same cause of action as in the present case, which recovery had been settled and satisfied, and was a bar to recovery in this action. It does not appear of record that this plea was relied on or that any consideration was given it by the court. Thereupon the defendants entered their plea of general issue, and the case was brought to trial before a jury.

At the close of the testimony the defendants requested the court, among others, to give the following instructions to the jury: "The court further instructs the jury that, if they believe that the reports and facts laid before the Commissioner of Internal Revenue by the visiting officers, Rives and Shelly, and by the revenue agent, C. H. Ingram, were such as to lead a reasonable and cautious man to honestly entertain the belief that the law was being violated by T. J. Haymes, the plaintiff, in the operation of his distillery, and that, in consequence of such facts and circumstances being made to appear to the commissioner, he, in good faith in the discharge of his official duty, directed the seizure of the plaintiff's property, then the plaintiff cannot recover any damage in this case on account of such seizure. The court further instructs the jury that if they believe from the evidence in this case that there were such circumstances as would indicate the law was being violated, and, in consequence of such circumstances, the distillery was seized, then the plaintiff can-

not recover." Both of these instructions were refused by the court, and the defendants duly excepted. The court gave the jury the following instruction: "The court instructs the jury that, if they believe from the evidence in this case that the plaintiff's distillery was seized and held by the defendants, or by their direction and authority, without there having been any violation of the law by the plaintiff, then they must find for the plaintiff such actual damages as he has sustained by reason of said seizure, not to exceed nineteen hundred ($1,900) dollars. In estimating such damages, the jury shall take into consideration the loss of profit sustained by the plaintiff, during the time his business was suspended; and the loss to him by damage to his credit and reputation; and as to each item they shall not, in any event, allow more than was stated in the bill of particulars as to each item." This instruction was objected to by the defendants, which objection was overruled and exception taken.

The jury returned a verdict in favor of plaintiff for $600, and the court, after refusing a motion by defendants to set the verdict aside, entered the following judgment in this case:

"T. J. Haymes, Plaintiff, v. Park Agnew et al., Defendants. Trespass on the Case.

"The motion of the defendants that the verdict be set aside and a new trial granted, having been argued by counsel, it is considered by the court that the said motion be, and it is hereby, overruled. It is further considered by the court that the plaintiff recover of the defendants the sum of $600, with interest thereon at the rate of 6 per centum per annum from April 16, 1904, until payment, and his costs in this behalf expended. And the court does hereby certify that the defendants, in making the seizure complained of, acted under the order of the proper officer of the government. It is therefore further ordered that no execution shall issue to enforce said above judgment against said defendants, or either of them; but said judgment shall be provided for and paid out of the proper appropriation from the treasury."

The case comes here by writ of error, sued out by the defendants.

Thos L. Moore, U. S. Atty. (John C. Blair, Asst. U. S. Atty., on the brief), for plaintiffs in error.

A. C. Edmunds and N. H. Hairston, for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge (after stating the facts). The decision of the trial court in this case was based largely upon the construction which the judge presiding placed upon sections 970 and 989 of the Revised Statutes [U. S. Comp. St. 1901, pp. 702, 708]. In order to present the question fully, we give the two sections involved, which are as follows:

"Sec. 970. When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: Provided, that the vessel, goods, wares, or merchandise, be, after judgment, forthwith returned to such claimant or his agent."

"Sec. 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for any recovery of any money exacted by or paid to him and by him paid into the treasury, in the performance of his official duty, and the court certifies

that there was probable cause for the act done by the collector or other officer, or that he acted under the direction of the Secretary of the Treasury, or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury."

The court below held that the two sections were inconsistent, and that their provisions were so repugnant that the latter statute necessarily, by implication, repealed the former; and, following up the reasoning, the conclusion reached was, in effect, that in every case of seizure in which there was a failure to secure a forfeiture, the owner or claimant of the property seized had a cause of action for damages, and that reasonable cause for seizure was not a defense to a recovery, but only a protection, personally, to the officer making the seizure. In other words, in every case of seizure, which was not prosecuted to judgment of forfeiture of property, the owner of the property is entitled to sue the seizing officer and recover judgment for damages, it being within the power of the court in which the recovery is had to certify that there was probable cause for the act done by the officer, or that he acted by direction of the Secretary of the Treasury, or other proper officer of the government; and thus transfer the liability for payment of the recovery from the officer to the government.

Examination of "An act to provide internal revenue to support the government, and to pay interest on the public debt," approved July 1, 1862 (chapter 119, 12 Stat. 432) and also of "An act to prevent and punish frauds upon the revenue; to provide for the more certain and speedy collection of claims in favor of the United States; and for other purposes," approved March 3, 1863 (chapter 76, 12 Stat. 737), will enlighten us as to the necessity for section 989, which is a provision of the latter act. Under the act first mentioned, which was enacted more particularly for the support of the government in the midst of the Civil War then in progress, internal revenue taxes were levied upon numerous subjects, many of them such as manufactured articles of goods, wares, and merchandise of various kinds, as well as foods and products. The means provided by the act for its enforcement were, in many instances, summary, authorizing collectors and deputy collectors of the internal revenue to make seizures of property and to hold it as forfeited to the United States for the non payment of taxes assessed upon it, and to proceed to its condemnation and sale without the intervention of the courts; in other instances, in cases of seizure for the violation or evasion of the law, proceedings in rem in the courts were provided. In some cases it is provided that there shall be an absolute forfeiture of the property, and in others a sale of the property, and after deducting the amount of taxes due and the expenses of the seizure and sale, that the remainder shall be turned over to the manufacturer or to the person in whose custody and possession the articles were when seized. This statute also provides for the intervention of the owner or claimant of the property, and its return to him in case no taxes are found to be due, or the causes of forfeiture are not sustained. Many of these subjects of taxation were perishable; many of a character such as to

make them liable to deterioration and consequent depreciation by being kept on hand, as they necessarily would be whilst under seizure and pending proceedings for sale or for condemnation. No matter how great care might be taken, property in custody might be destroyed by fire, lost or injured in transportation, or by some unavoidable accident when the officer was not in fault. Still, if the government fails to sustain its charges against the property the owner has his remedy to recover damages for the loss or injury. When we consider these subjects of taxation, and the powers conferred by the law for its enforcement, we can readily see the necessity for some provision by which an owner might recover damages for the loss or depreciation of his property, where there is a failure of condemnation, although the seizure was made by the officer in entire good faith, and upon reasonable grounds. It seems plain to us that the provisions of section 989 would apply in such cases. This section is a substantial reproduction of section 12 of the act approved March 3, 1863, above mentioned. By reference to this act it will be observed that it is devoted largely to the enforcement of the tariff laws and the collection of import duties. We think, however, that the law brought forward in the Revised Statutes as section 989, is sufficiently comprehensive to cover cases arising either under the tariff or the internal revenue laws of the government. The provisions of section 970 would be of no avail to the officer in a number of instances in which he might be sued for damages for an act done in the performance of his official duty, for the provisions of that section are confined solely to cases of seizure where there is a prosecution in court against the property seized. In such cases, although judgment is rendered in favor of the claimant, the court is empowered to have entered a certificate of reasonable cause for the seizure, and this prevents a recovery of the costs by the claimant, and also bars his action for damages against the person making the seizure, and the prosecutor, provided the property is forthwith returned to the claimant or his agent. Whereas, section 989 provides for the protection of the collector or other officer of the revenue from personal liability by reason of any act based upon probable cause, done by him in performance of his official duty or under the directions of the Secretary of the Treasury, or other proper officer of the government; and it also affords protection in cases of recovery against the collector, or other officer for money exacted by him, by virtue of his office, and paid into the treasury. Judge Wallace, in Hedden v. Iselin (C. C.) 31 Fed. 266, discussing section 989, has well said:

"However it may have been before, since the enactment of this provision it is plain that the laws of Congress do not contemplate the punishment of an officer of the revenue, by penalty or otherwise, for any act done in the honest discharge of his duty, or in obedience to the directions of the head of the department."

Both sections 970 and 989 have been frequently before the Supreme Court for construction and application. As far back as the case of Locke v. The United States, reported in 7 Cranch, 339, 3 L. Ed. 364, the provisions of the act of March 2, 1799 (1 Stat. 627, c. 22), which are substantially the same as those of section 970, being under consideration, the court held that:

"Probable cause means less than evidence which would justify condemnation; it imports a seizure made under circumstances which warrant suspicion."

The provisions of the 1799 Act were practically re-enacted in the act of February 24, 1807 (2 Stat. 422, c. 19) being section 89 of that act; and in the case of Gelston et al. v. Hoyt, reported in 3 Wheat. 246, 4 L. Ed. 381, there is a very full discussion of the rights of an officer making a seizure to defend, in an action of trespass, under his plea of justification, and the principle is also recognized there that probable cause for the seizure is sufficient to prevent recovery against him. These decisions, it is true, were before the act of March 3, 1863, in which the provisions of section 989 were enacted, but, since then, these two sections have time and again been involved in cases decided by the Supreme Court, and both of them have been treated by the court as existing law.

In Averill v. Smith, 84 U. S. 83, 21 L. Ed. 613, the decision was rendered nearly 10 years after section 989 first became the law (1863) and in that case, full recognition is given to the provisions of section 970. Many of the facts in Averill v. Smith are similar to those in the case now in hand: A collector of Internal Revenue seized a quantity of whisky, in barrels, as forfeited to the United States; an information was filed against it, and, under an order of the court, the property went into the hands of the marshal. The plaintiff appeared, and made claim that he was the true and bona fide owner of the property, and filed his answer, denying the material allegations of the information, to which the district attorney replied, tendering an issue. Upon the trial the jury found that the property did not become forfeited as alleged in the information. The court rendered judgment in favor of the claimant that the property be discharged, but at the same time adjudged and certified that there was probable cause for the seizure. It was held in the case that an action of trespass, after this certificate, would not lie against the collector, by virtue of the provisions of section 89 of the act of February 24, 1807 (chapter 22, 1 Stat. 695), which, as before stated, is brought forward in the Revised Statutes as section 970. Referring to the facts in the case, the court lays down, substantially, the general proposition so often repeated, that trespass will not lie in a case for the act of seizure, unless it appears that the act was tortious, or unauthorized; and says, referring to defendant:

"As such collector had good cause to believe, and did believe, that the property described in the information was forfeited to the United States for the illegal act of the owner, he was warranted in making the seizure."

Then, in United States v. Sherman, 98 U. S. 565, 25 L. Ed. 235, the court gives construction to section 989, and Mr. Justice Strong, delivering the opinion in the case, says that when the certificate provided by this section is given, the claim of the plaintiff in the suit is practically converted into a claim against the government. In United States v. Abatoir Place, 106 U. S. 160, 1 Sup. Ct. 169, 27 L. Ed. 128, section 970 is again considered, and it is set forth, verbatim, in the statement of facts in the case; the decision in the case being that the action of the District Court, in denying the motion of the United States for a certificate under the provision of the act, was not reviewable by the Supreme

Court. Then comes Schell v. Cochran, 107 U. S. 625, 2 Sup. Ct. 827, 27 L. Ed. 543, which involved the question of interest where a certificate had been given by the court of probable cause, under section 989, in a judgment against a seizing officer, it being held that interest could not be recovered against the United States, except from the date of the certificate.

These cases are mentioned in order to show that both of these sections have been frequently before the Supreme Court, and that no suggestion has been made that 989 in any way affected or interfered with the provisions of 970. The judge of the court below, in a very learned opinion, which shows great research and much thought, cites several of these cases. As to Averill v. Smith, supra, which we regard as a case of important bearing upon the questions involved here, he came to the conclusion that 989 had not been called to the attention of the Supreme Court when the case was under consideration, and he took the same view as to the case of Stacy v. Emery, 97 U. S. 642, 24 L. Ed. 1035, which we shall hereafter refer to. We think, too, that the case of Harding v. Woodcock, 137 U. S. 43, 11 Sup. Ct. 6, 34 L. Ed. 580, is important in that it shows that reasonable cause for action will avail an officer, although there was no proceeding under section 970. That was a case in which an assessment was made against a distiller for taxes. The Commissioner of Internal Revenue, upon application of the distiller, refused to abate the taxes, and instructed the collector to collect them. Thereupon the collector, under warrant of distraint, seized the property of the distiller and sold it. A suit was brought by the government, upon the bond of the distiller, for the taxes, and, upon the trial, the government was defeated. Thereupon the distiller brought his action against the collector for alleged wrongful seizure and sale of his property. The court held that the tax assessment certified to the collector by the Commissioner of Internal Revenue was a complete protection to him. As before stated, this case was entirely outside of the provisions of section 970. It was a case in which the judge could neither give nor refuse a certificate of reasonable cause, under that section, because the property was seized and sold without ever being in the courts; and yet, in that case, the court held that, if the officer's action was founded upon reasonable cause (and a tax assessment properly made and certified to him was held to be reasonable cause), he could not be subjected to damages at the instance of the distiller, who claimed that he was injured on account of the seizure of his property. Gould & Tucker, in their notes upon the Revised Statutes of the United States (volume 1), treat of sections 970 and 989 both as existing law, citing decisions under the two statutes; and there is no intimation that the one repeals the other, or that they are at all inharmonious.

In order to support the theory that both sections 970 and 989 are the law, each having its separate and distinct purposes, besides the instances already mentioned of the seizure of property under the original internal revenue law, in which the property, by its detention, may perish or become depreciated in value before its return to the owner, we may call attention to seizures under section 3460 of the Revised

Statutes [U. S. Comp. St. 1901, p. 2282]. By the provisions of this statute, if a collector of internal revenue seizes property, which he believes has violated the law so as to become forfeited, of the value of $500 or less, the case is not transferred to the district attorney for action, by a proceeding in rem, unless a claimant intervenes and files bond for costs. Let us take a case under this section, in which the collector, acting upon reasonable cause, makes a seizure, but afterwards, upon investigation, determines that the cause which he believed to exist at the time of the seizure cannot be sustained, and, without further action, releases the property, and returns it to the owner. In such case, if the property is restored intact, the owner could not recover damages for its seizure and detention; but if, on the other hand, the property was lost or injured whilst in custody of the collector, without his default, the owner would have a right of action in which he would be entitled to recover for the actual value of the property lost, or the injury to it, and, upon such recovery, the court, by virtue of the provisions of section 989, could certify the reasonable cause for the seizure and the liability for payment of the damages recovered would be upon the government. And the same principle would apply to an officer of the internal revenue, under section 3298 of the Revised Statutes [U. S. Comp. St. 1901, p. 2153], which empowers such officer to take possession of and detain any package containing, or supposed to contain, distilled spirits, when there is reason to believe that the tax has not been paid on the spirits, or that the same is being removed in violation of the law, and to hold the package not exceeding 48 hours, in a safe place, until he determines that the property should be proceeded against as forfeited. Suppose, for illustration, that an officer finds conditions about a package of spirits which lead him to the conclusion that it is untaxpaid, or that it is being unlawfully removed; and under this belief, he detains the package, but after investigation decides that the case is not sufficiently strong to warrant a forfeiture, and returns the property to the owners: Will any one contend that in a suit by the owner for damages for the seizure and detention of his property, the officer could not protect both himself and the government by showing that the conditions at the time of the seizure were such as to constitute probable cause, and to afford reasonable ground for the seizure? We think not. And yet, if the property was lost or injured during its detention, by the negligence or fault of the officer, he would be personally liable to the owner; but if, on the other hand, such loss or injury should occur by accident or circumstances over which he has no control, the owner would still be entitled to recover the value of his property, or such damages as resulted from the injury; and this would be a case in which the court could protect the officer by the certificate provided under section 989. Thus we see that these two sections are not inconsistent or repugnant, 970 being intended to prevent prosecutions for damages in cases of proceedings in court for forfeiture, which fail, but in which the judge certifies reasonable cause, and the property under seizure is forthwith returned to the claimant or his agent; and 989 being intended to meet other cases in which there is reasonable cause for the action of the officer,

but in which the owner of the property seized recovers damages for its loss or injury. The purposes of the provisions of the act of March 3, 1863 (now section 989) are further evidenced by the act of July 28, 1866 (chapter 298, 14 Stat. 328), by which the said provisions are extended to embrace cases arising under the captured and abandoned property laws. The protection afforded by section 989 is confined to officers of the revenue, whilst section 970 applies to all seizures under any act of Congress; and the latter has been the law of the land almost since the foundation of the government.

In the present case there was a proceeding in rem which was dismissed without trial, or hearing upon the merits. No certificate under section 970 was given, nor does it appear that any was asked, and the question to be determined is as to what protection a seizing officer has under such circumstances. We hold that the right of the officer to defend under the plea of reasonable cause is not destroyed by such a proceeding, but that in an action brought against him by the owner of the property for the recovery of damages based upon the unlawful and wrongful seizure of the same, the officer still has the right to interpose his plea of reasonable cause for his action; and, if it is adjudged in his favor, the plaintiff cannot recover. For this reason we conclude that the trial court was in error in refusing to instruct the jury as requested by defendants, which was, in substance, that if, at the time, the defendants had reasonable cause for the seizure, the plaintiff could not recover; and the court, in our opinion, under the circumstances, should have gone further and instructed the jury that the order of the Commissioner of Internal Revenue to the collector of the district, directing him to make the seizure, was, in law, reasonable cause, and a protection to the defendants against damages for their action. "The question of probable cause, the facts being undisputed, is one of law." United States v. Gay, 2 Gall. 359, Fed. Cas. No. 15,193. The facts here were uncontroverted that the officers of the internal revenue had examined Haymes' distillery, and had found in and about it conditions which led to the belief that it was not being operated according to law, and that the government was being defrauded of the taxes upon its product. The report of the revenue agent to the commissioner, set out in full in the record, and which was introduced in evidence upon the trial, shows this fact. Upon this report the commissioner came to the conclusion that the distillery and fixtures, and the distilled spirits on hand, were forfeited to the government; and we must say, upon the conditions about the distillery, which the report of the revenue agent shows, it was such a conclusion as would be naturally arrived at.

In Munn v. De Nemours, 3 Wash. C. C. 37, Fed. Cas. No. 9,926, which is reiterated and approved in Stacey v. Emery, supra, probable cause is held to be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged", and in the last named case the opinion quotes from Ulmer v. Leland, 1 Greenl. 135, 10 Am. Dec. 48, the following upon the same subject:

"Such a state of facts as would lead a man of ordinary caution to believe or to entertain an honest and strong suspicion that the person is guilty."

If the defendants acted bona fide, and the seizure was based upon reasonable cause, then every element of damages, save those of actual loss of the property, or injury to it whilst in custody, was eliminated. Otherwise, in every criminal proceeding, where an arrest is made, although the officer making it may act in perfect good faith, and be armed with the process of law, yet, if the prosecution should fail, the person arrested would have the right to recover from the officer damages for injury resulting to his character and business reputation by reason of the arrest.

It is a recognized principle of the law, in cases of seizure and forfeiture under the revenue laws, that it is the property, and not the owner which offends. The property is treated as the defendant in the proceedings—as a thing guilty, susceptible of being tried and condemned, whilst, as is said by the law writers, the owner merely gets notice along with the rest of the world, and may appear for his property or not. It follows, therefore, if an officer, armed with the proper process, or authority, arrests property upon the charge that it has offended the law, the same principles protect him as in cases of the arrest of individuals. It is not a rare occurrence that individuals are arrested, held in custody—sometimes incarcerated, and yet, upon the trial, they are acquitted. However, if the officer making the arrest was duly authorized, and acted within the limits of his duty, he cannot be mulcted in damages for the arrest and consequent injury to reputation and business credit. In the enforcement of the revenue laws, an officer, within the scope of his authority, and with proper process in his hand; or, under circumstances affording reasonable cause, has the right to arrest property and hold it as forfeited to the government for a violation of its laws. In such case, although the proceeding to condemn may fail, yet the officer cannot be subjected to damages, based alone upon alleged injury to the credit and reputation of the owner, resulting from the seizure and detention of his property, and consequent suspension of the business in which the property was engaged; and in no event can the government be subjected, either directly or indirectly, to the payment of such damages. The commissioner is the head of the internal revenue bureau, invested by law with the power to exercise his judgment and discretion in the administration of the responsible duties which attach to his position. It is his duty, as far as possible, to see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and to use the instrumentalities provided him in the prevention, detection, and punishment of fraud in relation thereto. The law gives him the right to order a seizure when, in his opinion (based upon information derived from his agents and other sources which he deems reliable), the property has become forfeited—indeed, he is empowered by section 3166 of the Revised Statutes [U. S. Comp. St. 1901, p. 2058] to specially authorize any officer of the internal revenue to make a seizure. It was in the exercise of this power that the commissioner gave the instruction to the collect-

or to make the seizure of Haymes' property. This instruction was not only sufficient warrant to authorize the defendant Agnew to make the seizure, but it made it his duty to do so, as a subordinate officer receiving a mandate from his superior. It follows, therefore, that if the superior officer had cause which in law would justify his act, his order, which his subordinate was required to obey, is a protection to the latter. Upon the principles which we have laid down, we not only hold that there was error in the refusal of the court to give the instructions requested by the defendants, but that there was also error in the rule laid down by the court to govern the jury in estimating the damages, which was as follows:

"The jury shall take into consideration the loss of profit sustained by the plaintiff during the time his business was suspended, and the loss to him by damage to his credit and reputation; and as to each item they shall not, in any event, allow more than was stated in the bill of particulars."

It will be observed that the plaintiff below, in his declaration, set up as one of his causes of action the loss of a quantity of distilled spirits, and also claimed damages for alleged injury to his machinery and fixtures whilst held under the seizure, but, in his amended bill of particulars, both of these grounds are omitted, and in the testimony on the trial no reference is made to the loss of the spirits, or to the depreciation of the property, the evidence relating substantially to damages alleged to have resulted to the plaintiff by reason of the closing of his distillery, and the loss of profits from its operations whilst in custody; and damages for alleged injury to his reputation and credit, caused by the suspension of his business. Thus it appears that finally the plaintiff sought to recover damages only for these causes, and the instruction above quoted was given in view of that fact. The grounds upon which we conclude this instruction was error have been, we think, already sufficiently discussed, and it is not, therefore, necessary to repeat them here. It is evident, from the facts we gather from the record, that the suit which the plaintiff below had brought against S. Brown Allen and the Fidelity & Deposit Company, the recovery in which was set up by the defendants as a bar to the present action, but which, as appears in the statement of facts, was not considered in the trial, was a suit for the value of the spirits alleged to have been lost, and for damage to the property whilst in custody; and this accounts for the abandonment of these elements of damage in the trial below. We take official notice of the fact that S. Brown Allen was, at the time, United States Marshal for the Western District of Virginia; and the record shows that the Haymes property was taken in custody by him about the time the proceeding in rem was commenced.

In the bill of particulars $50 is claimed for amount paid out in having property released from seizure, but the testimony of Haymes shows that this was composed of the fee paid to his attorney, and the outlay which he claims to have made in attending court. The judge, in his charge to the jury, made no mention of this claim for damages, and it probably was not considered; but, however that may be, it falls within the principles which we have before stated, and is not recoverable in this case. The reference we make to the suit of Haymes

against Brown and the surety company is more explanatory than otherwise, it being our purpose to base our decision in this case upon the principle that the defendants, having had reasonable cause for the seizure of Haymes' property, cannot be subjected to damages for the suspension of the business of the distillery whilst it was in custody, during the pendency of the proceeding in rem, nor to damages for alleged injury to business reputation and credit of the owner, as a result of the seizure and detention of the property. This disposes of the questions raised by exceptions to the judge's charge, which we are now considering.

The judgment of the Circuit Court is reversed, and the case remanded for such proceedings as may be necessary, in accordance with this opinion.

Reversed.

J. W. BISHOP CO. v. SHELHORSE, Sheriff.

(Circuit Court of Appeals, Fourth Circuit, November 9, 1905.)

No. 592.

1. PLEADING—DUPLICITY.

Under the Virginia practice, it is not an objection to a declaration in an action for wrongful death or a personal injury that it alleges in a single count separate and distinct acts of negligence on the part of defendant, either one of which alone would constitute a sufficient ground for the action, but which may have been concurrent causes that together produced the injury.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 135.]

2. SAME—DEMURRER.

Under the Virginia practice, a declaration is not demurrable for duplicity.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 434.]

3. TRIAL—REMARKS OF JUDGE—SUGGESTING AMENDMENT OF PLEADING.

It was not improper for a trial judge to suggest to a plaintiff the adding of another count to his declaration, setting forth with more clearness and detail matters covered by a general averment, the effect of which would be merely to divide his causes of action and present them in separate counts.

4. SAME—DIRECTION OF VERDICT.

A request for the direction of a verdict for defendant in an action for wrongful death was properly refused, where the declaration stated a cause of action and the evidence on the material issues of fact was conflicting.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 342.]

5. WRIT OF ERROR—MATTERS REVIEWABLE—RULING ON MOTION FOR NEW TRIAL.

In the federal courts, the ruling of a trial court on a motion to set aside a verdict and grant a new trial is not subject to review.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3860.]

6. SAME—QUESTIONS OF FACT.

On a writ of error, the appellate court cannot review questions of fact, or determine the weight to be given to evidence which was properly admitted.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3928-3934.]

In Error to the Circuit Court of the United States for the Western District of Virginia, at Danville.

Green, Withers & Green, for plaintiff in error.

Cabell & Custer and George C. Cabell, Jr., for defendant in error.

Before PRITCHARD, Circuit Judge, and PURNELL and WADDILL, District Judges.

WADDILL, District Judge. This is an action of trespass on the case, brought by the defendant in error against the plaintiff in error to recover damages arising from the death of the intestate of the defendant in error, who lost his life while in the employ of the plaintiff in error, through the alleged negligence of the latter.

The plaintiff in error, a corporation chartered under the laws of Rhode Island, was engaged in building a dam across the Dan river, just opposite the city of Danville, in the county of Pittsylvania, for the Dan River Power & Manufacturing Co., a corporation engaged in manufacturing cotton upon a large scale; a part of said work was the construction of a "concrete dam," and work was begun on both the north and south sides of the river about the same time. As it progressed on the south side, and extended from the bank out into the river bed, it became necessary to construct a certain platform, tables, etc., to be used for storing sand, rock, cement, and other material for use in concreting, which were constructed by the plaintiff in error under the direction of its superintendent and chief engineer. On the morning of the 18th of September, 1903, while the plaintiff's intestate was engaged at work upon the platform thus constructed, it gave way, and he was thrown into the river below and lost his life. The plaintiff below based his case upon the alleged negligence of the defendant in (1) having and maintaining an insufficient and unsafe structure for the purpose of the business in hand; (2) for using insufficient, defective, old, rotten, and inadequate timbers in the construction of said platform; and (3) in having an unfit and improper employé, one Monaghan, as foreman and boss in charge of the work in which said intestate was engaged at the time he lost his life. The plaintiff in error, having interposed its demurrer to the original and several amended declarations, pleaded not guilty, on which issue was joined, and a jury was impaneled on this issue, and rendered a verdict in favor of the defendant in error, upon which judgment was duly entered; and this writ of error was sued out by the plaintiff in error.

1. Three of the assignments of error relate to the action of the lower court in overruling the defendant's demurrer to the amended declaration, as well as to two additional amendments thereto, and also to the action of the court in suggesting to the counsel for the plaintiff the propriety of adding a new count to the declaration. Assuming the objections sought to be interposed to this declaration as amended can be made by demurrer in the federal court, said objections being merely for matters of duplicity in pleading, they seem to be clearly without foundation, either as respects the amended declaration or either of the subsequent amendments thereto. The demurrer was sustained to the original declaration, and the plaintiff filed what is

treated in the record as the amended declaration, to which he subsequently filed first and second amendments. The amended declaration sets forth the plaintiff's cause of action in a single count, namely, the failure of the defendant to furnish the plaintiff's intestate with a reasonably safe and suitable platform or structure on which to perform the duties required of him; the failure properly to construct such platform and structure of safe and suitable material; and to employ a reasonably competent foreman or boss to direct the work in hand. The first amendment sets forth this same cause of action in three different counts, and the second amendment by adding another count, which amplified the second count in the first amendment to the amended declaration, relative to the character of the materials used in and about the construction of said platform; and it was as to suggesting the addition of the last named count that the criticism was made specially of the action of the lower court. This declaration, whether treating the acts of negligence as set forth in the single count, or in the several counts as shown in the two last-named amendments, seems to us clearly sufficient to convey to the defendant full knowledge as to what the plaintiff's cause of action was; and we see no merit in its assignment of error thereto. The gravamen of the case was the negligence that caused the plaintiff's intestate to lose his life, and there is no good reason that we can conceive of why the averment as to the insecurity of the structure and defective material of which it was built, and the fact of the improper foreman giving directions for its use should not be set forth all in a single count, as was done in the amended declaration in this case; the plaintiff averring the knowledge of the defendant as to the existence of such conditions, and his ignorance respecting the same. Nor was it necessary to give the precise name of the alleged incompetent employé, when by the descriptive term of the declaration, namely, "reasonably safe, careful, cautious and competent officer, foreman and manager," the defendant was necessarily advised as to whom the complaint was directed. The first amendment to the amended declaration in three separate counts sets up in greater detail the plaintiff's cause of action, and it was upon this last-named amendment that the fourth count was added, at the suggestion of the judge; and the declaration as amended, with its several counts, on which the parties went to trial, was undoubtedly free from fault. The fourth count, added at the judge's suggestion, did not in any sense change the original cause of action, but amplified the same. Under the Virginia practice, the defendant clearly could not interpose the objections sought to be made here by demurrer, as it would be for mere duplicity in pleading at most, and could at common law have been availed of only by special demurrer, which has been abolished in Virginia by statute. Code Va. 1887, § 3272 [Va. Code 1904, p. 1722] Norfolk & Western R. R. Co. v. Ampey, 93 Va. 108, 122, 25 S. E. 226, and cases there cited. This decision will be found of interest, as well upon the question of the sufficiency of this declaration, as upon the right to raise the question indicated by the demurrer. Judge Riely, speaking for the court (on page 121 of 93 Va., page 227 of 25 S. E.) says:

"The main objection to the declaration relates to the first count, and the foundation of the objection is that this count alleges three distinct grounds of negligence as the cause of the injury sustained by the plaintiff, either of which would of itself, independently of the others, constitute a sufficient ground for the action. In other words, the claim is that the count is bad for duplicity. The grounds so stated are, the negligence of the defendant in failing to exercise due care in selecting competent servants, in failing to provide a sufficient number of train hands, and in failing to supply and maintain suitable and safe machinery and instrumentalities for the conduct of the business of the defendant. They are conjunctively alleged as concurrent causes, which, co-operating together, produced the injury. It is very questionable whether this constitutes duplicity. It is stated by eminent text-writers on the subject of pleading, that no matters, however multifarious, will operate to make a pleading double that together, constitute but one connected proposition or entire point. Stephen on Pleading, 232-3, 263; 4 Minor's Inst. pt. 2, p. 927; and Va. F. & M. I. Co. v. Saunders, 86 Va. 969, 11 S. E. 794. But, even if this count was obnoxious to the charge of duplicity, the fault could not be taken advantage of on a general demurrer."

This court will follow the state practice, as well in the matter of the sufficiency of the declaration and the statement of the several causes of action relating to an injury arising from a single occurrence in one and the same count (Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579; Bank v. Lowry, 93 U. S. 72, 23 L. Ed. 806; Cooke v. Avery, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. Ed. 209), as in the manner and method of making such defense (Burley v. German Am. Bank, 111 U. S. 216, 4 Sup. Ct. 341, 28 L. Ed. 406; Dabney's Fed. Juris. & Law Procedure, §§ 117, 118).

The action of the trial judge in suggesting the additional fourth count to this declaration was clearly free from objection, and the defendant was in no manner prejudiced thereby. A judge might, of course, abuse his discretion in respect to the amendment of pleadings, by making suggestions in a way that would indicate that he was a partisan of one side or the other, or that he was in some way prejudiced in the case; but there is no such suggestion here. What the judge did was harmless. The suggestion was to more clearly set forth the plaintiff's cause of action, which, in our view, independent of such suggestion, had already been sufficiently averred. It was made to counsel in the absence of the jury, and no injury resulted therefrom to the defendant. The judge doubted whether the second count in the declaration set forth with sufficient clearness the charge to furnish proper material for the construction of the platform in question, though it sought to make such averments, as also the fact of the failure to furnish the proper appliances, and he suggested, to remove the question of possible duplicity in the declaration, that another count be added, treating the second count as one for the failure to furnish safe and proper appliances, and the fourth or new count to cover the question of the failure to use suitable material in its construction. In 1 Va. Law Reg. 385, it is intimated that a motion to strike out one of these causes of action, where two are averred in a single count, is the proper remedy; and 5 Robinson's Prac. (New Ed.) 305, says that the proper course is for the court to direct the pleader to divide his causes of action, and present them in several counts. That is what the judge did, his idea being to get

at the merits of the controversy, and his action was proper and free from criticism. In Wiggins Ferry Co. v. O. & M. Ry. Co., 142 U. S. 396, 405, 12 Sup. Ct. 188, 35 L. Ed. 1055, Mr. Justice Brown, speaking for the Supreme Court, said:

"Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible. A mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice, and if the pleadings can be so amended as to admit proof of such claim, and such amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of the appellate court to permit such amendment to be made." Schooner Anne v. United States, 7 Cranch, 570, 3 L. Ed. 442.

2. The next assignment of error relates to the refusal of the court to give certain instructions offered by the plaintiff in error, and rejected by the court, and to the giving of those contained in the court's charge. The defendant's first instruction requested the court to instruct a verdict for the defendant, which the court refused. This is a usual motion in federal practice, and one that is quite frequently resorted to, resulting in the saving of time to the court and litigants, and much expense; but in our judgment it would have been clearly error for the court below to have adopted this method of disposing of this case. Upon every material issue, the conflict in the evidence was sharply drawn. In a word, the plaintiff insisted that the defendant failed to furnish a reasonably safe place, constructed of suitable and sound material, upon which his intestate was to work in the discharge of the duty required of him; that said platform was improperly constructed; that the defendant knew it was not suitable, and the materials used in its construction unsound; that Monaghan, under whom the plaintiff's intestate worked, was not a competent and careful boss or foreman; and that these facts were known, or should have been known, to the plaintiff in error. A large number of witnesses were examined, pro and con, on these questions, much the larger number on every point being examined by the plaintiff; and the jury, upon seeing and hearing these witnesses, were the proper judges to pass upon the question of fact at issue between the parties, and the proper weight to be given to such evidence, as well as upon the conflict between the witnesses themselves. It was not a case, therefore, to be taken from the jury. It is only in cases where there is either no evidence, or clearly insufficient evidence, upon which to base a verdict, that the judge should exercise his prerogative to instruct a verdict for one side or the other. And in this case, where the negligence consisted of the failure of the master to properly perform its duty respecting nonassignable obligations imposed upon it by law touching the servant, the case should clearly have been left to the jury, as was done. D., L. & W. R. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Tex. & Pac. R. R. Co. v. Cox, 145 U. S. 593, 606, 12 Sup. Ct. 905, 36 L. Ed. 829; Tex. & Pac. Ry. Co. v. Gentry, 163 U. S. 353, 368, 16 Sup. Ct. 1104, 41 L. Ed. 186.

The assignment of errors respecting the other instructions offered

by the plaintiff in error, and refused by the court, have been carefully considered in connection with the instructions as given by the court, and, without discussing the same severally and in detail, the conclusion reached is that the court's instructions fully and fairly submitted the case to the jury, and that there was no error in its action, either in the charge it gave or in rejecting the several instructions asked by the plaintiff in error. The instructions as given clearly covered the case, and substantially embraced what was asked for by the plaintiff in error, so far as the evidence justified the same. The plaintiff in error has no just cause of complaint, and was in no manner prejudiced by the court's action in giving and refusing instructions.

3. The next assignment of error relates to the refusal of the court to set aside the verdict of the jury and grant a new trial, because the verdict was contrary to the law and the evidence. The action of the trial court in granting or refusing to set aside a verdict is not subject to review in this court, being a matter within the discretion of the lower court, and this assignment is therefore not well taken. Mo. Pac. R. R. Co. v. C. & A. R. R. Co., 132 U. S. 191, 10 Sup. Ct. 65, 33 L. Ed. 309; Wilson v. Everett, 139 U. S. 616, 621, 11 Sup. Ct. 664, 35 L. Ed. 286; Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128, 134, 12 Sup. Ct. 181, 35 L. Ed. 961; Addington v. United States, 165 U. S. 184, 17 Sup. Ct. 288, 41 L. Ed. 679.

4. Upon the whole case, we cannot perceive that the plaintiff in error was in any manner prejudiced by any of the rulings of the court below, in the trial of this case. As was said by Mr. Justice Lamar, in Ætna Life Insurance Co. v. Ward, 140 U. S. 76, 91, 11 Sup. Ct. 720, 35 L. Ed. 371:

"It may be that, if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of the exceptions taken at the trial, to the admission or rejection of evidence, and to the charge of the court and its refusal to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted"—citing Minor v. Tillotson, 2 How. 392, 393, 11 L. Ed. 312; Keller's Lessee v. Eckert, 4 How. 289, 11 L. Ed. 979; Dirst v. Morris, 14 Wall. 484, 490, 20 L. Ed. 722; Prentice v. Zane, 8 How. 470, 485, 12 L. Ed. 1160; Wilson v. Everett, 139 U. S. 616, 11 Sup. Ct. 664, 35 L. Ed. 286.

The judgment of the lower court will be affirmed.

TURNBULL v. ROSS et al.

(Circuit Court of Appeals, Fourth Circuit. November 9, 1905.)

No. 597.

1. TRIAL—DIRECTION OF VERDICT.
It is the settled rule in the federal courts that it is the right and duty of a trial judge to direct a verdict, where in his opinion the evidence would not sustain a verdict for the adverse party.
[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 379, 383, 391.]

2. COURTS—FEDERAL JURISDICTION—COLLUSIVE TRANSFER OF CAUSE OF ACTION.
A trial judge may properly dismiss a suit, where he is satisfied from the evidence produced on the trial that the property involved as the subject-matter of the action was collusively transferred to plaintiff, who was a citizen of another state, to enable a suit to be brought in the federal court and in fraud of its jurisdiction, notwithstanding the fact that he had previously overruled a motion to dismiss on that ground; and such dismissal may be made by the Circuit Court of Appeals on the same grounds.

3. TRIAL—DIRECTION OF VERDICT.
The action of a trial judge in directing a verdict for defendant on the ground of the insufficiency of plaintiff's evidence to sustain a recovery affirmed.

In Error to the Circuit Court of the United States for the District of South Carolina, at Columbia.

John J. McMahan (Lyles & McMahan, on the brief), for plaintiff in error.

J. S. Muller (Barron & Ray, Halcott P. Green, and P. H. Nelson, on the brief), for defendants in error.

Before PRITCHARD, Circuit Judge, and PURNELL and BOYD, District Judges.

PURNELL, District Judge. On February 24, 1903, plaintiff commenced his suit at law in the Circuit Court for the District of South Carolina, at Columbia, for the recovery of a tract of land of 500 acres in the county of Lexington, on Congaree river, alleged to be of the value of $100,000, annual rental value of $10,000 and damages $40,000 for the removal of the stone therefrom and the wrongful withholding possession. Issue being joined, and several defenses set up, a trial was had on January 16, 1905, at a regular term of the court. The record does not include or purport to contain all the evidence introduced, as required by rule 14, subsec. 3. The record at the close of the testimony, or so much thereof as is included in the record, contains the following:

"Plaintiff rested. Defendants moved to dismiss the case on account of lack of jurisdiction, on the ground that it appeared from the evidence that the action was brought really for the benefit of John Campbell Bryce, of South Carolina, and that the conveyance to Mr. Turnbull was made to get jurisdiction. His honor, the presiding judge, overruled the motion, stating that he would submit that question to the jury as one of the issues. Defendants then moved for a nonsuit in the way of a demurrer to the evidence upon the ground that it was not sufficient—that the plaintiff has not proved a good title in him-

self; the defendants' attorney citing to the court during the argument of such motion, and as an authority therefor, the decision of the Supreme Court of the state of South Carolina in the case of Bryce v. Cayce, 62 S. C. 546, 40 S. E. 948. The court ruled: 'In view of the fact that you have already had a trial of this case in the state court, where it properly belonged, and the jury there found against you, and the further fact that it is doubtful as to whether the suit was not brought for the benefit of Bryce by Turnbull, and that there is doubt as to whether you have made out a case that ought to go to the jury, I am disposed to end the case and direct a verdict for the defendants. The court directs the jury to find a verdict for the defendants.' Plaintiff's attorneys at the time duly excepted to the ruling and verdict, and then and there asked and obtained an order allowing 20 days in which to prepare and serve a bill of exceptions. Thereupon the counsel for the said plaintiff did then and there propose his aforesaid objection to the ruling of the said court, and prayed that his bill of exceptions might be sealed, and it is sealed accordingly."

Subsequently, when the formal bill of exceptions was presented, the record shows the trial judge indorsed the same as follows, to wit:

"Allowed, except in so far as it is stated that my judgment was influenced by the consideration that the action properly belonged to the state courts. I had no such views, and, of course, my judgment was not predicated upon them."

The bill of exceptions thus allowed presents four questions, which may be disposed of in the order presented.

First. That the court erred in directing a verdict but should have submitted all issues to the jury. The right or duty of a judge to direct a verdict in a civil cause is too well settled to admit of argument. The Supreme Court has said a trial judge is primarily responsible for the just outcome of the trial. "He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters not capable of record, and when, in his deliberate opinion, there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment." Patton v. Texas & Pacific R. R. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Pythias Knights Sup. Lodge v. Beck, 181 U. S. 52, 21 Sup. Ct. 532, 45 L. Ed. 741. Many of the decisions of the Supreme Court on this subject are cited in Patton v. T. & P. R. R. Co., supra, and this ruling has, of course, been followed by the Circuit Courts of Appeal in the several circuits. In this circuit: Tucker v. B. & O. R. Co., 59 Fed. 968, 8 C. C. A. 416; Franklin Brass Co. v. Phœnix Assurance Co., 65 Fed. 773, 13 C. C. A. 124; Peoples Bank v. Ætna Ins. Co., 75 Fed. 507, 20 C. C. A. 630; Sloss Iron & Steel Co. v. S. & G. Ry. Co., 85 Fed. 133, 29 C. C. A. 50; Chapman v. Yellow Poplar Lumber Co., 89 Fed. 903, 32 C. C. A. 402; Hodges v. Kimball et al., 104 Fed. 745, 44 C. C. A. 402. There was, therefore, no error per se in directing a verdict.

The second assignment seeks to show there was error in referring to the fact that there had been a former action in the state court by John C. Bryce, plaintiff, against the defendants, or those under whom

they claimed, for the recovery of the same tract of land, which action had resulted in a decision by the Supreme Court adverse to plaintiff's claim and a final judgment for the defendants—it being insisted that plaintiff under the statute law of South Carolina, provided he pays the cost of the former action and commences his second action within two years, is entitled to two suits to recover real estate; that the first action though it result adversely will not sustain a plea of res judicata. This contention was insisted on with much vigor at the hearing, notwithstanding the declaration of the trial judge, in approving the formal bill of exceptions, that he "had no such views, and, of course, his judgment was not predicated upon them." Putting thoughts or views into a judge's mind which he expressly disclaims is carrying the art of mind reading farther than any psychologist, or the pretense of those who profess to practice this branch of that science, has ever claimed. True, the court said:

"In view of the fact that you have already had a trial of this case in the state court, where it properly belonged," etc., "I am disposed to end this case and direct a verdict for the defendants."

We would not presume to say, in the face of the declaration of the trial judge (who is a resident of and learned in the laws of South Carolina), and hold, his judgment was predicated on the view that the issues in the case were res judicata. His declaration on the subject is conclusive. We therefore decline to consider the exhaustive and learned argument of counsel, as set out in five briefs, on the effect, meaning, etc., of the statute of South Carolina (as contained in 17 St. at Large, p. 76; Code Proc. § 98), entited "An act to limit the plaintiff in an action for recovery of realty to two actions for the recovery of lands."

Third:

"Because his honor entertained doubt as to whether the suit was not brought for the benefit of Bryce by Turnbull when he had overruled defendants' motion to dismiss for want of jurisdiction on that ground, and when the evidence clearly showed that the suit was brought not for the benefit of Bryce, but for the benefit of Turnbull alone, and his honor allowed such doubt to influence his judgment in granting said motion, which was error."

This bill of exception is not fairly stated. The trial judge did overrule the motion to dismiss, temporarily, but stated he would submit that question to the jury. The evidence in the record, when analyzed, will support, not only a well-founded doubt that the suit was brought for the benefit of Bryce by Turnbull, but a conclusion that the transfer was made for this purpose and was a fraud on the jurisdiction. The value of the land is fixed at $100,000, rental value $10,000 in the complaint, $40,000 by the testimony of Bryce, and yet the consideration recited in the deed is $1,000 based on a "calculation" as to what Turnbull "had been contributing to his expenses" and $10 per month. Turnbull, who is a brother-in-law of Bryce and claims property valued at from $40,000 to $100,000, was not examined. Whether he was even present at the trial does not appear. This indifference to so important a matter must have its weight. Bryce was

both present and testified. His testimony as set out is unsatisfactory, vacillating, and confusing. His testimony, especially on the cross-examination, even in cold type, leaves the impression on the judicial mind that the transfer of title was to enable Turnbull, a nonresident, to bring suit in the United States Circuit Court to reimburse himself, but mainly for the benefit of Bryce, and to a judge who has looked into the eyes of the witness and noted his manner of testifying and attendant circumstances, the conclusion is not unreasonable that all subsequent attempts to reconcile such testimony to any other state of facts could not do more than create a doubt, to which plaintiff, upon whom the burden of proof rested, was not entitled; nor does any testimony in the record tend to remove, but confirms, this impression. Under these circumstances it was not only within the sound discretion of the trial judge to direct a verdict, but his duty, if it so appeared to his satisfaction, to dismiss the suit.

"The act of 1875, specifically requires the Circuit Court to dismiss a suit where it shall appear that parties have been improperly made or joined for the purpose of creating a case cognizable by the court. The provision is regarded as a salutary one and should be applied with rigor. THE OCCASION FOR ITS ENFORCEMENT ARISES CHIEFLY IN CASES OF COLLUSIVE TRANSFERS OF THE SUBJECT-MATTER OF ACTION FROM PARTIES WHOSE CHARACTER OF CITIZENSHIP WOULD NOT ENABLE THEM TO SUE IN THE FEDERAL COURT IN THEIR OWN NAMES. Whatever may have been the practice in such cases prior to the act, the method of taking objection to the jurisdiction is not now confined to a plea in abatement. The question of collusion may be determined by the court or submitted to the jury under proper instructions." (The capitals in the text are the writer's.)

This text from 22 Ency. of Pl. & Pr. 281, is supported by numerous federal decisions. Williams v. Nottawa, 104 U. S. 209, 26 L. Ed. 720; Hayden v. Manning, 106 U. S. 586, 1 Sup. Ct. 617, 27 L. Ed. 306; Farmington v. Pillsbury, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 116; Cashman v. Amador, etc., Co., 118 U. S. 58, 6 Sup. Ct. 926, 30 L. Ed. 72; Cross v. Allen, 141 U. S. 528, 12 Sup. Ct. 67, 35 L. Ed. 847; Crawford v. Neal, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 556; Lehigh Mining & Co., v. Kelly, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 447, 448, 449; Lake Co. Commissioners v. Dudley, 173 U. S. 243, 19 Sup. Ct. 398, 43 L. Ed. 688; Woodside v. Ciceroni, 93 Fed. 1, 35 C. C. A. 177; Kunkel v. Brown, 99 Fed. 595, 39 C. C. A. 665, and others.

Fourth:

"Because upon said motion his honor entertained doubt as to whether the plaintiff had made out a case that ought to go to the jury, when he should have held from the evidence that the plaintiff had made out a clear prima facie case for the recovery of the possession of the land, and allowed such doubt to influence him in granting said motion, which was error.

"And because, even if the evidence did leave it in doubt as to whether the plaintiff had made out a prima facie case to go to the jury, he should have submitted it to the jury to determine, and it was error for him to grant the motion upon that ground."

This exception, stated as two, but in reality one, is evidently based on some state practice, and counsel who make it were inadvertent to the federal decisions hereinbefore cited. As before said, the record

does not contain all the testimony offered, or purport to do so, and this is further evidenced by references in the briefs to testimony or evidence which is not in the record, we are therefore unable to say the exceptions as above stated are well founded. On an examination of the record we conclude they are not. Plaintiff must recover on his own title in South Carolina, as elsewhere, in actions to recover real estate. On the trial no evidence or muniments of title as to any other was offered. Defendants offered no evidence—"stood mute"—as they had a right to do. The burden was on the plaintiff to prove his title. This he failed to do. The trial judge, who is primarily responsible for the just outcome of litigation, "construing all the evidence" and "noting all those matters not capable of record," held "in his deliberate opinion there was no excuse for a verdict save in favor of defendants," and "so ruled by instructions to that effect." This court can find in the record no sufficient reason to differ in the conclusion thus reached. This exception is therefore overruled.

Our first conclusion was to remand this cause, with instructions to dismiss the suit; but, the trial court having only expressed doubt on the material grounds for such dismissal, that there may be an end of the litigation, and the cause having been fully heard on a second trial, as it is contended the laws of South Carolina provide for, resulting as it had resulted in the state court, the judgment is affirmed, and the suit dismissed. Plaintiff in error will be taxed with the costs.

Affirmed and dismissed.

BOYD, District Judge. I concur in the conclusion that this case should be dismissed. I base my decision more particularly on the ground that it appears to me satisfactorily, from the evidence in the case, that the transfer of the property involved as the subject-matter of the action was collusive and intended as a fraud upon the jurisdiction of the Circuit Court of the District of South Carolina.

SAITO v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 30, 1905.)

No. 1,173.

CRIMINAL LAW—REVIEW ON WRIT OF ERROR—REFUSAL OF INSTRUCTIONS.

The refusal of requested instructions in a criminal case cannot be reviewed by an appellate court, where the record does not contain the charge given by the court; the presumption being that such charge covered the requests in so far as they correctly stated the law.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2940, 2943.]

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

W. A. Keene, for plaintiff in error.

Jesse A. Frye, U. S. Atty., and Edward E. Cushman, Sp. Asst. Atty. Gen., for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was convicted under an indictment charging in effect that on September 25, 1904, he held a woman, named Haru Takahashi, for the purpose of prostitution, in pursuance of her illegal importation for that purpose by one Kanoto, in violation of that provision of Act Cong. March 3, 1903, c. 1012, 32 Stat. 1213 [U. S. Comp. St. Supp. 1905, p. 274], entitled "An act to regulate the immigration of aliens into the United States," which is as follows:

"Sec. 3. That the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden; and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold, any woman or girl for such purposes in pursuance of such illegal importation shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not less than one nor more than five years and pay a fine not exceeding five thousand dollars." 32 Stat. 1214 [U. S. Comp. St. Supp. 1905, p. 276].

It is insisted on behalf of the plaintiff in error that the evidence in the case was insufficient to justify the verdict, and that the court below erred in denying the motion made by the defendant that the jury be instructed to render a verdict of not guilty. An attentive reading of the testimony and consideration of the circumstances of the case satisfy us that the court did not err in denying the motion, and that the evidence is sufficient to support the verdict of guilty. The testimony, as well as the circumstances attending the bringing of the woman Takahashi from Yokohama to this country by Kanoto, clearly showed that she was imported by him for the purposes of prostitution, and that the defendant held her in Seattle for those purposes; and the testimony and attending circumstances sufficiently showed that he did so in pursuance of her illegal importation for those purposes.

By the immigration laws of the United States provision is made for the establishment of a board of special inquiry (Act March 3, 1893, c. 206, § 5, 27 Stat. 570 [U. S. Comp. St. 1901, p. 1302]) in order the more effectually to enforce them, and of such board the witness Gaffney was a member. He testified, among other things, that the woman in question had been brought before the board of inquiry and by it ordered deported on the ground that she had been surreptitiously imported into this country for purposes of prostitution, and that when he, with other immigration officers, went to the defendant's house, where the woman was kept, a woman with whom the defendant there lived as his wife interfered with the action of the officers, in the endeavor to retain Haru Takahashi in the defendant's establishment. The testimony of the witness in respect to the action of the board of inquiry was not objected to on the ground that it was not the best evidence, and we are of the opinion that the court below did not err in refusing to strike out the testimony complained of.

Various assignments of error were made on behalf of the plaintiff, growing out of the refusal of the court to give certain requested instructions, which are here urged on his behalf, but it is a sufficient answer to them to say that the charge given by the court to the jury is not brought up, and we must therefore presume that the court, in its charge, covered the defendant's requests in so far as they correctly stated the law. Andrews v. U. S., 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023.

The judgment is affirmed.

AMERICAN FEATHERBONE CO. v. WARREN FEATHERBONE CO.

(Circuit Court of Appeals, Seventh Circuit. August 1, 1905.)

No. 1,151.

PATENTS—PRIOR PUBLIC USE—FEATHERBONE.

The Warren and Holden patent, No. 559,827, for a process of manufacturing featherbone, and the resulting product, while disclosing invention of a meritorious character, is void for prior public and commercial use of the invention by the patentees for more than two years before the filing of the application.

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

For opinion below, see 133 Fed. 304.

The Warren Featherbone Company is the complainant in a suit against the appellant, American Featherbone Company for infringement of letters patent No. 559,827, issued May 12, 1896, to Edward K. Warren and Jonas H. Holden, assignors of the complainant, for an improved process and product in the manufacture of so called "featherbone." This appeal is from a decree which sustains the patent, finds infringement by the appellant, and grants a perpetual injunction.

Application for the patent was filed March 5, 1895. The specifications and explanatory drawings (Figs. 1 and 2), in so far as they are deemed material, are as follows:

"Our invention relates to improvements in 'featherbone' and in the method of manufacturing the same and to improved apparatus for the purpose. 'Featherbone' is a fanciful name given to the corset stiffener, for which Edward K. Warren received letters patent No. 286,749, dated October 16, 1883, and letters patent No. 311,621, dated February 3, 1885, issued to him for a further improvement in the manufacture of said featherbone. In the construction of featherbone as described in these former patents, in the first patent the fiber was wound into cords, and in the second one the cords were wound together side by side to form a broad flat blade, then the flat blade was stitched through, and this, with winding it, gave the same firmness and prevented it from becoming loose or falling apart; but in this construction there would frequently be small projections formed upon the blade or cord, which would remain there constantly, and a mere rolling or laundering was insufficient to make the blade smooth and flat, and the blade as then constructed was more liable to injury, for when a thread became broken, as the featherbone depended entirely upon winding to hold the fibers together, the blade or cord was likely to become frayed in this way.

"Our invention has for its object improvements in featherbone and in the method of manufacturing the same, to construct the same so that the blade shall be smooth and flat and thin and possess continuity in itself, not depending entirely on winding of the quill fiber to make the blade firm, and also to compact the blade so that it will be more strong and elastic where

such qualities are desired to answer its purpose. We desire to state, however, that in some instances it is not desired to make the blade stiff and firm, and we only refer to this as a means of constructing the same when it is desired to so manufacture the blades or cords of featherbone. * * *

"After the blades of featherbone have been wound and stitched, as indicated in the patents to said Warren above mentioned, we proceed to treat the same by first passing the strip of featherbone (which is constructed in a continuous strip as long as it will be convenient to handle) through a suitable sizing composed of glue and other suitable constituents, which can be so various that an attempt at enumeration would be useless. The strip should be thoroughly saturated. A long band of featherbone, C, is dipped down into the box or trough, A, containing sizing and passed into a dry-room, B, which is heated in any suitable and convenient manner to dry the sized featherbone quickly and as dry as it is possible to dry it by such means. The featherbone is then passed through the steam-heated tube or pipe, D'. It is passed through the small pipe, D', which is inserted in the large steam-pipe, D, which is connected by the pipes shown, which permits of a continuous flow of steam around the smaller pipe. This heating pipe in actual use is over 12 feet long, but the length of it is immaterial so long as the strip of featherbone, C, becomes thoroughly heated, and a greater or less length than 12 feet may be used, as speed or other circumstances may require. The strip of featherbone should be so thoroughly heated by this process that the fibers of quill contained therein are thoroughly softened; in fact, almost melted. This is accomplished by heating the same to very nearly the boiling point of water, which is accomplished by the steam-heated tube. As soon as it is heated in the pipe, it is passed out immediately before cooling between the cold rollers, E, E, E, E, which are made male and female to receive the same, and compress and form it into exactly the sized strips desired. One set of rollers can be used or more than one. In practice, several sets are used, and the strip passed through them continuously. The process of heating and rolling can be repeated, if desired, to produce an extra quality of featherbone; but for all ordinary purposes once heating and rolling or calendering is all that is required.

"We desire to state that in practice it is found that the sizing causes the thread to adhere to the fibers of the featherbone, and also fills up the small interstices between the fiber of quills in the strip; and when the featherbone is properly and thoroughly cooled and dried, it affords a composition which unites very firmly with the fibers of the featherbone and connects the thread very tight to it also. When the strip of featherbone is passed through the heating tube, the heat is sufficient to soften the sizing and also the substance of the quills, and makes them pliable and easy to bend; and also makes them so very soft that when they are bent in that condition they retain their shape. The substance of the quill regains its elasticity on cooling. When a strip of featherbone is heated in this way and then passed through between the cold rollers of the right dimension and size to compress all of the fibers, it crowds all very firmly into a blade and thoroughly incorporates all the featherbone together, so that it has the appearance of forming a continuous cord of the same material. The reduction in temperature causes the material to chill and set in the form desired. The fact that it is wound and stitched does not appear, except on close inspection. The temperature to which the featherbone is submitted, it will be readily understood, is very much higher than the temperature of the human body; the temperature being very near the boiling point, from the fact that the pipe D' is heated by live steam on the outside. We accomplish by this method the result long sought for in the manufacture of featherbone, and have so perfected a superior article in the first place that has much the same appearance of the article which it is intended to supersede—whalebone—and at the same time it possesses all of its own superior qualities—that is, it does not split. It can be sewed through in any direction with indifference with no fear of injuring the texture or quality of it.

"We desire to state that the steps of our process can be considerably

varied without departing from our invention. It is not absolutely necessary to pass the strip of featherbone down into the trough of sizing. The sizing can be applied in other ways so long as the strip of featherbone is saturated. It would not be absolutely necessary to have a special drying-room for the featherbone, and if it is heated in any other way to the required temperature and rolled between cold rollers the same result is attained, though the exact apparatus we have shown is found to be the most effective."

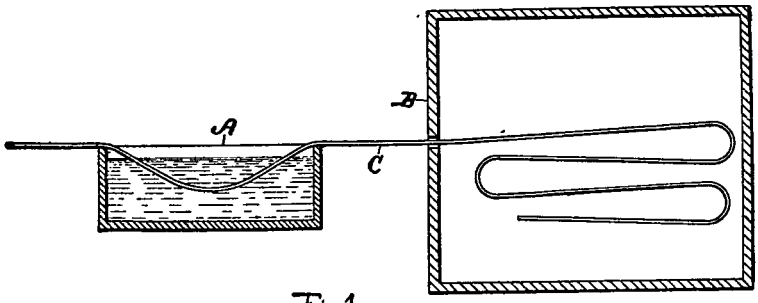


Fig 1

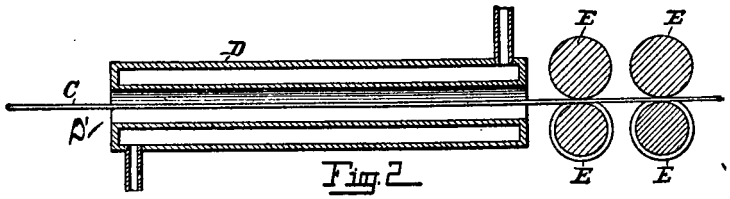


Fig. 2

The claims are:

"(1) A process of manufacturing corset stiffeners consisting in bundling to gether the fibers of quills to form cords or blades; sizing said cords or blades; drying the same; heating the dried sized quills until they are thoroughly softened and applying cold pressure to the same, substantially as set forth.

"(2) A process, in manufacturing corset stiffeners, consisting in bundling the fibers of quills into suitable blades, sizing the same, heating the blades until the fibers of the quills become softened, and applying cold pressure to the same to form the blades, as specified.

"(3) As an improved article of manufacture, an elastic cord or blade comprising the fiber or splints of quills of feathers, wrapping-thread and a sizing, all compacted together and molded to form the fiber or splints, and the sizing being incorporated into a continuous mass, and the thread embedded in the mass as and for the purpose set forth.

"(4) As an improved article of manufacture, an elastic cord or blade, comprising the fiber or splints of quills of feathers incorporated together, and a sizing, all compacted together and molded to form the fiber or splints into a continuous mass, as and for the purpose set forth."

Defenses are set up (1) of anticipations and want of invention, (2) of forfeiture by prior public use, and (3) of noninfringement of the process claims in any view. The record is voluminous, but references to the testimony in the opinion are deemed sufficient without other summary.

Jacob Rothschild and Lysander Hill, for appellant.

Seabury C. Mastick and Chas. K. Offield, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts). The production of an article which became known as "featherbone," to be used in lieu of whalebone, for "corset stiffeners" and analogous purposes, originated with Edward K. Warren, one of the patentees, in the year 1883. It was then made of quills, or quill splints stripped of the feathers, and bound together forming a rib or stiffener for various articles of dress, as described in letters patent No. 286,749, issued to the inventor, October 16, 1883. Several subsequent patents were obtained for various alleged improvements in methods and product, which are mentioned in reference to this origin of the name "featherbone," in the opinion of Judge Jenkins, speaking for this court, at the present term, in the case of Warren Featherbone Company v. American Featherbone Company, 141 Fed. 513.

The contention in defense of the present suit, however, that the product of this patent (No. 559,827) is identical with that described in the original patent (No. 286,749), or in one or the other of the last-mentioned patents (now expired) does not impress us as tenable. While it is true that quill splints are alike the basic element, thus justifying retention of the name featherbone, the introduction of sizing, reheating, and pressure was a new utilization of that element, and resulted in a new homogeneous material which has attained commercial success. The prior discovery that quills could be used as such element in a substitute for whalebone does not deprive this improvement of recognition as another useful discovery. Nor are we impressed with force in the contentions, either of anticipation of the process claims (1 and 2) in the prior patents introduced, or of noninfringement of such claims in the light of the prior art.

Thus viewing the invention of the patentees as meritorious, we are brought regretfully to the consideration of the evidence of its public use prior to the application for patent. The statute (section 4886, Rev. St. [3 U. S. Comp. St. 1901, p. 3382]) conditions the grant of a patent for an invention that it shall not have been "in public use or on sale in this country for more than two years prior to" the application; and the policy of this provision and its strict construction against the patent are well settled. Egbert v. Lippmann, 104 U. S. 333, 336, 26 L. Ed. 755; 10 Notes U. S. Rep. 176. Nevertheless, the evidence of such public use to defeat the patent must be clear and convincing; and if the rule stated in Morgan v. Daniels, 153 U. S. 120, 123, 14 Sup. Ct. 772, 38 L. Ed. 657, is applicable as well to this issue, every reasonable doubt should be resolved against the defense. While any well-defined case of public use more than two years before the application is filed bars the patent, use "if made in good faith, solely to test the qualities of the invention, and for the purpose of experiment" only, is not within the inhibition. Egbert v. Lippmann, supra. The evidence upon the issue in the present case is voluminous, and the direct testimony is conflicting in reference to the time when practical operations commenced in the use of the patent process. Such use for a year and several months prior to the application is substantially conceded, but the witness Charles K. Warren testifies, in effect, that the process was not perfected until the "summer or fall of 1893"—the application being filed March

5, 1895—and was not used commercially before that time; that all prior use was experimental only, in perfecting the process. Another witness corroborates this view. If this testimony may be credited—not considering the circumstantial evidence and the conduct and interest of the witness—strengthened by the presumptions in favor of patentability, it may be doubted whether the testimony of the 20 or more opposing witnesses, tending to show public use long prior to March, 1893, would be deemed sufficient to overcome its force. We are constrained, however, to the opinion that the evidence, direct and circumstantial, is decisive that the process and product of the patent in suit were in public (commercial) use in the factory more than two years before a patent was applied for, and as early as the year 1887 or 1888; and that the version given by the witness Warren is not only inconsistent with the circumstances and exhibits in evidence, but is further discredited by the stress of circumstances under which it arose, by the indefiniteness of the story, and by the apparent want of candor on the part of the witness.

Review of the evidence in point is unnecessary, as the admission which was ultimately brought out, of public use during and after the summer of 1893, narrows the controversy; and a few of the indisputable facts are sufficient to establish such use beyond the two-year limit. No explanation is offered for this conceded long delay in applying for the patent, and it is surely not unreasonable to infer that it was due to a wish to prolong the period of monopoly, rather than to want of familiarity with such applications. The monopoly under the original featherbone patent (No. 286,749) for the product "formed of quills or quill splints" was then unexpired, and its use by the Warrens was both large and exclusive, while the number of other patents theretofore taken out by these patentees indicated an intimate acquaintance with patent applications. The introduction of glue and the methods of utilizing it to make a new product of quill splints constitute the invention in question. Glue or sizing did not enter into the product of the earlier patents, but the manufacture of featherbone under those patents was continuous and extensive in the factory of the complainant, up to the adoption of the present invention.

Upon these premises a well authenticated series of featherbone exhibits in evidence establishes commercial use of the final invention long prior to the time thus conceded, and beyond possible escape from the limitation. If confirmation of these product exhibits were needful, it is supplied by the cumulative testimony of the witnesses before mentioned in reference to the use of glue in the process of manufacture; and the earlier correspondence between the complainant and certain of its customers, introduced in evidence, is additional confirmation of such use.

In the course of taking testimony for the defense, numerous exhibits of old dress waists or bodices were introduced, containing featherbone used for stiffening, and witnesses were tendered to prove dates and circumstances of making. These exhibits were examined by counsel for the complainant and by the patentee, E. K. Warren, according to a statement appearing in the record, and thereupon this admission was entered of record: "That each and all of the bodice exhibits above

mentioned contains stiffening strips of featherbone, and that the several bodices referred to were all made and used more than two years prior to the filing of the application for the patent here in suit, and that the strips of featherbone that now appear in them were in them at the time when they were so first made and used." None of the witnesses, therefore, were called for authentication of the exhibits. Subsequently the witness C. K. Warren (not the patentee) testified—over vigorous objections—in substance, that the featherbone in all these exhibit dress waists, except two called the "Newberry Exhibits," was made under the old process, and not under the patent, and that the featherbone in the Newberry exhibits was made not earlier than 1896, for reasons stated. Comment on this and other courses in the order and character of the testimony is needless for the present consideration, as the Newberry exhibits referred to were unmistakably identified by several credible witnesses as made in 1887 and 1889 respectively (for occasions which fix the dates beyond doubt) together with a third exhibit made in 1892. It was not only undisputed, but obvious on inspection, that the featherbone in each of the first mentioned exhibits was the product described in the present patent, and entered into the original make of the garments as the witness testified. Without reference to other exhibits and circumstances in the case of like effect, or to the failure of either of the patentees to testify upon this issue when no reasonable excuse appears for their absence, these instances of use are sufficient to defeat the patent.

The defense which was thus made out encountered unfair difficulties in the methods of introducing the various phases of the testimony, in misstatements of fact, direct and indirect, and other devious ways, involving much research and expense in overcoming them, and these means cannot be passed over without censure. Particular mention of one bold instance will suffice. The testimony of the witness Warren in reference to the time when the new process entered into use requires no further comment; but in support of his version, by way of showing the marked departure in the increase of business under the new process at the date so fixed—indicative as well of its advance over the earlier invention—tables were introduced to show the comparative sales of featherbone from the year 1888 to 1902, with a great increase after 1893. The testimony of Edward K. Warren in a prior suit was then discovered and introduced by the defense, and plainly refutes the story of these tables. So that it is now conceded that the tables omitted a very large proportion of the sales of the earlier years. In other words, they were worthless for any legitimate object, and were calculated to deceive; and but for the vigilance of the defense would have deceived the court. None of these censurable means referred to are attributed in any sense to either of the counsel in the case, but we are satisfied that they were devised by Charles K. Warren, the secretary and chief witness for the complainant, and he deserves the censure of the court accordingly.

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

PELTON WATER WHEEL CO. v. ABNER DOBLE CO.

(Circuit Court, N. D. California. November 20, 1905.)

No. 13,132.

PATENTS—INFRINGEMENT—WATER-WHEEL CASING.

The Krase patent, No. 633,962, for a water-wheel casing, the main feature of the invention being a disk upon the shaft and revolving with it for the purpose of preventing water splashed upon the shaft from working into the bearings, makes a side chamber or pocket in which the disk revolves an essential element of the combination, and must be limited to the details of construction shown. As so construed, it is not infringed by the device of the Doble patents, Nos. 619,148 and 619,149, which has a circular disk used for the same purpose, but which is placed in the main casing, instead of in a separate chamber.

In Equity. On final hearing.

N. A. Acker and Wm. F. Booth, for complainant.

J. H. Miller and Frohman & Jacobs, for defendant.

MORROW, Circuit Judge. This is a suit for an infringement of a patent. The complainant is the owner of United States patent No. 633,962, granted September 26, 1899, to the Pelton Water Wheel Company for water-wheel casing upon the application and assignment of William J. Krase.

The inventor declares in his application for a patent that he has invented "certain new and useful improvements in water-wheel casings, * * * and it consists in the arrangement of parts and details of construction." The object of the invention is to prevent water, in a water wheel, splashed upon the shaft, from making its escape from within the casing into the outside bearings. It is stated that usually a stuffing box is interposed between the casing and bearing boxes, so as to make a tight joint and thus protect the bearings, but in practical operation the water splashing upon the shaft within the casing makes its escape along the shaft through the stuffing box and works into the bearings, and this water working into the bearings interferes with proper lubrication of the bearings, and at the same time carries any dirt which may accumulate upon the shaft outside of the casings into the bearings, and keeps the surface surrounding the casing wet by the water trickling over it. To prevent the water escaping out along the shaft, there are mounted on the shaft, just inside the casing walls, circular disks, and these disks rotate with the shaft. Upon the side walls of the casing on each side is a pocket or chamber. Within these pockets or chambers the disks rotate. In the base of each pocket or chamber is an opening through which water entering the chamber or pocket may make its escape into the casing. The operation of this device is described as follows: During the operation of the water wheel the water splashed upon the rotating shaft will trickle or run thereon toward the side wall of the casing until brought into contact with the circular plates or disks. As the water travels toward the periphery, or outer edge of the plates or disks, to pass the obstruction, the same will be thrown therefrom by centrifugal force into

the pocket or chamber, and, running downward, will be discharged from the bottom thereof back into the casing. The water upon the shaft is thus prevented from escaping beyond the disks or plates, which act, so to speak, as deflecting shields for the water. Except for the open bottom, the pocket or chamber is entirely closed. Consequently the water cannot splash into said chamber or pocket, and as the walls of the chamber or pocket, including the connecting flange or web, are of circular form, the water thrown from the deflecting shields, plates, or disks rapidly moves toward the bottom or discharge portion thereof. The water is thus prevented from accumulating in the pocket or chamber. To make perfectly plain the scope of his invention, the patentee says in his specifications:

"I do not wish to be understood as claiming a casing for water wheels having side or lateral drip-compartments per se, for such is well known to me. My invention resides in the use of a shaft having disks or circular plates arranged thereon which rotate within said lateral or side-drip compartments, so as to throw the water into said compartments by centrifugal force."

Infringement is alleged of claim 1 only of the patent. That claim is as follows:

"The combination, with a water-wheel casing, of the side chambers or pockets having discharge openings therein, the power shaft passing through the casing, and of the disks, plates, or water-deflecting shields arranged thereon and working within the side chambers or pockets."

The defendant's device is part of the construction of a water wheel made under patent No. 619,148, dated February 7, 1899, issued to William A. Doble, and patent No. 619,149, dated February 7, 1899, issued to William A. Doble. The mechanism in defendant's device which prevents the water from passing along the shaft into the bearings is described by a witness as a water guard consisting of a saucer-shaped disk rotating with the power shaft of the water wheel inside the main casing or housing, and which co-operates with an inwardly-projecting circular lip or flange on the side housing. The purpose of the lip or flange is to prevent the possibility of water which falls beyond the centrifugal disk from falling down upon the shaft. It is a shaft guard. There is no supplementary chamber or pocket inside of the main casing in which the centrifugal disk revolves. In this device the water, which, passing along the shaft, has a tendency to reach the bearings, is arrested in its course by the saucer-shaped disk, and is thrown up and over the convex surface of this disk until the centrifugal action of the disk overcomes the adhesion of the water, when it is thrown off into the casing or housing. But, as the edge of the saucer-shaped disk revolving with the shaft within the casing or housing cannot be made absolutely water-tight, so as to prevent water trickling down the side of the casing between the edge of the disk and the casing, there is attached to the wall of the main casing or housing of the wheel, and within the saucer-shaped disk, an inwardly-projecting grooved lip or grooved flange, which prevents the water reaching the shaft and acts as a shaft guard. Water trickling down the side of the casing and reaching this grooved lip follows around the groove and falls off the bottom into the main casing or housing.

In this device, as well as in the complainant's, the water passing along the shaft in the direction of the bearings is arrested in its course by the revolving disk, but after that the mechanism and its operation is wholly different. In complainant's device the water is thrown from a disk, but the disk is revolving within a supplementary chamber or pocket, while in defendant's device the disk is revolving in the main water-wheel casing. In complainant's device the disk has only to take care of the water that passes along the shaft and into the supplementary chamber or pocket, while defendant's disk revolves in the main water wheel in the midst of all the water flowing within the wheel casing. In the complainant's device there is no inwardly-projecting grooved lip or grooved flange attached to the wall of the casing to prevent any water that may trickle down between the side of the casing and the disk from reaching the shaft and its bearings, and the only protection the device seems to afford against this apparent defect is the size of the disk and the limited amount of water reaching the disk revolving in the pocket.

This difference in the form and construction of elements of the two devices is not denied by the complainant, but it is contended that the two devices are substantially identical, and that the complainant is entitled to its combination broadly, and that it is not confined to any particular form of water collector or director, or any specific relation of such to the disk. It insists upon a broad construction of its claim, which will not confine it to a literal or special form of inclosed pocket and a disk literally working inside that pocket; that it is entitled to read the claim as calling for any arrangement of disk and water-collecting device working together in connection with a water-wheel casing and shaft, which will prevent the splashed water from escaping along the shaft through the casing to the bearings.

It does not appear to the court that this is a pioneer invention, and was not so claimed by the inventor in his application for the patent. He states distinctly that his invention is an improvement in water-wheel casings, and consists in the arrangement of parts and details of construction as set forth in the drawings and described and pointed out in the specifications, and he then proceeds to point out and describe the various points of the device and the details of its construction; and, in order that there may be no misunderstanding as to the extent of his claim and the character of these details, he states that he does not wish to be understood as claiming a casing for water wheels having side or lateral drip-compartments per se, for such was well known to him, but he declares that his invention resides in the use of a shaft having disks or circular plates arranged thereon, which rotate within said lateral or side drip compartments so as to throw the water into said compartments by centrifugal force. There can be no mistake about the meaning of this language. It describes complainant's invention accurately, and with careful detail, and the claim is equally clear in setting forth that the invention is a combination of a water-wheel casing, side chambers or pockets having discharge openings therein, the power shaft passing through the casings, and disks, plates, or water-deflecting shields arranged thereon and working within the side chambers or pockets. We cannot enlarge this claim to include any and every arrangement of disk

and water-collecting device, for the inventor has declared that his invention has no such scope; and we cannot say that the side chamber or pocket is not an essential element of his invention, since he has declared that it is. Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274, 24 L. Ed. 344.

The complainant's invention, limited as it is to the detail of construction set forth in the specifications and claim, is not broad enough to include defendant's device, under the application of the law of equivalents. Looking at the two devices in the light of their construction and operation, it is evident that one does not perform substantially the same function or office as the other, in substantially the same way, to obtain substantially the same result. It follows that the defendant's device is not an infringement of complainant's mechanism, and the action cannot be maintained. The other defenses, that of a lack of invention, and anticipation, need not be considered.

The bill is dismissed.

G. B. RITCHIE & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. June 5, 1905.)

No. 3,502.

CUSTOMS DUTIES—CLASSIFICATION—FLAX NOILS—WASTE.

Flax noils are dutiable as waste, under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 463, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1679], and not under Schedule J, par. 326, 30 Stat. 180 [U. S. Comp. St. 1901, p. 1661], as "tow of flax," by similitude.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,560, T. D. 24,963, which affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by G. B. Ritchie & Co.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The Board of General Appraisers has correctly found that the merchandise in question is flax noils. It was assessed for duty as tow of flax, under paragraph 326 of the act of July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 180 [U. S. Comp. St. 1901, p. 1661]. It is claimed as dutiable as "waste not specially provided for," under paragraph 463, Schedule N, of said act 30 Stat. 194 [U. S. Comp. St. 1901, p. 1679]. The uncontradicted testimony taken in this court is to the effect that the merchandise is not flax tow, and is flax waste. The only question, then, is whether the article is dutiable as flax tow by similitude. Inasmuch as there is a specific enumeration covering waste, the similitude clause cannot be applied. Arthur's Executors v. Butterfield, 125 U. S. 70, 8 Sup. Ct. 714, 31 L. Ed. 643.

The decision of the Board of General Appraisers is reversed.

In re LATIMER et al.

(District Court, E. D. Pennsylvania. December 27, 1905.)

No. 2,217.

BANKRUPTCY—TEMPORARY RESTRAINING ORDER—DISCONTINUANCE FOR DELAY.

A temporary restraining order, granted pending a rule to show cause why an injunction should not issue restraining defendant from disposing of property alleged in the bill to belong to a bankrupt, will be discontinued, where such allegation is denied by the answer, and after the lapse of several months the rule has not been brought to a hearing, and no proofs have been taken in support of the bill.

In Bankruptcy. Sur motion of respondent Lorna C. Francis to discontinue restraining order.

Henry J. Scott, for the motion.

Edgar J. Pershing, R. M. Anderson, and George Wharton Pepper, opposed.

HOLLAND, District Judge. In March, 1905, a petition in bankruptcy was filed against the above-mentioned parties. On the same day, a separate bill was filed by Mary V. Copeland, a creditor of the above-mentioned bankrupts, alleging that Lorna C. Francis, wife of Stanley Francis, is possessed of and holds the title to real estate situate within the jurisdiction of this court belonging to her husband, one of the alleged bankrupts. The bill prays that the said Lorna C. Francis, among others, be enjoined against the transfer or incumbrance of this real estate. Whereupon a rule was entered upon her and others to show cause why an injunction should not issue restraining and enjoining her and others from making sale, transfer, or conveyance of the said real estate, returnable April 8, 1905, at 10 o'clock a. m., and a restraining order was directed to issue, restraining any such transfer or incumbrance in the meantime and until the disposition of the rule. On April 8, 1905, Lorna C. Francis filed an answer in which she denies that she holds either an equitable or legal title to any property, real or personal, in which any of the bankrupts are in any manner interested, or in which there is invested any money or property of any character of the said bankrupts, and prays that she may be relieved of the restraining order. Stanley Francis also filed an answer denying his wife held any property belonging to him. Nothing further was done in the matter, nor was there any additional proof filed in support of the bill by the petitioner, and the motion to discontinue the restraining order was argued on bill and answers on September 27, 1905.

Without going into the question of the sufficiency of the allegations contained in the bill, we are of the opinion that this restraining order should be discontinued during a further pendency of the rule to show cause why a preliminary injunction should not issue against her, and it is so ordered. Should the petitioner desire to ask for a preliminary injunction, leave is hereby given to amend the bill and to

file such affidavits in support thereof as she may deem necessary, and, upon the filing of such amended bill and proofs in support thereof, the petitioner may again move for a restraining order, should it be deemed necessary.

UNITED STATES v. MITCHELL et al.

(Circuit Court, D. Oregon. September 11, 1905.)

Nos. 2,890, 2,898.

CONSPIRACY—FEDERAL STATUTE—SUFFICIENCY OF INDICTMENT.

An indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], which charges that defendants knowingly, unlawfully, wickedly, and corruptly conspired to defraud the United States out of its title to certain public lands by means of false, fraudulent, and fictitious entries of the same under the land laws, and that in pursuance of, and to effect the object of, such conspiracy, certain acts set forth were committed by one or more of the defendants, is not insufficient, because it does not expressly aver that such acts were done with knowledge of the fraudulent and illegal character of the entries. The essence of the offense is the conspiracy, and while an overt act is an essential element under the statute, the use of the word "knowingly" in charging the conspiracy must fairly be held to apply to and characterize the acts specifically charged to have been done in furtherance of such conspiracy, and for the purpose of carrying it into effect.

Indictment for conspiracy, under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676]. On demurrer.

See 136 Fed. 896.

Francis J. Heney, for the United States.

John M. Gearin, for defendant Binger Hermann.

HUNT, District Judge. It is charged that on February 1, 1902, defendants conspired and agreed together, knowingly, wickedly, and corruptly to defraud the United States out of the possession and use of, and the title to, divers large tracts of the public lands within Oregon, which lands had been, prior to September 28, 1893, open to entry under the homestead laws, but which were on that day included within the limits of the Cascade Range Forest Reserve by executive order, and withdrawn from settlement and entry, under the laws pertaining to forest reserves. It is alleged that the said unlawful conspiracy to defraud the United States was one for obtaining, for the profit and benefit of defendants, and appropriating the possession and use of, and title to, and the proceeds of the sale of, the lands, as set forth, by means and in pursuance of a certain false, fraudulent, and corrupt practice of them, the said defendants—

"Whereby, relying upon the fact that the said Binger Hermann, as, and who then was, Commissioner of the General Land Office of the said United States, had the power to recommend and secure the issuance of patents conveying title in such lands from the said United States to entrymen under the said homestead laws, in cases where the records of the said land office and General Land Office showed that homestead entries had been made upon the same prior to the day last aforesaid, and that the persons appearing to have made such entries had continued to reside upon and cultivate such

lands, notwithstanding such entries might be false and fraudulent, and relying also upon the fact that titles so obtained under such patents could be sold to persons who might want to relinquish the same to the said United States, as was and is allowed by law, in exchange for better lands, lying outside of the limits of the said forest reserve, they, the said John H. Mitchell, Binger Hermann, Stephen A. D. Puter, Horace G. McKinley, Emma L. Watson, Dan W. Tarpley, Elbert K. Brown, Mrs. Nellie Brown, Henry A. Young, Frank H. Walgamot, Clark. E. Loomis, and Salmon B. Ormsby, were to take advantage of the fact that there had been made and had been filed in the land office of the said United States at Oregon City, aforesaid, divers false and fraudulent applications and affidavits in writing for the entry of the said lands under the said homestead laws as and for applications and affidavits of bona fide settlers upon the said lands, and divers false and fraudulent affidavits as and for affidavits of final proof of the settlement of such persons upon the said lands at a time prior to their said inclusion within the limits of the said forest reserve and to their said withdrawal from entry, and of residence by such settlers upon, and their cultivation of, the same lands, in pursuance of and subsequent to such settlement, as is required by the said homestead laws—false and fraudulent, in this: that some of such applications and affidavits were made in and under assumed names of persons executing the same or causing the same to be executed, and none of such applications and affidavits was made by a person who had in fact settled upon the said lands prior to their said inclusion within the limits of the said forest reserve and to their said withdrawal from entry, or who had at any time resided upon, or in any manner cultivated or improved, the said lands, and were, directly, or through intermediate conveyances, to acquire such titles from the said United States in the name of the said Emma L. Watson, and, by and through her, to sell and dispose of the same so that they would finally become the property of persons who would have no knowledge of the fact that they were so unlawfully and fraudulently obtained from the said United States. * * * That, in pursuance of the said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, and by means thereof to defraud the said United States out of the possession and use of and title to a certain tract of the said public lands, that is to say, the northeast quarter of section thirty-two in the said township and range, containing one hundred and sixty acres of land, to enter and obtain title to which said tract an application and affidavits of the kinds aforesaid, respectively false and fraudulent in the particulars aforesaid, had, before the day in this indictment first aforesaid been filed in the said land office at Oregon City in the name of Emma Porter, that being an assumed name of the said Emma L. Watson. The said Salmon B. Ormsby afterwards, to wit, on the fourth day of February, in the same year nineteen hundred and two, at the city of Salem, in the said district of Oregon, unlawfully did make and execute a certain jurat, to wit, a jurat of the tenor following:

"'Subscribed and sworn to before me this 4th day of February, 1902, S. B. Ormsby, Forest Superintendent,' upon and to a certain deposition of one L. Jacobs concerning the supposed settlement and residence upon the same lands by Emma Porter."

Other overt acts are alleged, of a similar nature to that just described.

It is also alleged that, in pursuance of the said unlawful conspiracy and agreement, and to effect the object of the same, and by means thereof to defraud the United States out of the possession and use of and title to all of the tracts of public lands described in the indictment, the said John H. Mitchell, on March 3, 1902, at the city of Washington, unlawfully did prepare a certain written affidavit for the said Emma L. Watson to sign and swear to. This affidavit, made by Mrs. Emma L. Watson, substantially states that she owned by purchase certain described

lands; that she paid in the aggregate for them a little over $8,000; that when she bought she was advised that the titles were good, except that patents had not issued, but would be issued at a very early date, in the regular course of business; that, in order to raise money to purchase the lands, she had borrowed a large sum of money, and that she would suffer great injury unless her rights could be determined by the Interior Department at Washington; that all of the lands bought were homestead entries, and that she believed they were all made without fraud or other cause which would stand in the way of the issuance to the entrymen of patents to the lands—wherefore she asked speedy examination and action. The indictment contains another affidavit, made by defendant Puter, wherein he states that he was the representative of Mrs. Watson in investing her money, and that he advised her to buy the lands, and assured her that the titles were good, except that patents had not issued, and that he was put in an embarrassing position, as there was some delay, and certain attacks were made on a portion of the entries described, and that it was a matter of much importance to Mrs. Watson and himself that there be a speedy determination of the homestead entries. It is charged that on March 3, 1902, at Washington, D. C., defendant Puter did pay to John H. Mitchell the sum of $2,000 in furtherance of the conspiracy and to effect the object thereof; also that said John H. Mitchell afterwards, on March 10, 1902, at Washington, did introduce defendant Puter to one William A. Richards, who was then an assistant commissioner of the General Land Office, and then and there did commend the said Puter to the said Richards as one of the most reliable citizens of the state of Oregon. It is also averred that, in pursuance of the unlawful conspiracy and agreement, and to effect the object of the same, the defendant Emma L. Watson, on May 5, 1902, did execute a deed to one Frederick A. Kribs covering all of the tracts of land described in the indictment.

The point urged is that a scienter is not alleged, in that it is not charged that these defendants knew that the lands entered were falsely and fraudulently entered. The indictment is for conspiracy to defraud the United States, as denounced in section 5440, Rev. St. [U. S. Comp. St. 1901, p. 3676]. The essence of the offense charged is the conspiracy, although the statute requires not only a conspiracy, but the doing of some act to effect its object; such act being one of the means by which the conspiracy is sought to be carried into effect. Now the charge here is that defendants unlawfully conspired, knowingly, wickedly, and corruptly to defraud the United States out of title to certain lands, with an object and by certain means, that is, by certain acts by which the conspiracy was to be carried into effect. To have conspired knowingly, unlawfully, wickedly, and corruptly to acquire the lands described is a complete offense of conspiracy if any act was done to carry into effect the object of such conspiracy. Without the doing of the act to carry out the object of the conspiracy, there would be no crime; yet we must not lose sight of the fact that, while the doing of the act is essential, it is nevertheless but a means by which the conspiracy is sought to be made effective.

As I understand the reasoning and decision of the Supreme Court in

Dealy v. United States, 152 U. S. 542, 14 Sup. Ct. 680, 38 L. Ed. 545, it is that in an indictment for conspiracy to defraud in cases involving entries of public lands under section 5440, it is only necessary to allege that defendants did falsely, unlawfully, and wickedly conspire, combine, confederate, and agree together to defraud the United States of the title and possession of large tracts of public lands by means of false, feigned, illegal, and fictitious entries of the lands under the homestead laws (the lands being public lands, and open to entry under the homestead laws at the proper local land office); and that, according to and in pursuance of the conspiracy so charged, the defendants have done an act to carry into effect the object. It is true that in the indictment discussed in the Dealy Case it was alleged that the overt act done was the persuading of a person to make a filing and proof on certain lands upon which such person, as defendants well knew, had never made settlement, improvement, or residence; but, the indictment having previously charged that defendants unlawfully, falsely, and wickedly conspired, I do not believe the court regarded the particular use of the words alleging knowledge as essential to the portion of the pleading which averred particular facts connected solely with the doing of the overt act, which was but a means by which the conspiracy was sought to be carried into effect.

In the indictment under examination, we find that it is distinctly charged that defendants knowingly, wickedly, and corruptly conspired to defraud the United States out of title to certain public lands. Overt acts or means are then set forth. The language of the charge excludes the idea of any unintentional wrong, and the word "knowingly" as used may fairly be regarded as qualifying the acts subsequently stated, including the doing of those by which the conspiracy was to be carried into effect. Analogies are to be found in the opinions of the Supreme Court of the United States. In Dunbar v. United States, 156 U. S. 186, 15 Sup. Ct. 325, 39 L. Ed. 390, indictments were presented charging defendant with the crime of smuggling, under section 2865, Rev. St. [U. S. Comp. St. 1901, p. 1905]. The statute provides as follows:

"If any person shall knowingly and willfully, with intent to defraud the revenues of the United States, smuggle or clandestinely introduce into the United States any goods, wares or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty * * * every such person * * * shall be deemed guilty," etc.

The charge in one of the counts of one of the indictments was that the defendant willfully, unlawfully, and knowingly, and with intent to defraud the revenues of the United States, did smuggle and clandestinely introduce into the United States certain goods, wares, and merchandise, describing them, and which should have been invoiced, without paying or accounting for the duty, or any part thereof.

Another section of the statute (section 3082 [U. S. Comp. St. 1901, p. 2014]) provides:

"If any person shall fraudulently or knowingly import into the United States, or assist in so doing, any merchandise contrary to law, or shall receive, or in any manner facilitate the transportation, or concealment or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited, and the offender shall be fined," etc.

The substance of certain counts of the second indictment was that the defendant did willfully, unlawfully, and knowingly, and with intent to defraud the revenues of the United States, smuggle and clandestinely introduce into the United States certain amounts of prepared opium.

The ninth count of the second indictment in the Dunbar Case charged that on the 5th day of February, 1893, the defendant did willfully, unlawfully, fraudulently, and knowingly, and with intent to defraud the revenues of the United States, facilitate the transportation, after importation, of a large quantity of prepared opium, which was subject to a duty by law, and which should have been invoiced, and which prepared opium, on said 5th day of February, 1893, had been knowingly, willfully, unlawfully, and fraudulently brought, imported, smuggled, and clandestinely introduced into the United States, and upon which no duty had been paid or accounted for according to law, and that none of said prepared opium had been invoiced; the defendant then and there well knowing that no duty had been paid or accounted for according to law on said opium, and that none of said opium had been invoiced, and that the same, and the whole thereof, had been unlawfully, willfully, knowingly, and fraudulently brought, imported, smuggled, and clandestinely introduced into the United States. It was there alleged that all the counts except the ninth were bad, because a scienter was not alleged. No objection was made to the ninth count, because it was conceded that it averred a knowledge of the fact that the opium had been imported into the United States; but in the other counts such knowledge was not directly averred in language similar to that used in the ninth count.

The Supreme Court, by Justice Brewer, stated that the indictment had been carefully examined, and that none of the criticisms which were based upon a lack of allegation of knowledge were well taken:

"They charge that the defendant did 'willfully, unlawfully, and knowingly, and with intent to defraud the revenues of the United States, smuggle and clandestinely introduce into the United States,' the prepared opium. It is stated in 1 Bish. Crim. Proc. (3d Ed.) § 504, that the words 'knowingly' or 'well knowing' will supply the place of a positive averment that the defendant knew the fact subsequently stated; and to like effect are the authorities generally. The language of the indictment quoted excludes the idea of any unintentional and ignorant bringing into the country of prepared opium upon which the duty had not been paid, and is satisfied only by proof that such bringing in was done intentionally, knowingly, and with intent to defraud the revenues of the United States. Indeed, the word 'smuggling' as used carries with it the implication of knowledge. In Bouvier, vol. 2, p. 528, smuggling is defined: 'The fraudulent taking into a country or out of it merchandise which is lawfully prohibited.' We have, therefore, both the use of a term which implies intentional misconduct and a specific averment that what was done was done willfully, knowingly, and with intent to defraud. * * * An intent to defraud the revenues implies an intent to deprive such revenues of something that is lawfully due them, and there can be no such intent without knowledge of the fact that there is something due. So, when the charge is made that the defendant willfully, unlawfully, and knowingly, and with intent to defraud the revenues of the United States, smuggled and clandestinely introduced into the United States prepared opium, it carries with it a direct averment that he knew that the duties were not fully paid, and that he was seeking to bring such goods into the United States without their just contribution to the revenues. For these reasons, we think that this objection to the indictment also fails."

In Price v. United States, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727, defendant was indicted and convicted for depositing in the mails obscene, lewd, and lascivious matter. The sufficiency of the indictment was attacked upon the ground that there was no direct allegation that the defendant knew that the book that he deposited in the mail was obscene or lewd or lascivious; the only charge being that he knowingly deposited a book, the contents of which were, as a matter of fact, lewd and lascivious, the point being the alleged absence of any charge that he knowingly deposited a book which in fact was obscene, lascivious, and lewd, and which he knew was of that character. The court, through Justice Peckham, held that there was no force in the contention. He said:

"The plain meaning of the indictment is that the defendant deposited in the mail a book which he knew to be obscene, and that in truth it was obscene."

After approving of the decision in Rosen's Case, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606, the court continued:

"In that case we held that the general charge that the defendant unlawfully, willfully, and knowingly deposited and caused to be deposited in the post office a certain obscene, lewd, and lascivious paper, as therein described, might not unreasonably be construed as meaning that the defendant was and must have been aware of the nature of its contents at the time he caused it to be put into the post office for transmission and delivery. Mr. Justice Harlan, in delivering the opinion of the court in that case, said: 'Of course he did not understand the government as claiming that the mere depositing in the post office of an obscene, lewd, and lascivious paper was an offense under the statute, if the person so depositing it had neither knowledge nor notice at the time of its character or contents. He must have understood, from the words of the indictment, that the government imputed to him knowledge or notice of the contents of the paper so deposited. In their ordinary acceptation, the words "unlawfully, willfully, and knowingly," when applied to an act or thing done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing; and, when used in an indictment in connection with the charge of having deposited in the mails an obscene, lewd, and lascivious paper, contrary to the statute in such case made and provided, could not have been construed as applying to the mere depositing in the mail of a paper, the contents of which at the time were wholly unknown to the person depositing it. The case is, therefore, not one of total omission from the indictment of an essential averment, but, at most, one of inaccurate or imperfect statement of a fact; and such statement, after verdict, may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused.' * * *"

Like rulings were made in United States v. Fulkerson (D. C.) 74 Fed. 619; United States v. Nathan (D. C.) 61 Fed. 936; Blake v. United States, 71 Fed. 286, 18 C. C. A. 117.

My conclusion is that, considering all the language of this indictment, while it is not as direct as it might be in form, yet in its substantial averments it is sufficiently clear as against general demurrer, and that it well enough informs the defendants that they are charged with conspiracy to defraud, and with the doing of overt acts to effect the object of the conspiracy. They must therefore plead to the merits.

FLINN et al. v. INTERSTATE BUILDING & LOAN ASS'N OF ATLANTA, GA.

SCOTT v. EARLE et al.

(Circuit Court, D. South Carolina. November 17, 1905.)

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—SETTLEMENT WITH BORROWING STOCKHOLDERS.

Defendants were borrowing members of a building and loan association, and executed bonds which required them to make stipulated monthly payments, a stated part being for stock dues, another for interest, and a further sum as premium on the loans. The bond also contained a provision: "Upon final settlement with the association, it to retain as installments on said stock and interests no greater sum than the sum actually advanced with interest thereon at the rate of 8 per cent. per annum." The association became insolvent; defendants having made the required payments to that time. *Held* that, on settlement between them and its receiver under such provision of the contract, the rule of partial payments applied, and defendants were entitled to credit for the full amount of each monthly payment, whether made for dues, interest, or premium.

In Equity. On petitions of receiver for foreclosure of mortgages.

W. D. Ellis, W. A. Wimbish, and T. W. Bacot, for receiver.

S. J. Simpson, J. T. Hay, Haynsworth & Patterson, McCullough & McSwain, Wilson & Wilson, and W. R. Richey, for defendants.

BRAWLEY, District Judge. These are eight separate proceedings in equity for the collection of certain bonds and foreclosure of mortgages, given by the defendants above named, which for convenience have been heard together. The plaintiff is the receiver, appointed in the Circuit Court of the United States for the northern district of Georgia, December 31, 1900, of the Interstate Building & Loan Association of Atlanta, in proceedings in equity commenced by certain stockholders, alleging, among other things, the insolvency of said association, the failure of its plan as a building association, and its inability to continue a going concern. Ancillary proceedings were in due course commenced in this circuit, and the receiver, having duly qualified under the original and ancillary bill, is administering the estate as an entirety. He has filed petitions in this court against the eight defendants above named, separately, praying the foreclosure of certain mortgages. Testimony has been taken, and the case is before me upon the report of Julius H. Heyward, Esq., standing master, and exceptions thereto. The cases have been heard together, and, as there is one question common to all of them, that will now be considered, as it will be practically decisive of all the cases; there being one case, however, in which a separate question was involved, which will be considered in due course. The main question in the cause relates to the credits to be allowed upon the bonds sued on. In the printed argument submitted by the counsel for the receiver it is said:

"It should be observed at the outset, and borne in mind throughout, that these are not suits for foreclosure by a going and solvent building and loan association, under the conduct and control of its own regular officers, elected

according to its own by-laws and rules; but they are equitable proceedings by a receiver of this court, which court is winding up the affairs of an insolvent building and loan association for the benefit of all, and all claims of its shareholders or stockholders."

The question arises upon the construction of a written contract which is somewhat peculiar in the circumstances which gave rise to it, and in its terms, and much of the learning of which the Reports are full, relating to building and loan contracts generally, is of little pertinence. It appears from the statement of the learned counsel for the receiver that these contracts were prepared under the advice of counsel for building and loan associations, with a special view of meeting the objections which had theretofore been urged against the various building and loan contracts, which the Supreme Court of South Carolina had adjudged to be obnoxious to the usury laws of this state. Allusion is made to this feature in an opinion of the Circuit Court of Appeals of this circuit, which will be hereafter referred to.

All of the bonds sued on are on printed blanks, and are of like tenor. Taking the bond of E. A. Young, one of the defendants, as an example, so much thereof as is essential to an understanding of the question will be quoted. Young became the owner and holder of 15 shares of stock in the association in September, 1895, and in October of the same year borrowed from the association $1,500, and as collateral security transferred and assigned his shares of stock to the association, and as additional security mortgaged a certain tract or parcel of land in the county of Kershaw, in this state, which land was subsequently sold to one Smith who continued to make the payments which Young had agreed to make.

After reciting the loan, the bond is as follows.

"Now, the condition of the above obligation is such that if the above bound E. A. Young, or his heirs, executors, or administrators, do well and truly pay or cause to be paid to said association, so long as it shall continue to exist, or as may be provided in its by-laws, rules, and regulations, the sum of $24 monthly (of which the sum of $9 is for installments due on said 15 shares of stock, and the sum of $7.50 is for the interest on the sum actually advanced, and the further sum of $7.50 is for premium on the sum actually advanced), all of which said sums of $24 is to be paid on or before the 1st to the 5th day of each and every month, and shall perform the covenants contained in the mortgage or other instrument of writing securing this bond, and, if this bond be collected by suit, shall pay the additional sum of 10 per cent. on the amount due as counsel fees, and shall stand to and abide by the by-laws, rules, and regulations of said association (upon final settlement with the association, it to retain as installments on said stock and interests no greater sum than the sum actually advanced, with interest thereon at the rate of 8 per cent. per annum), then this obligation to be void and of none effect; or else to remain of full force and virtue."

It appears from the testimony that all the payments, with dues, interest, and premium, were regularly paid up to January 1, 1901, there being 61 payments of dues, and 60 payments of interest and premiums, and that there were certain payments made after the receivership, which were carried as a ledger credit, and that he was never in default as to his monthly payments. The total amount of such payments appears to be $1,539.

There is a long line of decisions in South Carolina, in building and

loan cases, beginning with Bollinger's Case, 12 Rich. Eq., 124, 78 Am. Dec. 463, holding that the borrower is entitled to credit on his loan all payments made, whether of stock dues, interest, premiums, in whatever form or guise, and if the aggregate of such payments in any year exceeds the legal rate of interest the transaction was treated as usurious; one of the judges alluding to the monthly payment called "premium" as "simply interest in attempted disguise," and all being treated as modes of payment of the borrower to be credited as of the time of payment, with interest adjusted or calculated according to the rule of partial payments. The Supreme Court of the state, in Gillison's Case, decided in 1887 (28 S. C. 544, 6 S. E. 333), reviews some of these cases, and, referring to the contract then considered, says that it is "of a very different character, and under it in no view of the case could the appellant be required to pay more than the rate of interest allowed by law, and hence there was no usury in it."

Such was the state of the law in South Carolina at the time when, as stated, the building and loan associations, under advice of counsel, prepared a form of contract which would not be obnoxious to the taint of usury, and evidently having in view Gillison's Case, where the court held that there was no usury if in any view of the case the party could not be required to pay more than the rate of interest allowed by law. This form of contract was then adopted, wherein it was provided that the association, upon final settlement, could "retain as installments on said stock and interests no greater sum than the sum actually advanced, with interest thereon at the rate of 8 per cent. per annum"; the law of the state then providing that by special contract 8 per cent. might be charged for the use of money. A similar contract was considered by the Circuit Court of Appeals in Interstate Building & Loan Association v. Edgefield Hotel Company, 134 Fed. 75, 67 C. C. A. 200. In that case the borrower obtained a loan of $6,000, and to do this had subscribed for 120 shares of stock, amounting at par value to $12,000, and had made 74 monthly payments of $102 each; $72 as installment on the stock, and $30 as interest. The court in its opinion says:

"There was, however, inserted in the bond, to meet certain decisions of the courts of South Carolina with regard to usury in building association mortgages, the following important stipulation, namely: 'It is further understood that upon final settlement with the association it shall retain as installments on said stock and interest no greater sum than the amount actually advanced, with interest thereon at the rate of 8 per cent. per annum.' * * * Very little light is obtainable on this question from adjudications in building association cases, as the stipulation by which the settlement in this case is controlled is unusual. It is urged by the appellant that as the monthly installments were not paid in reduction of the loan, but were primarily paid by the hotel company as shareholder, for the purpose of maturing its stock, and not as payments to be applied to its loan, and were payments on shares made as well by those who did not procure loans as by those who did, it is not consistent with justice or the contract of the parties that the installment payments should be applied to the loan. There would be force in this contention if the relation of the hotel company to the building association had remained that of the borrowing stockholder, obliged to continue its installments until its stock matured; but the stipulation that the building association in final settlement should not retain of the installment and interest paid

more than the amount actually advanced and 8 per cent. interest, recognizes that in the final settlement the borrowing stockholder may elect to be treated as a borrower simply, and settle as the borrower would settle with the lender. Without restrictive stipulation the borrowing stockholder might not be able to escape from his relation of stockholder, no matter how many years it might require to mature the stock, nor how excessive the rate of interest might become. To avoid this possible result, and to accord with the decisions in South Carolina, the stipulation was inserted for the borrower's protection in a contract prepared by the building association. Under such a contract prepared by the lender, if there is ambiguity, then by the established rule it is to be construed favorably to the party who, in order to obtain a loan at an exceptional rate of interest, is required to sign a contract, the stipulations of which are prepared by the other party to it. But we do not think that there is any ambiguity. What, under ordinary circumstances, would be the meaning of a stipulation that the lender should not retain out of the payments made to him more than the amount actually advanced with interest at 8 per cent.? It would, we think, be understood to mean that the lender should receive back the money advanced, and, for the use of his money while the borrower had it, 8 per cent. interest, and no more. If in this case the building association should receive the amount advanced, and 8 per cent. interest on it for the whole period of over six years, until the last payment was made, it would have had, in addition to 8 per cent. interest, the use of all the sums which in monthly payments during six years the borrower has paid back, and the use of which the borrower did not have. This would be greatly in excess of 8 per cent. interest. The rule to be applied in such a case between borrower and lender is the rule of partial payments, by which the excess of every payment made over the interest then accrued is applied in reduction of the principal, and the subsequent interest computed on the principal so reduced. Woodward v. Jewell, 140 U. S. 247, 248, 11 Sup. Ct. 784, 35 L. Ed. 478. The stipulation in this case clearly states, in unmistakable language, that out of the installments and interest paid by the borrower the building association shall retain on final settlement no more than the amount advanced, with interest thereon at 8 per cent."

It will be seen that Judge Morris, who wrote the opinion in this case, says that the stipulation above cited recognizes that in the final settlement the borrowing stockholder may elect to be treated as a borrower simply, and settle as a borrower would settle with a lender.

The Supreme Court of South Carolina, in Bird v. Kendall, 62 S. C. 192, 40 S. E. 147, says:

"When a person subscribes for shares of stock and becomes a member of a building and loan association, and thereafter borrows money from the association, pledging his shares of stock to secure its payment, he thereby practically ceases to be a member of the association. The new relation between him and the association is that of debtor and creditor, and it can only recover the principal sum loaned, together with the legal rate of interest."

It will be observed that in the case of the Edgefield Hotel Company the amount credited on the loan was "installments on said stock and interest." There was no premium eo nomine, for in that case the hotel company, in order to borrow $6,000, subscribed for stock of the par value of $12,000, so that his monthly payments were all on account of installments.

In the case of Young his subscription was for 15 shares of stock of the par value of $1,500, and the amount borrowed was $1,500. The monthly payments, by the stipulation of the bond, are "the sum of $24 monthly." Then there follows in parenthesis a statement of the manner in which the $24 is made up, as follows: "(Of which the sum of

$9 is for installment due on said 15 shares of stock, and the sum of $7.50 is for interest on the sum actually advanced, and the further sum of $7.50 is for premium on the sum actually advanced.)" Twelve months' interest at $7.50 per month is $90, which is equal to 6 per cent. on $1,500, and the further sum of $7.50 per month, payable as premium, would make the total annual charge on the loan, exclusive of the installment on the stock, $180, which is 12 per cent. Bearing in mind that the premium had been defined by the courts in South Carolina as "interest under another guise," the draftsmen of this form of contract, doubtless apprehensive that the courts would hold such a contract to be usurious, or that the borrower might not bite at the hook baited for him, undertook to meet this difficulty by providing in the last clause of the bond: "Upon the final settlement with the association, it to retain as installments on said stock and interests no greater sum than the sum actually advanced, with interest thereon at the rate of 8 per cent. per annum."

The referee holds that the final "s" in "interests" is a typographical error, but there is no testimony whatever to that effect. It is at the least highly improbable that the careful and astute counsel for the building and loan association, who prepared this form of bond, would overlook a word of such importance in that clause of the bond which related to the subject on which their opinion was especially asked, to wit, that clause which was to safeguard the contract against the decisions in South Carolina on the subject of interest, and it is therefore more probable that they used the plural noun, so that it might cover not only interest eo nomine, but "interest in the shape of premiums," which the court had already held to be "interest under another guise." If there is any ambiguity, the well-settled rule would require the construction most favorable to the borrower, as against the party who prepared the instrument. But is there any principle upon which payments on account of premium should be differentiated from any other payments made by the borrower? In a going concern it might be contended that payments on account of installments of stock and on account of premium would be considered as payments qua stockholder, and not as borrower simply. It is not necessary to go into all the learning on that subject, where there is a great diversity of opinion; but where the original contract between the association and the borrower cannot be carried out, where the enterprise has been prematurely abandoned, where the default is not with the borrower, but with the lender, the relation between the borrowing member is changed to the one existing between the ordinary creditor and debtor, and the borrowing member is to be charged with the amount actually received by him, with interest at the legal rate to date, and credited with all payments made, whether by way of dues, interest, or premium, according to the rules governing partial payments. I have already cited the case in South Carolina which holds that, where the borrower transfers and assigns his stock to the corporation and obtains a loan from it, his relation is simply that of debtor to creditor, and the opinion in the Edgefield Hotel Case, already cited, is to the same effect, although in that case the building and loan association

was not insolvent. In Georgia, City Loan, etc., Association v. Goodrich, 48 Ga. 445, supports the view just above stated, and other cases on the same line are collated in 4 A. & E. Ency. of Law, p. 1081. After all, what is meant by the word "premium," as used here? Webster's Dictionary gives as one definition of the word:

"Something offered or given for the loan of money, sometimes synonymous with interest, but generally signifying a sum in advance of the capital or sum lent."

Generally speaking, the word, as used in relation to building and loan associations, is the bonus which the borrowing member agrees to pay for the privilege of obtaining the money. In the beginning of these associations, whenever the association had accumulated a fund, it was put up at auction, and members bid for it, and the difference between the par value of his stock and the actual amount advanced to him was called the premium. The loan to Young was not made in that way. He borrowed from the association a sum equal to the par value of his stock, and his monthly payment was the gross sum of $24, a part being for the installment on his stock, a part for interest, and the "further sum," which was called premium. One can readily understand the contention that a borrower of a building and loan association occupies the dual relation of debtor and shareholder, and that as such it may be plausibly contended that to put the nonborrower and the borrower on the same footing he should be entitled to credit for the amount paid as interest only, and that as to all other payments he should stand in the same relation with other shareholders who are nonborrowers, getting such return as he may pro rata with other shareholders from the dues paid on the value of his stock; but such is not the contention here, for it is admitted that the borrower is entitled to credit on his loan for all payments made by way of installments on his stock, and the learned counsel for the receiver has submitted no argument from which I can draw any distinction in principle between the right of the borrower to credit for the amount paid as installments, and the amount paid for so-called premium. Their case rests solely upon the decision of the late Judge Simonton in the Alexander Case (C. C.) 120 Fed. 963. This opinion, in so far as it relates to this question, is in two lines, as follows:

"The words are 'installments on said stock and interest.' The words exclude the payments on account of premium."

There is no discussion whatsoever of the question now being considered. So far as appears, the only questions maturely considered were whether the contract was to be construed according to the law of Georgia, or of South Carolina, and whether or not it was usurious. The precise question now under consideration is nowhere discussed in the opinion, which in two lines disposes of the question before him, in holding that by the literal reading of the words of the contract, "installments on said stock and interest," payments on account of premium are not included. In that contract the word used was "interest"; in this, it is "interests."

While I do not consider that this opinion is absolutely binding and conclusive upon me in any case where I am called upon to exer-

cise an independent judgment, my respect for that learned judge would lead me to gravely doubt the correctness of any judgment differing with his upon a question to which he had given mature consideration and announced a carefully considered opinion. The summary disposal of the question then before him in the two lines quoted does not lead to the conclusion that upon the precise question now to be determined his judgment would differ with my own; for in Interstate Building & Loan Association v. Edgefield Hotel Company, reported in the same volume, page 427, he says:

"In this court, however, the defendant will be allowed to take the most favorable alternative, and to make a final settlement by estimating the amount due on the loan with interest from its date at 8 per cent. per annum, until date of settlement, and credit it with all payments made on account of interest and stock."

Under that rule, where his carefully considered opinion was subsequently affirmed by the Circuit Court of Appeals, the defendants here are entitled to credit for all "payments made on account of interest and stock." If the premium here paid was not on account of interest, or "interest in disguise," it certainly was made on account of stock. In either view it was a payment made on account of the loan, and in the final settlement the lender, by the terms of his contract, is not entitled to receive anything more than the principal loaned, with interest thereon at the rate of 8 per cent. per annum.

If the payments made under the head of "premium" had been segregated and devoted to some specific purpose, there might be some ground for distinguishing such payments from those made on account of installments on stock and interest; but this is not the case. Upon each certificate of stock there is printed certain "terms and conditions." The third is as follows:

"Fifty cents of each monthly payment and all interest, premiums, and forfeitures, shall go into the loan fund, and can be used for no other purpose than loans."

And the testimony of the receiver in these cases is that the "premiums" and "interest" "went to swell the loan fund." These citations from the "terms and conditions" and from the testimony dispose of the contention of plaintiff's counsel, on page 15 of the brief submitted, "that the premiums went into the common venture, while the installments on stock and the interest on the money went directly to canceling the stock and paying the interest, so as to eventually cancel the loan"; for both by the printed rules and in actual practice payments on account of installments on stock, on account of interest, and on account of premiums, went into a common fund, to wit, the "loan fund."

It seems to me clear that all the payments made by the several borrowers in these cases should be credited upon their loans according to the established rules of partial payments, that they became shareholders primarily for the purpose of obtaining the loans, that having complied with all the by-laws, rules, and regulations of the association in making the monthly payments stipulated, and being in nowise in default or chargeable with the premature failure of the associa-

tion, it is entitled upon final settlement by the terms of the contract to "no greater sum than the sum actually advanced, with interest thereon at the rate of 8 per cent per annum."

It follows, therefore, that the report of the referee disallowing payments made as premiums is reversed, and the case is remanded, with directions to state the accounts in accordance with this opinion; and as it is believed that the allowance of the additional credits will show that the loans have been paid in full, it becomes unnecessary to decide whether the plaintiff is entitled to the 10 per cent. claimed as counsel fees. So much of the report of the referee as relates to the cases against Anna E. Hart and C. B. Simmons is affirmed.

EMPLOYERS' TEAMING CO. v. TEAMSTERS' JOINT COUNCIL et al.

(Circuit Court, N. D. Illinois, E. D. December 20, 1905.)

No. 27,719.

1. INJUNCTION—DECREE—PERSONS CONCLUDED—VIOLATION OF INJUNCTION BY PERSONS NOT PARTIES.

   Rev. St. § 725 [U. S. Comp. St. 1901, p. 583], which gives to federal courts power to punish as contempts disobedience or resistance by officers, "or by any party, juror, witness or other person, to any lawful writ, process, rule, decree or command of the said courts," extends the power of such a court to enforce its decrees to persons other than those made parties by name; and it is the settled rule thereunder that, to render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit nor have been actually served with a copy of the injunction, so long as he appears to have had actual notice.

2. SAME—PROCEDURE—TITLE OF PROCEEDING.

   Where contempt proceedings for violating an injunction are instituted against a person not a party to the suit in which the injunction was issued, the proper practice is to entitle the application for a rule to show cause in such suit; and, if the respondent is found guilty thereafter, all orders should be entitled as in a suit by the government.

3. SAME—SUFFICIENCY OF PETITION.

   A petition for a rule to show cause why the respondent named therein should not be adjudged guilty of a contempt of court in violating an injunctional order made in a cause to which such respondent is not a party is sufficient to advise the respondent of the charge against him, and to authorize the court to punish him, where it sets out specifically the acts which he is charged as having committed, although such acts bring the case within the criminal and punitive, rather than the civil and remedial, class of contempts, the power of the court to punish a willful disregard of its authority not being restricted by the conclusion of the petitioner to the contrary, and that petitioner should be held for a civil contempt for violation of the injunction.

4. CONTEMPT—ANSWER AS EVIDENCE.

   In a proceeding for contempt in a suit in equity, although the contempt charged is of the criminal class, the sworn answer of the respondent is not conclusive, but may be traversed, whether or not he is a party to the suit.

5. INJUNCTION—VIOLATION—OBSTRUCTING PROCESS OF COURT.

   An order was issued in a suit in equity for an injunction restraining defendants, their agents or servants, and all other persons aiding or abetting or acting in concert with them, or having knowledge of the order,

from interfering with or in any manner hindering, obstructing, or stopping the business of complainant, which was a teaming company. The order was widely published. Copies were posted in public places and placed on each side of all of complainant's wagons, which also bore large signs calling attention thereto. The wagons were also operated under armed guards. In proceedings for contempt against respondent, who was not a party to the suit, it was shown that he was one of the most active in a mob which attacked one of complainant's wagons so placarded and guarded; that he incited others to violence, and himself threw stones at the wagons, teamsters and guards, and assaulted one of the guards while the latter was in charge of the police. *Held*, that he must be deemed to have had knowledge of the order, notwithstanding his sworn general denial of all the allegations of the petition and that he was guilty of contempt in aiding and abetting the defendants in the cause in violating the order of the court and willfully obstructing its process.

In Equity. On motion to attach for contempt.

Moran, Mayer & Meyer, for complainant.
J. C. LeBosky and Daniel Cruise, for defendants.

KOHLSAAT, Circuit Judge. This cause comes before the court on motion to attach certain persons, not made parties to the original bill by name, for contempt of court alleged to have been committed by them, respectively, in that they knowingly violated the restraining order issued in said cause. The decree ran against the defendants named therein, "and each and every of the agents and servants of the said defendants, and of each of them, and any and all other persons and associations now or hereafter aiding or abetting or confederating or acting in concert with said defendants, or any or either of them, in committing the acts and grievances or any of them complained of in said bill of complaint." It directs that its terms be binding upon the defendants named, and "all other persons whomsoever from and after the time they severally have knowledge of the allowance of this order."

The petition for a rule to show cause sets up the filing of the bill in which it is prayed that the original defendants, and each and every of their agents and servants, and any and all other persons and associations, be restrained from interfering with, hindering, obstructing, or stopping any of the business of complainant, and makes further reference to the prayer of the bill. It then recites the decree for an injunction issued in the language of the bill. It proceeds further to set out what steps were taken to convey notice to everybody, including persons in the situation of respondents, and charges, upon information and belief, that respondents had actual knowledge of the decree and its terms. It then sets out the several acts of the several respondents complained of, supporting the same by affidavits, and prays that an order may be entered directing respondents severally to show cause by a short day why they should not severally be attached for contempt for violating "said temporary stay and injunctional order."

Respondents insist that the court is without power to grant the relief asked for in the petition. It is not an easy matter to deduce a definite rule of law in such cases from the various federal decisions. Section 725 of the Revised Statutes of the United States of 1878 [U. S. Comp. St. 1901, p. 583] reads as follows:

"The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said court in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

The language giving the court power to punish the "disobedience or resistance by any such officer, or by any party, juror, witness or other person, to any lawful writ, process, rule, decree or command of the said courts," manifestly extends the power of the court to enforce its decrees to persons other than those made parties by name.

Mr. Justice Brown, speaking for the Supreme Court in Re Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110, lays down the general rule that:

"To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice"—citing High on Injunctions, § 1444; Mead v. Norris, 21 Wis. 310; Wellesley v. Mornington, 11 Beav. 181.

This has been uniformly followed in the federal courts, and is now the well-settled rule. The respondent in that case was an employé of the defendant, but the decision does not seem to rest at all upon that fact. The language both of the statute and the Lennon Case seems broad enough to embrace the facts at bar. As to this, however, the courts seem to be in doubt.

In the Case of Reese, 107 Fed. 942, 47 C. C. A. 87, the Circuit Court of Appeals for the Eighth Circuit had under consideration a motion for the issuance of a rule to show cause, which prayed that such rule issue against Reese, who was not a party to the original suit, to show cause why he should not be attached for contempt for violation of the temporary injunction. It was there charged that Reese had come into Kansas at the head of a column of about 300 men, called "strikers," and had interfered with the men and plant of the party protected by the injunction. The decree ran against the named defendants and "all other persons who have or may combine, confederate, or conspire with said defendants or either of them." Reese had not been served with the order, but was found by the Circuit Court to have had knowledge thereof, and was adjudged guilty of violating the temporary injunction and of contempt of court, and was sentenced to three months' imprisonment. Proceedings for habeas corpus were instituted before Thayer, Circuit Judge, and Reese was discharged. From this order the jailer prosecuted an appeal. It does not appear from the motion for the rule, or otherwise, in the record, that Reese had combined or confederated or conspired with the named defendants. Such being the case, the court held that the act complained of was one against the dignity of the court, and an obstruction of, and interference with, the course of justice; that one not a party to the suit by name or adequate representation is not amen-

able to punishment as for contempt for a violation merely of the injunction at the suit of a private litigant for his protection. "There is nothing in the petition, order to show cause, or commitment," says the court, "remotely suggesting the purpose of the court to punish him for a willful resistence or disregard of the court's authority, or for interfering with or obstructing the course of justice otherwise than the same is involved in violating an express order of the court, alleged to have been made in the case against him. * * * The petitioner, not being a party defendant in the main case, was not subject to the jurisdiction of the court in that case, and the court had no authority to punish him for the offense as charged against him in the motion for commitment, and a fortiori no authority, on that motion, to punish him for some other offense not therein charged against him." In support of this position the court cites the English case of Seaward v. Paterson, 76 Law T. (N. S.) 215. In that case the respondent was adjudged in contempt for knowingly aiding and assisting in doing that which the court had prohibited.

In the case of Phillips v. Detroit, 19 Fed. Cas. 512, Case No. 11,101, Judge, now Justice, Brown, cites approvingly the language of the court in the case of Wellesley v. Earl of Mornington, 11 Beav. 180, in which an injunction was issued against the defendant which did not in terms extend to his servants and agents, and says:

"A motion having been made to commit his agent for a breach of the injunction, it was held irregular, but it was afterwards decided that, if he had knowledge of the writ, he might be committed for the contempt, although not for the breach of the injunction."

The judgment of the court, however, in Phillips v. Detroit, was that respondents were guilty of a violation of the injunction, and they were subjected to the payment of a fine.

In the case of Parsons v. People, 51 Ill. App. 467, the court, speaking through Judge Gary, says:

"That Ida [the respondent] was not one of the board, and therefore not in terms enjoined, does not excuse her disobedience of any injunction, the existence of which she knew [citing Wellesley v. Mornington, supra]. But then the rule upon her should not have been, as it is, to show cause why she 'should not be attached and committed to jail for contempt of court in disobeying the injunction entered in this cause,' etc., but it should have been, as it was as to other parties included in the rule, 'in knowingly and willfully aiding and abetting in disobeying and violating said injunction.'"

In Sloan v. People, 115 Ill. App. 64, the court says of this decision that the decision was not placed upon the ground above stated, but upon a higher ground, and that it should not control.

Judge Baker, in the Indiana District, in Conkey v. Russell (C. C.) 111 Fed. 417, finds nothing in the Reese Case holding that a person not named as a defendant in the main suit, who aids and abets, may not make himself responsible the same as if he had been made a party to the main suit, and therefore proceeded to hold Besette, the respondent, as a violator of the injunctional order as an aider and abettor. On appeal to the Court of Appeals for this Circuit the case was certified to the Supreme Court as to certain questions of practice, where it was held that the act of Besette, which consisted in interference

with the employés of, and those seeking employment with, the Conkey Company, in view of the fact that he was not a party to the main suit, came "more fully within the punitive than the remedial class." Unfortunately no decision on the merits was arrived at in that case. It was, however, held that the matter could be taken to the Appellate Court only by writ of error. In the course of its decision, the court quotes with approval the language of Judge Sanborn, of the Court of Appeals for the Eighth Circuit, in Re Nevitt, 117 Fed. 448, 54 C. C. A. 622, as follows:

"Proceedings for contempt are of two classes—those prosecuted to preserve the power and vindicate the dignity of the court and to punish for disobedience of their orders; and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they are instituted to protect or enforce."

And adds:

"Doubtless the distinction referred to in the quotation is the cause of the difference in the rulings of the various state courts as to the right of review. Manifestly, if one inside of a courtroom disturbs the order of proceedings or is guilty of personal misconduct in the presence of the court, such action may properly be regarded as a contempt of court; yet it is not misconduct in which any individual suitor is especially interested. It is more like an ordinary crime which affects the public at large, and the criminal nature of the act is the dominant feature. On the other hand, if, in the progress of a suit, a party is ordered by the court to abstain from some action which is injurious to the rights of the adverse party, and he disobeys that order, he may also be guilty of contempt, but the personal injury to the party in whose favor the court has made the order gives a remedial character to the contempt proceedings."

The court then proceeds to say:

"It may not be always easy to classify a particular act as being either a punitive or a remedial character. It may partake of the characteristics of both."

In the case of U. S. v. Agler (C. C.) 62 Fed. 824, Judge Baker held that a petition for a rule to show cause which, in the absence of several other allegations referred to, failed to charge respondent, who was not a party to the main case, with aiding the common object, together with other members, is insufficient, and adds:

"I think an injunction that is issued against one man, enjoining and restraining him and all that give aid and abet him, is valid against everybody that aids or gives countenance to the man to whom it is addressed."

The New York Court of Appeals in Rigas v. Livingston, 178 N. Y. 20, 70 N. E. 107, holds that persons who are not connected in any way with the parties to the action are not restrained by the injunctional order. This seems to be the established rule in that state, based upon the language of the statute.

In Union Pacific Ry. Co. v. Ruef (C. C.) 120 Fed. 116, Judges Mun-

ger and McPherson, after directing certain parties to be dismissed from the case, say:

"But they will be held to have knowledge of this opinion and of the decree herein. And those in any way related in a business way to the other defendants, those who are servants, agents, or employés of the defendants who are enjoined, and those who are fellows or companions of defendants, who are strikers, are and will be bound by the writ of injunction issued herein to the same extent and as fully as if named in the writ. * * * And any action by those dismissed from the case, as well as others, in any way in conflict or in violation of the writ of injunction, will subject themselves to the same penalties as though they were named in the writ of injunction."

In Chisholm v. Caines (C. C.) 121 Fed. 397, it is held that a person not a party to the suit may be in contempt either by aiding or abetting a party to the suit in disobeying or resisting the injunction, or by independently and intentionally interfering with, and preventing the execution of, the decree of the court, thereby thwarting the administration of justice, rendering nugatory its action, and contemning the authority of the court. The proceeding for contempt was based upon a petition which simply stated the facts and alleged a violation of the injunction. Respondents, in their answer, denied the jurisdiction of the court upon the ground that they were not parties to the suit, and that the injunction was asked solely for the individual benefit and protection of complainants. The court held the return insufficient, thereby holding in substance that the petition was sufficient as a basis for contempt proceedings against respondents, not as parties to the suit, but as interfering with, and obstructing the course of, justice.

In the case of O'Brien v. People (decided by the Supreme Court of Illinois, June 23, 1905) 75 N. E. 108, it appears that certain persons, some of whom were not parties to the suit, were attached and found guilty of violating the injunction, and were punished by the lower court. The cause was taken to the Supreme Court on writ of error. They were held upon a petition which charged that they knowingly and deliberately violated the injunction. It was, among other things, insisted that the petition and affidavits upon which the contempt proceedings were based were insufficient, and that they did not clearly advise respondents of the offense with which they were charged. The court held that respondents were not entitled to a specific bill of particulars, and that it was not necessary to set out the charge with the same particularity that would be required in an indictment, citing 1 Bishop's Crim. Proc. § 643. After defining the several kinds of contempt proceedings the court holds that the bill was for the protection of the business of complainants; that while the acts complained of incidentally assailed the dignity of the law, and the order of the court had been violated, that was merely incidental to the rights of private individuals; that the proceeding was civil and in no sense criminal. The facts in this case are in substance like those in the case at bar. The distinction between those made parties and those not so made, and whether in the latter case respondents could be held the same as if made parties to the main bill, was not specifically raised.

A careful review of the subject leads to the conclusion that the acts as charged against the respondents come, as Justice Brewer says

in the Besette Case, 24 Sup. Ct. 665, 48 L. Ed. 997, "more fully within the punitive than the remedial class." See, also, In re Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072. That being so, and assuming the acts alleged to be proven, is the petition for a rule sufficient to justify the court in finding respondents guilty of contempt and punishing them therefor? The decision in the Reese Case, supra, seems to me to hold clearly that it is not, if the contempt is to be treated as criminal, and respondent not within the class of the parties made defendants. The learned judge who wrote that opinion treats the petition as in the nature of, and practically like, an indictment, and holds that respondent was entitled to be advised of the charge against him, which, he states, was not affected by the petition for the rule in that case. While it is doubtless true that a respondent is entitled to be advised of the charge he is to meet, it is also true that such a requirement goes rather to the facts to be established than to the kind of proceeding in which such facts are to be reviewed by the court. The petition herein was presented in the cause pending in equity. The proceeding, while properly of a punitive nature, was also in aid of complainants in the case. It came under that class of actions which the cases supra hold to partake of both a punitive and a civil or remedial character. The same facts are sufficient to establish respondents' guilt in either case. Did the petition in question and the accompanying affidavits advise respondents of all the matters requisite to their defense? Certainly, so far as the evidence was concerned, the facts relied on as constituting the contempt were fully set out. It could have been no different whatever the character of the information might be. An adequate return to the rule must be the same in either case. It was proper that the petition be entitled in the equity suit. Where contempt proceedings are instituted against a person not a party to a civil action, the proper practice is to entitle the application for a rule to show cause in the civil action; and, if the respondent is found guilty, thereafter all orders should be entitled as in a suit by the government. U. S. v. Wayne, 28 Fed. Cas. 504, Case No. 16,664, cited in U. S. v. Anonymous (C. C.) 21 Fed. 761; Lester v. People, 150 Ill. 408, 424, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375; Rapalje on Contempt, § 95.

In O'Brien v. People, supra, it was objected that the petition and affidavits upon which the rule was issued were insufficient, for the reason that they did not clearly and specifically inform plaintiffs in error as to the offense with which they were charged. The court says:

"We do not think this position tenable. Courts of chancery have within themselves full power and authority to enforce their official mandates in a summary and effective manner. To say otherwise would render them powerless and inefficient. * * * As we have said, the court had jurisdiction of the persons and the subject-matter of the suit, and issued the injunction, which was not only binding upon the persons who were actual parties defendant to the bill, but was also binding upon all parties who had actual knowledge of the contents of the writ. * * * We are unable to see how it can be successfully maintained that defendants below did not have sufficient notice of the charge made against them to intelligently prepare their defense, if they had any. They were not entitled to a specific bill of particulars, nor was it necessary to set out the charges with the same particularity that would be required

In an indictment. It has often been held that, in an attachment proceeding for contempt alleged to have been committed out of the presence of the court, it should be brought to the attention of the court by an affidavit setting out the particular respects in which the injunction is alleged to have been violated; but that was sufficiently done in this case"—citing 4 Enc. of Pl. & Prac. 776, 780; People v. Diedrich, 141 Ill. 665, 30 N. E. 1038; Oster v. People, 192 Ill. 473, 61 N. E. 469, 56 L. R. A. 462.

The most common, and, in the United States, the almost universal practice in this (proceedings for contempt) matter, is to present to the court an affidavit setting forth the facts and circumstances constituting the alleged contempt. Rapalje on Contempt, § 93. The affidavit may be made on information and belief. Id. § 94. All the facts necessary to constitute the contempt should be stated in the affidavit. Id. § 96. While it is generally required that the rule should be based on an affidavit, still it is not absolutely essential. It is only necessary that the court have sufficient evidence upon which to base the issuance of the rule. Newport v. Newport Light Co., 92 Ky. 449, 17 S. W. 455; In re Daves, 81 N. C. 72; In re Deaton, 105 N. C. 59, 11 S. E. 244; State v. Frew, 24 W. Va. 416, 49 Am. Rep. 257. It would seem to be a very narrow construction of the powers of the court to hold that the mere conclusion of the petitioner that respondent should be held for the violation of the injunctional order as a party to the suit would tie the hands of the court in punishing a willful disregard of its authority. If, as intimated in the Reese Case, supra, there is a distinction to be observed in the terms of the initial proceedings in the several kinds of contempt, it must be also true that in the present case the form of the moving papers, in so far as they might be held to suggest the one course rather than the other, are surplusage, and may and should be ignored by the court. The petition in this case is unmistakable in its language, so that respondents know just what they had to face. It also properly advised the court of the acts to be inquired into, and is, in my judgment, a sufficient foundation for the present proceeding. Moreover, if respondent should be found guilty of aiding or abetting, or confederating or acting in concert with, the named defendants, they come within the class of persons named in and enjoined by the injunctional order, and are therefore violators thereof, within the language of the decisions. They are in effect parties to the cause, at least in the same situation as a named party, so far as concerns a violation of the order, when they are informed of the injunction. Sloan v. People, 115 Ill. App. 64. The same rule is set out in the cases above cited and in People v. Marr (N. Y. Ct. App. May 30, 1905) 74 N. E. 431, 181 N. Y. 463; Anderson v. Indianapolis Drop Forging Co. (Ind. App., Nov. 22, 1904) 72 N. E. 277.

It was contended on the hearing that the case at bar was a criminal contempt, if any, and that respondents were entitled to be discharged on their sworn answers denying the acts charged in the petition. Such has been the rule at common law, but the practice has never obtained in equity. As far back as Blackstone's time it was the well-established rule that the answer of a respondent, in a proceeding for contempt in equity, was not conclusive, but might be traversed. 2 Blackstone's Com. 287, 288. In chancery the answer of a party charged with con-

tempt is not conclusive, and the truth of the answer may be examined into and disproved. Rapalje on Contempt, § 120, and cases cited. In the Matter of Debs (C. C.) 64 Fed. 738, Judge Woods held, citing a large number of authorities, to the effect that:

"In a proceeding for contempt in equity, a sworn answer, however full and unequivocal, is not conclusive."

And in the same case the court says, in answer to the proposition that in such proceeding the answer of a stranger to the suit is conclusive:

"I know of no authority and perceive no reason for treating the answer of a stranger to the bill as conclusive, while the answer of a party to the bill is not conclusive."

In the Matter of Christensen Engineering Company, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072, the court, speaking by Mr. Chief Justice Fuller, says of Ex parte Debs et al. that in that proceeding there was nothing of a remedial or compensatory nature. In re Savin, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150, was a case wherein Savin was charged with contempt in attempting to deter a witness from testifying. He was found guilty of contempt, and sentenced to jail. A petition for a writ of habeas corpus was filed, and in discussing the case Mr. Justice Harlan says:

"It is, however, contended that the proceedings in the District Court were insufficient to give that court jurisdiction to render judgment. This contention is based mainly upon the refusal of the court to require service of interrogatories upon the appellant, so that, in answering them, he could purge himself of the contempt charged. The court could have adopted that mode of trying the question of contempt, but it was not bound to do so. It could, in its discretion, adopt such mode of determining that question as it deemed proper, provided due regard was had to the essential rules that obtain in the trial of matters of contempt."

Again, in the case of United States v. Anonymous, 21 Fed. 761, a case much quoted as an exhaustive study of the question, Judge Hammond says:

"But there never was in a court of equity, as at law, any rule that the answer of the respondent to interrogatories should be taken as true and he be discharged, if he denied the contempt."

This was a criminal contempt proceeding, and the court declined to treat respondent's answer as conclusive.

The present proceeding, while, as said by the Supreme Court in the Besette Case, it comes more fully within the punitive than the remedial class, is entitled in the main cause. It is heard upon a rule issued by the court sitting in equity in that cause. As above set out, it has been uniformly so treated by the federal courts. They have not indulged in nice distinctions which can serve neither court nor parties further than to make the practice in such cases indefinite and uncertain. The answers of respondents herein are not conclusive upon the court.

There remains the inquiry as to whether respondents were sufficiently advised of the terms of the injunctional order, and whether, having such knowledge, they willfully set at naught and defied the order

of the court. It was shown upon the hearing, and was a matter of common knowledge as well at the time, that complainant's wagons were placarded with printed copies of the order upon both sides. They also bore large signs notifying all persons that they were protected by the order. The daily press teemed with references thereto. Copies of the order were posted in public places. Indeed, such publicity has rarely been given similar orders. The wagons paraded the streets under armed guards. This of itself could not fail to direct attention to them. It is incredible that any person, other than infants and idiots, could fail to be in the immediate vicinity of complainant's wagons without knowing of the injunctional decree. Of all the parties brought before the court there is not one who can within reason be said to have been without full knowledge of the fact that, if he committed the acts complained of, he was defying the order of the court and obstructing the course of justice. The decree required defendants to desist and refrain from in any manner interfering with, hindering, obstructing, or stopping any of complainant's business in the maintenance and operation of its horses, wagons, and teams, and from interfering with, or obstructing or attempting to intimidate, any of its agents or employés in the transaction of its business. This cause is one of a number instituted in the several pending suits at about the same time for the purpose of punishing the several alleged wrongdoers. The petition in this case asks for a rule against 24 persons, which was granted.

There are so many persons involved in this and the other suits that it seems best to the court, at this time, to take up and dispose of that one which at the hearing seemed to be the most flagrant in character, both as to the acts alleged and the person of the alleged wrongdoer. This was the respondent Daniel Garrigan. He was duly served with the rule, and appeared in person and by counsel at the hearing. His answer sets up the several grounds upon which want of jurisdiction in the court for the purposes of this hearing is based, and traverses all and singular the charges made against him. The affidavits of a large number of witnesses were read on each side, which, as is usual in such controversies, were directly contradictory of each other. For the petitioner it was in substance deposed that complainant's two wagons were going north on Michigan avenue from Monroe street to 280 Michigan St., on the North Side, on May 2, 1905; that they bore in a conspicuous manner printed copies of the injunction order of the court, together with large placards calling attention to the order and the protection thereby afforded; that it was impossible for any one to see the wagons without seeing the placards and order; that an excited crowd or mob gathered about the teams; that threats of violence were made, and stones thrown at the wagons, teamsters and guards; that respondent Garrigan was among the most active of the advisers to violence, that he threw stones at the wagons, teamsters, and guards; that he was flitting from one position to another, dodging into doorways and throwing stones; that he used violent and incendiary language; that he violently assaulted one of the colored guards while the latter was in care of or charge of the police; and that all

this time he was dressed in the uniform, cap and all, of the Chicago City Fire Department. These charges he denies, except that he admits having been there, and that he followed the wagons over the said route. His witnesses, including several police officers, either deny that he committed said acts or that they saw him commit the same. In such irreconcilable conflict of testimony it is often impossible to get a clue to the truth. Such a clue, however, this case presents. The witnesses on both sides are mainly partisans of one side or the other. This is not true of the witnesses Dimmick and Evanson, both employés of Spaulding and Merrick, tobacco merchants at 271 Michigan street. Both of these witnesses impressed me as absolutely disinterested and thoroughly reliable. Their evidence directly implicates Garrigan in the unlawful and mob-like transactions of that occasion. Both saw him strike a colored guard when in the patrol wagon and unprotected. This was denied by certain police officers, but in view of the last-named evidence and of the course taken by the police in making no arrests from among the rioters, and other circumstances in the evidence, I deem their evidence inconclusive.

I therefore find the testimony of Garrigan is discredited. All things considered, I am left in no doubt as to Garrigan's action in the case. He willfully attacked and interfered with complainant's men, teams, wagons, and business. He attempted, by violence and harangue, to intimidate complainant's employés, and induce them not to continue in complainant's employment. All this he did when surrounded by an excited mob. He called the men names. He took every available means of demonstrating his sympathy with the striking teamsters and defendants to the suit, and his hatred of the men who had taken their places. He swept aside the order of the court as nothing, and beyond question knew just what he was doing. The basis of his motives was plainly disclosed in his conduct, namely, an intense desire to punish complainant and complainant's servants for attempting to transact their lawful business in defiance of the behest of the striking employés of complainant. He is a man of intelligence. He must have known the force of the injunctional order. What he did was plainly done in aiding and abetting the defendants named in the bill. That a conspiracy with them is not shown counts for nothing. Even though they had been discharged under the rule, he could still be held. Sloan v. People, supra. He both violated the injunction and obstructed the process of the court. I therefore find him guilty, and order that he be attached for contempt of court in so doing, and that he be confined in the county jail of Du Page county, Ill., located at Wheaton, for the term of three months, unless sooner discharged by due process of law. The cases of the other respondents are reserved for further order of the court.

Counsel for complainant may prepare said order in accordance herewith.

THE VIOLETTA.

(District Court, S. D. New York. November 3, 1905.)

1. COLLISION—TOW DRIFTING AGAINST BARGE ENGAGED IN ANCHORING—ABSENCE OF LOOKOUTS.

A barge laden with coal, which had been cast off from a tow off Weehawken, and was attempting to anchor at or near the limits of the anchorage ground, was struck and sunk by one of three mud scows in tow of a tug on a hawser, which had just started from a point near by bound for the sea, and which, while the tug was working to the middle of the river, drifted down upon the barge. Neither the tug nor barge had an efficient lookout, and neither observed the other in time to avoid the collision, which might have been done by either by beginning in time. *Held*, that the absence of such lookouts was the proximate cause of the collision, and that both tug and barge were in fault.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 79, 149.]

2. SAME—FAULT OF TUG—LIABILITY OF TOW.

A tow which is without power and passively in control of a tug, and which was not chargeable with any negligence contributing to a collision between it and another vessel, cannot be held liable with the tug therefor, on the theory that the entire tow constitutes one vessel.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 72, 245.]

In Admiralty. Suit for collision.

Butler, Notman & Mynderse, for libellants.
Benedict & Benedict, for claimants.

ADAMS, District Judge. This action was brought by Jesse L. Eddy and others, the owners of the barge Thomas L. Parker, to recover the damages sustained by them through a collision between the barge and one or more of three mud scows, being towed by the tug Violetta from a point off Weehawken, New Jersey, and bound for sea. The Parker loaded with coal, was towed down the river from Cornwall, on the 17th day of December, 1902, by the tug Edwin H. Meade bound for Providence, Rhode Island. She reached a point off Weehawken the 18th and anchored in the vicinity of the Violetta's starting place while the Meade went to deliver the other vessels in the tow in New York. The Violetta made up a tow of 3 scows tandem on a hawser of about 150 feet in length and in proceeding to obtain a desired position in the river brought one of the scows violently in contact with the stem of the Parker, which, in a few minutes caused her to sink in such a depth of water that she was completely submerged and large damages, said to be about $25,000, resulted.

The Parker was a 3 masted coal barge in good condition, equipped with steam machinery for hauling the anchor and working the pump. She was 186 feet long and 23 feet wide, manned with a master, an engineer and a deck hand. At Cornwall, she was placed in the hawser tier of the Meade's tow on the starboard side and had several lines running to three boats in the tow, two on her port side and one behind. When the vicinity off Weehawken was reached, the Meade cast her off, with instructions to anchor until she should call for

her a little later. This the Parker proceeded to do, intending to put out about 40 fathoms but the tide was so strong, that she would not hold with that length and a greater scope, about 60 fathoms, was given but still she dragged and finally all of her chain, 75 fathoms, went out, when she held.

One of the questions in the case, is where she brought up. The libellants contend that she was still on anchorage ground while the claimants insist that she went entirely below the southerly limit thereof and is not entitled to any rights by reason of being on anchorage ground. A great deal of testimony has been taken upon this subject. A number of libellants' witnesses have placed the collision within anchorage boundaries, while the claimants put it below. It seems that the Parker cast her anchor when she was wholly within the limits and doubtless if it had held when the compressor was put upon the chain at 40 fathoms, she would have remained there, but the dragging carried her down so that when she brought up and held, she was probably below the southern limit of that section and the collision took place outside of the anchorage ground.

The Violetta's account of the affair is that she started from a point about 1900 feet above the collision. She intended to get out in the channel as soon as practicable and at first took a course of N. E. and varied it to N. E. by E. and veered around to S. E. under a gradual port helm. When she had gone part of the distance, moving out from shore but drifting down the river with the tide, her master at the wheel saw the barge, headed towards New Jersey and sagging down with the tide, and some 400 or 500 feet below him. The tug at this time was proceeding at full speed. The master saw the barge then swing to her anchor, and her anchor chain straighten up, when he headed more for New York and gave another bell for some extra speed which had been kept in reserve; he then saw the anchor chain come up again and the barge head more to the northward; he got by with the tug and two scows and the third scow collided with the bow of the barge. The tug was then from 200 to 250 feet across the barge, when he saw the starboard corner of the third scow strike the starboard bow of the barge, causing a parting of the lines between that scow and the others, immediately ahead, and the swinging around of the scow adrift on the port side of the barge.

The barge contends that she had been riding at anchor some 25 minutes before the collision, and the tug that the collision occurred while the barge was swinging to her anchor. It is probable that about the time the barge was swung out of the tow preparatory to anchoring, the tug had made up her tow and got started before the Parker held, but neither saw the movements of the other until a collision was imminent and it was too late to avoid it. The members of the crew of the barge were fully occupied in her manœuvres and the master of the tug, who was also acting as lookout in the absence of a person charged with that duty, did not see what the barge was going to do, nor indeed see her at all until the collision was imminent. He acknowledged that his eyesight was not very good and it was therefore particularly incumbent upon him to have aid in such

respect. Each side charges the other, inter alia, with the absence of a good lookout and the evidence sustains the allegations. It is shown that there was ample time while the Parker was getting out her anchor and swinging to it for the Violetta to have seen what she was about to do, especially as her movements would have shown a vigilant lookout that she was intending to anchor and the necessity for precautions on the tug's part in the 2 or 3 minutes that elapsed between her starting and the collision, which could easily have been avoided by a continuance of the course which the tug pursued until she changed to the southward. Likewise there was abundant opportunity for the Parker to have avoided the collision by refraining from anchoring for a short time, which she doubtless would have done, if she had seen the tug and tow a couple of minutes sooner. This lack of lookout seems to have been the proximate cause of the collision and both vessels should be condemned therefor.

Another question is whether the tow or any part of it should be held with the Violetta. It is urged by the libellants that the whole tow constituted one vessel and all should be condemned. Where proceedings are brought in rem, resort must be had to the actions of all the vessels to fix the faults of collision. The scows here were merely passive instruments of the tug and not implicated in the fault found against her. The authorities are opposed to holding the tow in such a case. In Sturgis v. Boyer et al., 24 How. 110, 16 L. Ed. 591, it was said (page 124 of 24 How., 16 L. Ed. 591) that the mere fact that one vessel strikes and damages another does not, of itself, make her liable for the injury, but the collision must, in some degree, be occasioned by her fault. In discussing the question of the liability of a tow in that case, it was said (pages 121–123 of 24 How., 16 L. Ed. 591):

"Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management, of the master and crew of the tow. Fault in that state of the case cannot be imputed to the tug, provided she was properly equipped and seaworthy for the business in which she was engaged; and if she was the property of third persons, her owners cannot be held responsible for the want of skill, negligence, or mismanagement of the master and crew of the other vessel, for the reason that they are not the agents of the owners of the tug, and her owners in the case supposed do not sustain towards those intrusted with the navigation of the vessel the relation of the principal. But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessel must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. As-

suming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part, or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking, and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty by refraining from such participation. Vessels engaged in commerce are held liable for damage occasioned by collision, on account of the complicity, direct or indirect, of their owners, or the negligence, want of care, or skill, on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel. Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, or ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation. Sproul v. Hemmingway, 14 Pick. 1 [25 Am. Dec. 350]; 1 Pars. Mar. L., 208. The Brig James Gray v. The John Frazer et al., 21 How. 184 [16 L. Ed. 106]."

In the case of The Doris Eckhoff, 50 Fed. 134, 1 C. C. A. 494, in this circuit, it was held that a schooner in tow of a tug in the East River was not partly liable for a fault committed by the towing tug in failing to navigate in the middle of the river, as required by state statute. The court said (pages 136, 137, of 50 Fed., page 496 of 1 C. C. A.):

"So far as the proper navigation of the tow itself is concerned, the law is abundantly settled that she is bound to follow the guidance of the tug, to keep in her wake, and conform to her directions. The Margaret, 94 U. S. 494, 24 L. Ed. 146. This the schooner did. The district judge, however, held that the master and crew of the schooner were participating in the navigation, and in fault for not controlling the movements of the tug to the extent of requiring her to proceed in mid-river, either by ordering her to do so, or by endeavoring to swing her over in that direction by altering the helm of the Flint irrespective of the heading of the tug; that there was 'at least an acquiescence on the part of the master of the schooner in the illegal course taken by the tug;' and that as he was present, with his crew on board, steering after the tug, he must be held to have participated in the navigation of that course. We do not find that this proposition is supported by the authorities. The tug was, in fact, under the command and direction of her own master, and received no orders or direction from those on the Flint. On the contrary, those on the tow received and obeyed orders from the tug. We are unable to distinguish this case from that of The John Fraser, 21 How. 184, 16 L. Ed. 106. In that case the Fraser was in tow of

the steamboat General Clinch, which navigated with her into such dangerous proximity to an anchored vessel that, upon casting off her hawser, the Fraser was unable to avoid collision. Although she had her master and crew on board, and was attending to her own helm, she was not held to be participating in the navigation. The court said:

'According to the usage of trade at that port, she engaged a steamboat, well acquainted with the harbor and its usages, to bring her in. * * * The General Clinch was * * * under the command and direction of her own pilot. * * * She could select her own course and her own rate of speed. * * * When fastened to the hawser, and in tow, the Fraser was controlled entirely by the steam tug, both as to her course and speed. The steamboat was not subject to the orders of the commander of the John Fraser, but was altogether under the direction and control of her own commander. * * * The Fraser could do nothing more than watch the motions of the steamboat, and use her own rudder, so as to keep as nearly as might be in the wake of the tug to which she was attached.'

—And held that the collision was not caused by any fault or negligence on the part of the Fraser, and that she was not answerable for the consequences of the improper navigation of the Clinch. We do not find any qualification of the rule laid down in this case in any subsequent decision."

There is no suggestion here that the navigation of the Parker after she was cast off by the Meade, was in any way the result of negligence on the part of the latter as in The John Fraser, 21 How. 184, 16 L. Ed. 106, and she must be held to have been a participant in the negligence which produced the loss.

There will be a decree for the libellants for half damages against the Violetta, with an order of reference. The libel as to the tow will be dismissed.

ALLEN v. LUKE et al.

(Circuit Court, D. Massachusetts. January 3, 1906.)

No. 2,135.

1. EQUITY—PLEADING—MULTIFARIOUSNESS.

A bill filed by the receiver of a bank against a number of the directors to recover money of the bank alleged to have been lost through defendants' misconduct is not bad for multifariousness, where the matters alleged are such as can most conveniently be tried in a single suit.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 371, 372, 377–379.]

2. BANKS AND BANKING—SUIT AGAINST DIRECTORS—RECEIVER OF NATIONAL BANK.

A receiver of a national bank may maintain a suit against the directors in behalf of creditors and stockholders to recover sums alleged to have been lost to the bank through the misconduct or negligence of defendants, and it is not a necessary condition precedent that violations of the banking act should have been previously adjudged in a suit brought by the comptroller.

3. SAME—PLEADING—CERTAINTY OF BILL.

In such a suit, it is not necessary that the bill allege the exact amount of the loss arising from each transaction set out where it is not yet known; but it should set out with particularity the acts of defendants relied on to constitute negligence or misconduct, and the details of the several transactions should be given with such fulness as can be done by complainant.

4. ABATEMENT AND REVIVAL—ACTION AGAINST BANK DIRECTOR—SURVIVAL.
A cause of action against a director of a national bank to recover for money lost to the bank through his negligence or misconduct survives against his executors.

In Equity.

Frank D. Allen and Walter L. Van Kleeck, for complainant.
Richard D. Ware, for Mason.
Ropes, Gray & Gorham, for defendants Porter & Luke.
Tower, Talbot, Hiler & Pillsbury, for defendants Weeks and others.
Boyd B. Jones, for defendant Loring.
Herbert L. Harding, for defendant Richardson.
Horace G. Allen, for defendant Allen.

LOWELL, Circuit Judge. This is a bill in equity, brought by the receiver of an insolvent national bank against certain of its former directors to recover, in behalf of creditors and stockholders, money lost by the bank through the alleged misconduct of the defendants.

The defendants have demurred to the bill on several grounds, viz.:

(1) For multifariousness. It is not possible to state with precision a test of multifariousness universally applicable. The court is of opinion that the trial and decision of the matters herein presented concerning all these defendants can most conveniently be had in one proceeding, and that this may be done without injustice to anybody. As no case has been cited which holds a bill like this to be multifarious, the court is left free to follow the rule of convenience.

(2) That the Comptroller of the Currency alone is entitled to sue. This contention is contrary to a practice so general that a judgment of a court of appeal is required to overthrow it.

(3) That the cause of action is barred by the statute of limitations (Mass. Rev. Laws, c. 202, § 5). The bill sets up the defendant's liability at common law, as well as under the banking act. That the statute of Massachusetts referred to does not affect common-law liability is admitted.

(4) That the directors cannot be held to answer in this proceeding until suit has been brought by the Comptroller, and violations of the banking act have been determined and adjudged. This contention is opposed to the unbroken practice, and that practice will be followed until it has been changed by a court of appeal.

(5) That the bill is uncertain. It was argued that the bill is uncertain in several respects:

(a) That there is no sufficient allegation of loss arising to the bank as the result of any particular transaction complained of. For example, regarding the Mason & Hamlin loan, the bill alleges "there will be a probable loss on this indebtedness of Mason & Hamlin Company of not less than $30,000." The complainant may be altogether unable to state the precise amount of the loss. The transaction may not yet be closed, and the allegation of the bill, though open to criticism in form, seems substantially sufficient. If he think fit, the complainant may amend the above allegation by substituting some phrase like this:

"There will be a large loss on this indebtedness, the precise amount of which cannot yet be ascertained by your complainant, but, according to his best estimate, will be not less than $30,000."

The bill further alleges that the bank is insolvent. From its insolvency the creditors must suffer loss. Though a recovery in this suit may restore solvency to the bank, and a surplus for the stockholders, yet the bill is not demurrable on that ground. To the varying rights of creditors, stockholders, and the present defendants, a court of equity can always do justice by orders made in the cause from time to time.

(b) That many of the transactions complained of, involving a number of loans and payments, are not sufficiently set out as to their dates and amounts. In this respect the bill seems demurrable under the decision of this court in Price v. Coleman (C. C.) 21 Fed. 357. If the complainant wishes to rely upon these matters he must amend by inserting transcripts of the accounts, or the like itemized statements, as was done in Stephens v. Overstolz (C. C.) 43 Fed. 771.

(c) That the bill does not set out with sufficient particularity the acts relied on to charge the several defendants. As to most of the transactions complained of, the bill alleges loss to the bank through the defendants' negligence and misconduct; but the nature of that misconduct is not set out. As it stands, the bill seems to me quite as objectionable in this respect as was the bill held demurrable by Judge Colt in Price v. Coleman.

Our judicial practice is sometimes complained of for depriving of his remedy a party who has good cause of action, but has failed to state that cause with precision. The complaint has some foundation. Decisions which have acquired authority, and which cannot now be lightly disregarded, may require a particularity of allegation greater than that which is sufficient to inform the defendant of the charge brought against him. In the case at bar, the information given by the bill regarding the transactions of the bank with Mason & Hamlin, Mitchell, Coburn, Damon, and others, may in fact be sufficient to inform the defendants of the pecuniary nature of the transactions complained of. Perhaps the defendants would suffer no substantial harm if they were compelled to obtain more specific pecuniary information by showing, in an application for particulars, that these were needed in order to prepare their defense. As the complainant, however, can easily meet the requirements of the decided cases by adding to the bill a transcript of the several accounts in question, no harm is done him by requiring him to amend accordingly. To require him to particularize the nature of the defendants' negligence upon which he relies is a more serious matter. This particularization, however, is required by substantial justice, as well as by precedent. The complainant believes that the bank has suffered loss through the negligence and misconduct of the defendants, its directors, and so believing, has brought suit against them. But in order that the defendants may prepare their defense, in order that they may by demurrer raise questions of law without the expense of a trial of the facts, they are entitled to know the kind of alleged negligence upon which the complainant will rely. It is not sufficient that A., thinking he has a grievance against

B., should state merely that he has a grievance, and leave its nature to appear at the trial. Justice to the defendant and an economical ordering of judicial procedure require something more. Actionable negligence is not a habit of mind, but action or inaction contrary to the practice of reasonable men under the circumstances. The complainant must specify the action or inaction relied on. Here, for example, does he rely upon the failure of a given defendant to attend a particular meeting of the board of directors, or upon his joining in a particular vote which due care would have shown him to be improper, or upon specific intentional misconduct? These, or other kinds of action and inaction may be the concrete facts which the complainant has in mind when he charges negligence. The defendants are entitled to a concrete statement. Take, for example, the allegation in paragraph 32 of the bill, that the defendants "suffered and permitted the said (false) reports to be placed on file in the department of the Comptroller of the Currency." As to any particular defendant, what is the concrete misfeasance or nonfeasance upon which the complainant relies? Each defendant is entitled to know, as to himself in particular, what the complainant means by the words "suffered and permitted," for this reason, if for no other, that he may question by demurrer if the action or inaction complained of is ground for his liability under the decisions in Briggs v. Spaulding, 141 U. S. 142, 11 Sup. Ct. 924, 35 L. Ed. 662, and like cases. Most of the instances specified in the bill are the acts of the corporation, some appear to be acts of the board of directors. These acts, as such, do not render any defendant liable, but only the act or omission of that individual defendant, by which improper corporate acts have been caused or permitted. The individual act, as well as the corporate, must be set out, and therefore these allegations of the defendants' misconduct are held to be insufficient.

The allegations of paragraph 17 "that the said directors utterly failed and neglected to perform their aforesaid official duties, and each and every of them, and that for a considerable period of time prior to said November 13, 1902, as hereinbefore and hereinafter set forth, failed to give any adequate attention to the affairs of said bank, and allowed the said bank to be improvidently and recklessly managed," and that the defendants "wholly failed and neglected to make personal examinations into the conduct and management of its affairs, and into the condition of its accounts," are too general, especially as they are unrelated to any particular occasion of damage. It is possible that language might be pieced together from different paragraphs of this necessarily voluminous bill, which would sufficiently allege actionable wrong done by some defendant. This has not been pointed out, and, in any case, I hold that the bill must be considerably amended before it will sufficiently present the issues, which the complainant obviously wishes to raise.

The executors of a deceased director, who have been made defendants, demur upon the ground that the cause of action does not survive the death of their testator. The contrary is settled for this court by Boyd v. Schneider, 131 Fed. 223, 65 C. C. A. 209.

Demurrer sustained. Complainant has 30 days to amend his bill.

JONES v. GOULD et al.

(Circuit Court, S. D. Ohio, E. D. October 26, 1905.)

1. COURTS—UNITED STATES COURTS—LOCAL SUITS.

The stock of a corporation organized under the laws of a state has its situs in such state, and is properly within a federal judicial district in the state, within the meaning of Act March 3, 1875, c. 137, § 8, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], providing for suits to enforce liens, etc.

2. SAME.

A suit must really be one in rem, directed primarily against specific property within the district for the purpose of enforcing a legal or equitable lien upon or claim to such property, or of removing an incumbrance or lien or cloud upon the title to such property, to come within the intent and meaning of Judiciary Act March 3, 1875, c. 137, § 8, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], authorizing the bringing in of nonresident defendants by an order; and, if to enforce a lien, such lien must be one existing when the suit is brought, and not one sought to be created thereby.

3. SAME.

A subscriber to a syndicate fund, which was placed absolutely in the hands of managers to be invested in certain coal lands and railroad property and in constructing connecting lines, the property to be then sold and the proceeds divided or capitalized, and the stock distributed among the subscribers, has no lien upon or claim to the specific property so purchased by the managers which will give a Circuit Court of the United States jurisdiction of a suit in rem against it, under Act March 3, 1875, c. 137, § 8, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], where neither complainant nor defendants are residents of the district.

In Equity. On motion to quash service.

RICHARDS, Circuit Judge (orally). This case is submitted to me upon a motion to quash the service of a restraining order made upon the defendants, Gould, Ramsey, Guy, and Blair. I had expected to put in writing my conclusions, but an examination of the authorities has occupied the limited time at my disposal and precluded this. I may hereafter prepare a short opinion. At present I shall content myself with stating the general results reached.

Upon the filing of the bill, I set the case for hearing upon the motion to appoint a receiver, and upon application of the complainant restrained the defendants, until the further order of the court, from selling, contracting to sell, transferring, or parting with the possession of any of the properties of the Little Kanawha Syndicate, so called, as described in the bill. I also directed that notice of this order, with a copy of the bill, be served personally upon the said defendants. Service of this order was made, and the defendants, making a special appearance for the purpose, have filed motions to quash the service, made outside of this state and district, on the ground that in each instance (1) the defendant is an inhabitant and citizen of some state other than Ohio; (2) it appears upon the face of the bill that the relief sought is of such a nature that the defendant cannot lawfully be called upon to defend against the same in this district; and (3) the court is without jurisdiction to proceed against the defendant.

It is contended, in the first place, that by the filing of these motions each of the defendants entered his appearance generally and is now in court. The rule is, of course, well settled that where a defendant

appears by motion to object to the jurisdiction of the court over his person, and at the same time asks that the cause be dismissed because the court has no jurisdiction of the subject-matter of the action, this constitutes a voluntary appearance. Elliott v. Lawhead, 43 Ohio St. 171, 1 N. E. 577; Fitzgerald v. Fitzgerald, 137 U. S. 98, 106, 11 Sup. Ct. 36, 34 L. Ed. 608. It may be conceded that the wording of the third clause gives color to the claim of the plaintiff; but I think a careful reading of the motion clears this up, and evinces that the point intended to be made is that the court had not acquired, and could not acquire, jurisdiction of the person of the defendant. The statement in the third clause that the court is without jurisdiction to proceed against him, evidently refers to the claim that the court has not obtained and cannot obtain jurisdiction of his person.

Proceeding to a consideration of the merits of the motion: While the first section of Act March 3, 1875, c. 137, 18 Stat. 470, as amended in 1888 (Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), provides that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only upon the fact that the action is between citizens of different states, suit shall be brought only within the district of the residence of either the plaintiff or defendant," and while clearly the institution of this suit is not in compliance with these provisions, for neither the plaintiff nor any of the defendants are residents of this district, it is contended that jurisdiction may be sustained, and all the defendants ultimately be brought in, under section 8 of the same act (18 Stat. 472 [U. S. Comp. St. 1901, p. 513]), which provides "that when in any suit commenced in any Circuit Court of the United States to enforce any legal or equitable lien, or claim to, or to remove any incumbrance or lien or cloud upon the title of real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order" directing special service by publication or otherwise.

The contention of the plaintiff, briefly stated, is that this is a suit to enforce a trust in certain property, real or personal, which was purchased in part with moneys subscribed by him, and is now held by the syndicate managers, Gould, Ramsey & Guy, upon certain trusts defined in what is known as the syndicate agreement; that a part of this property, namely, the stock of two railroad companies organized in Ohio, has a situs within this district, and because of this fact, the suit may be regarded as one to enforce a legal or equitable claim to such property, of which the court has jurisdiction under section 8, with authority to bring the nonresident defendants in by publication.

I am satisfied from the authorities cited that the stock referred to has its situs within this district. These Ohio railroad corporations are inhabitants, citizens of Ohio, and their stocks have their situs here. Jellenik v. Huron Copper Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647.

But, as I sufficiently indicated during the course of the argu-

ment, the serious question, it seems to me, is whether this is a suit "to enforce a legal or equitable lien upon or claim to" this railroad stock, which is the only property within the district. Of course, the general rule is well known that the authority of a court is limited to persons and property within its territorial jurisdiction. Where an action is in personam, the defendant must be served or his appearance secured; if in rem, judgment only operates upon the property within the district. Upon examination of such authorities as I have been able to make and a consideration of the phraseology of the section, I have reached the conclusion that to come within its intent and meaning, the suit must really be one in rem, directed primarily against specific property for the purpose of enforcing a legal or equitable lien upon or claim to such property, or of removing an incumbrance, or lien, or cloud upon the title to such property. All the cases cited have been cases of this kind, cases strictly in rem, and I have not found one in which jurisdiction is sustained under section 8, that was not directed primarily against property located within the district.

There are several cases where the court has refused to take jurisdiction of an action to subject the property of the defendant ultimately to the payment of his debts, although part of the property was within the district. Thus in the case of Shainwald v. Lewis (D. C.) 5 Fed. 510, Judge Hillyer said respecting section 738 (page 516):

"In my judgment this section was only intended to reach those suits in equity in which it was sought to enforce some pre-existing lien or claim, legal or equitable, upon or to some specific property, real or personal, and not cases in which it is sought to reach and appropriate the general property of a defendant to the payment of his debts. By the words 'legal or equitable lien or claim against real or personal property,' Congress intended to reach every case in which there should be any sort of charge upon a specific piece of property, capable of being enforced by a court of equity."

And in Dormitzer v. Illinois, etc., Bridge Co. (C. C.) 6 Fed. 217, Judge Lowell declined to entertain jurisdiction of a suit to attach the property of a nonresident defendant, saying (page 218):

"A recent statute gives these courts jurisdiction to enforce a lien upon or claim to, or remove an encumbrance, or lien, or cloud upon the title to, real or personal property within the district, though the defendants or some of them, may not be either inhabitants thereof or found therein, first giving notice to the absent defendants. But this means a lien or title existing anterior to the suit, and not one caused by the institution of the suit itself."

I have not been able to find that these cases have been qualified or overruled.

This suit might indirectly and ultimately affect property in Ohio, but not necessarily. The plaintiff, as a syndicate subscriber, has no lien on, or claim to this property. He did subscribe certain money, some $70,000, to the syndicate fund. This fund was placed absolutely in the possession and control of the syndicate managers; the title passed to them; they were to purchase with it certain coal and railroad properties, which were to be connected by lines to be constructed by the syndicate, and after this was done, the properties were either to be sold and the profits, if there were any, divided among the subscribers, or the property was to be capitalized and the stock distributed

among the subscribers. The managers were to receive for their services a certain per cent. of the funds subscribed. The fullest discretion was vested in them, both as to the time of existence of the syndicate, and their conduct under the agreement. This subscriber brings this suit not because he is a creditor of the syndicate managers, not because he has a claim against them, and thus, in a certain sense, a claim against the syndicate property, but because he contributed to the fund in their possession and control. He has no title to or interest in the fund. He may have an ultimate interest in the profits of the deal, if it turns out ultimately that there are any. What he wants now is to control the syndicate managers, or have the court control them. This appears from the wording of the temporary restraining order. He wants the court to appoint a receiver to take over the syndicate property, and administer it, and call upon the syndicate managers to account for what they have done.

Now, this does not seem to me so much a suit against the property, because of some lien or claim to it, as a suit against the syndicate managers, because they are not doing their duty under the syndicate agreement. It appears to me that it is the syndicate managers, and not the syndicate property, that the plaintiff is after. I think it would be manifestly unjust and unfair not only to the managers themselves who have direct interests under the syndicate agreement, but to the 69/70 of the subscribers to the fund who are not represented here, for the court to take jurisdiction and assume to grant the relief asked for in the absence and without the appearance of the syndicate managers. In my opinion, they are necessary and indispensable parties, and as they have not been brought in, and can not be brought in, I think the case is one of which I ought not further to entertain jurisdiction.

I sustain the motion to quash service and upon my own motion proceeding to pass upon questions of jurisdiction, I abrogate the temporary restraining order, decline to appoint a receiver, and dismiss the suit for want of jurisdiction.

THE MATTIE.

(District Court, S. D. New York. November 22, 1905.)

COLLISION—TUGS WITH TOWS MEETING—NEGLIGENT TOWAGE.

A collision at the mouth of Harlem river between the last one of three scows, in tow of the tug Mattie on a line passing down the river, and a car afloat in tow alongside of a transfer tug coming up, held due solely to the fault of the Mattie in being too far to the eastward and in failing to properly estimate the distance between her tow, which was not kept in line, and the other tow, by reason of which it was swept against the latter by the ebb tide.

In Admiralty. Suit for collision.

John J. Delany and E. Crosby Kindleberger, for City of New York.

Wing, Putnam & Burlingham, for the Mattie.

William Greenough, for New York, New Haven & Hartford Railroad Co.

ADAMS, District Judge. This action was brought by the City of New York, the owner of Scow No. 23, to recover the damages sustained through a collision between her and a car float in tow of tug Transfer No. 4, owned by the New York, New Haven & Hartford Railroad Company, in the early morning of the 8th day of March, 1905. No. 23 was being towed, with two other scows, by the tug Mattie, the No. 23 being the stern scow, immediately behind the other two which were lashed together, side by side. The tow was on a hawser of about 100 feet in length. The Mattie, with her tow, had come from Riker's Island bound to New York and had gone up the Harlem River to 110th Street, where she landed for a few minutes for orders, then rounded to and proceeded down the river. All the scows were light. The No. 4 was bound from Jersey City to the Harlem River, with a car float on each side. She came up the East River on the easterly side of Blackwell's Island. The port corner of her port float came in contact with the port side of the No. 23, doing some damage. The tide was ebb.

The libellant charges fault against both tugs and the scow is charged by them with being deficient in lights. It appears that the scow had one light only, which was set aft, but as it was seen in time to give due notice of her presence and position, the fault is not insisted upon by the tugs and both seek to escape liability for the collision by showing that the other was solely in fault.

The Mattie urges that the place of collision is the determining factor in the case and that it occurred within 300 or 400 feet of Horns Hook, where the Transfer had no right to be. The Transfer contends that the place of collision was considerably further up the river and that the cause was the swinging of the Mattie's tow to the port, so that it was impossible for the Transfer to avoid it.

The testimony on the part of the City shows that the collision occurred about opposite 92nd Street, and that of the Transfer that it happened somewhat further up, to the westward of the lower end of the island, known as Little Mill Rock, while those on the Mattie say that when the Transfer was first sighted, the Mattie then being off 92nd or 93rd Street, she was seen along the Astoria shore and the collision took place some distance below, the master placing it at about 87th Street. The weight of testimony seems to favor the contention of the City and the Transfer in this respect. The length of the Mattie and her tow was about 400 feet and it is probable that the tail of the tow was near the vicinity of the place where the others contend the tug was. It appears that the Transfer brought herself to practically a stand still a short distance from the place mentioned, and while lying there, without much, if any, motion, the tow of the Mattie was swept by the tide over against her tow, causing the damage. I do not see that any case has been made against the Transfer.

The cause of the collision seems to have been the neglect of the Mattie in being too far to the eastward and in failing to properly estimate the distance between the course of her tow, which was not kept in line, and the Transfer, with the result of the former being brought into contact with the port float of the latter.

There should be a decree for the libellant against the Mattie, with an order of reference. The libel as to the Transfer will be dismissed.

DAVIS v. FARMER et al.

(District Court, D. Kentucky. September 29, 1894.)

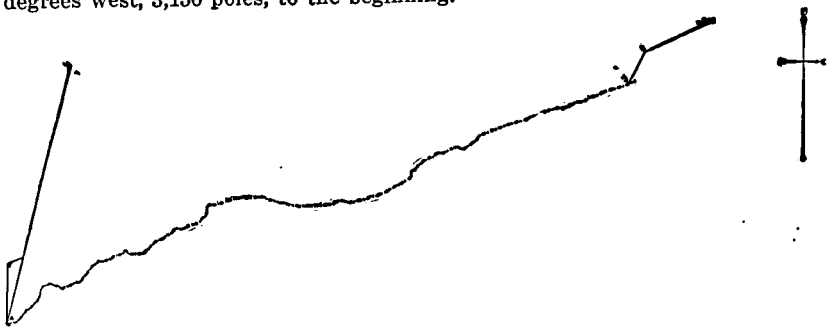
BOUNDARIES—CONSTRUCTION OF SURVEY—CONFLICT BETWEEN CALLS FOR CORNER AND COURSE AND DISTANCE.

The call from the third to the fourth corner of a survey of land, made under a warrant of the state of Kentucky and afterwards carried into a patent issued by the state, was from a stake on the top of Cumberland Mountain, "thence south, 60 degrees west, 8,320 poles, to a stake near Cumberland Gap." If the course and distance be followed, it would carry the fourth corner several miles within the state of Tennessee; whereas, if the line be run following the state line along the crest of the Cumberland Mountains in a general southwesterly course, it would strike the center of the Gap at a distance of 7,934 poles. *Held*, that the words "near Cumberland Gap" should be construed to mean at or in Cumberland Gap, and that, as so construed, such natural object would govern the call for course and distance, and fix the corner at the center of the Gap.

In Equity. Suit to quiet Title.

BARR, District Judge. This is a suit to quiet the title of the complainant as against the claim of the defendants. The complainant claims a fee-simple title to a large tract of land in the counties of Harlan and Bell, in this state. The claim is based upon a patent issued by the commonwealth of Kentucky, dated September 25, 1845, to John Ledford, Noble Smith, and Henry Skidmore. The land is described thus, to wit:

"Beginning on Crank's Creek, on two beeches and two sugar trees, the beginning corner to said Smith's 1,500-acre survey; thence south, 70 degrees west, 664 poles, to three beeches, beginning corner to a 600-acre survey of said Smith; thence south, 28 degrees west, 400 poles, to a stake on the top of Cumberland Mountain; thence south, 60 degrees west, 8,320 poles, to a stake near Cumberland Gap; thence north, 55 degrees, 8,820, to a stake; thence south, 5 degrees west, 3,150 poles, to the beginning."



It is alleged that this patent was issued under a survey made and dated March 3, 1845, by James Farmer, surveyor of Harlan county, Ky., upon a warrant, numbered 316, issued by the Harlan county court on March 3, 1845, which directed said surveyor to survey for said Ledford and Skidmore 86,000 acres of land in Harlan county. It is alleged that Ledford and Skidmore assigned to Noble Smith an undivided interest of 28,666⅔ acres in said land by a written indorse-

ment on said warrant, and hence the patent was issued to Ledford, Skidmore, and Smith.

The claim of the defendants, Wm. C. Farmer, John W. Forrester, Leopold Wallack, E. B. Moore, and others, which the complainant is seeking to have quieted against, is based upon an alleged survey made same day as survey to Ledford, Skidmore, and Smith, March 3, 1845, and patented by the commonwealth of Kentucky on the 5th day of July, 1846, to said Wm. C. Farmer and Thomas Forrester, assignee, etc., and is described as bounded thus, viz.:

"Beginning at two Spanish oaks and black oak on top of Cumberland Mountain, in the Chadwell Gap, near the head waters of Martin Fork, near a cliff of rock west of the trace leading across said mountain; thence south, 71 degrees west, 140 poles, to a hickory on top of the mountain; thence south, 72 west, with the top of said mountain, 2,560 poles, to a stake near Cumberland Gap; thence north, 800 poles, to a stake; thence north, 72 east, 2,240 poles, to a stake; thence north, 540 poles, to a stake; thence north, 70 east, 960 poles, to a stake; thence south, 3 east, 1,280 poles, to a stake; thence south, 62 west, 600 poles, to the beginning—containing 12,900 acres, more or less."

This tract of land, if the line be run along the crest of Cumberland Mountains from Chadwell Gap and to the center of Cumberland Gap, will be almost entirely within the exterior lines of the 86,000-acre survey, if the center of Cumberland Gap be considered the fourth corner of that survey. There is, however, upon these assumptions, a triangular strip of land which is outside of these lines and which is not claimed by complainant in her pleadings. There are also 21 tracts of land, held by and under patents and surveys within the exterior lines of said 12,900-survey, which are senior to complainant's patent and not claimed by her.

If, however, the 86,000-acre survey and patent be located, not with the fourth corner at Cumberland Gap, but according to the distances and corners as called in the survey and patent, then about two-thirds of the 12,900-acre survey will be within the exterior boundaries of the 86,000-acre survey.

The defendants William C. Farmer and John W. Forrester have filed answers, and set up as a defense to complainant's bill that the survey of the 12,900 acres of land was made in the morning of March 3, 1845, and before the survey of the 86,000 acres of land to Skidmore, Smith, and Ledford, by said Wm. C. Farmer, who was then a deputy surveyor of Harlan county, under James Farmer, who was the surveyor of said county, under proper warrant, and that there was a parol agreement with said Skidmore, Smith, and Ledford that this prior survey should be made, and that they did not claim the land within the 12,900-acre survey. The complainant excepted to this defense, and the court sustained the exception; and it need not be noticed now, further than to state all the testimony taken by defendants to sustain this defense has been excepted to by complainant and should now be sustained and excluded from the record.

The record shows that the defendants Farmer and Forrester contracted to sell the 12,900-acre survey to one Edward B. Moon, who has filed an answer and cross-bill herein. In his answer he denies complainant's title and possession, and in his cross-bill he sets out his contract of purchase from defendants Farmer and Forrester, and

their subsequent sale to one Leopold Wallack by Farmer and Forrester, and prays for an enforcement of his contract of purchase. This cross-bill has not been prepared and need not be considered now. It appears from the record that Farmer and Forrester have conveyed all their right, title, and interest to Leopold Wallack, and that he was, at the commencement of this suit, January, 1891, and still is, the holder of the title of said Farmer and Forrester in said 12,900-acre survey. They, however, claim to be the equitable owner of said land, as Wallack has not paid the purchase money. Wallack is before the court by constructive service only.

Neither the defendants Farmer and Forrester, nor any other defendant, has sought by cross-bill or other proceeding to have the patent of September 25, 1845, to Ledford, Smith, and Skidmore, set aside and declared void, so far as it embraced the survey of 12,900 acres of land. The defendants Farmer and Forrester, do deny complainant's possession of any part of the 12,900-acre survey, and allege they have been in adverse possession, claiming under said survey and patent, for more than 45 years, and plead the statute of limitations, and they deny complainant's title.

The plea of the statute of limitations cannot be sustained, unless there has been a continued and adverse possession by the defendants or those under whom they claim for the statutory period. The patent of July, 1846, did not convey title to the 12,900-acre survey, because the commonwealth of Kentucky had already conveyed away, by the patent dated September 25, 1845, all land covered by it and not previously disposed of. The survey of the 12,900 acres on the 3d of March, 1845, if made, and the subsequent patent in 1846, might be a color of title, if the boundaries were clearly and distinctly marked, and there was an actual and adverse possession to those clearly marked boundaries. But there is no such possession proven in this case upon which to base a title by adverse possession. Indeed, it is quite clear from the testimony in the record that the alleged survey was not actually made in 1845, and that there were no marked boundaries of this tract of 12,900 acres of land as described in survey or patent at the date of either. If this survey was ever actually made and the boundaries marked, it has not been proven in this case. Wm. C. Farmer testifies in a general way that he paid taxes on this tract of land, but he does not file receipts or other evidence of the assessment and payment thereof. It is true there is some evidence of recent occupation of parts of this survey (land) by tenants of defendants; but, giving this testimony its uttermost effect, it falls very far short of making out an adverse and continuous possession under the statute of limitations. The defendants have failed to sustain their defense.

The next inquiry is whether the complainant has shown legal title and a possession sufficient to sustain her bill to quiet title as against defendants. There must be clear proof of both possession and legal title in complainant, else, in the absence of a statute, her bill cannot be maintained. The Supreme Court has said:

"Those only who have a clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity

to give them peace or dissipate a cloud on the title.—Orton v. Smith, 18 How. 265, 15 L. Ed. 393. A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for, if his title is legal, his remedy at law by action of ejectment is plain, adequate, and complete; and, if his title is equitable he must acquire the legal title and then bring ejectment." Frost v. Spitley, 121 U. S. 556, 7 Sup. Ct. 1129, 30 L. Ed. 1010.

The complainant has proven satisfactorily, although not denied by defendants, that whatever title vested in the original patentees, Ledford, Skidmore, and Smith, by the patent from the commonwealth of Kentucky, is now vested in her; and there is no claim made as a defense that the patent of the state of Kentucky made under the act of 1835 is null and void under the provisions of said act of 1855, nor is there any defense that this patent was obtained by fraud. We must, therefore, assume that whatever title to the land described in this survey and patent was in the county court of Harlan county, and in the state of Kentucky, at the execution and delivery of the patent, passed to the original patentees and is now in the complainant.

This legal title could not be affected by the fact that the commonwealth of Kentucky patented to Wm. C. Farmer and Thomas Forrester, on the 5th of July, 1846, a tract of land—12,900 acres—which was partly within the boundaries of the patent previously executed to Ledford, Smith, and Skidmore. That part of the land within the patent executed in March, 1845, had already been conveyed to Ledford, Smith, and Skidmore, and could not, of course, be again conveyed. We have read with care the testimony in the record touching the question of possession of complainant of the land conveyed by the patent of March, 1845, and are satisfied that before the institution of this suit, and at that time, complainant had possession of the land claimed by defendants under the patent of July, 1846, which is within the boundaries of the patent executed March 3, 1845, to Ledford, Smith, and Skidmore.

The taxes to the state of Kentucky have been paid by complainant, and those under whom she claims, for many, many years, and actual possession had been taken by her and held by tenants claiming under complainant's title for some time before the institution of this suit. This actual possession was within the boundaries of the survey and patent under which defendants claim title, as well as outside of those boundaries, but within the boundaries given in patent of the commonwealth of Kentucky to Ledford, Smith, and Skidmore. The complainant's title and possession as proven entitled her to equitable relief against defendants' claim of title to the land described in patent of July, 1846, which is within the patent executed in March, 1845.

There is, however, difficulty in determining the extent of this relief, because of the difficulty in fixing the boundaries of the 86,000-acre survey patented to Ledford, Smith, and Skidmore. The difficulty is in fixing the fourth corner of the survey. If the call from the third to the fourth corner is run according to course and distances, without regard to the call of "a stake near Cumberland Gap"—that is, "thence south, 60 degrees west, 8,320 poles"—the line runs into the state of Tennessee some eight or ten miles, and the corner would be near Powell river. But if this course be disregarded, and the line run along the crest of the Cumberland Mountains towards Cumberland

Gap, and with the county line of Harlan county and the state line into the Gap, the fourth corner might be ascertained, and would be by a stake in the center of Cumberland Gap.

This Gap has, according to the testimony of Gen. Duffield, an average width of 50 yards between the sides of the pass, and a length of about 500 yards; and if the crest of Cumberland Mountains is followed along the state (Kentucky) line, it will go to about the center of this Gap. Gen. Duffield testifies that the course of the crest of Cumberland Mountains, after leaving the third corner of the 86,000-acre survey, is south, 60 west, and thence the crest of the mountains runs south, 38 west, for about 3 miles, and that if all of the meanders of the crest of the mountains are reduced to a straight line from the third corner to the fourth corner of the 86,000-acre survey, assuming the line to run with the crest of Cumberland Mountains, the line is south, 70° 12′ west, and the distance 7,934 to the center of the Gap, instead of 8,320 poles, as called for in the patent.

If the call of this patent had been for a stake in or at Cumberland Gap, instead of a stake near Cumberland Gap, there would be no serious difficulty in disregarding the course mentioned in the patent and running the line so as to reach the natural object—i. e., Cumberland Gap—called as the fourth corner. The word "near" in this patent should be construed to mean at or in Cumberland Gap, as neither the county of Harlan could sell, nor the state of Kentucky could convey, land lying in Tennessee. This is, we think, the proper construction, rather than run the lines of this patent according to the courses and distances, so as to include many thousands of acres of land in the state of Tennessee.

The complainant is entitled to relief prayed for in her bill as amended, and her costs herein expended.

DAVIS' HEIRS v. HINCKLEY et al.

(Circuit Court, D. Kentucky. July 11, 1900.)

1. BOUNDARIES—CONSTRUCTION OF PATENT—CONFLICT BETWEEN CALLS FOR CORNER AND FOR COURSE AND DISTANCE.

   The call from the third to the fourth corner of a survey of land, made under warrant of the state of Kentucky and afterwards carried into a patent issued by the state, was from a stake on the top of Cumberland Mountain, "thence south, 60 degrees west, 8,320 poles, to a stake near Cumberland Gap." If the course and distance be followed, it would carry the fourth corner several miles within the state of Tennessee; whereas, if the line be run following the state line along the crest of the Cumberland Mountains in a general southwesterly course, it would strike the center of the Gap at the Tennessee line. *Held*, that the words "near Cumberland Gap" should be construed to mean at or in Cumberland Gap, and that, as so construed, such natural object would control the calls for course and distance, and fix the corner at the center of the Gap.

2. QUIETING TITLE—POSSESSION OF COMPLAINANT—POSSESSION OF PORTION OF TRACT.

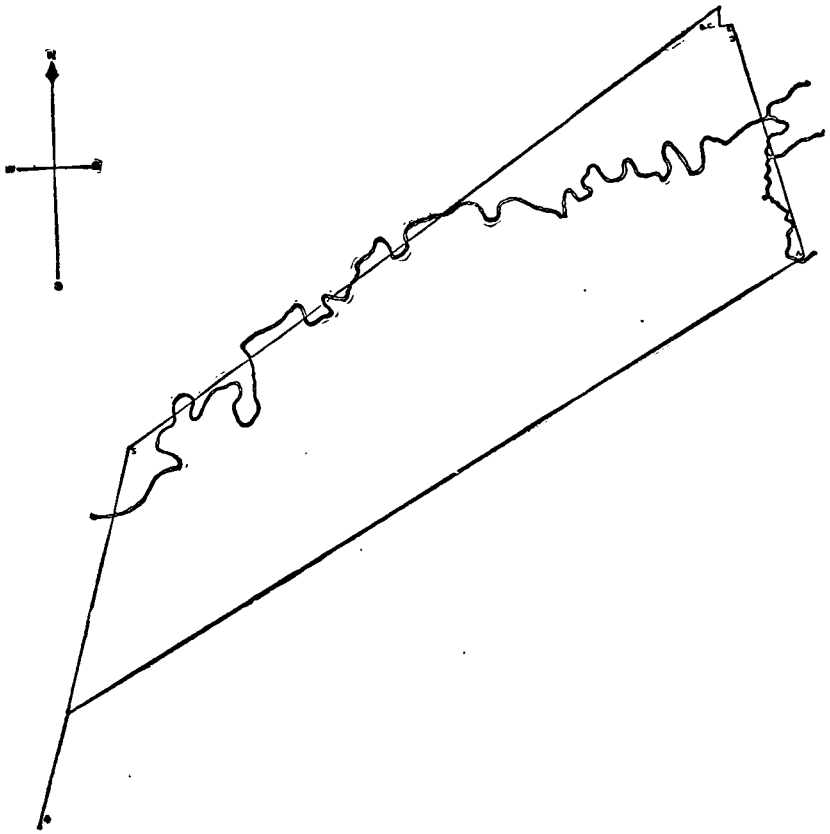
   Where a large tract of land in a body included a large quantity of wild mountain land, the payment of taxes thereon by the legal owner for many years and the occupation of parts of it by tenants constituted possession of the entire tract, such as would support a suit to quiet title.

In Equity. Suit to quiet title.

EVANS, District Judge. The complainants' bill seeks a decree quieting their title to a large tract of land, mainly in Harlan county, Ky., upon the allegations that they have the legal title to the land and the possession thereof, and that the defendants are, without foundation therefor, making some claim to the ownership of said land. The defendants H. V. Harris and Frank G. Brown, though properly brought before the court by statutory service sufficient for the purposes of the relief sought as to the land, have not appeared nor pleaded; but the defendants F. E. Hinckley and the Horn Silver Mining Company have pleaded that they are innocent purchasers for value of said land and have possession thereof, and they have also contested alike the title and the possession of the complainants. These defendants, however, have taken little or no proof in support of their plea or in opposition to complainants' claim, and practically the case must be decided alone upon the testimony offered by the complainants.

Without treating the case at all elaborately (as it presents no serious difficulties), it will suffice to say, first, that there seems to be no doubt that the patent of September, 1845, issued upon the survey of March 3, 1845, to Ledford, Skidmore, and Smith, is not only prior to that under which the defendants claim, but is valid as to all lands included within the boundaries of that patent, except such parts thereof as had been previously patented by the state of Kentucky to other persons; second, that, as between complainants and defendants at least, the proof is sufficient to show possession in the former of all the land in dispute. The continued and prompt payment of the taxes upon the land for a long period of time and its occupation by tenants, considered with reference to the character of the otherwise unoccupied portions of the land, is, all things considered, about the only character of possession

of which it is susceptible under the circumstances almost judicially known to exist in that section of the state and in that mountainous region. The chain of the complainants' title from the commonwealth to the year 1870, when Edward M. Davis, the complainant's ancestor, purchased it, seems to be well established, if, fourth, the identity of the land is sufficiently shown by the testimony.



The determination of this question ultimately depends upon the location and upon the manner of locating the fourth corner called for in the patent. The call is from a "stake on top of Cumberland Mountain, south, 60 degrees west, 8,320 poles, to a stake near Cumberland Gap." It is clearly proved that, if this exact course were followed the full distance, it would lead across the state line and onward over a portion of the state of Virginia to Powell's creek, in the state of Tennessee, some 10 miles southwardly from Cumberland Gap, which is the corner of the two last-named states upon the Kentucky line. As neither Harlan county, nor the state of Kentucky, had any power either to survey, or sell, or convey lands outside of the latter state, it is entirely manifest

that the line from the third corner to the fourth corner named in the patent to Ledford, Skidmore, and Smith, as soon as it struck the state line, must conform to it in its progress to Cumberland Gap. This is a conclusion which must follow from the very necessities of the case, particularly as that line would never come north of the state line. Besides, as the fourth corner was fixed as "near Cumberland Gap," course and distance alike must, upon the most familiar principles of Kentucky land law, yield to a designated natural object which is certainly ascertainable. There can be no doubt as to the identity or location of Cumberland Gap as a natural object. It was a most noted place. It cannot be doubted that the proper construction of the words "near Cumberland Gap" require that they should in this connection be read as equivalent to the phrase "at Cumberland Gap"; nor can there be any doubt that this also leads to the further result that the corner at Cumberland Gap should be located on the state line in the center of the Gap. Most probably—we might say, indeed, certainly—the state line monument, located in the Gap, is altogether the most proper and appropriate place to fix the exact location of the corner in the Gap, and the court holds and finds that it is the proper location of the fourth corner. This prime factor being established, the other essential consequences follow as matter of course.

The court is of the opinion, therefore, that the complainants are entitled to a decree in the usual form quieting their title as against all claims of each of the defendants to the entire boundary described in the patent as the same is now ascertained, and as this result will be worked out by locating the fourth corner of the patent at the state line monument in the Cumberland Gap. The complainants are entitled to costs against the defendants Hinckley and the Horn Silver Mining Company, but not against the other defendants, who have not been personally served and who have not appeared in the case.

A decree may be prepared accordingly; but the form of one found in the papers is not thought to be quite up to this requirement, nor to the rules of the court.

DAVIS v. COMMONWEALTH LAND & LUMBER CO. et al.

(Circuit Court, E. D. Kentucky. August 31, 1904.)

1. COURTS—FEDERAL COURTS—FOLLOWING STATE DECISION.

Pending a number of suits to quiet title in a federal court by the owners of a large tract of land under a patent from the state which involved the question of the boundary of such tract, and after such question had been decided in two of the suits, an action in replevin to recover a number of logs, between different parties, was instituted in a state court, and the issues were so made as to raise the question of the boundary of the same tract of land, and a decision of such question by the highest court of the state was obtained therein, which reduced the area of the tract nearly one-half from that given it by the federal decisions. The owners of the land were not parties to such action, which was apparently brought for the purpose of obtaining such decision and was not seriously contested. *Held*, that the decision of the state court, while entitled to the highest consideration, was not binding on the federal court in the suits by the owners of the land which were still pending.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. BOUNDARIES—CONSTRUCTION OF PATENT—FOLLOWING COURSE OF NATURAL OBJECT BETWEEN CORNERS.

The call for the third line of a boundary to the fourth corner, as given in a patent issued by the state of Kentucky, was from a stake on the top of Cumberland Mountain, "thence south, 60 degrees west, 8,320 poles, to a stake near Cumberland Gap." If the course and distance be followed, the line would pass to the eastward of Cumberland Gap, through a portion of Virginia and several miles into the state of Tennessee. If the crest of the Cumberland Mountain be followed the distance called for, it would fall short of reaching Cumberland Gap, and locate the fourth corner at a point on such crest to the northeast of the Gap. *Held* that, both the third and fourth corners being points on the Cumberland Mountain, the line joining them ran with the top of such mountain for the distance called for, and not in a straight line following the given course, and that the fourth corner was at the point on the crest of the mountain 8,320 poles from the third corner as so measured.

3. SAME—RUNNING LINES BACKWARD.

While the boundary lines of a survey as given in a patent or deed may be run backward and in reverse order where necessary, because of an insurmountable difficulty in running them in their direct order, it is not permissible in doing so to disregard natural objects called for in the boundary, either as corners or lines.

4. SAME—QUANTITY.

In locating the boundary of a tract of land as given in a patent or deed, the question of quantity can only be considered where it cannot be located by natural objects, nor by following the courses and distances called for, or where it is necessary, in order to close the lines, to run some of them backward and in reverse order, and the number of unlocated corners and lines is such that there are alternative ways of closing, in which case the quantity given may be resorted to in determining which way shall be adopted.

5. QUIETING TITLE—RIGHT TO MAINTAIN SUIT—SUFFICIENCY OF EVIDENCE.

To entitle a complainant to maintain a suit to quiet title, he must show that defendant claims the land. If complainant derives title through a deed containing exceptions, he must show that the land claimed by defendant is outside of such exceptions; but a lack of proof on his part in that respect may be supplied by evidence introduced by defendant.

6. ADVERSE POSSESSION—EVIDENCE.
Evidence considered, and *held* insufficient to sustain the defense of title by adverse possession in a suit to quiet title.

7. QUIETING TITLE—PROOF OF POSSESSION.
Evidence *held* to show possession by complainant in a suit to quiet title at the time the suit was instituted.

[Ed. Note.—Necessity of possession in suits to quiet title, see note to Jackson v. Simmons, 39 C. C. A. 522.]

In Equity. Suit to quiet title.

Frank Chinn, D. W. Lindsey, and William Ayres, for Charles Henry Davis.

Helm, Bruce & Helm and W. F. Hall, for Commonwealth Land & Lumber Co.

COCHRAN, District Judge. This is a suit by the complainant, Charles H. Davis, trustee, against the defendants, Commonwealth Land & Lumber Company, North Cumberland Manufacturing Company, Continental Land Company, and G. W. Bramlett, to quiet his title to certain land in Harlan county, Ky. A decree pro confesso has been entered against the defendant companies. The individual defendant, Bramlett, alone has answered the bill. He does not assert title to said land in himself, but in his son, W. L. Bramlett, as purchaser at judicial sale in proceedings against the first-named company, whom he claims purchased for his benefit and on whose sale bond he is surety.

That land is a part of a certain tract of land granted by the commonwealth of Kentucky to John Ledford, Henry Skidmore, and Noble Smith by patent dated September 25, 1845, issued on a survey dated March 3, 1845, made under an order of the Harlan county court and conveyed, except so far as covered by senior patents and prior conveyances, November, 1870, by said patentees to complainant's grandfather, Edward M. Davis, through whom he claims, and is a part of that portion thereof outside of said senior patents and prior conveyances. Said senior patents are not identified in said conveyance, are quite numerous, and cover a large portion of the land within the boundary of said tract of land contained in the patent. Said prior conveyances are very few, cover but a small portion of said land, and are specifically identified in said conveyance. The description of said tract of land granted by said patent as set forth therein is as follows, to wit:

"A certain tract or parcel of land containing eighty-six thousand acres, by survey bearing date the 3d day of March, 1845, lying and being in the county of Harlan and bounded as follows, to wit: Beginning on Crank's creek on two bushes and two sugar trees, beginning corner to said Smith's 1,500 survey; thence S. 70° W., 664 poles, to three beeches, beginning corner to Smith's 600-acre survey; thence S. 28° W., 400 poles, to a stake on the top of Cumberland Mountain; thence S. 60° W., 8,320 poles, to a stake near Cumberland Gap; thence N. 15° E., 3,200 poles, to a stake; thence N. 55° E., 8,820 poles, to a stake; thence S. 5° W., 3,150 poles, to the beginning."

The land to which complainant desires his title quieted is a part of the land contained within the following boundary, to wit: Beginning at a double maple, two beeches, and two black gums, on the north side of the Clover Fork of the Cumberland river, about 20 poles from the same; thence S. 80 degrees W., passing William Turner's at 80 poles,

in all 680 poles, to a sugar tree and hickory; thence south, crossing said fork, 480 poles, to a stake in the Little Black Mountain; thence west 1,920 poles, to a stake; thence north 480 poles, to a stake; thence N. 66 degrees E. 680 poles, to a stake on the Poor Fork; thence, running up the same, N. 80 degrees E. 1,920 poles, to a stake; thence, recrossing said Big Black, 960 poles, to the beginning—granted to Moses Cawood, under whom defendant asserts title as aforesaid by a patent issued January 28, 1846, on a survey dated March 6, 1845, made by virtue of an order of the Harlan county court of that date. This patent is three days junior to the Ledford patent, and states that said boundary contains 9,500 acres. Complainant claims that the whole of this tract is within the boundary of the Ledford patent; that 4,500 acres thereof is within that portion of said patent covered by senior patents; and that as much as 5,000 acres thereof is within the portion of said patent not covered by senior patents or prior conveyances. It is this latter portion of said Cawood patent that complainant claims, and his title thereto that he seeks to have quieted herein.

The defendant denies that the whole of the Cawood patent is within the Ledford patent, or that as much as 5,000 acres thereof is within said portion thereof outside of the senior patents. In his answer he states that he has not sufficient knowledge or information to form a belief as to whether any part thereof is within that part of the Ledford patent outside of the senior patents, and denies that exceeding 1,000 acres thereof is within such part of the Ledford patent. According to the evidence as presented by him, a part of the Cawood patent is within the Ledford patent, possibly as much as one-third thereof. The defendant does not take the position, either in his pleading or evidence, that no part of the Cawood patent is within that part of the Ledford patent outside the senior patents, and hence that no part of the land claimed by him is within any part of the land claimed by complainant. His not doing so conduces to show that his real position relates to the extent that his claim is within complainant's. The extent that the one claim is within the other claim, and hence of complainant's right to relief herein, if he is entitled to relief, depends primarily on the question as to how much of the Cawood patent is within the Ledford patent. In order to settle it, both patents must be located. There is no dispute as to the location of the Cawood patent. There is as to that of the Ledford patent. And this is the principal controversy in this case, to a consideration of which I will at once proceed. What, then, is the true location of the Ledford patent?

At the threshold of this question, we are met with the contention by defendant that the Court of Appeals of Kentucky, in the case of Creech v. Johnson, 76 S. W. 185, 25 Ky. Law Rep. 659, has located the Ledford patent, and that this location is conclusive on this court. The first proposition is conceded; the second is disputed. Is this court, then, conclusively bound by the location of the Ledford patent made in that case? Is it thereby foreclosed from investigating and determining the true location of said patent on its merits? That case was this: It was an action by one Johnson and two Jacksons against two Creeches to recover possession of 222 poplar logs alleged to have been wrongfully detained by defendants from the plaintiffs and $400 for the wrong-

ful detention thereof. The petition alleged that they were cut by defendants from 50 acres of unoccupied land of which the plaintiffs were the owners. The defendants denied that the plaintiffs were the owners of said land or logs, and alleged affirmatively that the plaintiffs claimed said land under a patent which issued in 1902 on a survey made in that year, and that same was void because it was embraced by the Ledford patent, under which the complainant herein claims, and also by a patent to one Boyd Dickinson issued more than 40 years before. These affirmative allegations were denied by the plaintiffs. The lower court rendered a money judgment in favor of plaintiffs against defendants for the sum of $256. This judgment was affirmed by the Court of Appeals. The action was brought September 22, 1902, one month and fourteen days after this suit was brought, which was on August 8, 1902. Judgment in the lower court was rendered June 2, 1903. The appeal was docketed at September term, 1903, of the Court of Appeals, submitted September 29, 1903, on motion to advance, and disposed of October 14, 1903. After this action was brought, and before its final disposition, five other suits were brought in this court by complainant against other claimants to parts of the same land, including said Creeches, which suits are still pending. I cannot resist the conclusion that the object of that action was to bring about a construction of complainant's patent by the Court of Appeals of Kentucky adversely to complainant's contention as to its true location, in order that such construction might be availed of in this and the other suits pending in this court as a bar to the view that it might have as to such location. The situation existing at the time the action was brought, the proceedings had in it, and the reasons given, on the motion to advance it in the Court of Appeals, for its being advanced, all conduce to this end.

This court had in two suits prior to the pending litigation herein in regard to said patent construed it. Judge Barr had construed it in 1894 (Davis v. Farmer [D. C.] 141 Fed. 703), and Judge Evans in 1900 (Davis' Heirs v. Hinckley [C. C.] 141 Fed. 708). They placed the same construction upon it, which was adverse to the construction thereof advanced by the defendants in said pending litigation. This construction had been acquiesced in by the defendants in the prior litigation. It was reasonable to conclude that this court would adhere to its former construction if things remained as they had been. A possible, if not probable, ground of getting it to change its construction, was to obtain a construction by the Court of Appeals before the pending litigation could be prepared and brought to a hearing, upon the idea that it was a question of local law and this court would be bound by that construction. Such was the situation when said action was brought. Then, as to the proceedings had: Many of the steps in it were taken by agreement of the parties. Though a common-law action, it was agreed that it might be tried by the court upon depositions; the taking of the depositions was by agreement, and what one witness would swear to was agreed to; instead of bill of exceptions, an agreement was filed as to the evidence heard in the lower court; and in the Court of Appeals both sides concurred in the motion to advance. Still further, plaintiffs' case was made out by introducing his 50-acre patent and proving that the logs were cut from its bound-

ary and their value. This they did. But they did not rest here. They voluntarily reduced their claim to 64 logs, of the value of $4 apiece, cut from 17 acres of said 50-acre patent, by proving that the rest thereof was covered by senior patents, and then took upon themselves the burden of showing that said 17 acres was not embraced within the Ledford patent, under which complainant claims. But, though defendants had alleged that it was within the Boyd Dickinson patent, also, they did not undertake to show that it was not, contenting themselves with attempting to show only that it was not within the Ledford patent. This they attempted to do through the surveyor on whom defendants rely herein in support of their contention as to the true location of the patent. On the other hand, the defendants introduced no evidence whatever. They did not attempt to show that said 17 acres was within the Ledford patent, nor did they dispute plaintiffs' evidence as to the number of logs cut from the 17 acres or their value. As stated before, the action was for the recovery of the logs. No claim was made that defendants had converted them to their own use, nor was evidence introduced to that effect. There was no prayer for a money judgment, save as to damages for wrongful detention. The judgment was for $256, the value of the 64 logs at $4 apiece. It should have been for the logs themselves, if to be had, and, if not, for their value. This error in the judgment was not called to the attention of the Court of Appeals, and the judgment sought to be reversed on this ground. Finally, as to the reason given for having the case advanced in the Court of Appeals: It is as follows:

"This case involves the location of a patent which, if located according to the contention made by the patentees and those claiming under them, will include about 300 square miles and dispossess a population of about 15,000 souls. The location of this patent was before this court at the last term in the case of Asher v. Howard, reported in 70 S. W. 277, 24 Ky. Law Rep. 961, where your honors declined to pass on the question of location on the ground that the interests were large and the facts not so brought out as to enable the court to pass intelligibly upon the questions. This case has been prepared for the purpose of obviating that difficulty and presenting to the court all the facts necessary to enable it to locate the patent. The magnitude of the tract of land and the extent of population alone make it a public question, and while not within the exact language of rule 16 of this court the case is within the equity of that rule, because the question has recently been considered, but not adjudicated, by the court. There are many cases pending, both in the state and federal courts, concerning the location of this patent. Under these circumstances we feel that the court will grant the request made by both parties to the appeal to advance the case."

Here is an express avowal that the case had been prepared for the purpose of enabling the Court of Appeals to locate complainant's patent, which it had refused to do in a former case. And the patent is desired to be located, not particularly to serve the interests of the parties to that litigation, but of others in no way connected with it. Certainly, in view of all this, I am warranted in concluding that the sole purpose of that litigation was to bring about a construction of the complainant's patent; and I think there is not much reason to doubt but that it was for the purpose of securing a construction adverse to complainant.

It remains, then, to be considered whether this court is bound by

that construction obtained in this way. Certainly complainant is not bound by that construction. I mean by this that the judgment in that case could not be pleaded by way of estoppel against him by the parties to it or by any one else. This, because he was no party to that litigation. By the construction put upon his patent therein, it is cut half in two from what he claims it to be and from what it was adjudged to be by this court on the two occasions referred to in suits to which he was a party and which were fought out at arm's length by the parties thereto. The land covered by the patent as he claims it to be and as it was so adjudged is worth probably more than a half million of dollars, and since 1870, when the original patentees parted with their title thereto to his grandfather, Edward M. Davis, the latter and those claiming under him have paid over $25,000 in state and county taxes. There is no good reason here, then, for making an exception to the rule that one is not estopped by a judgment in a suit to which he is not a party. If this case were in the state courts, they would not hesitate for a moment to lay aside the decision in the Creech-Johnson Case and deal with it as if that case had never arisen. If it were before the Court of Appeals as it is before me, it would blot that case from its memory, so as not to be affected or influenced by it to the slightest degree in passing upon complainant's rights. Is this court, then, bound by that decision when the state courts are not? Was complainant's sole remedy, after that case was decided, in order to get a hearing of his contention on its merits, to abandon this suit and go into the state courts? I think not. I think this court is just as free as the state courts to consider the matter on its merits.

The defendant in support of his position relies on the well-known doctrine that the federal courts are bound by the decisions of the state courts in matters of local law. He cites the following cases as applying that doctrine to a case of this kind, to wit: Preston v. Bowmar, 6 Wheat. 580, 5 L. Ed. 336; Suydam v. Williamson, 24 How. 427, 16 L. Ed. 742; Henderson v. Griffin, 5 Pet. 151, 8 L. Ed. 79. Each of these cases was an action of ejectment. In the Preston-Bowmar case plaintiff's right of recovery depended upon the location of the patent under which he was claiming. He had theretofore brought an action in the state court and lost it. In those days a judgment in ejectment was not a bar to another suit in ejectment. Hence it was that he was able to sue again, and he brought his suit in the federal court. A judgment dismissing his suit there was affirmed. The Supreme Court did not so act because it considered itself conclusively bound by the judgment of the state court in the former suit, but because the location of the patent which it made could not be pronounced unreasonable or founded in clear mistake. In the Suydam-Williamson case plaintiff's right of recovery depended upon whether the title under which he claimed had been divested by certain proceedings had in the state court. It had been decided in the highest state court that it had been. But this had been so decided, not simply in a single case. It had been so decided in at least two, and possibly more, cases. Besides, in all those cases the position of the plaintiff in regard thereto had been represented by those under whom he claimed, and that with an earnest effort to have that position upheld; and Mr. Justice Camp-

bell placed stress upon the fact that the persons whose titles had been so attempted to be divested by those proceedings were "children under the superintending care of the parental jurisdiction of the state." In the Henderson-Griffin case plaintiff's recovery depended upon whether it was barred by the statute of limitations. It was, unless it came within an exception to the effect that, if the plaintiff had discontinued a former suit, then he or any one claiming by, from, or under him might bring another suit within a certain period. A former suit had been brought in the state court by parties named as trustees in a trust executed by the statute of uses. That court decided that the plaintiffs had no right of action, and the suit was thereupon discontinued. Thereafter the suit in the federal court was brought by the cestuis que trustent in said trust. It was held that they did not claim by, from, or under the plaintiffs in the state court, and hence the case did not come within the exception, and the suit in the federal court was barred by the statute of limitations. The decision of the state court did not involve any question decided in the suit in the federal court. It was simply accepted as the law and held that, notwithstanding plaintiffs had title under the decision by the state court, their right of action was barred by the statute.

There is nothing, therefore, in either of these cases that justifies the position that a decision of the Court of Appeals of this state, which, if binding, will take from a noncitizen thereof one-half of a very valuable property claimed by him, upon which he and his family for over 30 years have paid taxes amounting in the aggregate to a very large sum of money, rendered in a suit to which he was not a party and of which he had not the slightest notice, involving the title of 64 poplar logs, worth not exceeding $256, and in which, though his title was set up, it was not defended and was put forward for the purpose of being shot down, is conclusive upon him as to his rights, or necessitates an abandonment of a suit which he has pending in this court with all the rights accruing to him thereunder to prevent its being so. The following cases, to wit: Carroll v. Smith, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; Gibson v. Lyon, 115 U. S. 439, 6 Sup. Ct. 129, 29 L. Ed. 440; Barber v. Pittsburg, etc., Ry. Co., 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925—are authorities against any such position.

In the Carrol-Smith case Mr. Justice Matthews said:

"The decision in Hawkins v. Carroll Co., 50 Miss. 735, above referred to, is not a judgment of the Supreme Court of Mississippi construing the Constitution and laws of the state, which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply in the present case. It is a decision upon the very bonds here in suit, pronounced after the controversy arose and between other parties. It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the Courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of these courts, to determine for themselves what is the law of the state by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one state, suing in another, the choice of resorting to a federal tribunal."

The Gibson-Lyon case was an action of ejectment. A prior action in ejectment had been brought in the state court by the vendor of plaintiff and decided against him. Mr. Justice Matthews stated that defendant contended that this judgment of the state court—

"If not entitled to the force of an estoppel, is at least an authoritative decision of the highest court of the state upon the law of the case, which, as it involves only questions of title to real estate within its territory dependent on its local jurisprudence, ought to furnish the obligatory rule of decision for the courts of the United States."

He responded to this contention in these words:

"As a precedent, the decision of the Supreme Court of the state, though single, is entitled to peculiar respect, because all the questions decided arise upon the local law of the state; but it cannot have conclusive force in the courts of the United States, unless it has become a rule of property."

He then proceeded to consider the question as to plaintiff's right on its merits, but disposed of it in the same way the state court did.

The Barber-Railway Co. case was also an action of ejectment. Plaintiff's right to recover depended on the construction of a devise in a will. That devise had been construed by the Supreme Court of the state in a prior action of ejectment, and the question was as to the effect of its judgment. Mr. Justice Gray said:

"The decision of the Supreme Court of Pennsylvania, in the former action of ejectment, is certainly not conclusive as an adjudication of the rights of the parties, inasmuch as a single verdict and judgment in ejectment, not being conclusive under the laws and in the courts of the state, is not conclusive in the courts of the United States, and no bar to the second action of ejectment. * * * The question whether the opinion of the Supreme Court of the state in the former action is conclusive evidence of the law of Pennsylvania in a court of the United States depends upon the further question whether the opinion is declaratory of the settled law of Pennsylvania as to the effect of such devises, or is a decision upon the construction of this particular devise. When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a state, that construction is to be followed by the courts of the United States in determining the title to land within the state, whether between the same or between other parties. * * * But a single decision of the highest courts of a state upon the construction of the words of a particular devise is not conclusive evidence of the law of the state, in a case in a court of the United States, involving the construction of the same words, between other parties, or even between the same parties or their privies, unless under such circumstances as to be an adjudication of their rights."

It must be held, therefore, that the opinion of the Court of Appeals of Kentucky in the Creech-Johnson case is not conclusive on this court as to the true location of complainant's patent. The mere fact that prior thereto such location had been determined by this court on two occasions, and this location was held to be erroneous in the Court of Appeals in that case, does not give the opinion therein any more force than it would be entitled to if such location had not been so determined. It is, however, the duty of this court to treat that opinion with respect, to examine the reasons given for the conclusion reached in it and weigh them carefully, and not to depart therefrom lightly, but only upon the deepest conviction that it has fallen into error. This I will do.

I recur, then, to the question which I started out to consider, and that is, as to what is the true location of the Ledford patent. In order to

locate a boundary of land contained in a deed or patent, it is essential to first interpret the words used in describing the boundary and determine their meaning, or, in other words, to ascertain what boundary is called for thereby. The patent calls for six lines and six corners. The first corner is two beeches and two sugar trees in Crank's creek, the beginning corner of Noble Smith's 1,500-acre survey. The second corner is three beeches, the beginning corner to a 600-acre survey of said Noble Smith. The other four corners are stakes. The third corner, or first stake corner, is located "on the top of the Cumberland Mountain." The fourth corner or second stake corner, is located "near Cumberland Gap." The other two stake corners are not located, save so far as they are located by the courses and distances called for in the lines leading to them.

Now, the first two corners—the beech-sugar tree corner, beginning corner of the Smith 1,500-acre survey, and the beech corner, the beginning corner of the Smith 600-acre survey—are known objects and can be readily found by one going on the ground. The fixing of these two corners fixes the first line, which, according to the true interpretation thereof, nothing else appearing, is a straight, or, as the old ejectment lawyers would term it, a rectilinear, or right, line, between those two corners. The patent boundary undertakes to give the course and distance of this line. According to that, its course is S. 70° W. and its distance 664 poles. But actual running and measurement of that line, making due allowance for variation in the magnetic meridian, shows that such is not the true course and distance of said line. It runs further south and is longer than is there given. Complainants's surveyors testify that it runs S. 66½° W., and defendant's surveyor that it runs S. 67½° W.; thus differing by one degree. The former testify that its length is 920 poles, or 256 poles longer than given in the patent; the latter that its length is 911.5 poles, or 247.5 poles longer than so given, thus differing by 8½ poles. In locating this first line, according to the rule of preference governing in such cases, by which the order of preference is natural objects, artificial objects, adjacent lines, courses, distances, and, lastly, quantity, the line given in the patent as the first line, limiting ourselves to the course and distance, must be rejected, and the straight line between the two known natural objects constituting the first and second corners accepted as the first line thereof.

When we come to the second line, there is no doubt as to its meaning and true interpretation. It is a straight line between the second corner, three beeches, and a stake on top of Cumberland Mountain. But it cannot be located, as in the case of the first line, by first locating the corners and then drawing a straight line between them. This, because the third corner, the stake on top of Cumberland Mountain, is not to be found. Hence we must pursue the opposite course, and locate the corner by first locating the line; and we locate the line by running the course called for in the patent, which is S. 28° W. Where that line strikes the top of Cumberland Mountain is the third corner. By actual measurement, the distance is longer than called for in the patent, to wit, 400 poles. Complainant's surveyors testify that it is 424.12 poles, and defendant's surveyor that it is 463.4 poles, thus differing by 39.28 poles.

So far there is not the slightest difficulty in locating the patent. Both

sides are agreed. It is out of the third line that the supposed difficulty in locating the patent arises. Here we must first interpret the call for that line, and in so doing we must go to the very root of the matter. Splitting this call up into its elements, we find that it calls for three things in relation to said line. It calls for us to go from a stake on top of Cumberland Mountain to a stake near Cumberland Gap, it calls for a course S. 60° W., and it calls for a distance of 8,320 poles, or just 26 miles. What, then, does the first call, to wit, from a stake on top of Cumberland Mountain to a stake near Cumberland Gap, mean? We are here, I opine, at the very heart of this controversy. Settle this matter correctly, and this case is settled so far as the question as to the location of the Ledford patent is concerned.

Just here, then, let us retire from the center to the circumference—from the unknown to the known—and then come back to the center again. In the first place, I think it can be safely laid down that a call from one object to another object is a call, nothing else appearing, for a straight or rectilinear or right line between and connecting the two objects. But, whilst this is so, it is not necessarily so. It is so, nothing else appearing. It is consistent with this call that the real line between and connecting the two objects is not such a line. In the case of Lyon v. Ross, 1 Bibb, 466, a parent had divided his land by deed between his two children. The partition line called for therein ran from corner to corner, without mentioning any intervening object. One pole distant from a rectilinear line between the two corners was a spring. It was proven that the line as run in making the division passed through the center of this spring, so as to afford to both farms the use of water from the spring. The question was, as stated by Judge Boyle, "whether a mathematical line, the shortest distance between the two corners, or the line as actually run," was to be deemed the boundary between the two places. It was held that the line actually run was. Judge Boyle said:

"In surveys, where a line in fact has not been run, or, if run, no objects existed on the direction of the line to give it locality, or those that existed, being of perishable nature, have become extinct, to ascertain the line in question, the course called for must, of necessity, be adopted as the only practicable mode; but, when ascertained and marked by natural or artificial objects, it would seem most reasonable that it should remain to be considered as the proper boundary of the survey, notwithstanding it might afterwards be found to deviate somewhat from a rectilinear direction. To substitute the rectilinear line, instead of the line actually run and located by natural or artificial objects, as the test of right between parties, would be subjecting men to the inconvenience of being governed by a rule which was invisible and untangible, and capable of being known but by few, instead of being governed by a rule which is an object of sense, and equally capable of being known to all. In the present case, as the proof is unquestionable that the line actually run passed through the middle of the spring, we cannot hesitate to say that the spring ought to be taken as the boundary between the parties, and that the complainants are entitled to a moiety thereof."

This decision may be thought to be questionable, as permitting parol evidence to vary a deed. But, whether so or not, it must be accepted that if the call is from one point in a continuous object, natural or artificial, to another point in the same object, the line between and connecting the two points follows the sinuosities of such object, if not straight,

and is curved or zigzag as the case may be. And this is so, whether the call is simply from point to point, without further reference to the object, or is more definite, and says that in going from the one to the other you go with or follow the object. In such a case it cannot be said that parol evidence is admitted to vary the writing; for it is a cardinal rule in the construction of a writing that it is to be construed in the light of existing circumstances, and in such a case the continuous object between and connecting the two points called for is a part of the existing circumstances. In view of it, the call to run between the two points is construed to run with it, though it is not so expressed. A good instance of the application of this in the case of an artificial object may be found in the case of Whitaker v. Hall, 1 Bibb, 79. In that case Judge Bibb, in his usual vigorous style, said:

"We have no difficulty in deciding it as a general rule that, when an entry calls for a road or trace, and has reference to an intermediate distance between the two objects on that road, the meanders, and not a direct line, must govern the admeasurements. When a road is mentioned, and a distance to an object on it, the mind of every man of common sense takes the road, and follows it as the safest and most infallible guide."

Here the call was "along the road," but it was held that that was not essential. A good instance of the application in the case of a natural object may be found in the case of St. Clair Co. v. Lovingston, 23 Wall. 46, 23 L. Ed. 59. In that case Mr. Justice Swayne said:

"It may be considered a canon in American jurisprudence that where the calls in a conveyance of land are for two corners at, in, or on a stream or its banks, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of the rule by showing that the intention of the parties was otherwise."

And it is well settled that the mere fact that the connection between the two points in the natural or artificial object consists of a line or series of lines whose courses and distances are given, which do not correspond with the sinuosities or meanders of the continuous object in question, is not sufficient of itself to show that it was the intention of the parties that the two corners should not be connected by such sinuosities or meanders. In the Whitaker-Hall case, supra, Judge Bibb added to the quotation we have made from his opinion the following, to wit:

"Where a mathematical point is required on a road at a given distance, common sense would blush for that sophistication which would attempt to find it by taking the bearings and distances along the meanders of the road, protracting, taking the given distance with the dividers, and applying it to the plat, taking the course of the direct line, then running the line according to this experimental course, and measuring the distance on the ground. And when this direct line, so taken, was applied to the ground, the distance would fall short of or overreach the road, by reason of the inaccuracy of instruments, or because the meanders of the road had been taken, not on a perfect plane, or because the direct course was over an uneven surface, and thus the operator must begin again to search for the point required; whereas the first admeasurement along the meanders of the road would have at once ascertained the point required."

In the case of Bruce v. Taylor, 2 J. J. Marsh. 160, the calls of the patent were to begin on the Ohio river and then for certain courses and distances without any corner or marked line to the mouth of

Kinnekenick, a stream emptying into the Ohio, and then certain courses and distances, without any corners or marked lines, to a stake on the Ohio river, and then for courses, distances, and corners from the river round to the beginning. If the patent was construed to bind on the river and run with its meanders from the beginning to the mouth of Kinnekenick, and thence to the stake on the river, it included the land in controversy in that case; but if the courses and distances up the river controlled and were established as the boundary, then the patent did not include that land. The former was held to be the true construction of the patent. Judge Robertson said:

"It is our opinion that the river is the boundary. The beginning is on the river. The mouth of Kinnekenick is on the river. The stake called for is on the river. The intermediate courses are in the general direction of the river. No corners are called for. The courses and distances are not accurate, but such as would be called for when intending that the river should be the boundary. The surveyor would not be particular in ascertaining by his compass the exact course, nor with his chain the precise distance."

Then in St. Clair Co.-Lovingston case the calls of one of the surveys construed therein were as follows, to wit:

"Beginning on the Mississippi river, opposite to St. Louis, from which the lower window of the United States storehouse in St. Louis bears N. 70¾° W.; thence S. 5° W. 160 poles, to a point in the river from which a sycamore 20 inches in diameter bears S. 85° E., 250 links; thence S. 35° E. 130 poles, to a point; thence N. 15° W. 170 poles, to a forked elm on the bank of Cahokia creek; thence N. 85° W. 70 poles, to the beginning."

It will be noted that here was a call from a definite point on the bank of the river to a definite point in the river. It was not said as to whether the line was to run with the bank or with the river. The sole defining of the line, otherwise than due to the terminal points called for, was the course and distance given. It was held that the river was the line. Mr. Justice Swayne said:

"It will be observed that the beginning corner is on the bank of the river. The second corner is a point in the river. The line between them is a straight one. Where the course described would have fixed the line does not appear. There was an obvious benefit in having the entire front of the land extend to the water's edge. There was no previous survey or ownership by another to prevent this from being done. No sensible reason can be imagined for having the two corners on the river and the intermediate line deflect from it. Under the circumstances we cannot doubt that the river was intended to be made, and was made, the west line of the survey. In the light of the facts, such is our construction of the calls of the survey, and we give them this effect."

With these principles well settled, how is the call in question to be construed? If the call had been from the stake on the top of Cumberland Mountain to another stake on the top thereof, definitely fixed, there would be no question but that the line between the two stakes would run with the top of the mountain, though it was not so expressed, and notwithstanding whatever relation thereto the course called for bore. If it did not coincide with the top of the mountain, it would have to be rejected. It could not control the location of the line or affect it. So, if the call had been from the stake on top of Cumberland Mountain to Cumberland Gap, the same result would follow. For Cumberland Gap is a feature of the top of Cumberland Mountain. It is a break therein.

So, likewise, would it follow, if the call had been from the stake on top of Cumberland Mountain to another stake on top thereof near Cumberland Gap. Does, then, any different result follow from the mere fact that, instead of the call being either one of these three, it is a call from the stake on top of Cumberland Mountain to a stake near Cumberland Gap? Does that not mean a stake on top of Cumberland Mountain near Cumberland Gap? I think it does. It cannot reasonably mean anything else. The call means to run with the top of Cumberland Mountain to a stake on the top thereof near Cumberland Gap. That such is the true meaning of this call is enforced by considering by way of illustration only the first three calls of the conflicting patent involved in the suit by complainant against Farmer and others (141 Fed. 703), in which Judge Barr construed and located complainant's patent. That patent was issued July 15, 1846, on a survey made March 3, 1845, apparently on the same day that complainant's survey was made. His survey was made by the surveyor, James Farmer, and that by the deputy surveyor, W. C. Farmer, nephew of the former. Its first three calls are as follows, to wit:

"Beginning at two Spanish oaks and black oak on top of Cumberland Mountain, in the Chadwell Gap, near the head waters of Martin Fork, near a cliff of rock west of the trail leading across said mountain; thence S. 71° W. 140 poles, to a hickory on top of mountain; thence S. 72° W., with the top of said mountain, W. 2,560 poles, to a stake near Cumberland Gap."

Here the beginning corner on top of the mountain is more definitely fixed than the third corner in the Ledford patent. It is two Spanish oaks and black oak, in Chadwell Gap, near the head waters of Martin Fork, near a cliff of rock, west of the trail leading across the mountain. The second corner is a hickory on top of the mountain. The course and distance of the first line is given, and it is not said that it runs with the top of the mountain. But is it not certain that it does so wherever the course and distance will take one? The third corner is a stake near Cumberland Gap, just as in the Ledford patent the fourth corner is a stake near said Gap. It is not said, any more than here, that the stake is on top of the mountain. It is said, however, that the second line runs, not only a certain course and distance, but "with the top of said mountain." Does not, therefore, this line run with the top thereof, wherever the course may take one? Clearly so. Now, though the matter is not so definitely expressed, I think it is equally clear that the third line of the Ledford patent, from the stake on top of Cumberland Mountain to a stake near Cumberland Gap, runs with the top of the mountain and thence to a stake on top thereof, wherever the course called for, to wit, S. 60° W., may take one. We are not authorized to abandon the top of Cumberland Mountain for it; for it is a commonplace that courses and distances must yield to objects called for, and particularly to natural objects as to whose location there cannot be the slightest doubt. Particularly should we not abandon the top of the natural object thus called for, in the light of the consideration that to do so would run us out of the state of Kentucky into the states of Virginia and Tennessee. From Cumberland Gap west the top of Cumberland Mountain is the dividing line between the states of Kentucky and Virginia. At Cumberland Gap those states and the state of Tennessee corner. If a line is run from

the stake on top of Cumberland Mountain—the third corner of the Ledford patent—S. 60° W. 8,320 poles, it will take one across the wedge of Virginia, between Kentucky and Tennessee, running to Cumberland Gap, into Tennessee, on Powell river, 4⅓ miles southeast of Cumberland Gap. Kentucky had no right to grant land outside of its borders. This consideration therefore removes all possible ground for claiming that the course called for and distance along the course has any bearing whatever in fixing the third line of the Ledford patent.

We think, however, that entirely too much stress is placed upon this consideration. It is not a controlling consideration in fixing that line. It is simply a confirming one. The line would have to be where we have fixed it, to wit, on the top of Cumberland Mountain, even if such consideration did not exist, and Kentucky and Harlan county thereof extended south of Cumberland Mountain and took in the territory where said course and distance will take one. In the Bruce-Taylor Case, above, there was a similar confirming consideration. If the courses and distances called for between the corners on the Ohio river were run out, some of them would take one across the Ohio river into the state of Ohio. This fact was alluded to as confirming the construction of the patent necessitated by the other considerations in the case. Judge Robertson said:

"In this case there is a manifest mistake in the calls of the patent for course and distance. If they must be literally pursued for ascertaining the boundary, much of the land which the patent will be made to include will be covered by the Ohio river, and some of it will be in the state of Ohio. It was not intended to appropriate the river, nor land on the north of it. It was not practicable to do either. Then here is a plain mistake in the patent. How is it to be rectified? There must be some deviation from the calls. They cannot, therefore, define the true boundary; and, consequently, some other line than that which would be described by them must be established. This line is evidently the river. Disregard the calls for course and distance, and no rational mind can doubt that it was the intention of the government, the patentee, and the surveyor to bound the 8,200 acres on the north by the river. These calls must be disregarded, because they are incongruous and false. The river is then left without any competition with any other line, and it is established as the true line by many circumstances which could not be reconciled by fixing any other boundary."

Besides all this, it is expressly stated in the patent that the tract of land thereby conveyed and bounded as therein set forth is located in Harlan county, Ky. Consistently with this statement, the third line of the boundary cannot be run into Virginia and Tennessee, thereby locating said tract in the three states of Virginia, Tennessee, and Kentucky. To so run it would do violence to that statement. It must be run so as to throw the whole of the tract of land in Kentucky, if any attention is paid thereto. It must be accepted, therefore, that the third line of the Ledford patent runs with the top of Cumberland Mountain, from the stake on top thereof at the end of the second line to a stake near Cumberland Gap; i. e., that this is the true meaning of the first of the three elements into which we have split the call for this line, and that the second element, to wit, that the line called for runs a course of S. 60° W., must be rejected. In rejecting it we do nothing more than we were compelled to do in regard to the call for course and distance as to the first line. It should not be overlooked,

however, that there was some basis for the course having been so given. The general course of Cumberland Mountain is southwestwardly, and according to the testimony of complainant's surveyors the course of Cumberland Mountain from the stake on top thereof at the end of the second line for a distance of one to three miles is S. 60° W. It then turns towards the north; but, as it approaches Cumberland Gap, for a distance of several miles, it resumes again the course of S. 60° W.

What, then, as to the third element of the call for the third line, to wit, that it shall go a distance of 8,320 poles, or 26 miles? Simply this, that that distance is to be applied to the top of Cumberland Mountain, and wherever it will take one there is the stake near Cumberland Gap which is called for as the end of the third line. According to complainant's surveyors, that distance lacks 724 poles of taking one to Cumberland Gap, and according to defendant's surveyor it lacks 140.59 poles of so doing. In holding that this line goes no farther than this distance will take one, I come in conflict with the opinions of Judges Barr and Evans. They held that this line ran to the center of Cumberland Gap. Complainant so contends herein. This contention, to be valid, amounts to this: That invariably, when a call says that it runs to an object near another object, you run to the latter object and not to the former. I cannot accede to the correctness of this position. There may be instances of such a call where, in order to prevent the description failing from uncertainty, it will be proper to go to the object near to which the object called for is said to be. A case of that sort exists when the object called for cannot be found and there are no data by which its place can be located. When, however, the object called for can be found or its place can be located, the line must be run to that object or place. It cannot properly be made to run to the object near to which the object called for is said to be. This distinction was brought out in the case of Harry v. Graham, 18 N. C. 76, 27 Am. Dec. 226. There the second call of the boundary involved was for a line running a certain course and distance to "a black oak near his (Graham's) own line." There was no black oak at the terminus of this line, run by the course and distance called for. It failed to reach Graham's line by 30 poles. The question was whether the line should stop at the end of the distance called for or should be continued to Graham's line. It was held that it should stop at said distance. Judge Ruffin, in delivering the opinion of the court, said:

"The call is not for that line, or for a tree in it, but to one near it. The argument is that, as it cannot be told how near, we must go to it. The argument would be strong if the call had been simply for a black oak near the line, as in the case supposed by the counsel of a description beginning at a stake or tree, not found, near the middle of the field. There would be no point but the middle of the field to govern; and, rather than the deed should be void for uncertainty, that would be adopted. But, if the words of the deed were 'beginning at a stake near the middle of the field and standing 100 poles east from a certain tree,' it would be different, because the former is removed by the mathematical certainty to be obtained by measuration from the other point given. That is precisely the case before us. The call is not merely for a black oak near the line, but that black oak is represented as standing N. 45° W. 320 poles from a chestnut and red oak, which are found, which removes the uncertainty which, without any distance given, we should feel upon the point how near the line of the other tract is to be approached."

So here the call is not to a stake near Cumberland Gap merely. It is a call for a stake near said Gap which is 8,320 poles, or 26 miles, by the top of Cumberland Mountain, from the stake on top thereof at the end of the second line. Judges Barr and Evans were led to locate the terminus of the third line of the Ledford patent in the center of the Gap by the undue emphasis, heretofore referred to, placed upon the consideration that running the third line according to the course for the distance called for would take one across the wedge-shaped point of Virginia into Tennessee, 4⅓ miles southeast of Cumberland Gap. With the alternative presented of taking the end of such a line or the center of the Gap as the terminus of the third line of the patent, there was nothing to be done but accept the latter. The alternative was not presented of taking the end of the line run with the top of Cumberland Mountain, a distance of 8,320 poles from the third corner of the patent or the center of the Gap. Had it been, the result would probably have been different. This alternative, however, is presented to me, and I have no hesitancy in holding that the end of the line so run, rather than the center of the Gap, should be treated as the end of the third line or the fourth corner of the patent. No better reason for so holding can be given than that the one is called for and the other is not. This error in the holding of Judges Barr and Evans is what, in my opinion, threw Judge Hobson off the track in Creech v. Johnson. It is plain that running the third line to the center of the Gap is a strain upon the call of the patent, if not a violation of it—such a strain as was calculated to lead one to hunt up some other way of locating the patent. And this I believe to be the psychological explanation of the error into which Judge Hobson fell in locating the patent, which error I will point out further on.

If, then, I am correct so far, it must be determined which of the two measurements of the top of Cumberland Mountain from the third corner is to be accepted—that of complainant's surveyors, or that of defendant's surveyor. The experience of the former has been so much greater than that of the latter, that it must be regarded that they are beyond question the greater experts. They, no doubt, could tell the course of the top of the mountain better and measure it with greater accuracy. But defendant's surveyor is more after the order of the surveyor who made the original survey and he has furnished the number of meanders there are of the top of the mountain from the third corner to Cumberland Gap, to wit, 169, and has given the course and distance of each, so that his work can be tested. And, still further, he brings the end of the distance nearer to Cumberland Gap, and hence makes my location of the patent more in conformity with that of Judges Barr and Evans. This consideration has much force with me, as I have been bothered with the idea that perhaps comity required that I should accept their location. For these reasons provisionally I shall at least accept a point 140.59 poles from the center of Cumberland Gap as the location of the stake near that Gap called for in the third call of the patent.

We have thus far succeeded in locating the first three lines of the patent. The first line runs between two natural objects, two beeches and two sugar trees at one end and three beeches at the other. The second one runs between two natural objects, to wit, the three beeches and the top of Cumberland Mountain. The third line does not run be-

tween natural objects, but is itself in its entire course a part of a natural object, to wit, the top of Cumberland Mountain. In running the first line, both course and distance had to be rejected on account of the natural objects; in running the second line, the distance alone had to rejected on that account; and in running the third line, the course alone had to be rejected, and that only for that portion thereof between the two ends of the line. If, then, there is to be any difficulty in locating the patent, it must be found in the other three lines lying between the fourth and the beginning courses. There is no call for a natural object in the course of either one of them. No natural object is struck after the fourth corner is left until the beginning corner is again reached. If running these three lines from the fourth corner according to their courses and distances would take one to the beginning corner, of course, such would be the location of them.

But it is not to be expected, in view of the departures made from the courses and distances given for the other three lines, that so running them would take one there; and it will not do so. To make the connection, therefore, a departure from the course or distance, or both, of one or more of these lines will have to be made. The connection can be made by running the fourth and fifth lines according to courses and distances given, and then connecting the fifth corner with the beginning by a straight line. This line will depart from both course and distance given in the patent as to it. The connection can be made by running the fourth and sixth lines according to the courses and distances given, and connecting the fifth and sixth corners by a straight line between them. To do this, the sixth line will have to be reversed, and the fifth line will depart from both course and distance given in the patent. Then the lines can be run in either one of three ways without either line departing from the course given. In each instance there will be a departure from distance as to one or more of the lines. The fourth line can be run according to course and distance given, and the fifth and sixth lines can be extended until they intersect. In this case the sixth line will be reversed. Then, the sixth line can be reversed, and run according to course and distance given, and the fifth line also reversed, and extended on course given until it strikes the fourth line, which will shorten that line. Or the sixth and fourth lines can be extended and shortened proportionately, and the fifth and sixth corners connected by a straight line between them according to the course given. Here, then, are five different ways of making the connection between the fourth and beginning corner. It is a problem as to which of these five ways should be adopted. Counsel on neither side have addressed themselves to this problem. The testimony of the surveyors as to the effect of these different ways of running these lines upon the location of this part of the patent has been based upon the assumption that the fourth corner is at Cumberland Gap. In solving this problem, I need the assistance of the testimony of the surveyors as to such effect on the basis that the fourth corner is 140.59 poles from Cumberland Gap, or 724 poles therefrom. There are several other suits pending in this court brought by complainant under this patent, and the defendants therein may be more or less affected by the location of these lines. The problem as to their location, therefore, should be set down for further hearing. According to

either way of locating said lines, a much greater part of the Cawood patent than defendants concede is within the boundary of the Ledford patent. By running the fourth line according to the course and distance given and the fifth and sixth lines as to course given, the sixth being reversed, and both extended until they intercept, the Cawood patent will be thrown entirely within the Ledford. It is not certain that it will be so thrown by running said lines in any of the other ways.

It remains to consider the location of the latter patent made by the Court of Appeals in the Creech-Johnson case. It located the first and second lines the same as I have done. It also accepted a part of the top of Cumberland Mountain as the third line. It did not, however, accept 8,320 poles of the top thereof from the third corner southwesterly as the third line. It accepted only so much thereof as lay between the third corner and the point where the top of the mountain would be struck by running backwards from the beginning corner along the sixth, fifth, and fourth lines, according to the courses and distances of the sixth and fifth lines and the courses of the fourth line. So doing shortened the fourth line from 3,200 poles to 1,090 poles, or in all 2,110 poles. It left 6,798.19 poles, instead of 8,320 poles of the top of Cumberland Mountain, between the point so struck and the third corner, as the third line, thus cutting off and throwing out of the boundary 1,521.81 poles of the top of said mountain. It is undoubtedly true that in locating a boundary it may be proper to run the lines backwards in their reverse order. The circumstances under which it is proper to do this are well stated by Mr. Justice Bradley in Ayers v. Watson, 137 U. S. 584, 11 Sup. Ct. 201, 34 L. Ed. 803, in these words:

"As already intimated, the judge was right in holding as he did and in instructing the jury that the beginning corner of a survey does not control more than any other corner actually well ascertained, and that we are not constrained to follow the calls of the grant in the order said calls stand in the field notes, but are permitted to reverse the calls and trace the lines the other way, and should do so, whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant. If an insurmountable difficulty is met with in running the lines in one direction, and is entirely obviated by running them in the reverse direction, and all the known calls of the survey are harmonized by the latter course, it is only a dictate of common sense to follow it."

And that case affords a good illustration of this statement. The land located in that case bounded on the north side of the San Andres river, in Texas. It was rectangular in shape, and that river was its southern boundary. The boundary called first for the western line. It ran from a pecan tree on the margin of the river N. 22° E. 22,960 varas, to a stake in the prairie. Next came the northern boundary. It ran from said stake S. 70° E. 12,580 varas, to two small hackberries. Lastly came the eastern boundary. It ran from said two small hackberries S. 20° W. 26,400 varas, to a box elder tree on the margin of said river. Now, in running these three lines in the order in which they were given, there was no difficulty with the first line. A line of the course and distance given could be run from the pecan tree, and the place where it ended could, for the time being, be accepted as the stake called for as the second corner. The difficulty came with the second line. Running it according to the course and distance given, it did not strike

any hackberries, and it fell short by 570 varas of striking the eastern line. Besides, the distance from an extension of it to the eastern line to the box elder tree was 30,400 varas, or 4,000 varas more than called for as to this line. But, by going to the box elder tree and running the eastern line backwards, the course and distance given took one along a plainly marked line with old blazes, and at the termination of the distance called for, as there was testimony tending to show, there had formerly been two small hackberries, and from that point one would be taken to the pecan tree by running the second and first lines backwards according to their courses and distances, except that the first line would be 4,000 varas shorter than called for. It was held that the boundary should be located by running the lines backwards in their reverse order, if the testimony as to the location of the hackberries was correct.

But by running the lines in their direct order in this case we meet with no difficulty, much less an insurmountable one, until after we have left the third line. It is true that the top of Cumberland Mountain, the distance called for, to wit, 8,320 poles from the third corner, does not run S. 60° W., and because it does not do so we have to reject it. But that is nothing more than we have to do with the first and second lines. We have to reject both course and distance as to the first line, and the distance alone as to the second line. The course and distance of the first line, the distance of the second line, and the course of the third line, do not harmonize with the natural objects called for, and have to be rejected for this reason, and not because they cause the slightest difficulty in locating that much of the boundary. Hence any reversing, or any effect on location due to reversing, must be confined to the fourth, fifth, and sixth lines. And in all of the five possible ways of locating those lines, save the one of running the fourth and fifth lines according to courses and distances and connecting the sixth and beginning corners by a straight line between them, involves reversing more or less as an aid in determining the location. No case can be found in which it has been held that in running the lines backwards and in their reverse orders to locate the boundary it is lawful to disregard natural objects called for in the boundary, either as corners or lines. Due respect must be shown such objects, whichever way the boundary is run, and as much one way as another.

The cases cited in the Creech-Johnson case as sanctioning the propriety of running the calls of a boundary backwards, to wit, Thornberry v. Churchill, 4 T. B. Mon. 29, 16 Am. Dec. 125, and Pearson v. Baker, 4 Dana, 321, do not lay down anything contrary to this. Yet, according to the location of the Ledford patent made in that case, 1,521.81 poles of the top of Cumberland Mountain, constituting a part of the third line, are rejected, and that line is limited to 6,798.19 poles thereof, when the patent boundary calls for 8,320 poles. That this is not proper is to be drawn inferentially from the case of Preston's Heirs v. Bowmar, 2 Bibb, 493, the decision in which the Supreme Court of the United States followed in the case of Preston v. Bowmar, 6 Wheat. 580, 5 L. Ed. 336. The boundary in that case was made up of four lines. The first line ran from an ash in the middle of a line of Glenn's land, the beginning corner, with said line, N. 20° E. 800 poles, to a hoop-

wood and sugar tree, corner to Moffit's land. The second line ran from said corner, with the line of Moffit's land, N. 70° W. 100 poles, to a sugar tree. The third line ran from the sugar tree S. 33° W. 820 poles. The fourth and last line ran thence S. 70° E. 300 poles, to the beginning. No corners were extant save the first and second, and no line was visible save that which connected these two corners and Moffit's line, which extended from the second corner and a part of which was the second line. The sugar tree called for as the third corner was not extant or located. So the call for the second line was the same as if it did not call for a sugar tree, but was simply for N. 70° W., with Moffit's line, 100 poles, from the second corner. In running the third and fourth lines from the end of said 100 poles to the beginning corner according to the courses and distances given the boundary would not close. To close it resort was had to reversing it. It could be closed by running the third line direct and the fourth line reversed, according to the courses given, and extending them until they intersected. This would require an extension of the fourth line 81¼ poles. It could be closed by running the fourth line reversed the course and distance called for, and connecting the termination thereof with the termination of the 100 poles of Moffit's line constituting the second line. It was held that the last way was the proper one to close the boundary. The matter is reasoned out by Judge Boyle with his usual force. One reason given is that according to either way there was a surplus of acreage, and according to the way adopted the surplus was less, though even then it was more than 200 acres. The idea never occurred to Judge Boyle, or, if it did, it was not expressed, that the survey could be closed by not only reversing the fourth line and running it according to course and distance given, but also reversing the third line and running the course given until it struck Moffit's line, thereby cutting off and throwing out of the boundary 81¼ poles of the 100 poles of Moffit's line called for as the second line.

In this case I do not think it is possible to give any good reason for rejecting 1,521.81 poles, or nearly 5 miles, of the top of Cumberland Mountain, called for as the third line of the patent. Three reasons are given for so doing in the Creech-Johnson case. One is that if the patent is located by running the fourth line from the stake near Cumberland Gap, treated as in the center thereof, the course and distance given, and the fifth and sixth lines the courses given, the sixth line being reversed, and both lines extended until they intersect, the fifth line will be 2,058 poles longer than called for and the sixth line 1,840 poles. How much longer they will be than called for if the stake near Cumberland Gap is located 724 poles, or 140.59 poles, from the Gap, does not appear. Certainly not as much longer as where the stake is located in the Gap; but still, no doubt, they will be much longer. But that is only one of five possible ways of locating these three lines of the patent, and the most advantageous to complainant.

Then, again, it is urged that if the patent is located in this way it will contain an acreage considerably in excess of that called for in the patent. The patent calls for 86,000 acres. According to the testimony of defendant's surveyor, who testified in that case, the quantity in it so located will be 182,184 acres; whereas, locating it as located in that

case, it will contain 93,552 acres. But according to the testimony of complainant's surveyors herein there is within the boundary, locating it according to the way stated, 105,000 acres covered by senior patents, which deducted from 190,000, the quantity in the boundary as they estimated, leaves 85,000 acres. It is true that literally the words of the patent make 86,000 acres the quantity within the boundary, and not the quantity within it not included in senior patents. But the words used are not inconsistent with the intention that it should refer to the latter. And the persons claiming the patent have always assessed 86,000 acres for taxation and paid taxes on that quantity. But, apart from all this, the excess in quantity cannot control the location of the first three lines. They are unalterably fixed by natural objects. The sole place in which the excess in quantity can have a bearing in locating the patent is in the other three lines, the fourth, fifth, and sixth. Just what bearing they shall have there I will not undertake to say now. I have left open for further determination the location of those lines. It is not amiss, however, to direct attention to one point in the case of Ayers v. Watson, referred to above on the first hearing in the Supreme Court. It may be found in 113 U. S. 594, 5 Sup. Ct. 641, 28 L. Ed. 1093. The grant involved therein, termed the "Moreno grant," called for just 11 leagues of land. As before stated, the third or northeast corner was two small hackberries. They were not to be found at the time of the litigation, and it was a question of fact for the jury as to where they were located. Evidence introduced by the party contending for the narrower location of the grant tended to locate them at the end of the blazed eastern line from the box elder tree or fourth corner, the termination of the distance given for that line. Evidence introduced by the party contending for the wider location of the grant tended to show that they were not so located. It was, therefore, a question also for the jury to determine how the grant should be located on the basis they found that the hackberries were not so located. In view of this, the trial court instructed the jury as follows:

"If you are not able to fix the disputed lines, or the disputed portions of the lines, with reasonable certainty, from the proof, you may, taking the river as a basis, so extend the eastern and western lines as that a line run N. 70° W. (or S. 70° E.), connecting the extremities of said side lines, will embrace 11 leagues of land."

In other words, the jury was told that, in the contingency stated, they were to be governed in locating the northern line by the quantity called for in the grant. This was held to be an error. Mr. Justice Bradley said:

"The statement in the first part of the charge, that the jury should follow in the tracks of the surveyor, so far as they could be discovered, and when these were not to be found they should follow the course and distance which he gives, so far as not in conflict with tracks that are found, was correct. Had this proposition been followed in the subsequent part of the charge, it would not have been open to criticism. But when directions were given to the jury in greater detail, they were not referred to the courses and distances given by the surveyor, in case they were unable to identify his tracks (that is, in case the proof relating to the two hackberries was insufficient); but they were told thus, 'You will from the whole proof so fix the unmarked or disputed lines called for in the grant as in your judgment most nearly harmonizes the calls with the known corners and the undisputed lines,' and,

if not able to fix these lines in this way, then to resort to the rule of quantity. This was putting the matter as if it depended on the judgment of the jury whether the lines could be run according to the survey; whereas, if not compelled by fixed monuments (such as the plaintiff claimed the hackberry trees to be) to run the second or back line in a particular manner, there was nothing in the way, so far as the evidence showed, of running the first and second lines according to the field notes, only extending the second line so as to meet the east line, the position of which was known. If the northeast corner was not determined by the hackberries, there was nothing to interfere with the location of the Moreno grant in exact accordance with the field notes, except the one thing of extending the second line far enough to meet the conceded location of the eastern boundary. It did not depend on anything requiring the exercise of judgment on their part. It was a matter of course. If the position of the eastern line had not been discovered at all, and nothing had been known but the beginning corner, the field notes would have furnished the only guide for locating the survey. The position of that line being known, it controlled the survey only in respect to that line, which required the second line to be extended sufficiently to reach it. But, if the two hackberry trees in that line were also identified as the true northeast corner, then the position of the north line and the length of the first course would be controlled by those trees. We think there was an error in not putting it to the jury with sufficient distinctness that the course and distance of the first two lines of the survey must govern, if the evidence was not sufficient to fix the location of the northern line by identifying the two hackberries with those called for in the field notes for the northeast corner of the survey, or by some other marks or monuments."

According to this, the quantity called for not only had no bearing in locating the grant by the natural objects called for, but also it had no bearing in locating it by the courses and distances called for. It was held that, if it could not be located according to natural objects, it should be located according to the courses and distances, without reference to the question of quantity. In that case there was but one way of locating the grant by courses and distances. Here there are five alternative ways of locating the fourth, fifth, and sixth lines, and it may well be that in this case the matter of quantity should cut a figure in determining which of these ways shall be adopted, just as in the case of Preston v. Bowmar, supra, the question of quantity was considered by Judge Boyle in determining which of the two alternative ways of locating the third and fourth lines should be adopted. In no other way can the matter of quantity have any determining force in locating the Ledford patent. As said by Judge Guffy in Pitman v. Nunnelly, 17 Ky. Law Rep. 793, 32 S. W. 606:

"The commonwealth has conveyed that boundary to him and the quantity embraced cannot change the law. This doctrine has been so often announced by this court that citation of authorities is unnecessary."

Then again the Court of Appeals directs attention to the fact that, if the Ledford patent is located in the way it declined to locate it, it will include within its boundaries Harlantown, the county seat of Harlan county, held under senior patents; whereas, if located in the way in which it decided it should be located, that place would be excluded from it. This is no doubt true, and the probability is that the boundary will include said place if the fourth, fifth, and sixth lines are located in either one of the five alternative ways in which they may be located. But there is no greater reason for locating the patent so as to exclude Harlantown than for locating it so as to exclude any other sen-

ior patents of which, as heretofore stated, there are a great number, and that, whichever way of the five you locate it. Why, then, should the location of any of these senior grants have anything to do with the location of the Ledford patent? What right is there to so locate it as to exclude one senior patent rather than another? As a matter of fact, at the time of the making of the survey and issuance of the patent, there were not more than three or four people living in Harlantown. Further, it is conceded that the Cawood patent includes said towns within its boundaries, and also that it contains 18,477 acres, when it calls only for 9,500 acres. These, then, are my reasons for differing from the position of the Court of Appeals in the Creech-Johnson case. I hope no one will think that I have not due respect for that court, and would much prefer to agree with it than to differ. I only differ from it because my convictions compel me to do so, just as they compel me to differ from Judges Barr and Evans in the particular above stated. I have set forth in detail my reasons for so differing, so that it can be judged whether I am right or wrong. If I am wrong, I feel that what I have said will find justification in that it may be of some help, at least, in reaching a correct conclusion.

The consideration of the question as to the true location of the Ledford patent thus far has left open for determination the exact location of the stake on the top of Cumberland Mountain near Cumberland Gap constituting the fourth corner of the patent, and which of the five possible ways of locating the fourth, fifth, and sixth lines of the patent, should be adopted. Leaving them so for the present, I pass to the other questions requiring determination at my hands.

Defendant contends that the bill should be dismissed, because complainant has failed to show that the land claimed by him and as to which he seeks to have his title quieted is claimed by defendant, or, in other words, that any part of the Cawood patent under which defendant claims is outside of those portions of the Ledford patent covered by said senior patents and prior conveyances which were excepted from the deed by the Ledford patentees to Edward M. Davis, and hence within that portion thereof which passed by said deed, the only portion thereof to which complainant claims title. It is well settled that one claiming under a deed which excepts certain portions of a tract of land therein described and conveys the remainder thereof only must show that the land claimed by him is outside the exception in order to show that he acquired title thereto by virtue of said deed. This was decided in the following cases, to wit: Guthrie v. Lewis' Devisees, 1 T. B. Mon. 142; Hall v. Martin, 89 Ky. 9, 11 S. W 953; Moses v. Gatliff, 12 S. W. 139, 11 Ky. Law Rep. 356; Hawkins v. Barney, 5 Pet. 457, 8 L. Ed. 190; Greenleaf v. Birth, 6 Pet. 303, 8 L. Ed. 406; Maxwell Land Grant Co. v. Dawson, 151 U. S. 603, 14 Sup. Ct. 458, 38 L. Ed. 279; Webb v. Phillips, 80 Fed. 954, 26 C. C. A. 272. These were all actions of ejectment, save the last, and that was an action to recover possession of logs, the title to which depended on the title to the land from which they were cut. The rule applies equally well, I think, to a suit in equity to quiet title. To be entitled to such relief, the complainant should show that the defendant is claiming the land to which he claims title, and,

if he is claiming under such a deed, he cannot show this without showing that the land claimed by defendant is outside the exceptions.

How, then, as to defendant's contention? That the Cawood patent is wholly outside of the exceptions, so far as they relate to prior conveyances, is shown by the exceptions themselves, which to this extent are specifically identified in the deed, and defendant does not contend otherwise. Then, as to the exceptions so far as they relate to the senior patents: The defendant does not deny that some part of the Cawood patent is not within that part of the Ledford patent outside the senior patents. He says in his answer that he has not sufficient knowledge or information to form a belief in regard thereto, but limits his denial to a denial that exceeding 1,000 acres of the Cawood patent is within such part of the Ledford patent. Possibly this does not relieve complainant of the necessity of proving that some part of the one patent is within that part of the other patent. Treating the matter so, it must be conceded that, so far as the evidence introduced by complainant is concerned, it is not shown that such is the case. But I think there is evidence introduced by defendant that tends to show it, if the Cawood patent is entirely within the Ledford, which provisionally must be accepted to be the fact. In that contingency, defendant's claim is based on the fact that some part of the Cawood patent is within such portion of the Ledford patent. He does not claim title in his son to the whole of the Cawood patent. It is true that in some parts of his pleading, in setting forth his claim, it is put forward as embracing the entire patent; that the title deeds under which the claim is asserted back of the judicial proceedings under which his son acquired title cover the whole patent; and that Judge Hall, who acted as agent for a predecessor in the title from 1887 to 1898, testifies in certain portions of his deposition that his claim on behalf of his principal was to the bounds of the Cawood patent. But it is evident that defendant recognizes that there are patents senior to the Cawood patent, as to which that patent is invalid, and that he only claims so much of the Cawood patent as is outside of said senior patents. In his original answer he expressly states that his claim is to the Cawood patent—

"Except so far as the land within said outer boundary is embraced within the boundaries of patents older than either the patent for 9,500-acre tract of land mentioned in the bill of complaint or the patent for said 86,000-acre tract of land mentioned in the bill of complaint."

Then on cross-examination Judge Hall, who made the judicial sale in which defendant's son purchased as commissioner of the Jefferson circuit court, testified that the sale bill described the land to be sold as lying and being on the waters of Clover Fork and Poor Fork and Big Black Mountain, patented in a 9,500-acre survey and containing 5,000 acres, more or less, which as he testified was the quantity then supposed to be within the Cawood patent after deducting the portions thereof covered by the senior patents. Treating this claim literally, there was no claim at the judicial sale to any part of the Cawood patent covered by the Ledford patent, for the latter was a senior patent to the former—three days the senior. It is certainly a claim to no part of the Cawood patent senior to it and the Ledford patent both, the way the claim is put in the original answer. But what is senior to the Ledford patent is

also senior to the Cawood patent. If, then, the Cawood patent is entirely within the Ledford patent, the defendant has no claim whatever, unless some part of the Cawood patent is in that part of the Ledford patent outside of the patents senior to it. Hence it is I have said that in that contingency defendant's claim is based on the fact that some part of the Cawood patent is within that part of the Ledford patent outside of the patents senior to it. Unless such is the case, the defendant has no claim to a foot of land. And in that contingency defendant's evidence may be treated as tending to show that as much as 5,000 acres of the Cawood patent is within that part of the Ledford patent outside of the patents as complainant claims. The statement in said sale bill tends to show that Judge Hall on direct examination testified in regard to 29 patents senior to the Ledford patent, copies of which he files with his deposition, covering about 4,500 acres of land, which he says he knows are within the Cawood patent, and refers to 40 or 50 other such senior patents as to which he has heard were within it, and on cross-examination he testified that there are "some less than 5,000 acres" in the Cawood patent outside said senior patents as to which he thus testified on direct examination. In the contingency that the Cawood patent is not wholly within the Ledford patent, it is possible that the senior patents may cover that part of the Cawood patent within the Ledford patent, and that part of the Cawood patent not covered by senior patents may be wholly outside of the Ledford patent. In this contingency, of course, no part of defendant's claim will be within the land to which complainant claims title, and complainant will be entitled to no relief as against defendant. This, perhaps, is hardly more than a mere possibility. But, until the Ledford patent is fully located in the particulars left open, it cannot be told that it may not be so located as to embrace the entire Cawood patent, in which event, according to defendant's claim and the testimony of Judge Hall, as much as 5,000 acres of land claimed by defendant is within the land claimed by complainant, to which he has shown paper title.

In any event, then, the disposition of this contention of defendant should be postponed until the final determination of the question as to the location of the Ledford patent. However, complainant could not have shown how much, if any, of the claim of defendant was within that part of the Ledford patent outside of the senior patents and its exact location without causing said patents to be located, and this could not be done without a survey. The evidence establishes that, owing to the opposition on the part of the people living in that part of the Ledford patent covered by the Cawood patent to the making of a survey, to the end of locating said senior patents, it could not have been had without its being done under the order of the court. Had the complainant in advance of the hearing of this cause applied for an order of survey, it would have been denied until at least the contention of defendant that this court was bound by the location of the Ledford patent in the Creech-Johnson case had been disposed of. Otherwise much useless labor and expense might have been incurred. In view of this consideration, if defendant were otherwise entitled to have the bill dismissed on the ground claimed, I would refuse to dismiss it. I leave open, then, for further determination what, if any, action should be had looking to the location of said senior patents.

Again, defendant contends that the bill should be dismissed because it is shown by the evidence that complainant's right to the land in contest had been barred by 15 years' adverse possession by his son and those under whom he claims immediately preceding the bringing of this suit. The burden was upon the defendant to make this good. In order for this position to be well taken, three things are essential: There must have been an actual possession of the land in contest; that possession must have been continued without break for a period of 15 years; and there must have been a claim of ownership of the land. There is ground for saying that, prior to the bringing of this suit, there was claim of ownership to the land in contest, and that for a period of 15 years. But this is at least questionable, in view of the testimony of Judge Hall that at the judicial sale, at which defendant's son purchased, the land proposed to be sold was advertised as the land within the Cawood patent not covered by senior patents, estimated as 5,000 acres. This aside, however, is there evidence of any actual possession of the land in contest—much less of 15 years' adverse possession on the part of those under whom defendant claims? In disposing of this question, I will treat the matter as if there had never been any actual possession in complainant and those under whom he claims of any part of the land conveyed by the deed to Edward M. Davis, which is the most favorable view of it for defendant. In order that there may have been actual possession of the land in contest in those under whom defendant claims, it is necessary that there should have been an intrusion on said land, either by residence, inclosure, or other act of equal notoriety.

The only such act on which defendant relies is the Little settlement on Fouch's Branch of Clover Fork. The evidence makes clear that this is an old settlement. But it also makes clear to my mind that this settlement is within the senior patent for 5,000 acres issued to Jacob Myers May 6, 1788, on a survey dated April 19, 1786, and the senior patent, No. 2,196, for 1,600 acres issued to Aaron Fountain July 31, 1801, on a survey dated November 6, 1796. Mr. Duffield, one of complainant's surveyors, testifies distinctly that it is within both patents, and demonstrates that it is. So far as said Aaron Fountain patent is concerned, he was unable to locate it by first locating the other two Aaron Fountain patents, both issued the same day as the other, to wit, July 31, 1801—one, No. 2,197, on a survey dated November 2, 1796, for 1,600 acres; and the other, No. 2,198, on a survey dated November 8, 1796, for 1,800 acres. These two patents he was enabled to locate by having their beginning corners pointed out to him by competent persons. These corners were tree corners and are well known—that of 2,197 said to be 80 poles above the South (Martin's) Fork of Cumberland river, and that of 2,198 said to be 80 poles above the mouth of the North (Poor) Fork of said river. The one corner is said to be on the "most northwardly" bank of said South (Martin's) Fork, and the other on the "most eastwardly" bank of the North (Poor) Fork. It seems to me there is a mistake here. The calls should have been just the reverse. The corners are so located according to the testimony. No. 2,196 calls for the second corner of 2,197, and its lines are called for by No. 2,198. It thus lies between the two on the Middle (Clover) Fork of said river, into which Fouch's Branch, on the east side of which is the Little settle-

ment, empties from its north side. Mr. Duffield ascertained by actual survey the relation of this settlement to the beginning corners of said two Fountain surveys, as well as the relation to each other of the various features of the topography of the entire country in that quarter. By protraction, therefore, of these three Fountain surveys, he was enabled to say whether the Little settlement was within the Fountain patent No. 2,196. I do not think Mr. Kirby had sufficient information to say whether it was within said patent.

It is equally clear that it is within the Jacob Myers 5,000-acre patent. That patent is said to be at the three forks of Cumberland river on the upper side. It calls for a 1,000-acre patent issued same day on a survey made four days before it was made, to wit, April 15, 1788. That 1,000 acres lies in a square. Each side of the square is 400 poles long. The beginning corner is a black oak on the north side of the North (Poor) Fork of Cumberland river, and its first line runs from that corner S. 20° E. 400 poles, "crossing three forks." The land covered by the patent lies west of that line. The 5,000-acre patent is a trapezoid; the two nonparallel lines striking the parallel lines at equal angles. Said eastern line of the 1,000-acre patent is the middle part of the shortest of the two parallel lines of the 5,000-acre patent, which extends 100 poles on either side of said eastern line, and is hence 600 poles long. This line of the 5,000-acre patent is its western line, and it lies on the east thereof. If, then, the eastern side of the 1,000-acre patent can be located, the 5,000-acre patent can be located from it by protraction. These two Myers patents were issued on surveys made about 10 years earlier than those on which the three Fountain patents were issued. No. 2,198 Fountain patent calls for Jacob Myers' lines. Nothing else appearing, this must mean the lines of one or the other or both of said earlier Jacob Myers patent; their other lines showing that they lie in the same neighborhood. It begins where "Jacob Myers' line should cross" the North (Poor) Fork of Cumberland river, and runs thence in a westerly direction with Myers' line. Locating the beginning corner of the Myers 1,000 acres at the beginning corner of the Fountain 1,800-acre patent, No. 2,198, will so locate the former patent as to substantially harmonize the latter patent with it; that is, a point where Jacob Myers' line should cross said fork, to wit, the western line of the 5,000-acre patent and the eastern line of the 1,000-acre patent, and a line of said Myers run in a westerly direction therefrom, to wit, the last or northern line of the Myers 1,000-acre patent. There is a difference, however, of 6 degrees in the two calls, and the Fountain patent does not call for the same timber as the two Myers patents call for at that point. The one difference can be accounted for by mistake, and the other by design. If the beginning corner of the Fountain patent No. 2,198 be accepted as the beginning corner of the Myers patents, then the Myers 5,000-acre patent located by protraction therefrom will include the Little settlement. If, however, this is not accepted, the only other possible way of locating the eastern line of the Myers 1,000-acre patent is by moving it either west or east, but not moving it so far in either direction that it will not cross the three forks of Cumberland river; for it is so located in said patent. The farther east this line is moved, the farther inside of the Myers 5,000-acre patent

will the Little settlement be thrown, and it cannot be moved far enough west to exclude it.

I, therefore, conclude that the Little settlement is within patents senior to the Ledford patent, and hence not in that part of said patent not covered by senior patents to which complainant claims title. It was not, therefore, an intrusion on complainant's title. Not only is it within patents senior to the Ledford and Cawood patents, but the evidence justifies the conclusion that it was never claimed under the Cawood patent. Mr. Little testifies that from 1848 William Turner had tenants on it and claimed it. This was before he acquired title under the Cawood patent, which was in 1854. It was not sold as a part of the Cawood patent in 1887, when in the settlement of William Turner's estate the patent was sold and purchased by the Commonwealth Land & Lumber Company. It had theretofore been conveyed by William Turner to his son, George B. Turner, who on September 14, 1884, conveyed it to W. C. L. Huff. And in the spring of 1887 it was conveyed by him to said company. Mr. Huff testifies that this land was sold and conveyed to him as a part of, or along with, what was known as the "Hensley Place," which William Turner held under the Fountain patent. And though, in a written statement given by George B. Turner at the time of Huff's purchase, it is stated that it was held under the 9,500-acre patent, Mr. Turner testified on cross-examination that it was his understanding that it was in the Aaron Fountain patent, and that his father had told him that he thought it was in it, and that he had purchased 200 acres of the Fountain patent. There is a failure, therefore, on defendant's part, to prove 15 years' adverse possession of the land in contest. The fact is that a careful consideration of the evidence induces the conviction that, notwithstanding the Cawood patent was conveyed as a whole by the mesne conveyances under which defendant claims without mention of senior patents, there was no claim really to any portion thereof, except so far as it lay outside senior patents. And though it may not have been known that the Ledford patent covered much, if any, of the Cawood patent, this fact did not make the claim, if so limited, adverse to the Ledford patent.

Finally, defendant contends that the bill should be dismissed because there is no proof of actual possession on part of complainant at the time this suit was brought. Undoubtedly actual possession is essential to enable one to maintain a suit to quiet the title to land. Peck v. Ayers & Lord Tie Co., 116 Fed. 273, 53 C. C. A. 551. And though the cases before Judges Barr and Evans in relation to this same tract of land were suits to quiet the title in which actual possession to their maintenance was necessary and actual possession was found and adjudged therein, and though the defendant in his original answer admits the possibility that complainant or those under whom he claims may at some time have been in possession of some part of the land claimed by him, which would be sufficient to give possession of the whole, except so far as adversely held, it is probable that it was essential for complainant to prove herein actual possession of the land in contest at the time this suit was brought. I will so treat it. I think the complainant has proven such possession. The testimony shows that on September 21, 1892, the then holder of the title under which complainant claims leased to J. H. Mid-

dleton the entire land claimed by him, and under that lease said Middleton a year or two thereafter cleared, inclosed, and began to cultivate over 10 acres of said land on the east side of Turner's Branch, which empties into Clover Fork from the north side, and has had possession of it ever since, and that later under said lease he took possession of certain land on the left-hand fork of Ages Creek, which empties into Clover Fork from the north side, both of which parcels are within the Ledford and Cawood patents and outside senior patents, and that on October 3, 1898, the then holder of the title under which complainant claims made a similar lease to said Middleton and one Hiram Cawood, and under that lease shortly afterwards they entered and cleared and inclosed and placed tenants on about 15 acres on the east side of Mill Branch, which empties into Clover Fork from the south side, and have had possession thereof ever since, which land is inside both the Ledford and Cawood patents and outside senior patents.

Point is made of the fact that according to Mr. Middleton's testimony the 10 acres on Turner's Branch is surrounded entirely by older titles and possession, and it is claimed that this fact prevented said act of taking possession extending farther than the 10 acres. Granting for the sake of the argument, that this is so; it amounted to a taking of possession of that much of the Ledford patent, and this possession was sufficient to uphold a suit to quiet the title as to said ten acres. In view of this, I think that the court of equity, to prevent a multiplicity of suits, would quiet the title to the rest of the Ledford patent, held under the same claim, even though there may have been no actual possession thereof. But I think that the several acts of possession taken under said leases were sufficient to give actual possession of the entire boundary, so far as not adversely held.

I will set the case for further hearing at Frankfort on the first day of the next September term as to matters left open herein, and it will be well if counsel for all persons concerned in the litigation pending in this court in which the location of the Ledford patent is involved could be present and indicate such views as they have in regard to the matter.

DAVIS v. COMMONWEALTH LAND & LUMBER CO. et al.

(Circuit Court, E. D. Kentucky. February 17, 1905.)

1. BOUNDARIES—LOCATION—GENERAL RULES.
The Kentucky decisions do not establish any hard and fast rule requiring the intervening lines of a boundary of land, connecting extant corners and the nonextant corners at their points of intersection with each other, to be located by running the lines according to the courses called for whenever it is possible to do so; but the rule is that they should be so located unless there is some circumstance bringing the mind to a contrary conclusion, and it is established by such decisions that in case of a boundary consisting of four lines, two of the corners of which are extant and connected by one of the lines, a mistake in the call for the course of such line, and the necessity of preserving the shape or figure of the boundary as shown by the original plat, are sufficient circumstances to justify and require a departure from the course called for as to the opposite line.

2. SAME—RUNNING LINES IN REVERSAL.
Under the rule of the Kentucky decisions the running of lines backward and in reverse order in making a location of lost corners in a boundary may be resorted to only when it is proper under all the circumstances to locate the lines of such portion of the boundary in accordance with the courses called for, and they cannot be so located without resorting to such reversing process; and in such case it should be resorted to only to the extent necessary to accomplish such purpose.

3. SAME—LOST CORNERS—RELOCATING.
A boundary consisted of six lines, its general shape, however, as shown by the plat of survey, being that of a quadrilateral, bordering on a nonrectangular parallelogram with the third and fifth sides and the fourth and sixth sides, respectively, opposite each other. The course of the third side as located varied from that given in the call. The fifth and sixth corners, and the fourth, fifth, and sixth sides, could not be located on the ground; it appearing that such lines were never in fact actually run. *Held*, under all the circumstances shown, and keeping in view the preservation of the shape of the tract as shown by the plat, that the lost corners should be located by running the fourth line from the fourth corner the course and distance called for, thus establishing the fifth corner, by running the sixth line backward from the beginning corner on its course reversed and for the distance called for, and running the fifth side from the fifth to the sixth corner as so established, making such side the only one of the three which varied from the course or distance called for.

In Equity. Suit to quiet title.

Frank Chinn, D. W. Lindsey, and William Ayres, for Charles H. Davis.

Helm, Bruce & Helm and W. F. Hall, for Commonwealth Land & Lumber Co.

COCHRAN, District Judge. The former opinion herein (141 Fed. 711) left open for final decision three matters, to wit: (1) The true location of the fourth corner of the Ledford patent on the top of Cumberland Mountain. (2) The true location of the fifth and sixth corners, and the fourth, fifth, and sixth lines, thereof. (3) The location of the patents senior to the Ledford patent. Since then the depositions of the two surveyors, Will Ward Duffield and James E. Kirby, have been retaken, and the matters left open reargued orally

and on brief. After due consideration I have reached the following conclusions in regard to said matters:

As to the first matter, I conclude that the fourth corner should be located 724.40 poles from the monument in Cumberland Gap marking the corner between the three states of Kentucky, Virginia, and Tennessee. This conclusion accepts the measurement of the third line of 8,320 poles on the top of Cumberland Mountain by Mr. Duffield as correct, and the distance of said fourth corner from said monument should be according to said measurement. Both sides accept that measurement as the more correct one. I was led in former opinion to indicate a preference for Mr. Kirby's measurement in this particular by an indisposition to get farther away from the fourth corner as formerly fixed by this court than I had to.

In order to fully justify the conclusion I have reached in regard to the second matter, an extended consideration of it is necessary. In the former opinion I indicated that there were five possible ways of locating the fifth and sixth corners, and the fourth, fifth, and sixth lines, of the Ledford patent. They were as follows, to wit: (1) Run fourth and fifth lines the courses and distances called for, and then connect the end of the fifth line with the beginning corner. The fifth and sixth corners will be the ends of the fourth and fifth lines thus run. (2) Run the fourth line the course and distance called for, and the sixth line the reverse of the course called for and the distance called for, and then connect the ends of these two lines. The fifth and sixth corners will be the ends of said two lines. (3) Run fourth line the course and distance called for, fifth the course called for, and the sixth line the reverse of the course called for, and extend fifth and sixth lines until they intersect. The fifth corner will be the end of the fourth line so run, and the sixth corner will be the intersection of the fifth and sixth lines so run. (4) Run the fifth and sixth lines in reverse order, the sixth line the reverse of the course and the distance called for, and the fifth line the reverse of the course called for, extending it until it strikes the fourth line run the course called for. The fifth corner will be the intersection of the fifth and fourth lines so run, and the sixth corner will be the end of the sixth line so run. (5) Run the fourth line the course called for, and the sixth line the reverse of the course called for, and shorten the one and lengthen the other proportionately in order that their ends may be connected by the fifth line run according to course called for. The fifth and sixth corners will be the ends of the fourth and sixth lines so shortened and lengthened. I might have said that there is another and sixth way of locating said corners and lines, to wit: Run the sixth and fifth lines in reverse order, and the reverse of the courses and the distances called for, and then connect the ends of the fifth line with the fourth corner. The fifth and sixth corners will be the ends of the fifth and sixth lines so run.

The third, fourth, and fifth ways preserve the courses called for as to all the lines. The third and fourth preserve also the distance called for as to one of them; that preserved by the third being the distance of the fourth line, and that preserved by the fourth being the distance

of the sixth line—the two ways thus being opposites. By the fifth the distance of neither of the lines is preserved. The first, second, and sixth ways preserve the course and distance of two of the lines, and neither course nor distance of the other line. By the first it is the sixth line that is not so preserved. By the second it is the fifth line, and by the sixth it is the fourth. The first and sixth ways are opposites.

In saying that there are these six possible ways of locating the Ledford patent, I do not mean to be understood as holding that, after due weight is given to all the relevant facts and considerations, there are six different ways in which it is possible to locate said patent. If that were true, then, as suggested by counsel for T. J. Asher, who is interested in the location of said patent, though not a party to the suit, it might be said that the patent is void for uncertainty. What I mean is that there are these six possible hypotheses as to the true location of said patent to which the relevant facts and considerations may be applied to determine which is the correct one. I hold that from these facts and circumstances the correct hypothesis can be determined, and after it is determined there is no other possible way in which to locate the patent, giving due weight thereto. Which, then, of these six hypotheses is the correct one? The fifth one may be dismissed from our consideration without more to do. The defendant contends that the fourth hypothesis is the correct one, and plaintiff seems to be content with the adoption of either the first, second, or third. This eliminates the sixth. The choice, then, lies between the first four.

We are met here again by the decision of the Court of Appeals of Kentucky in the case of Creech v. Johnson, 76 S. W. 185. Counsel for defendant urge that that decision settles that the fourth hypothesis is the correct one and should be followed here, unless it can be shown that it is clearly a mistake. It is questionable whether such is the true effect of that decision. It is certain that it decided no such thing. What it decided was that the three lines in question should be run in reverse order and each one the reverse of the course called for. So doing would not only locate the three lines and two corners now in question, but also locate the third line as to length and the fourth corner, and in so doing said lines would be run the reverse of the courses called for, and the fifth and sixth also the distance called for: the only departure from the calls of the patent being in the reverse running and as to the distance of the fourth line. The fourth hypothesis differs from this location in three particulars. It starts out with the fourth corner already fixed and has nothing whatever to do with locating it. Again, the reversing process is not kept up from the beginning corner to the top of Cumberland Mountain. It stops with the fifth line, thus limiting that process to the fifth and sixth lines. The fourth line is run the course called for. And, again, the fifth line is not run according to distance called for. Its distance is lengthened the extent required in order to connect with the fourth line so run. It is in view of these differences that it occurs to me to

say that there may be a question as to whether any such effect can be given to the decision in that case, or, in other words, as to whether the Court of Appeals would have decided in favor of the fourth hypothesis, had it been of the opinion that its location of the patent was wrong and the fourth corner thereof should be located as heretofore determined herein. If any such effect can be given to it, it can only be because a decision that the reversing process should apply to the three lines with a shortening of the fourth is a decision that, if that is not correct, it should be applied to two of them with a lengthening of the fifth and a greater shortening of the fourth, or because the general principles which it was thought required the one location in fact require the other. But, conceding that such an effect can be properly given to the decision, I do not think I am any more affected by the decision to this extent that I was affected by its location of the patent. This matter I have covered in the former opinion. The authorities there referred to establish that the principles applicable to this case are rules of property, and in so far as they have been settled and determined by decisions of the Court of Appeals of Kentucky other, than in cases involving the patent in question herein, this court is bound thereby. But it is not bound by the decision in Creech v. Johnson as to the principles applicable to the location of the Ledford patent, or as to their application thereto. For it to be so bound would be to hold that one can be estopped by a judgment in a proceeding to which he was no party, when it is an invariable rule that, in order for one to be estopped by a former judgment, he must have been a party thereto. This applies as well to a partial estoppel as to a complete estoppel. One is not bound to any extent by a judgment to which he was no party. He is therefore not bound thereby, unless he can show that the judgment was clearly a mistake. The statement in the case of Preston v. Bowmar, 6 Wheat. 580, 5 L. Ed. 336, that the judgment of the state court should be followed unless it could be pronounced unreasonable or founded in clear mistake, had application to a case where the parties in the federal court were the same as those in the state court, but for technical reasons the judgment of the latter court was not an estoppel. So much, then, as to the value of the decision in Creech v. Johnson in favor of the fourth hypothesis.

We come, now, to a consideration on the merits of the question as to which of these first four hypotheses is the correct one. By the fourth hypothesis, as stated, the fifth and sixth lines are run in reverse order and the reverse of the courses called for, and by the second and third hypotheses the sixth line is run the reverse of the course called for, by the second the distance called for, and by the third the distance necessary to strike the fifth line run the course called for. Each one of these three hypotheses, therefore, makes use to a more or less extent of the reversing process. This being so, it is important to understand just when it is proper to resort to the reversing process to any extent in locating those lines of a boundary of land which intervene between extant corners thereof, the corner or corners at whose points of connection with each other are nonextant.

The relevant decisions of the Kentucky Court of Appeals in cases other than Creech v. Johnson are conclusive as to this, as has been already intimated. But it will clear the way for their consideration to first ascertain what rule on the subject prevails in other jurisdictions. Judge Hobson, in his opinion in Creech v. Johnson, cites the decision of the Supreme Court of North Carolina in the case of Harry v. Graham 18 N. C. 76, 27 Am. Dec. 226, referred to in the former opinion herein on another point, in addition to certain Kentucky decisions in support of the resort therein made to the reversing process. In view of this and of the lucidity of Chief Justice Ruffin's opinion, the decision in that case on this subject affords a good starting point from which to begin a consideration of relevant decisions in other jurisdictions. That case involved the location of only two lines intervening between extant corners and of a single nonextant corner at the point of connection of said two lines with each other. The extant corners between which said two lines intervened were the second, a chestnut oak and red oak, and the fourth, a post oak; the two intervening lines were the second and third; and the nonextant corner at their point of connection with each other was the third—a black oak. The calls for said two lines were as follows, to wit: From the chestnut oak and red oak "N. 45° W. 220 poles, to a black oak near Mr. Graham's own line; thence N. 45° E. 220 poles," to the post oak. The significance of the word "near" in locating the third or black oak corner and said two lines was considered in the former opinion. The extant corners could not be connected by running said two lines from the second one according to the courses and distances called for. To make the connection a departure from the calls to a certain extent was necessary. It was held that it should be made by running the two lines in the order called for, the second according to course and distance called for, the end of which would be the third corner, and the third line therefrom to the fourth corner the course and distance necessary to reach it, thus departing from the call for that line as to both course and distance. It was urged that the connection should be made by resorting to the reversing process. Of course, it could not be made by running the two lines in reverse order and the reverse of the courses and the distances called for. The way in which it was urged that the reversing process should be used was to run the third line from the fourth corner the reverse of the course called for, the end of which would be the third corner, and the second line from said corner to the second corner, the course and distance necessary to reach that corner. There was another way of making the connection which made use of the reversing process, though not to as great extent as the other way, but which seems not to have been considered. It was to run the second line from the second corner the course called for, and the third line from the fourth corner the reverse of the course called for, and to extend both lines until they intersected. This involved a departure from the calls as to both lines as to distance. According to this the third corner would be the point of intersection between said two lines thus run. The decision, however, as to how the connection should

be made was against this way as well as against the other, which seems to have been the only one urged. The argument which led the court to the conclusion which it reached was made up of two propositions. One was as to the value of the order in which the lines were called for. Concerning this Judge Ruffin said:

"The natural order of survey is that which the deed shows the parties to the deed adopted to identify to their own satisfaction the land intended to be conveyed by the one to the other. It may be considered as their directions how the identity shall be established by survey at any future time and it supposes certain points, as the beginning, to be established."

The other was as to the value of a call for course and distance. Concerning this he said:

"Course and distance from a given point is a certain description in itself, and therefore is never departed from, unless there be something else which proves that the course and distance stated in the deed were thus stated by mistake."

But, whilst it was held that the case in hand was not one where resort could properly be had to the reversing process in locating said two intervening lines and single nonextant corner, it was conceded that there were cases where it would be proper to resort thereto in locating lines intervening between extant corners and nonextant corners at their points of connection with each other. Concerning the contingency in which it would be proper so to do, Judge Ruffin said:

"The party cannot have recourse to that method of ascertaining a previous line in the order of description, unless by reversing he gives a more certain means of identifying the prior line than the deed gives in its description of the line itself."

And again:

"If, therefore, the description of a particular line be complete in itself, the court cannot vary from that description because it will not correspond with the description of the posterior line, unless the description of the latter be more specific than the former, and unless from the latter a mistake in the former can be inferred."

In the first quotation he said that resort may not be had to the reversing process, unless it "gives a more certain means of identifying the prior line than the deed gives in its description of the line itself"; in the second, that it may not be had "unless the description of the latter [posterior line] be more specific than the former [prior line], and unless from the latter [posterior line] a mistake in the former [prior line] can be clearly inferred." He illustrated the position thus taken in these words:

"For example, if this deed had said that the line from the corner, chestnut oak and red oak, ran to a black oak near the patentee's other line, and gave neither course nor distance, or only one, and then, etc. (as in the call), the line might be reversed from the post oak to ascertain the corner of that and the next preceding line, because that affords the only evidence (the black oak not being found or its locality otherwise identified) of the point at which the one line terminated and the other began. So if, even upon such calls as this present deed contains, a line of marked trees were found by tracing the line back from the post oak corresponding with the survey for the 300-acre

patent, that might carry the other line to the point of intersection, because it proves an actual survey and the evidence of permanent natural objects to show where the black oak once actually stood, which, wherever it stood, would be the terminus and control the distance mentioned in the deed."

According to this position, therefore, resort may be had to the reversing process to make such location, if the posterior line has an advantage over the prior line in point of certainty and cannot be had unless such is the case. The advantage may go so far, as in the first of the two examples referred to, that the location cannot be made without resorting to the reversing process. This, however, is not essential. It is sufficient that in some particular the advantage in point of certainty exists. In the absence of such advantage, the value of the order called for and of a call for course and distance is such that the one and the other, so far as possible, should be adhered to. That such is the reasoning upon which the position taken is based appears from the words in which Judge Ruffin announced his conclusion, which are as follows:

"But there is no such evidence in this case, and in the absence of it there is nothing more to show that the mistake was made in the description of the second line than it exists in that of the third line. A mistake was certainly made in the one or the other. In which? is the question. The one line has a certain beginning and the other has a certain ending, and they meet at the same point, and that point of meeting is uncertain. It cannot be rendered more certain by running it from either of the given points, and therefore we are not at liberty to resort to the description of the latter line to control that of the prior line, but must lay down the prior one from its own description. Because it is prior it controls the next line, since that begins where the other ends."

This decision of the Supreme Court of North Carolina has been followed by a number of other decisions in the same jurisdiction, amongst which may be cited the decisions in the following cases, to wit: Safret v. Hartman, 52 N. C. 203; Norwood v. Crawford, 114 N. C. 513, 19 S. E. 349; Duncan v. Hall, 117 N. C. 443, 23 S. E. 362.

In the case of Safret v. Hartman, Pearson, C. J., in referring to the decision in Harry v. Graham, said:

"It is decided in that case that a posterior line could not be reversed, in order by its intersection with the prior line to show the corners, unless such posterior line was certain, because to do so would be to extend the distance of the prior by the course of the posterior line. The claim of mistake resting on the one or the other being equal, it was deemed proper to follow the order in which the survey was made."

He said that resort could not be had to the reversing process "unless such posterior line was certain."

In the case of Norwood v. Crawford, Judge Avery said:

"Where by running with the calls a different result from that attained by reversing is necessarily reached or may ensue, the safer and more certain method of following the order of the original survey by the interested parties who directed it is as a rule adopted. We find no case in our Reports where this court has given its sanction to the correctness of a survey made by reversing the line from a known beginning corner. The rule is to run with the calls in regular order from a known beginning, and to resort to the test of reversing in the subsequent progress around the boundary only where the

terminus of a call cannot be ascertained by running forward, but can be fixed with absolute certainty by running reversely the next succeeding line."

And again:

"The invariable rule seems to require that the lines shall be run from a known beginning, according to the direction and distance, if given, in the order in which the parties originally ran and arranged them; but if a call is reached in the regular order which either by a failure to specify distance or by fixing the corner on a line of another tract makes its terminus uncertain, and by reversing the next succeeding line and from a known point the location of the line or point called for can be made certain, then that mode of surveying becomes proper only because it plainly tends to the attainment of the leading object in making all surveys—certainty of location. If, for instance, the first call in the deed by which the surveyor ran had been for a point in the line of another tract, and thence with said line a given distance to a third corner, which was admitted to be at a certain point on second line, it would have been proper to have reversed the call from the third corner, so as to ascertain the point at which a prolongation of the first line would intersect with that of the adjacent tract. The same course would be pursued, and for a similar reason, where in the case supposed course, but not distance, was given in the first call, and the line of the adjacent tract was known to be marked from the third corner to a point at which, running by course, the first line would intersect it."

In the first of these two quotations he said that resort could be had to the reversing process "only where the terminus of the call cannot be ascertained by running forward, but can be fixed with absolute certainty by running reversely the next succeeding line"; and, in the second, that it can be had "if a call is reached in the regular order which either by failure to specify distance or by fixing the corner on a line of another tract makes the terminus uncertain, and by reversing the next succeeding call from a known point the location of the line or point called for can be made certain." This would seem to limit the right to resort to said process to a case coming within the first example stated by Judge Ruffin in Harry v. Graham in illustration of the position taken by him therein.

In the case of Duncan v. Hall, Judge Avery said:

"In determining which is correct, the courts proceed upon the idea that the object of legal investigation and inquiry is to find the lines and corners and monuments which were agreed upon by the parties to the original conveyance, and that in order to attain that object the lines should be run in the direction and order adopted by them. There are some exceptional instances in which it is manifest that reversing a line is a more certain means of ascertaining the location of a prior line than the description of such prior line given in the deed, but such cases are rare exceptions to a well-established general rule. The general rule is an established law of evidence, adopted as best calculated to ascertain what was the intention to be conveyed; and it is incumbent on a party asking the courts to depart from it to show facts which bring the particular case within the exceptions to the rule."

Here he said that resort could be had to the reversing process if it was a "more certain means of ascertaining the location of a prior line than the description of such prior line given in the deed." The position thus taken is substantially that taken in Harry v. Graham. It will be noted that it is laid down that cases where resort should be had to the reversing process "are rare exceptions to a well-established general rule."

This line of decisions gives us the North Carolina rule on the subject. It is not necessary to consider the decisions in other jurisdictions in like detail; for 5 Cyc. p. 878, undertakes to state the rule to be deduced from all the decisions on the subject, which is substantially the same as the North Carolina rule. It uses these words:

"Where a disputed or lost line or corner can thereby be established more nearly in conformity with the terms of the instrument and with the intent of the parties as gathered therefrom, it is competent to ascertain such line or corner by first ascertaining the position of some other bound and tracing the back line from that by reversing the course and distance; but a line will not be reversed for the purpose of showing the termination of a prior line, unless the description of the posterior line is more definite than that of the prior line, and a mistake in the prior line can be clearly shown."

An illustration as to where resort may be had to the reversing process because the posterior line has an advantage over the prior line in point of certainty different from those given in Harry v. Graham may be found in the case of Swenson v. Willsford, 84 Tex. 424, 19 S. W. 613. It involved the location of the boundary of a four-sided body of land on the east side of the Colorado river, known as "survey No. 52." The boundary began at the southwest corner of survey No. 53, on the east bank of said river, and ran thence down the river with its meanders to the northwest corner of survey No. 51, thence east 7,411 varas, thence north 2,450 varas, and thence west 8,098 varas, to the beginning. The north line of the survey, as thus called for, was 8,098 varas, and that of the south line 7,411 varas. The northwest and southwest corners on the river were known. If the boundary was located by running the calls in direct order, the north line was 1,000 varas longer than called for; and if by running them in reverse order, the south line was 1,000 varas shorter. The question was as to the order in which the lines should be run, and hence which line should yield, whether the south or prior line, or the north or posterior line. It was held that the lines should be run in reverse order, and that the south or prior line should yield. It was so held because the evidence was that the north or posterior line had been actually run at the time of the survey, and the south or prior line had not been so run. In affirming the judgment of the lower court, Tarlton, J., said:

"There was evidence tending to show that the north line, which the court, disregarding the order of the calls in the field notes, chose to follow in fixing the survey preferably to the south line, was actually surveyed; whereas it is certain that the south line was never actually traced by the surveyor. The court, it is fair to infer, was influenced in its conclusion by this evidence, and applied the rule requiring it to follow in the footsteps of the surveyor."

The case of Ayers v. Watson, 137 U. S. 584, 11 Sup. Ct. 201, 34 L. Ed. 803, referred to in the former opinion, would seem to come within the first example stated by Judge Ruffin in Harry v. Graham, which is a case where the boundary cannot be located by pursuing the direct order, but can be located by pursuing the reverse order. Mr. Justice Bradley said:

"The judge was right in holding as he did, and in instructing the jury that the beginning corner of a survey does not control more than any other corner

actually well ascertained, and that we are not constrained to follow the calls of the grant in the order said calls stand in the field notes, but are permitted to reverse the calls and trace the lines the other way, and should do so whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant. If an insurmountable difficulty is met with in running the lines in one direction, and is entirely obviated by running them in the reverse direction, and all the known calls of the survey are harmonized by the latter course, it is only a dictate of common sense to follow it."

In running the lines of the boundary involved in that case in direct order, an "insurmountable difficulty" was met with. The west line from the pecan tree, the beginning corner on the river, and the north line from the end thereof, could be run according to the courses and distances given in the boundary; but the northeast corner, two small hackberries, called for as the end of the second or north line, and the easterly line from that corner to the box elder tree on the river, could not be found. It was necessary to find that corner and line in order to locate the boundary. The difficulty of finding them was insurmountable by running the lines in direct order. In that condition of things a random line was run across the front of the boundary from the western line the distance usually taken for an 11 league survey—the size of the survey in question—and a blazed line running north and south was found. This line was followed south to the river, where was found the box elder tree. Starting from this corner and running north or backwards the distance called for the easterly line, two small hackberries, each marked on the inside with old blazes facing each other, were found. The hackberries were 4,000 varas short of reaching the point where the second line terminated, running in direct order. It was held that the boundary should be located by running the lines in reverse order, thus shortening the first line 4,000 varas.

It is now time to take up the relevant Kentucky decisions, other than Creech v. Johnson, and ascertain what rule they lay down on the subject. Judge Hobson, in that case, as justifying the use therein made of the reversing process, cited the two cases of Thornberry v. Churchill, 4 T. B. Mon. 35, 16 Am. Dec. 125, and Pearson v. Baker, 4 Dana, 321. Counsel for defendant, as justifying the use made of said process by the fourth hypothesis, rely mainly on the two earlier cases of Beckley v. Bryan, Sneed 91, and Bryan v. Beckley, Litt. Sel. Cas. 91, 12 Am. Dec. 276. What deduction, then, is to be made from these four cases?

The historical method requires that we should dispose of the two latter ones first. They involved the location of the same boundary of land. They were two appeals of the same case. The decision in the first case was rendered November, 1801, and that in the second November, 1809, eight years later. The decision in the latter case, however, was not published until 1824, long after decisions subsequently rendered in other cases had been published. It was published then, along with other omitted decisions, pursuant to an act of the Legislature. The boundary whose location was involved in said cases was that of a four-sided body of land, or one consisting of four lines. The calls therefor as they appeared in the certificate of survey

and patent are not given in the report of either case, and it cannot be readily made out from either just how they did so appear. As near as I can make it out, this is how it was: Beginning at a white walnut and hoopwood, and running thence with the line of William Preston S. 45° W. 500 poles, to ——— trees; thence N. 70° W. 600 poles, to ——— trees; thence N. 20° E. 460 poles, to an elm, buckeye, and ash; thence S. 70° E. 800 poles, to the beginning. The trees marking the second and third corners, which were named in the certificate of survey and patent, but which are not named in either report, were nonextant. Those marking the beginning and fourth corners were extant. The first line, from the beginning corner to the second corner was visible; i. e., could be traced on the ground by visible marks, probably marked trees. It was the longer line of the adjoining survey of William Preston. The call for S. 45° W. corresponded with the course of that line as so marked. The call for the fourth line, running from the elm, buckeye, and ash, the fourth corner, to the white walnut and hoopwood at the beginning corner, was, as stated, S. 70° E. 800 poles. Such however, was not the real course or distance of said line. As it really was, it departed from the call as to both course and distance. The departure as to course was perhaps as much as 2½ degrees, and that as to distance 184 poles; the real distance being 984 poles, instead of 800, as called for. The fact as to departure of this line from the call as to course was not known on the first appeal, but was known on the second. It was known on the first appeal that the distance of the fourth line was greater than called for, but it was not known that it was as great as it really was. The course thereof was supposed to be as called for. According to the calls, the second line (which was N. 70° W.) and the fourth line (which was S. 70° E.) were parallel. But, if the fourth line was run as it really was and the second line as called for, the two lines would not be parallel. According to the calls, the second line was 200 poles shorter than the fourth line, and, of course, the second line, located as called for, would have been 384 poles shorter than the fourth line as its length really was. The boundary purported to contain 2,000 acres. In fact, located as it was decided it should be, it contained "much surplus." No importance seems to have been attached on either appeal to the fact that the first line was visibly marked and hence fixed as to course, which fixed also the location of the second corner in so far as direction from the beginning corner was concerned. It seems to have been treated as a case involving the location of three lines intervening between extant corners and two nonextant corners at their points of connection with each other. No connection could be made between the beginning and fourth corners by running said three intervening lines according to the courses and distances called for. The question then was how the connection should be made—on the first appeal, under the facts as they were then understood to be; on the second appeal, under the facts as they really were. On the first appeal it was held that the connection should be made in this way, to wit:

"As to ascertaining Beckley's lost corners and lines, the meaning of the court is, from his northwestwardly corner, an elm, buckeye, and ash, extend a line S. 20° W. 460 poles. From his eastwardly corner, a white walnut and hoopwood, extend a line southwest, with a line styled in his grant William Preston's, 500 poles. The extremities of these two extended lines will be the lost corners, and then connect these corners with a line running parallel to the line which connects the two first-mentioned corners, and the survey will be closed."

This conclusion was reached after considering generally the subject as to how lines intervening between extant corners of a boundary of land and the nonextant corners at their points of connection with each other should be located and laying down general rules applicable to the different situations or conditions that might exist. Three such general rules were thus laid down, as follows, to wit:

(1) If it is possible to make a connection between the extant corners by locating the intervening lines according to the courses and distances called for, then such lines and nonextant corners should be thus located. The general principle in pursuance to which this rule was laid down was that:

"Nothing but necessity will justify departure either from course or distance."

(2) If it is not possible to make a connection between said extant corners in this way, and it is possible to make it by locating the intervening lines according to courses called for, departing from the calls as to one or more of the distances, then said lines and nonextant corners should be thus located. The general principle in pursuance to which this was laid down was that:

"When a departure from either course or distance becomes necessary, reason as well as law seems to suggest that the distances taken in our mode of mensuration ought to yield, as being much the more uncertain of the two."

(3) If, however, it is not possible to make the connection in either of these two ways, then said intervening lines and nonextant corners should be located by departing from the calls as to both courses and distances the extent necessary to make the connection. The general principle in pursuance to which this rule was laid down is implied in that in pursuance to which the first one was laid down, to wit: Necessity will justify departure from both course and distance.

To the second of these general rules two subrules were laid down. The first one had application where there were three or more intervening lines and two or more nonextant corners; the second, where there were but two intervening lines and a single nonextant corner. The first one was stated in these words:

"But, if the courses and distances thus run do not close the survey, it must be accomplished by running the same courses and either lengthening or shortening the distances, as each case may require, and in proportion to the length of each line as called for in the plat and certificate."

Or again in these words:

"But when two or more corners are missing, and running the distances called for in the plat and certificate of survey will not close, then the length of each line can only be determined by calculation."

The second one was stated in these words:

"When there is but one corner of a survey lost, the courses called for in the plat and certificate of survey ought only to be regarded, and nothing more is necessary than to extend those courses from the adjacent corners, which remain until they intersect each other, and the place of intersection will be the situation of the corner to be ascertained."

Just here, in passing, it should be noted that this subrule afterwards became firmly fixed in Kentucky law. In the case of Haggan v. Wood, Sneed, 273, it was said:

"Conformably with principles formerly established by this court in such cases, a line should be extended north from Rees' said corner so far that a line extended west from the said walnut tree will intersect it, and this intersection should be considered as the place where the lost hoopwood stood."

In the case of Wishart v. Cosby, 1 A. K. Marsh. 383, Judge Owsley said:

"There could not be a doubt, from the repeated decisions of this court, but that the intersection of the lines from the northeast corner and the southwest corner should form the northwestern boundary of Cosby's claim."

In the case of Mercer v. Bate, 4 J. J. Marsh. 339, Judge Robertson said:

"The counsel for the appellant urge the analogy between this case and that of Beckley v. Bryan and Ransdale, reported in printed decisions by Sneed (page 91); and they insist that to find the white oak corner the patent courses should be reversed, and that wherever a line from M. will strike one from D., pursuing the reversed courses in the patent, the law there fixes the corner. The cases are not analogous, and therefore the argument, although it was ingenious and able, is not applicable. If we have not been mistaken in the foregoing view, there is no necessity for resorting to that species of legal construction which the authority of the case in printed decisions and of many subsequent cases prescribes."

To the first one of these two subrules an exception having application to a boundary which had four corners only was laid down in these words:

"It may be supposed that where two corners of a survey are lost which has only four corners, and the distance between the remaining corners is greater or less than the distance called for in the plat and certificate of survey, the three lost lines should be extended on their respective courses so as to bear a just proportion to the remaining line, which would, indeed, be in conformity to the general rule just prescribed; at least, the same effect would be presumed as if the rule had been literally applied. But it is conceived by the court that the remaining line, being ether longer or shorter than is expressed in the plat and certificate of survey, ought to be presumed to have happened by mistake, which could necessarily have affected only the length of the opposite line. Therefore the presumption cannot be carried further, in violation of the lengths of the other two lost lines, than as specified in the plat and certificate of survey, and, therefore, that every such case must be an exception to the rule; that is to say, the two lost lines which are to run from the remaining corners ought to be extended on the courses and to the distances called for in the plat and certificate of survey, making proper allowance on each line for the unevenness of the ground over which it passes, and also to preserve the course of the other lost line as called for in the same. The propriety of the exception will be further evinced by considering that the general rule arises principally from the necessity of the

cases to which it is applied, but in the cases to which the exception is applied the necessity does not exist, and surely nothing but necessity will justify a departure from either course or distance."

Indeed, it would seem that in such a case the connection could not be made by following the courses of all three lines without limiting the change in distance to the line opposite to that in which the mistake of distance was made, and that necessity would require that it be so confined. The case in hand was treated as coming within said exception—i. e., as involving the location of three intervening lines and two nonextant corners of a four-cornered boundary—and hence said lines and corners were located in accordance therewith. The case, however, was not without a feature that might be thought to have warranted its being treated as coming within the second subrule; i. e., as involving the location of two intervening lines and one nonextant corner, to wit, the second and third lines and the third corner. This feature was the visibly marked line of the adjoining survey of William Preston, a part of which constituted the first line and in which the second corner was located. It fixed the course of that line and the direction of that corner from the beginning corner. That line and corner lacked fixity or extantness only in so far as distance from the beginning corner was concerned. That was left to be determined alone by the call, according to which it was 500 poles. If this view of the matter should be correct, the direction given as to how the location should be made, quoted above, amounted practically to a direction that it be made in accordance with said second subrule. It was no more than it would have been had the direction been to begin in Preston's line 500 poles from the beginning corner, and run thence a line parallel with the fourth line until it intersected the third line run the reverse of the course called for. The point of intersection would have been at the distance called for as to the third line had there been no mistake in the course called for as to the fourth line. The language quoted from the opinion of Judge Robertson in Mercer v. Bate would seem to indicate that he so construed that decision.

This analysis so far of the case of Beckley v. Bryan places us in position to estimate its bearing on the question in hand; i. e., when is it proper, in locating the lines of a boundary of land intervening between extant corners and nonextant corners at their points of connection with each other, to run said lines, or some of them, the reverse of the order and of the courses called for. It will be noted that by the location directed to be made in that case the third line was run the reverse of the course called for; that by every other location made according to the exception to the first of said two subrules, in a case coming within it, the third line had to be run the reverse of the course called for in order to make it; and that in every location made according to the second of said two subrules the posterior line, the second of the two intervening lines, had to be run the reverse of the course called for in order to make it. It is possible, if not probable, that in many cases coming within the first of said two subrules, and not within said exception, one or more of the inter-

vening lines had to be run the reverse of the course called for, and, if more than one, as a matter of course, that those lines had to be run also in reverse order, in order to make a location in accordance with said subrule. This being so, the deposit from the case of Beckley v. Bryan is this: That resort should be had to the reversing process in locating such intervening lines and nonextant corners of a boundary of land whenever it is necessary to resort thereto in order to comply with said second general rule; i. e., to make a location of said intervening lines according to the courses called for, departing from the calls as to one or more of the distances and to the extent that it is necessary to make such a location. That it was felt that such was the precipitation from it is evident from the fact that amongst other premises stated at the beginning of the opinion was this one, to wit:

"That this court cannot discover, from the land law or from the nature of the case, that the corner of a survey which is made the beginning in the plat and certificate of survey is of any higher dignity or of greater importance in any point of view than one of the other corners, nor in this respect that the surveyor was subjected to the direction of the owner; but it rather seems that the surveyor was, and ought to have been, left at discretion to fix on the corner of a survey for a beginning which might afterwards be the most easily found, or which could be described with the greatest certainty, without consulting the owner, or giving a preference to the beginning called for in his entry, when survey was founded on an entry. And, for similar reasons, it seems that it was also at the discretion of the surveyor, when he was inserting the other corners, in the plat and certificate, to proceed either to the right hand or to the left from the corner he chose to name first."

The raison d'être of this premise must have been an anticipated objection to the second general rule, about to be laid down, that it involved a resort to a greater or less extent to the reversing process in order to make a location in accordance with it.

One other matter remains to be noticed in order to a complete appraisement of this case. As heretofore stated, the boundary of land involved therein was said to contain 2,000 acres; but, located as it was decided it should be, it contained "much surplus." That there was nothing in this consideration to affect the propriety of the location made, this other premise was laid down, to wit:

"There is but one species of cases in which any court of justice is authorized by our land law to divest the owner of a survey of the surplus included within its boundaries, namely, where the survey was made posterior to an entry made by another person on the same land, and to do more would be unequal and unjust, inasmuch as a survey which is too small cannot be enlarged."

Now, then, as to the decision on the second appeal in Bryan v. Beckley. The only question involved in that appeal, over and above what was involved in the first one, was as to the effect, if any, that should be given to the consideration that the real course of the fourth line was not as called for, and the excess of the real distance thereof over that called for was greater than it was understood to be on the first appeal. Of course, there was nothing in the greater excess of distance to cause a location different in any particular from that which was held to be the proper one in the first appeal. How as to the

variation of the real course from that called for? The existence of this variation prevented a connection of the ends of the first and third lines, run, the first the course and distance called for, and the third the reverse of the course and the distance called for, by a line run the course called for. It is probable that the ends of these two lines thus run could have been connected by a line run the real course of the fourth line—i. e., parallel to its real course—thus imparting to the second line the mistake in course as to the fourth line as well as to the mistake in distance. In order to connect the first and third lines by a line run according to the course called for, it was necessary to either lengthen the third line or shorten the first one. The connection could be made in either way and thus bring about a location of all three lines according to the courses called for. There were thus two ways of so locating said three lines. The problem before the court, therefore, was as to whether the mistake as to course in the fourth line should be imparted to the second line, and it run the real course of the fourth line, and hence parallel to it; and, if not, which of said two alternative ways of locating said three lines according to the courses called for should be adopted. Its freedom of action in solving was limited by the decision on the former appeal. It was bound by the rules laid down and principles recognized on the former appeal, so far as they applied to the case under its changed aspect. Chief Justice Bibb stated this in these words:

"It is distinctly to be understood that we feel ourselves bound to adhere to the principles of the former decision, as well because we are fully persuaded that they are correct in themselves, as because, if they were not orthodox, we have no lawful power to change or oppugn their application to this controversy. So far as they apply, we disclaim all and every authority to counteract them by any other. If the case, in its new features, can be adjusted according to the principles of the former decision taken in their true spirit and effect, then assuredly it must be so decided. Where those principles fall short, others apposite and coadjutant may be applied."

Amongst the other rules laid down on the first appeal which it thus felt itself bound by was the second general rule, which required that the lines of a boundary of land intervening between extant corners and the nonextant corner or corners at their points of connection with each other should be located by running those lines the courses called for, if the location could thus be made, and could not be made by running them the courses and distances called for. It regarded that this rule as thus laid down required that in every instance where said intervening lines and nonextant corner or corners could thus be located and could not be located in the other way, they should be so located, and that there was no exception whatever to it. The only thing which it considered would authorize a departure from it was "inevitable necessity"; and, whilst "inevitable necessity" is not defined, I take it that by it was meant an impossibility of locating said lines in accordance with said rule. If this is so, then "inevitable necessity" was not an exception to the rule, but a limitation upon it. With this view of the matter, of course, the court was bound to hold that the lines and corners whose location was involved therein should not be located in the first of the three ways suggested above; i. e.,

by imparting the mistake as to course in the fourth line to the second line, and running it, not the course called for, but the real course of the fourth line, and hence parallel to it. For "inevitable necessity" did not, as the court looked at it, require that the course called for as to the second line should be disregarded. It could be located according to the course called for in either one of the two other ways of making the location suggested above. Judge Bibb said:

"If any intention of departing from course, except from inevitable necessity, had been intended, the direction to connect the extremities of the two lines, the one of 500 poles and the other of 460 poles, would have been nugatory; for a line run from those extremities to connect them would have closed the survey. But so to connect the lines did not comport with the views and intention of the court. Such a connection might have, and in fact would have, produced a departure from the patent course expressed for that line."

There was, therefore, nothing left to be done but to choose between said two other ways of making the location. The court held that the location should be made by shortening the first line. The ground upon which it so held was that this way was against the claimant of the land. Judge Bibb said:

"The length of one or the other of the lines of 500 poles or of 460 poles—that is to say, of A, B, or E, C—must be departed from, and then the length of the one which is made to yield must be determined by calculation. We say the one or the other, because there is no necessity for both to yield, and to make them both do so would be a departure from the spirit of the first and fifth principles, and to the second case put, in the section just alluded to. A departure from distance, even, ought not to be indulged farther than necessary. A departure in the distance of both lines is not necessary. Either lengthening the line of 460 poles, or shortening that of 500 poles, will do; and the section directs a lengthening or shortening, but not to do both, unless upon necessity. The former opinion excludes the idea of deciding the matter by going around from the beginning called for in the grant, in the progressive order of the courses and distances therein recited, because, by the fourth section of the opinion, it is clearly to be understood that the order of the courses in the certificate of survey is no evidence that the same order was observed in executing the survey. But there is a principle of equity which seems to be decisive on this subject, namely, that a complainant in equity ought not to have relief farther than his claim is reasonably certain. Now it is evident that if from the extremity of the line of 400 poles (from C) a line is extended the patent course to intersect the line of 500 poles (A, B, shortened), and from the extremity (B) of the line of 500 poles a line be extended the patent course to intersect the line of 400 poles (E, C) extended, the claim to all the land between those two lines is in dubio; that land may have been excluded or included by the grant. And this argument would apply also to the extension and diminution of the distances on the lines E, C, and A, B, in equal proportions. But as to all the lands which would be included by retaining the line of 460 poles in length, and reducing the line of 500 poles by calculation to close the survey, the grant would be certain in every part, and for that only the claim should be established."

In so holding a portion of the visibly marked line of Preston called for as constituting the first line was thrown out of the boundary. That line, notwithstanding the advantage it had over the third line, in that it was marked upon the ground, coinciding as marked with the call for course, was treated as of no greater value than said third line. The decision in the second appeal, therefore, makes no advance over that in the first as to the contingency in which resort

should be had to the reversing process in locating such intervening lines and nonextant corners of a boundary of land. It simply recognizes the same contingency as that which was the outgrowth of the decision on the first appeal. It, however, makes a greater use of the reversing process. The decision on the first appeal required only that the third line should be run the reverse of the course called for; that on the second, that the second and third lines should be run in reverse order, and each the reverse of the course called for.

The advance which Bryan v. Beckley made upon Beckley v. Bryan was in its interpretation of the second general rule laid down in the latter case and its determination as to which of the two alternative ways of making a location according to said rule should be chosen. It held generally that said rule required that no departure should be made from it save in the case of "inevitable necessity," and particularly that in case of a boundary of a four-sided body of land a mistake in the call for course of the line connecting the two extant corners thereof was not sufficient ground for departing from the call as to course for the opposite line connecting the other two corners which were nonextant, though mistake in distance was sufficient ground for departure from distance. As to choosing between the two alternative ways of making a location according to said rule, it held that way should be chosen which was most against the claimant, even though the effect of such choice was to throw out a portion of a visibly marked line in the boundary of said land.

Now, then, as to the two cases cited by Judge Hobson in Creech v. Johnson: Neither one of these two cases makes any advance upon Beckley v. Bryan as to the contingency in which resort should be had to the reversing process in locating such intervening lines and nonextant corners of a boundary of land. They each make use of the reversing process in the same contingency in which it was used in said case, to wit, to make a location of said lines according to the courses called for; it not being possible to make the location according to both courses and distances called for.

The case of Thornberry v. Churchill was another instance to those already referred to of an application of the second subrule to said second general rule laid down in Beckley v. Bryan. It involved the location of a portion of a boundary of a four-sided body of land, the same as in Beckley v. Bryan and Bryan v. Beckley. The boundary was as follows, to wit:

"Beginning at a poplar and beech, corner to William Fleming and Henry Harrison; and with Harrison's line N. 80° E. 80 poles, to a beech in William Bryant's line; with the same south 228 poles, to a beech in William Pope's line; and with the same west 297 poles, to a white oak and poplar in Fleming's line; and with the same N. 45° E. 300 poles, to the beginning."

There was but a single corner nonextant. The beginning, second, and fourth corners were extant. There were some variations between the calls for the second and fourth corners and the facts; but they were not regarded as rendering the corners nonextant. This, of course, fixed the location of the first and fourth lines. According to the calls, the third corner, a beech, was at the junction of the west

line of the adjoining survey of Bryant and of the north line of the adjoining survey of Pope. It was nonextant, because the beech could not be found and there was no junction of said two lines of said two adjoining surveys. This was because the Bryant survey was east and north of the Pope survey, or the Pope survey was south and west of the Bryant survey. Hence it was, as stated, a case within the first subrule to the second general rule stated in Beckley v. Bryan. That rule required that the second line should be run south from the second corner with Bryant's line as far as it went, and the third line should be run east the reverse of the course called for from the fourth corner with Pope's line as far as it went, and that the two lines should be extended until they intersected. It was in justification of the use of the reversing process in making such a location of the intervening lines and nonextant corner in such a case that Judge Bibb, then Chief Justice, said:

"The order in which the surveyor gave the lines and corners in his certificate of survey is of no importance. To find the position of the survey by reversing the courses is as lawful and persuasive as by following the order in the certificate of survey. The cases adjudged upon that point are conformable to reason and practical utility in guarding against mistakes and destruction of corners by fraud, accident, and the elements."

In fact, owing to the fixity of the west line of Bryant's survey and of the north line of Pope's survey, it was impossible to fully locate the lines and corners in question in said case in any other way than was adopted.

The case of Pearson v. Baker was like Bryan v. Beckley, in that it was possible to make two locations of the intervening lines and nonextant corners according to the courses called for as to said lines, departing from the distances to a certain extent, which were treated at the only alternative locations thereof; and it was held, as in that case, that that location should be adopted which was against the claimant. It involved the location of four intervening lines and three nonextant corners of a boundary of a ten-sided body of land, and hence came within the first subrule to the second general rule laid down in Beckley v. Bryan, but not within the exception thereto. The departure from distance, however was not distributed proportionately amongst said four lines, as seems to be required by said first subrule. Indeed, I do not see how it was possible to so distribute and yet comply with said second general rule. It was confined to one of said four lines. The extant corners were the first, second, third, fourth, and fifth, at the beginning, and the ninth and tenth, at the end. The nonextant corners were the sixth, seventh, and eighth, and the portion of the boundary whose location was involved was, therefore, the fifth, sixth, seventh, and eighth lines, and the sixth, seventh, and eighth corners. One of the two alternative locations thereof referred to above is referred to by Judge Ewing in these words:

"By extending the line from the fifth corner, which is found, towards the sixth, the distance called for in the patent, preserving the course of it and the subsequent lines, the survey would close; but the opposite line or lines from the seventh to the eighth and from the eighth to the ninth corners

would be longer than the distances called for in the patent by some 50 or 60 poles each."

The other is referred to by him in these words:

"If those lines are reversed, and the distances called for in the patent run, preserving the courses called for, the opposite line or lines from the fifth towards the sixth corner will be contracted some 60 or 70 poles short of the distance called for."

He stated the question in the case in these words:

"And the only question is whether the line from the fifth to the sixth corner shall be extended the full distance called for, which, by preserving the courses, would make the opposite lines longer than called for; or whether those lines should be contracted to the true distance called for by reversing the courses, which would contract the line from the fifth towards the sixth corner some 60 or 70 poles shorter than called for."

The second of these two alternative locations, on its face, involved a resort to the reversing process in order to make it. According to it, the four lines would be run in reverse order, and each one the reverse of the course called for. Apparently, at least, the first one did not involve a resort thereto. But, as far as I can make it out, it would seem that it did, though not to so great an extent as the second one. It involved that the eighth line should be run the reverse of the course called for until it intersected the seventh line run, together with the fifth and sixth, the course called for; the latter two the distance called for, also. I do not see how the courses of all four lines under this location could otherwise be preserved. It was held that the second of these two locations should be made. This was on the ground that it was against the claimant of the boundary. There was, however, another circumstance that might be thought to have favored the location. It was that, according to it, the distances of all the lines were preserved save as to one, the sixth; whereas, according to the other, the distances of two of the lines, the seventh and eighth, were not preserved.

In estimating the value of this decision it should be noted that it was emphasized by Judge Ewing that there was an entire absence of any circumstance other than the one which controlled the decision to affect the choice between the two locations. This he did in these words:

"The quantity embraced in the survey by adopting either of these modes of construction is not given; nor does it appear whether there will be a surplus, the true quantity or a failure of quantity, by adopting one mode or the other; nor are the true distances or courses of the opposite lines which are found given; nor is there any other circumstance which might produce a preponderance of presumption in favor of one mode of construction or the other. In this naked attitude of the case, we are called upon to determine which mode of construction shall be adopted to find the true position of the lost corners."

The principles which he regarded as applicable to the cases, limiting the choice of location to the two stated and determining the choice between them, were stated in these words:

"First. In general, distance yields to course, or, in the absence of any circumstance bringing the mind to a contrary conclusion, the courses shall be

first pursued, contracting or extending the distances, as the case may require, to make the survey close. Litt. Sel. Cas. 91 [12 Am. Dec. 276].

"Second. The beginning corner in the plat or certificate of survey is of no higher dignity or importance than any other corner of the survey. Beckley v. Bryan, Sneed, 91.

"Third. The order in which the surveyor gives the lines and corners in his certificate of survey is of no importance to find the true position of the survey. Reversing the courses is as lawful and persuasive as following the order of the certificate. [Thornberry v. Churchill] 4 T. B. Mon. 32.

"Fourth. That construction is to prevail which is most against the party claiming under an uncertain survey. It is his duty to show and establish his corner. Preston's Heirs v. Bowmar, 2 Bibb, 493. From which it will follow that he who sets up and relies on an outstanding claim must show that it embraces the land in contest, and should not succeed by using it when it is uncertain whether it embraces it or not."

The conclusion reached in view of these general principles was stated in these words:

"In the absence of all circumstances to lead the mind to any definite conclusion, we cannot determine whether the surveyor made the mistake by running the sixth [fifth?] line too short, or the eighth or ninth [seventh or eighth?] too long, and we are not warranted in coming to a conclusion that the mistake occurred in the eighth or ninth [seventh or eighth?], by running them too long, rather than in the sixth [fifth?], by running it too short, because it approximated nearer to the beginning than the other two in the order in which the certificate of survey has been made out. In this uncertainty as to the line or lines in which the mistake occurred, or as to the true position of the lost corner, the defendant who sets up and relies on the claim as embracing the land in controversy cannot succeed."

These four cases, the two relied on by defendant's counsel and the two cited by Judge Hobson in Creech v. Johnson, present us, therefore, with a single contingency for resorting to the reversing process in locating lines intervening between extant corners of a boundary of land and the nonextant corners at their points of connection with each other. That contingency is whenever it is proper, if not whenever it is possible, to locate said lines according to the courses called for, and it is not possible to make such location without resorting to such process. This contingency is distinct from that presented to us by the North Carolina decisions and those of other jurisdictions following in their wake. The contingency thereby presented, as will be borne in mind, is whenever the posterior line has an advantage in point of certainty over the prior line. The latter contingency is the existence of a certain fact; the former, the possibility, if not the propriety, of accomplishing a certain fact, and the impossibility of accomplishing it without resort to the reversing process. The one contingency involves a greater resort to the reversing process than the other. The one involves the application of such process to at least two lines, and hence the running of lines in reverse order, as well as the reverse of the courses called for. The other, whilst it may involve this much, may not involve more than the application of such process to a single line and the running of it the reverse of the course called for; i. e., it involves so much resorting to the reversing process as is essential to locating said lines according to the courses called for, and no more. I find no case in Kentucky recognizing the contingency presented by the North Carolina de-

cisions. There would seem to be no doubt, however, but that in a case involving it the Kentucky Court of Appeals would recognize it as calling for a resort to the reversing process. It seems to be in accordance with right reason. But, on the other hand, it would seem that the North Carolina Supreme Court does not recognize the contingency presented by these Kentucky decisions, at least so far as a case coming within the second subrule to the second general rule laid down in Beckley v. Bryan is concerned. The case of Harry v. Graham was such a case, and one, according to the Kentucky decisions, calling for the application of said subrule. It involved the location of two intervening lines and a single nonextant corner. Said subrule was not applied thereto by the Supreme Court of North Carolina, but it made a location of said lines contrary thereto.

Returning, then, to the contingency thus presented by these four cases, it is important to the determination of the question whether this case comes within it that we should understand exactly the nature of it. As I have stated it above, it is whenever it is proper, if not whenever it is possible, to locate the intervening lines according to the courses called for, departing from the distance, and it is impossible to make such location without resorting to said process. Is it, then, whenever it is possible to make such location, or simply whenever it is proper to do so? Is the true deduction from those four cases that, in every case where it is possible to locate such intervening lines according to the courses called for, they should be so located, so that the contingency calling for resort to such process are the two facts, to wit, the possibility of making such location and the impossibility of making it without resorting thereto? Or is the true deduction therefrom that, in every case where it is proper to locate such intervening lines according to the courses called for, they should be so located, so that the contingencies calling for resort to such process are the two facts, to wit, the propriety of making such location and the impossibility of making it without resort thereto? In Beckley v. Bryan it is laid down in general terms that said lines should be located according to courses called for whenever they cannot be located according to courses and distances called for both, but can be located according to courses called for alone. No exception is stated, and apparently the only limit to the requirement is the impossibility of doing the one thing and the possibility of doing the other. In Bryan v. Beckley seemingly the requirement is so interpreted. It is stated that said lines should be so located unless "inevitable necessity" requires otherwise, which I take to mean, as heretofore stated, unless it is impossible so to do. In Thornberry v. Churchill nothing whatever is said on this subject. But when we come to Pearson v. Baker we find the rule laid down in Beckley v. Bryan, as interpreted in Bryan v. Beckley, toned down somewhat. It is there said, in stating the general principles applicable to the case, as quoted above, that "in the general" distance yields to course, or "in the absence of any circumstance bringing the mind to a contrary conclusion the courses shall be first pursued, contracting or extending the distances as the case may require to make the survey

close." According to this, a location according to courses called for is to be made "in the general," or "in the absence of any circumstances bringing the mind to a contrary conclusion." Brvan v. Beckley is cited as supporting this statement. It is evident, however, that Bryan v. Beckley is no authority for such cautious statement. It is equally evident that the source of it is the case of Preston v. Bowmar, 2 Bibb, 493, cited by Judge Ewing in support of the fourth general principle stated by him, and to which reference is made in the former opinion. It is there analyzed to a certain extent, but it is important that in connection with the matter in hand it should be gone into deeper. The boundary therein involved, like that in Beckley v. Bryan and Bryan v. Beckley, was that of a four-sided body of land. It is as follows, to wit:

"Beginning at an ash in the middle of a line of Glenn's land; and with it N. 20° E. 800 poles, crossing three branches, to a hoopwood and sugar tree, corner to Moffit's land; and with a line thereof N. 70° W. 100 poles, crossing the creek, to a sugar tree; S. 33° W. 820 poles, crossing three forks of the creek, to two sugar trees; S. 70° E. 300 poles, to the beginning."

The beginning corner, the ash, and the second corner, the hoopwood and sugar tree, were extant. This fixed absolutely the first line. The third corner, the sugar tree in Moffit's line, 100 poles from the second corner, was nonextant, otherwise than as fixed as to direction from the second corner by Moffit's line. The fourth corner, the two sugar trees, was entirely nonextant. The first line was not according to course called for. It varied several degrees north from the call, and was 963 poles long, or 163 poles longer than the call. The course of Moffit's line, which was visibly marked, varied something from the call. So far, at least, how like the facts in the case of Bryan v. Beckley were the facts of this case? If we treat the ash, elm, and buckeye corner—the fourth corner—of the boundary involved in that case as the beginning corner, we have exactly the facts of this case with one exception. The beginning and second corners would be extant there the same as here. This would fix absolutely the first line, and there, as here, it would vary something from the call as to course and distance both. Again, there, as here, the second line would be a portion of a visibly marked line of an adjoining survey, there of Preston, here of Moffit; the third corner would be nonextant, save so far as direction from the second corner was concerned; the fourth corner would be entirely nonextant; and the lines to be located would be the third and fourth, or, if the third corner be treated as entirely nonextant, the second, third, and fourth. The only difference between the two cases would be that in Bryan v. Beckley the visibly marked line of Preston, called for as the second line under the hypothetical case stated, would be the same as the course called for, whereas here the visibly marked line of Moffit, called for as the second line, varied something from the call as to course. There was nothing in the mere circumstance that in Bryan v. Beckley it was the beginning and fourth corners that were extant and the first line that was part of a visibly marked line of an adjoining survey, whereas in Preston v. Bowmar it was the beginning and second cor-

ners that were extant and it was the second line that was a part of a visibly marked line of an adjoining survey, or in the further circumstance that in Beckley v. Bryan the visibly marked line, a part of which constituted the first line, corresponded exactly with the call as to course for that line, where as in Preston v. Bowmar the visibly marked line, part of which constituted the second line, varied something from the call as to course for that line, to cause a difference in the decisions of the two cases. Yet how different in fact was the decision? According to the position taken in Beckley v. Bryan that no departure should be made from the courses of the intervening lines whose location is in question except in case of "inevitable necessity" and according to the location therein made of the intervening lines whose location was involved therein, to wit, the second and third, no departure should have been made from the courses of the intervening lines whose location was involved in Preston v. Bowmar, to wit, the third and fourth, because "inevitable necessity" did not require it. This position limited the choice of two alternative locations of said lines, each one of which was a location according to course called for. One was to run the third line the course called for and the fourth line the reverse of the course called for, and extend the two lines until they intersected. The other was to run the third and fourth lines in reverse order, and each one of them the reverse of the courses called for. The former preserved the entire 100 poles of Moffit's line, constituting the second line; and the latter threw out 81½ poles thereof. And according to the further position taken in Bryan v. Beckley the latter of these two alternative locations should have been chosen, because it was against the claimant. But the alternative locations contemplated by the court in Preston v. Bowmar were not these two. The latter one of the two, the one which was in accordance with the location in Bryan v. Beckley, was not contemplated as a possible location. The only two locations contemplated were the former one of these two and a location made which, like it, accepted the second line as 100 poles long with Moffit's line from the second corner, and ran the fourth line the reverse of the course called for, but according to the distance called for, and then connected the ends of these two lines thus run by the third line. This location was in accordance with the location which was discarded in Bryan v. Beckley as foreclosed by the decision in Beckley v. Bryan, and it located the third line not according to the course called for, but departing therefrom, and in disregard of the rule laid down in Beckley v. Bryan, as interpreted in Bryan v. Beckley, that no departure should be made from course called for save in the event of "inevitable necessity." It was held that such was the proper location to be made of the lines in question. It is true, as suggested by defendant's counsel, that amongst the reasons given for the choice of this location in preference to the other one with which it was contrasted was that of the two it was against the claimant—the same reason given for the choice made in Bryan v. Beckley between the two alternative locations in accordance with the courses called for. Chief Justice Boyle expressed himself to this effect in these words:

"We ought, upon the clearest principles of reason, as well as law, to prefer that which operates against those claiming under the survey."

And again in these words:

"And a title founded upon a doubtful hypothesis ought not to succeed against the possession alone, where the party claiming under the doubtful title is plaintiff; nor ought it to succeed against a clear title in another, whether the party claiming under it is plaintiff or defendant, or whether the controversy is before a court of law or equity. For in no court, nor in no situation, ought a doubtful title to prevail against a clear one."

But the location which was in accordance with that made in Bryan v. Beckley—i. e., which ran the third and fourth lines in reverse order and the reverse of the courses called for, throwing out a portion of Moffit's visibly marked line called for—was still more against the claimant, and yet this fact was not deemed sufficient even to bring that hypothetical location up for consideration. This circumstance, then, could have been regarded only as one confirming a location already determined on because of other circumstances. What, then, were the circumstances which led the court to adopt a location which involved a departure from the course called for as to the third line? There were two of them. One was the existence of the mistake in the call for the opposite line, to wit, the first one, as to course. Judge Boyle referred to this in these words:

"There are, however, circumstances in this case upon which we think the presumption of a mistake in the course of the line opposite to the one connecting the two corners extant ought to be preferred to the presumption of a mistake in the distance of the two others. The necessity of presuming a mistake in either is obviously produced in a great measure by the mistake which is found to exist in the courses of the lines extant. As, therefore, when the necessity of presuming a mistake of distance in some or of course in others of the lost lines is produced by the mistake which is found in the length of the lines extant, we adopt the presumption of a mistake in distance, rather than in course, so by a parity of reason, when the same necessity is produced by the existence of a mistake in the course of the lines extant, it would seem proper to presume a mistake in the course, rather than in the distance, of the lost lines. In this way the necessity of presuming a mistake of either course or distance will be made to operate according to the cause which produced it."

The other circumstance was referred to in these words:

"The presumption of a mistake in the course of one line, rather than of distance in the others, is in this case in no inconsiderable degree fortified by the consideration that the figure of the survey will thus be preserved as nearly as the course and distance of the line extant will permit, whereas, if the survey should be made to close by presuming a mistake in the distance of the others, the figure will in a great measure be destroyed."

This case of Preston v. Bowmar was decided in the fall of 1811, about two years after the decision in Bryan v. Beckley. The decision in it was printed in 1816, long before that in Bryan v. Beckley was printed, as heretofore stated. It must be admitted that it qualifies, if it does not directly conflict, with Bryan v. Beckley, and in so far as it affects the decision in that case, being the later of the two and published in due course, must be accepted as controlling. It certainly qualifies the broad statement in Bryan v. Beckley that no departure can be made from course, save in case of "inevitable necessity," and justifies the cautious statement of Judge Ewing in Pres-

ton v. Bowmar that departure should be made from course when there is "any circumstance bringing the mind to a contrary conclusion." And it would seem to overthrow the position taken in Bryan v. Beckley that the mistake in the fourth line as to course should not be imparted to the second or opposite line. Here the mistake in the course of the first line was imparted to the third or opposite line. No express reference is made in Judge Boyle's opinion to the case of Bryan v. Beckley; but there are reasons for believing that he must have had it in mind and been conscious of the fact that position was being taken in conflict therewith. He was on the bench when Bryan v. Beckley was decided, and no doubt participated in the decision. In the short space of time that had elapsed between the two decisions—about two years—and the comparative meagerness of litigation in those days, he can hardly have forgotten it. The change in position taken can be accounted for by the change in the composition of the court which had taken place in the meantime. When Bryan v. Beckley was decided, Judge Bibb, who delivered the opinion, was Chief Justice, and with him were associated Judges Boyle and Wallace. When Preston v. Bowmar was decided, Judge Bibb had left the bench, Judge Boyle had become Chief Justice, and with him were associated Judges Wallace, Logan, and Clarke. I can imagine that possibly Judges Bibb and Boyle did not agree as to the decision in Bryan v. Beckley. If so, it was a case of Greek meet Greek. And though Judge Bibb overcame in Bryan v. Beckley, with him absent, Judge Boyle had his way in Preston v. Bowmar. Judge Boyle's opinion was published in due course, through the instrumentality of Judge Bibb, then reporter, whereas that of Judge Bibb in Bryan v. Beckley remained in oblivion until rescued therefrom along with the many other unreported decisions contained in Littell's Selected Cases. That the question in Preston v. Bowmar provoked much contest is shown by the fact that the defeated plaintiff at once took his case to the United States Circuit Court for the District of Kentucky, the judgment in the state court, a judgment in ejectment, not being an estoppel, from whence it was carried to the Supreme Court of the United States and is the case of Preston v. Bowmar, 6 Wheat. 581, 5 L. Ed. 336, relied on by defendant's counsel on another point. That court followed the Kentucky decision, because the construction which had been made could not be "pronounced unreasonable or founded in clear mistake." Just here, in passing, it should be noted that Mr. Justice Story, in his opinion in that case, referred to the matter of preference between courses and distances called for in these words:

"It may be laid down as a universal rule that course and distance yield to natural and ascertained objects. But where these are wanting, and the course and distance cannot be reconciled, there is no universal rule that obliges us to prefer the one to the other. Cases may exist in which the one or the other may be preferred upon a minute examination of all the circumstances."

The fact that no reference was made by Judge Boyle in Preston v. Bowmar to the decision in Bryan v. Beckley was evidently because it

had not been reported. That he passed it over in silence may be some evidence also of his disapproval of it. But he did refer to the decision in Beckley v. Bryan, and that, too, in a way that indicates that he was conscious of the subsequent decision in Bryan v. Beckley. And the fact that he found it necessary to explain the decision in Beckley v. Bryan, so as to show that the decision in Preston v. Bowmar did not conflict therewith, and the explanation thereof which he gave, are indicative somewhat, at least, that he felt that he was running counter to the decision in Bryan v. Beckley. The explanation of the decision in Beckley v. Bryan is in these words:

"But it was contended in the argument that the case Beckley v. Bryan and Ransdal established the point that a lost line was in no case to depart from its course. We are by no means disposed to derogate from the authority of that case as a precedent. It was the first, and must always remain a leading, one in this country upon the subject of the mode of ascertaining lost lines and corners. The opinion then delivered contains, indeed, a most admirable outline of the general doctrines upon this point; but some of its expressions, when taken in the abstract, and unconnected with context and the case before the court, are certainly liable to be misapprehended, and the expressions principally relied on by the counsel to establish their position seem to be of this description. To understand those expressions correctly, it is proper to have reference to the case as it appeared to the court. In that case a base line was found connecting two corners, which were extant, and another line extending from one of those corners, which was a line of a larger adjoining survey, but upon which no corner was found. The base line was longer than the corresponding line of the patent; but it was not supposed by the court, as is evident from the whole context of their opinion, to vary from its proper course. To make the survey close, therefore, the line opposite to the base line must be extended beyond its given length, or the other lost line must vary from its course. The court decided that the line opposite to the base line should be extended. Acting, as the court did, under the idea that there was no mistake in the course of the base line, the decision was most indubitably correct; and, considered with reference to such case, the expressions in the opinion there delivered, which were relied on in this case, are perfectly consistent with the doctrine we have attempted to establish. But, if those expressions are correctly interpreted in the latitude contended for, then it is evident that the rule laid down in that opinion is broader and more extensive than the state of fact in the case required, and that it ought not to operate upon a case like the present, which, from the circumstance of a mistake in the courses of the lines extant, is essentially different. In that case it was necessary that distance should yield to course, for the purpose of preserving the shape of the figure of the survey, and in this case it is necessary, for the same reason, that course should yield to distance. The same principle, therefore, which required the rule to be applied to the former, prohibits its application to the latter, case."

This explanation, it seems to me, was intended so to limit the decision in Beckley v. Bryan as to prevent its being carried to the extent to which it was carried in Bryan v. Beckley. Concerning this explanation Judge Robertson used these words in Mercer v. Bate, supra, to wit:

"This case (Preston v. Bowmar) reviews that of Beckley v. Bryan et al., and applies its doctrines rationally, according to their principles."

It must be accepted, therefore, that the decision in Preston v. Bowmar is the source of the cautious statement of Judge Ewing in Pearson v. Baker already quoted, and, still further, that case must be

accepted as an authority for the proposition that in case of a boundary of four lines, two corners of which connected by one line are extant, a mistake in the call for course of such line and the necessity of preserving the figure of the original plat of the survey are sufficient considerations or circumstances to justify a departure from the call as to course of the opposite line. In this it is supported, to a certain extent, at least, by the decision in Mercer v. Bate. That case involved a boundary of four lines. The first, second, and third corners were extant. These corners fixed the first and second lines. There seems to have been no mistake in the call for either of the lines as to course. The fourth corner was nonextant, and the case, therefore, involved the location of the third and fourth lines. There were two alternative methods of making their location. One was to locate them as to courses called for, departing from distance. This would be to extend the third line 456 poles. The other was to locate the third line according to course called for, but 30 poles longer than distance called for, and the fourth line so as to connect the end of said third line thus located and the beginning corner, departing from the call as to course. There were circumstances which pointed to the end of the third line thus located as the third corner, and as to the excess of distance over the call Judge Robertson said it was as great "as the difference between the actual distance of either of the other marked lines and their patent length authorize us to expect." It was held that the latter was the true location. The absence of a mistake as to course in the line connecting the extant corners to affect the matter was referred to by Judge Robertson in these words:

"There was a mistake either in the patent course of the closing line or in the distance called for in the third line and in the plat of the survey. If the competition were between course and distance alone, the course should yield to the distance, because the conflict between them is not produced by a mistake in the course of any other line. See Preston v. Bowmar, 2 Bibb, 494."

The existence of a circumstance in the figure of the survey to affect the matter was referred to by him in these words:

"By establishing X (the corner decided against) as the corner, a figure will be given to the survey obviously and essentially variant from that exhibited in the plat of the original survey. The two plats are strikingly dissimilar. It is scarcely possible that in a survey with only four corners, and the lines of which were all, except one, actually run and marked, so great a mistake could have occurred as that which must be imputed to the surveyor if the white oak corner be at or near X. The official acts of the surveyor are to be accepted. The court must presume that he did his duty and that his report is accurate, the more especially as there is nothing which can tend to even a suspicion that there was any mistake or fraud. The original plat is not only admissible as evidence, but it is essentially one of the most potent facts which can be adduced, and hence it has often been admitted by this court as always either preponderating or alone conclusive."

The significance of the original plat of a boundary of land as a factor in determining its location was referred to by him again in response to a petition for rehearing in these words:

"That the shape of the original survey is evidence and persuasive evidence of the boundary of the original has been too long and too firmly settled by this

court to render it proper now to reason on it or array authorities in its support."

It was referred to by Judge Mills in Alexander v. Lively, 5 T. B. Mon. 159, 17 Am. Dec. 50, in these words:

"The plat is a necessary part of the surveyor's report required by law, and is therefore proper evidence in ascertaining the position of the land, and what is included and must settle the figure in this case and prove the mistake. This accords with many other decisions of this court in construing the acts of ministerial officers, 'ut res magis valeat quam pereat.'"

A recent case making use of the plat of a boundary of land in fixing its location is that of Patrick v. Spradlin (Ky.) 42 S. W. 919. In the case of Blight v. Atwell, 4 J. J. Marsh. 279, the necessity of conforming to the figure of the plat was held to be a sufficient circumstance in and of itself to overcome a course location. The boundary involved in that case was one of four lines. It was as follows, to wit:

"Beginning 864 poles from the river Ohio, adjoining the lands of Philip Barbour, and running S. 72° E. 4,599 poles, to the northern boundary at B, as marked on a certain plan annexed; thence N. 18° E. 864 poles, to a black oak, sugar tree, and ash, on the bank of the Ohio river; thence, down the river and binding thereon, 5,290 poles, to a beech and two sugar trees; thence S. 18° W. to the first bound in the said plan at A."

It was not so stated, but it would seem that the third corner, the black oak, sugar tree, and ash, and the fourth corner, the beech and two sugar trees, were extant. The third line connected these two corners. The first and second corners away from the river were nonextant and it seems that the first, second, and fourth lines were unmarked in any way. The beginning corner according to the boundary, therefore, was S. 18° W. 864 poles from the fourth corner. Running from the beginning corner thus fixed, the course and distance called for would bring one to a point not 864 poles from the third corner, but one much nearer than 864 poles. If the reversing process were adopted, by running the first and second lines in reverse order and the reverse of the courses called for the distance called for, the beginning corner from the river would be located at a point from the river much farther than 864 poles. Here, then, were two alternative course locations. By one the second line would be shortened, and by the other the fourth line would be lengthened. It was held that neither location was proper, and that a noncourse location of the first line, by running the fourth line from the fourth corner the course and distance called for, the second line from the third corner the reverse of the course and the distance called for, and connecting the ends of said lines, which would throw the first line between the two alternative course locations, was the proper location thereof. And it was so held solely because it made the figure of the boundary conform to the figure thereof given in the plat. Judge Robertson said:

"Either the distance or course must, therefore, yield. The circuit court instructed the jury that, in absence of marked lines and corners, the described course must govern and designate the position of B. We do not concur with the circuit court. The plat annexed to the deed for identifying the boundary,

and the calls in the deed, show that the parties intended that A and B should be 864 poles from the river, and that distance instead of marks should identify the corners, and that A and B are both 864 poles from the river, as they are exhibited in the plat. As there is no corner at A, nor line from A to the river, it would be as reasonable to establish B 864 poles from the Ohio, and then reverse the course for the purpose of designating A, as it would be to fix A at the described distance and ascertain B by the course alone. We consider it very clear that B, as shown on the plat, viz., at 864 poles from the river, is the true position for the corner. Many considerations might be suggested which could leave little or no doubt; but argument is deemed unnecessary. A statement of the facts alone should be perfectly satisfactory. The simple fact that the deed is made according to the plat ought alone to be sufficient."

The conclusion to be reached, therefore, is that, notwithstanding what was said in Beckley v. Bryan and what was said and done in Bryan v. Beckley, there is not in this state any hard and fast rule requiring the intervening lines of a boundary of land and the nonextant corners at their points of connection with each other to be located by locating the lines according to the courses called for, if it is at all possible to do so. The rule is that they should be so located unless there is some "circumstance bringing the mind to a contrary conclusion." So it is, as said by Mr. Justice Story in Preston v. Bowmar:

"Cases may exist in which the one or the other (i. e., course or distance) may be preferred upon a minute examination of all the circumstances."

So far as Beckley v. Bryan and Bryan v. Beckley lay down any different rules, they have been discredited and overthrown by the later decisions.

A further conclusion to be reached is that in the case of a boundary of land consisting of four lines, two of the corners of which are extant and connected by one of the lines, a mistake in the call for the course of such line and the necessity of preserving the shape or figure of the boundary as shown by the original plat are sufficient circumstances to justify and to require a departure from the course called for as to the line opposite to such line. And a still further conclusion to be reached is that the nature of the contingency in which resort should be had to the reversing process in making a location of a portion of a boundary of land, precipitated by the four cases referred to above, is this: Whenever it is proper, after a consideration of all the circumstances, to locate the lines of such portion of a boundary of land in accordance with the courses called for, and they cannot be so located without resorting to such process, then, in that event and to the extent that is necessary to resort thereto, such resort should be had. It is simply as an aid to a course location in a case in which such location is proper, and in no other contingency is it to be gathered from said cases that it is proper to resort to such process. It is not to be gathered therefrom, or any other Kentucky cases, that resort should be had thereto, because a location so made would be against the claimant, and would cut down the quantity covered by the boundary from an amount greatly in excess to an amount only slightly in excess of the amount called for. The small part that the circumstance as to quantity figures in locating

the boundary of a tract of land is indicated in the quotation made above from the opinion in the case of Beckley v. Bryan. To the same effect is the statement by Judge Robertson in the case of Mercer v. Bate:

"The simple fact of surplus extending to even more than a duplication of Madison's proper quantity would not be sufficient to establish such a mistake."

The only instances in which a location against the claimant—one cutting down the quantity—was preferred in said four cases were two. One was where the two alternative locations were each according to courses called for and there was no circumstance indicating which should be preferred. This was the case in Bryan v. Beckley and Pearson v. Baker. The other was where a location not according to course called for of the line of a boundary of land consisting of four lines opposite to the line connecting two extant corners thereof was preferred to either one of two alternative locations according to course, one of which placed it on the outside and the other on the inside of the location made; the preference shown being because of a mistake in the course called for as to the line connecting the two extant corners, to which it was opposite, and it made the boundary conform to the shape or figure of the plat. This was the case of Preston v. Bowmar.

It remains, then, to apply the rules gathered and deductions drawn from the decisions which we have considered in detail. And first comes what I may term the "North Carolina rule" in both its aspects, affirmative and negative. It is certain that this rule in its affirmative aspect does not require a resort to the reversing process in locating the three lines in question of the Ledford boundary. Neither one of these lines has any advantage over any one of the others in point of certainty. Judge Hobson, in Creech v. Johnson, says that the fact that no timber is called for in the fourth, fifth, and sixth corners and that a mistake was made as to the distance of the first and second lines "would seem to indicate that this patent was perhaps laid out by protraction and that the surveyor did not in fact run the lines." The surveyors who testified herein expressed their opinions that the third, fourth, fifth, and sixth lines were not run at the time of the making of the boundary. Counsel on both sides seem agreed as to this. And I have no doubt that such is the case. If, then, the fourth, fifth, and sixth lines were not run at said time, but were laid off by protraction, in the very nature of things, neither one of these three lines could have an advantage over either one of the others in point of certainty. Said rule, therefore, does not call for the use of the reversing process in locating said lines, and it cannot be claimed that it is favorable to either the second, third, or fourth hypothesis, each one of which makes use of the reversing process to a more or less extent. Indeed, in its negative aspect, which is that resort should not be had to the reversing process unless the posterior line has an advantage over the prior line in point of certainty, it forbids a location according to either one of these three hypotheses, and requires that it should be located in accordance with the first one. And, looking at the matter

from the standpoint of reasonableness alone—i. e., apart from authority—there is something to be said in its favor. The location of a boundary of land is nothing more nor less than tracking the surveyor who made it. By tracking him I mean following the boundary which he has made according to its true intent and meaning, whether it is made by actual survey or protraction only. Here, as I endeavored to make plain in the former opinion, there is no difficulty in tracking the surveyor from the beginning to the fourth corner of the Ledford boundary. It is true that the calls for the first, second, and third lines vary somewhat from the monuments called for; but the monuments are there and there is no difficulty in finding them. As to the rest of the distance—i. e., from the fourth to the beginning corner—whilst the surveyor cannot be tracked by monuments, he can be tracked by his calls for course and distance as to the fourth and fifth lines and for the beginning corner as to the sixth line. It is true that the call for the latter varies from the course and distance called for. But this is nothing more than was the case with the first line, and with the second line as to distance, and the third line as to course. If there was no hesitancy in departing from these calls to this extent, why should there be any hesitancy in departing from the call for the sixth line as to course and distance? Where, then, does any necessity come in to require one, in tracking the surveyor from the beginning corner in the direction called for, to quit going forward at any point and attempt to track him in the opposite direction? If there is no uncertainty in so tracking him, what consideration is there to require such procedure? Is there any beyond the fact that thereby a quantity of land is brought within the boundary in excess—greatly in excess—of that called for? There is not. But that fact is not a consideration sufficient to require such procedure; for the location of a boundary of lands is not to be affected by the quantity embraced within, save in the event of some uncertainty, and according to the position reached there is no uncertainty in tracking the surveyor from the beginning corner back to same in the direction called for.

Such, I take it to be, is the line of reasoning along which the North Carolina rule would forbid a location of the lines in question of the Ledford boundary in accordance with the second, third, and fourth hypotheses, and require a location in accordance with the first one. Of course, it leaves out of consideration any effect that should be given to the figure or shape of the original plat. And it is not without Kentucky authority in its support. I refer to the case of Simpkins v. Wells, 42 S. W. 348. In that case the boundary whose location was involved contained 11 lines and had 11 corners. The first 3 corners were marked by timber called for, and were known. Nothing was called for as to the other corners. Each other line, however, was designated by course and distance. The call for the last line was "N. 20 poles to the beginning." The real courses and distances for the first and second lines, connecting the known corners, did not correspond to the calls, and hence the latter had to yield to the former. The other nine lines could be run according to courses and distances called for, except the last one. That, in order to close the

survey, pursuing the direct order, had to be run N. 5° 10′ E. 141 poles, instead of N. 20 poles, as called for. It was held that the location should thus be made, notwithstanding that it appeared that by running the last five lines in reverse order and the reverse of the courses and according to the distances called for, and inserting two other lines of certain courses and distances between said last five lines and the first six, the survey would close, all the lines save the first two connecting the extant corners would be located according to courses and distances called for, and the figure of the boundary would be made to resemble the surveyor's original plat.

Seemingly a direct authority in support of this position was the case of Alexander v. Lively, supra. Judge Guffy said:

"But appellants contend that to run it [the last line] only 20 poles the call would not close; but we suggest that the call is also to the beginning, and the rule of law has long been held by this court that both courses and distances give way to natural objects, and by that rule, if the call had been S. such a distance to the beginning, that the call to the beginning would prevail. You must go from this lost corner to the beginning, regardless of courses and distances. This fact is recognized by all, else you would have no boundary."

Counsel for defendant contend that this case "practically overrules all preceding cases." It must be conceded that seemingly it is out of touch with the earlier decisions of the same court which we have considered herein. No reference is made in the opinion to any of them. The case of Harry v. Graham, therefore, instead of being in support of the location made in Creech v. Johnson, as cited by Judge Hobson, is directly in the teeth of it.

But, though the North Carolina rule in its negative aspect requires a location in accordance with the first hypothesis, it cannot be followed here, because it is contrary to the deductions drawn from the relevant Kentucky authorities, leaving to one side Simpkins v. Wells, which require, if possible, a course location, unless there are some circumstances bringing the mind to a contrary conclusion; and there are in this case two possible course locations, and though, as we shall see, there are circumstances which bring the mind to a conclusion contrary to a course location, those circumstances do not bring it to a conclusion in favor of the first hypothesis. The two possible course locations are locations in accordance with the third and fourth hypotheses. That in accordance with the third hypothesis is favorable to plaintiff, the claimant of the boundary in question; whereas that in accordance with the fourth hypothesis is against him. If, then, we were shut up to these two hypotheses we would be bound to choose the fourth one. This would be required by the decision in Bryan v Beckley and Pearson v. Baker. But we are not shut up to these two hypotheses. There are circumstances in this case which bring the mind to a conclusion against a course location according to either hypothesis, and they bring it to a conclusion in favor of the second hypothesis, which preserves the courses and distances called for as to the fourth and sixth lines, and disregards the course and distance called for as to the fifth line. They are the very two circumstances which existed in Preston v. Bowmar, and caused a location of the

third line of the boundary involved therein in disregard of the call for said line as to course and distance. These two circumstances were a mistake as to the call for the first line—the line opposite to the third—as to both course and distance, and the necessity of disregarding said call in order to make the location of said boundary conform to the shape or figure of the original plat.

The boundary herein consists of six lines, but for the purpose of its true location it may be treated as one of four lines. The first two lines make a slight notch or offset in the southeast corner thereof. With the exception of that notch or offset, the boundary is that of a four-sided body of land. This treats the course of the top of Cumberland Mountain as a straight line, instead of zigzag, as it really is. It is so treated in the plat constituting a part of the certificate of survey. To make it a boundary of four lines, all that is necessary to do is to extend the line coinciding with the top of Cumberland Mountain northeast with said top until it intersects with the sixth line extended. This would throw out the first and second lines and remove said notch or offset. The third and fifth lines, therefore, are opposite, and so are the fourth and sixth. Now, the course called for the third line is S. 60° W. The real course from the third to the fourth corner by a straight line is about S. 72° 30′ W., a variation of about 12° 30′ to the right, or south. The course called for of the fifth line is N. 55° E. Locating it in accordance with the second hypothesis will cause its course to be N. 67° 54′ E., a variation of 12° 24′ to the right, or south. This is according to Duffield. According to Kirby the result is substantially the same. The second hypothesis imparts, therefore, the mistake in the third line to its opposite line, the fifth; and, in view of the conceded fact that the fourth, fifth, and sixth lines were never actually run, this is what one would expect.

Then, as to the figure made by the boundary: Treating it as one of four lines, its figure is that of a trapezium, bordering on a non-rectangular parallelogram. As shown by the plat forming a part of the certificate of survey, leaving out said notch or offset, one would say that it is such a parallelogram. Such appears to be its figure in the plat incorporated in the opinion in Creech v. Johnson. The third hypothesis increases the sixth line from 3,100 poles, called for, to 5,518 poles, an excess of 2,382 poles. The fourth hypothesis cuts the fourth line down from 3,200 poles to 296 poles, a diminution of 2,904 poles. This is according to Duffield. According to Kirby it is substantially the same. According, therefore, to the third hypothesis, the sixth line is nearly twice as long as the fourth. It only lacks 882 poles of being so. According to the fourth hypothesis the sixth line is over ten times as long as the fourth. How far away from non-rectangular parallelogram a location according to either of these two hypotheses will throw the figure of the boundary is evident from the disproportion which they cause between the lengths of these two lines which according to the calls and as shown on the original plat are nearly equal. The fourth one throws it farther away than the third. It almost makes a triangle out of it. I conclude, therefore, that these two circumstances are sufficient to bring the mind against

a course location of all three of the lines in question, and in favor of a location according to the second hypothesis, which is a course location save as to the fifth line. And I hold that a location in accordance with said hypothesis is the correct location of said lines. The only authority that can be relied on in support of the fourth hypothesis, which is the one that defendant contends for, is the case of Bryan v. Beckley. That case, however, is discredited in so far as it decided the particular question involved therein, to wit, the effect that should be given to the fact that there was a mistake in the course called for as to the fourth line upon the location that had been made in Beckley v. Bryan, by the shortly subsequent case of Preston v. Bowmar, backed up as it is by Mercer v. Bate and Blight v. Atwell. Besides, there is no indication that the location of the second line in accordance with the course called for, notwithstanding the mistake as to course in its opposite line, had any effect, or was regarded as having any effect, on the figure of the boundary as shown by the original plat. This circumstance, to which great importance is attached by the Court of Appeals of Kentucky and which exists in this case, did not exist in that case. And this difference between the two cases is sufficient in itself to remove that case from any controlling effect on the disposition of this. As in Blight v. Atwell, so here, the figure of the original plat is sufficient to require a noncourse location, and that according to the second hypothesis.

Counsel for plaintiff rely on the case of Asher v. Vansant (Ky.) 67 S. W. 374, in support of their contentions herein, in addition to certain of the decisions heretofore considered. I have not found it necessary to consider this case in detail so as to determine its exact bearing. Counsel for the defendant refer to the statement therein by Judge Burnam that the "case of Beckley v. Bryan, which was decided in 1801 and which is reported in Litt. Sel. Cas. 100, and in Ky. Dec. (Sneed) 91, which is the leading case upon this subject," to wit, the ascertainment of the location of the lost corners of a survey when one or more of them can be shown. This is in a certain sense true of Beckley v. Bryan. It, however, is not to be treated as an indorsement of Bryan v. Beckley, over against Preston v. Bowmar, Mercer v. Bate, and Blight v. Atwell, or as qualifying to any extent the deduction to be made from those cases.

The location of the fourth and sixth lines according to this hypothesis should take into consideration variation in the magnetic needle from the true meridan between 1845 and the present time. According to Duffield that variation is 1° 56′ to the right. According to Kirby it is 2° 24′. There is not a very great difference here; but, owing to the testimony of Kirby that the variation allowed by him is that allowed by the local surveyors, I think best to conform to this local usage.

The remaining matter left open for determination is that as to the location of the patents senior to the Ledford patent. Counsel for defendant have urged that complainant's bill should be dismissed because the plaintiff has not proven their location, and thus shown that defendant is claiming land owned by him. Of course, complainant is

not entitled to relief against defendant unless the latter is claiming land owned by him; and it cannot be said from this record that defendant is so doing, unless it shows that some part of the portion of the Cawood patent which he is claiming is within that portion of the Ledford patent located according to the second hypothesis outside of senior patents. This it does not show, save so far as the opinion of the witness Will Ward Duffield is concerned. He has expressed the opinion that there are from 5,000 to 7,000 acres of the Cawood patent not covered by senior patents, and that about one-half of this is within the Ledford patent outside of senior patents. If so, then defendant is claiming 2,500 to 3,500 acres of the Ledford patent owned by complainant. Possibly this evidence is not admissible. Possibly, in view of the difficulty of otherwise proving the fact, it ought to be admitted. But, even if it is inadmissible, I do not think that complainant's bill should be dismissed for want of evidence of the fact. It could hardly be proved without the assistance of this court. Had complainant applied for such assistance heretofore, it would have been denied. It should not have been rendered in advance of a determination of a location of the patent. Otherwise, much labor and expense would have been incurred to no purpose.

In view, however, of this position of defendant, if it is adhered to, I will send the case to a commission to ascertain and report what the fact is, and enter no decree until it is determined. If defendant indicates a waiver of the position, it will not be so referred.

BRAMBLET v. DAVIS.

(Circuit Court of Appeals, Sixth Circuit. December 20, 1905.)

No. 1,421.

1. BOUNDARIES—LOCATION FROM DESCRIPTION IN PATENT—EFFECT OF EXTENSION BEYOND STATE LINE.

The fact that the boundaries of a tract of land as given in a state patent, based on a survey made at the instance of the patentee, extend beyond the state line, affords no ground for the relocation of the tract by the courts, so as to place it all within the state. The true rule requires them to ascertain and locate that portion of the boundary which lies within the state by the usual methods, running the lines backwards and in reverse order from known corners according to the calls of the patent where necessary, and to exclude from the tract that portion which lies without the state by taking the state line as the boundary between the points where such line is crossed by the lines of the survey.

2. PUBLIC LANDS—PURCHASER OF STATE LANDS—DEFICIENCY IN QUANTITY.

A purchaser of state lands, who selects the land and has a "call" survey of the same made by protraction without actually running the lines, and applies for and obtains a patent in accordance with such survey, takes the risk of overlaps upon prior grants and of loss by reason of the extension of the boundaries, if run in accordance with the calls of the survey and patent across the line of the state; and a grantee of such purchaser takes no greater rights in those respects than his grantor had.

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

Frank Chinn and Wm. Ayres, for appellant.

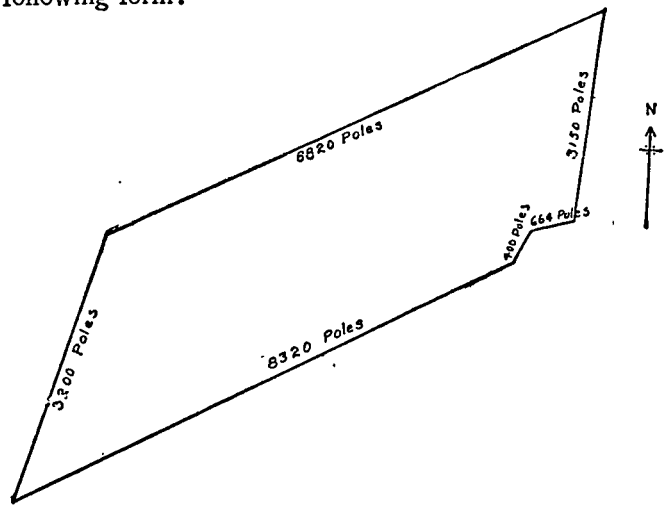
Helm Bruce and W. O. Harris, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit to quiet the title to land in Harlan county, Ky. The complainant, Charles Henry Davis, trustee, claims title under a patent issued September 25, 1845, on a survey dated March 3, 1845. The defendant, George W. Bramblet, claims under a junior patent issued January 28, 1846, on a survey dated March 6, 1845. The first patent, calling for 86,000 acres of land, was issued to Ledford, Skidmore, and Smith, and will be referred to as the Ledford patent. The second, calling for 9,500 acres, was issued to Moses Cawood. The controversy grows out of an alleged conflict in the boundaries of the two patents, and involves the true location of the Ledford patent; that of the Cawood patent being undisputed. Located in one way, the Ledford patent embraces the entire land called for by the Cawood patent. Located in another, the conflict is but slight. The description of the land granted by the Ledford patent is as follows:

"A certain tract or parcel of land, containing 86,000 acres, by survey, bearing date the third day of March, 1845, lying and being in the county of Harlan, and bounded as followeth, to wit: Beginning on Crank's creek, on two beeches and two sugar trees, beginning corner to said Smith's 1,500-acre survey; thence S. 70° W. 664 poles, to three beeches, beginning corner to Smith's 600-acre survey; thence S. 28° W. 400 poles, to a stake on the top of Cumberland Mountain; then S. 60° W. 8,320 poles, to a stake near Cumberland Gap; thence N. 15° E. 3,200 poles, to a stake; thence N. 55° E. 8,820 poles, to a stake; thence S. 5° W. 3,150 poles, to the beginning, with its appurtenances."

The order of the Harlan county court for the survey was made March 3, 1845, and on the same day the certificate of survey, on which the patent was issued, was made. This survey describes the property precisely as it is described in the patent. Accompanying it was a plat in the following form:



Laid out by the courses and distances given above, the boundary of the survey closes, defining a tract of land of about the shape shown above, running in its longest direction from northeast to southwest, the southeast side of which (made up of the first, second, and third lines) is approximately 30 miles long, the opposite or northwest side (bounded by the fifth line) 27½ miles long, and the ends (being the fourth and sixth lines about 10 miles long. It contains in round numbers 300 square miles, or 192,000 acres, over 100,000 acres more than called for.

Coming to the location of the patent, it will be observed that the first and second lines call for known natural objects as corners—the first corner being "on Crank's creek, on two beeches and two sugar trees, beginning corner to said Smith's 1,500-acre survey"; the second corner, "three beeches, beginning corner to Smith's 600-acre survey"; and the third corner, "a stake on the top of Cumberland Mountain." By their use, the first line, with a slightly changed course, was found to be 911.5 poles, instead of 664 poles, in length, and the second line 463.4 poles, instead of 400 poles, in length. The increase in length of these two lines, amounting to 310.7 poles, and the slight change in their bearing, would necessarily produce a slight variation at the point of closure, but so slight in so great a perimeter (almost 80 miles in length) that the survey, with the first and second lines thus located, may be said practically to close. The first and second lines, thus defined by natural objects, are the only ones about whose location there is no dispute. The second ends at "a stake on the top of Cumberland Mountain." The state line between Kentucky and Virginia, in this locality, runs along the top or highest point of Cumberland Mountain, so that

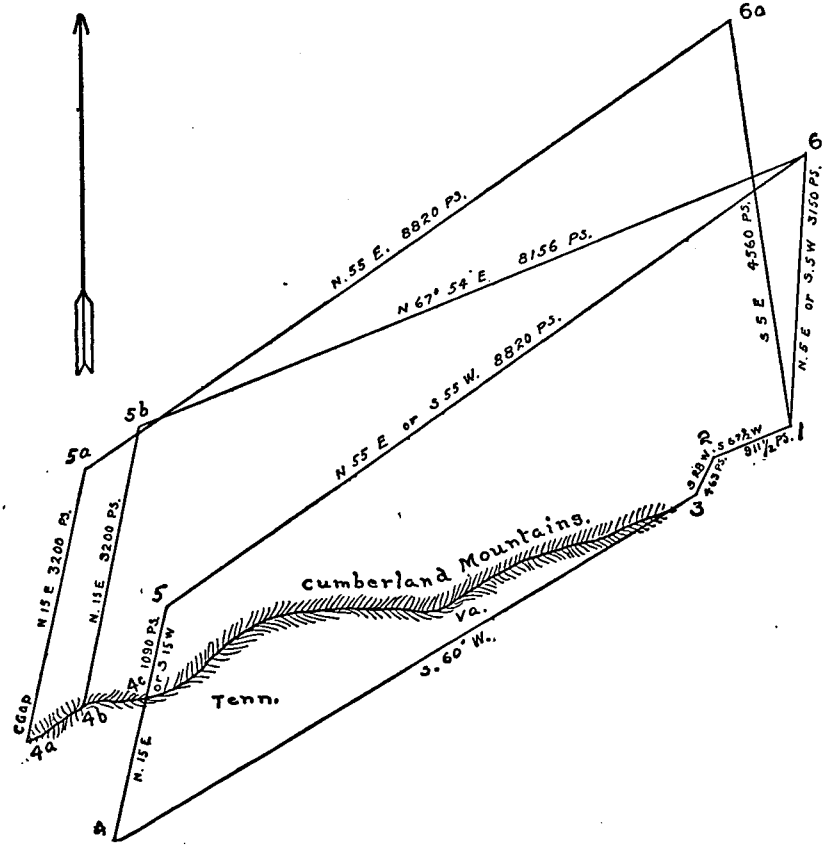
the third corner is on the boundary which marks the limit of the territorial jurisdiction of Kentucky.

Right here is where the difficulty in locating the patent begins, for the third line, which is defined as "then S. 60° W. 8,320 poles, to a stake near Cumberland Gap," if run from the third corner by this course and distance, crosses the state line, passes through the wedge-like point of Virginia between Kentucky and Tennessee, and ends in Tennessee about four miles southeast of Cumberland Gap. Taking the point thus fixed by course and distance as the fourth corner, and running the remaining lines (the fourth, fifth, and sixth) by the courses and distances given, the boundary practically closes. But because Kentucky had no authority to run its survey into other states, and no power to issue a patent for land located in other states, doubt was naturally thrown about the true location of the patent, and the matter has been before the courts, both state and federal, a number of times.

The first suit was brought by Maria Mott Davis, the grandmother of the complainant, and then the owner of the Ledford patent, against W. C. Farmer and others, to quiet her title to a tract of 12,900 acres claimed under a junior patent. This suit was instituted in the Circuit Court of the United States, and was decided by Judge Barr in 1894. 141 Fed. 703. He held that the fourth corner of the patent should be located at or in Cumberland Gap, and the third line should run with the state line from the third to the fourth corner thus ascertained. A few years later, a similar suit was brought by the same person in the same court to quiet her title under the Ledford patent against one Hinckley, claiming 67,000 acres under a junior patent. This suit was decided by Judge Evans, who followed Judge Barr in fixing the fourth corner at or in Cumberland Gap. 141 Fed. 708. Taking the fourth corner as being at or in Cumberland Gap, both Judge Barr and Judge Evans ran the fourth and fifth lines according to their courses and distances, and from the sixth corner, thus ascertained, ran a line to the beginning, thus closing the survey. As a result, the sixth or closing line, instead of running S. 5° W. 3,150 poles, ran S. 5° E. 4,560 poles, the course being changed 10 degrees, and the length increased 1,410 poles, or nearly 5 miles. This is the location contended for by the complainant below.

While the present case was pending in the court below, a suit involving the location of this patent was begun in the state court and decided by the Court of Appeals of Kentucky. This was the case of Creech v. Johnson, decided October 14, 1903, and reported in 116 Ky. 441, 76 S. W. 185. The highest court of Kentucky there held that, having located the first and second lines, about which there seemed to be no dispute, and thus reached the state line at the third corner, the way to deal with the difficulty presented was to go back to the beginning, reverse the courses and run the lines according to the calls of the patent, until the state line should again be reached. From this point, where the fourth line reversed should intersect the state line, run with the state line to the third corner, itself on the state line. The location thus fixed as compared with that made by Judges Barr and Evans, is roughly shown by a diagram printed in the opinion. 116 Ky. 447, 76 S. W. 186.

The court below had before it all of the opinions when it rendered its decision, but concurred in none of them. It declined to follow the decision of the Court of Appeals of Kentucky as one in a matter of local law, and in a most learned and elaborate opinion determined on a location of its own, different from any one of the others. Having run the first and second lines, as practically agreed upon, to the top of Cumberland Mountain, being the state line, it ran the third line, rejecting its course, with the state line, the distance called for in the patent, namely, 8,320 poles. Here it stopped and located the fourth corner, being a point 720.4 poles (about two and one-fifth miles) from Cumberland Gap. From the fourth corner thus fixed it ran the fourth line according to the course and distance given in the patent, thus fixing the fifth corner. It then went back to the beginning corner, reversed the course of the last line and ran it the distance of the call, thus fixing the sixth corner. It then closed the survey by running a line from the fifth corner thus fixed to the sixth corner thus fixed, without regard to either the course or distance of the patent; the result being that the fifth line, instead of running north 55° E. 8,320 poles, is made to run north 67.54° E. 8,156 poles. The locations made by the different courts are shown in the following map:



[Owing to the difficulty of imprinting one color upon another, as would be necessary if this cut was prepared as indicated by the court, the locations made by the different courts have been indicated as follows:

The lines according to the calls of the patent are indicated by 1, 2, 3, 4, 4c, 5, 6, 1. That portion which falls outside of Kentucky is represented by the lines south of the Cumberland Mountains, being 3 to 4 and 4 to 4c.

The lines as located by Judges Barr and Evans are indicated by numbers 1, 2, 3, 4c, 4b, 4a, 5a, 6a, 1.

The lines as located by the court below are indicated by 1, 2, 3, 4c, 4b, 5b, 6, 1.

The lines as located by the Court of Appeals of Kentucky are indicated by 1, 2, 3, 4c, 5, 6, 1. Editor.]

The line of Cumberland Mountain appears from the third corner to Cumberland Gap, which was selected by Judges Barr and Evans as the fourth corner. This line is colored red up to the point where the court below fixed the fourth corner, and from there on, blue. The fourth, fifth, and sixth lines, as located by Judges Barr and Evans, are colored blue; as located by the court below, red; and as located by the Court of Appeals of Kentucky, yellow. The third and the portion of the fourth line, according to the patent calls, which fall outside of Kentucky, are colored green. The acreages embraced in these locations are as follows: The location made by Judges Barr and Evans contains 182,184 acres, being 96,184 acres in excess of that called for by the patent; that made by the Court of Appeals of Kentucky contains within Kentucky 93,552 acres, an excess of 7,522 over that called for by the patent; and that made by the court below contains 149,352 acres, an excess of 63,352 over that called for by the patent.

From the decree enforcing this location an appeal has been taken to this court. Neither party is satisfied with the ruling of the court below; the appellant contending for the location made by the Court of Appeals of Kentucky, and the appellee for that made by Judges Barr and Evans in the Circuit Court of the United States. The doubt which hangs about the true location of this patent flows from the fact that no actual survey of the land purchased and to be patented was ever made. This is apparent, and may be taken as conceded. The patent was based upon a survey by protraction, known commonly as a "call" survey, which was made only on paper. The surveyor never went on the ground, and therefore left no "tracks" to follow. We are remitted to reason and the rules of construction to ascertain the meaning of the patent. Run by the courses and distances given, the survey closes, and it closes no matter which way the lines are run, whether forward or backward, whether directly or by the reverse method. The first, second, and third corners being fixed by natural objects, and the others described by courses and distances, there is no difficulty in locating the entire survey according to the strict terms of the patent. But it appears, when thus located, that part of it falls outside of Kentucky. Well, what of it? If the patentee saw fit to place part of his survey outside of Kentucky, ought the court therefore to be expected to relocate the patent and place all of it inside of Kentucky? We think not. If part of it clearly falls outside of Kentucky, that part fails, just as does part embraced in a prior patent.

The duty of the court in this contingency is not to strain the law and dislocate the survey, in order to bring all its lines within Kentucky, but simply ascertain and define the portion of the survey which does really lie within Kentucky. This can best be done by first locating the lines which lie in Kentucky, and locating them as nearly as possible according

to the calls of the patent. This is what common sense suggests and the settled rules of construction in such cases require. Let us quote the principles laid down in the leading case of Pearson v. Baker, 34 Ky. 321, 324, all of which apply to the present situation:

"First. In the general, distance yields to course, or, in the absence of any circumstance bringing the mind to a contrary conclusion, the courses shall be first pursued, contracting or extending the distances, as the case may require, to make the survey close. [Bryan v. Beckley] Litt. Sel. Cas. 91.

"Second. The beginning corner in the plat or certificate of survey is of no higher dignity or importance than any other corner of the survey. Beckley v. Bryan, Ky. Dec. 91; 1 Pirtle's Digest, 114.

"Third. The order in which the surveyor gives the lines and corners in his certificate of survey is of no importance to find the true position of the survey. Reversing the courses is as lawful and persuasive as following the order of the certificate. [Thornberry v. Churchill] 4 T. B. Mon. 32 [16 Am. Dec. 125].

"Fourth. That construction is to prevail which is most against the party claiming under an uncertain survey. It is his duty to show and establish his corners. Preston's Heirs v. Bowmar, 2 Bibb, 493. From which it will follow that he who sets up and relies on an outstanding claim must show that it embraces the land in contest, and should not succeed by using it, when it is uncertain whether it embraces it or not."

When, then, having located the first and second lines, we come to the beginning of the third, and find that, by running it according to the course and distance given in the patent, it crosses into Virginia and ultimately ends in Tennessee, a difficulty is presented which in our opinion entirely justifies us in going back to the beginning, reversing the calls, and tracing the lines the other way, so as first of all to locate the lines which do lie within Kentucky, and ascertain the boundaries of the granted land which is located there. There is no trouble in doing this, and, having run the sixth and fifth lines reversed, the fourth line reversed brings us again to the top of Cumberland Mountain, from which, if run out on the same course, the line would, at the distance given in the patent, strike the end of the third line run out according to the patent call. But since it is a vain thing to run the lines of a Kentucky survey outside of Kentucky, and since we have reached the boundary of the state at two widely separated points, one the beginning of the third line, and the other, practically, the beginning of the fourth, so that between the lines thus run and the boundary itself all the Kentucky land granted by the patent is really embraced, we may reject the third line and the part of the fourth outside of Kentucky, and adopt a new third line, which runs with the state line along the top of Cumberland Mountain between the two points mentioned. In this way all the lines are located as called for in the patent, except the third and part of the fourth, for which a portion of the state line is substituted ex necessitate, thus closing the survey and giving the patentee every acre of land in Kentucky which he is entitled to on that side. Bruce v. Taylor, 2 J. J. Marsh. 160.

The method adopted by Judges Barr and Evans, and by the court below, after ascertaining that the third line, run by course and distance, would leave Kentucky, cross the wedge-like point of Virginia, and land in Tennessee, was to make a new third line, with a new fourth corner, all located in Kentucky. To do this, Judge Barr and Evans rejected both the course and distance given in the patent, fixed the fourth corner at or in Cumberland Gap, and ran the line by the meanders of the top

of the mountain to it, while the court below, rejecting the course of the patent, ran the line by the meanders of the top of the mountain the distance of the call, and stopped, fixing his fourth corner there. We agree with the court below that Judges Barr and Evans were in error in fixing the fourth corner "at or in Cumberland Gap," merely because the patent says that the third line, after being run S. 60° W. 8,320 poles, would end "at a stake near Cumberland Gap." Under such a call, how "near" the stake, marking the terminus of the third line, would be to Cumberland Gap must be determined by running out the line according to its course and distance. Harry v. Graham, 18 N. C. 76, 78, 27 Am. Dec. 226. And the terminus of a line run a distance of 26 miles might well be said to be near a place so well known as Cumberland Gap if it should turn out to be about 4 miles from it. Rejecting Cumberland Gap as the fourth corner, and disregarding the course of the call, the court below ran the third line by the meanders of the top of Cumberland Mountain the full distance called for in the patent, and stopped there, although still 2 miles or more from Cumberland Gap. The fourth corner, thus fixed, was regarded near enough to come within the description of the patent.

In our opinion, the court below avoided one error to fall into another. It, too, created a corner not contemplated in the patent, but in a different way. Clearly the surveyor never intended to run the third line with the meanders of the state line either to Cumberland Gap or the distance of the call, or he would have said so. He intended to run the line S. 60°W. 8,320 poles, and thus fix the fourth corner, because the survey was a paper one, and only from the fourth corner thus fixed would the remaining lines of the call, when traced, close the survey. He probably supposed that a line run from the third corner S. 60° W. would stay in Kentucky; but he made a mistake, and the patentees took the chance. The fault we find with Judges Barr and Evans and the court below is that they made a new line and created a new corner before they were compelled to. Obviously, the running of the third and part of the fourth lines outside of Kentucky necessitated a new boundary on that side, which, of course, would be the state line; but it seems to us the proper way to find how much of the survey is bounded by the state line, is to go back to the beginning, reverse the courses, and run the calls until the state line is again reached. This, we think, is what would naturally be done if a possible purchaser under a junior patent wished to find out the boundaries of the Ledford patent on the northwest side.

The creation of a new fourth corner made more trouble. The fourth, fifth, and sixth lines, beginning at the new fourth corner and run according to the patent, would not close the survey by many miles. Various expedients for closing it were suggested and different ones adopted. Judges Barr and Evans ran the fourth and fifth lines according to the calls, and from the sixth corner thus fixed ran to the beginning. This changed the course of the sixth line from S. 5° W. to S. 5° E., and increased its length from 3,150 poles to 4,650 poles, a distance of almost 5 miles. If they had run the fifth line by its course until it intersected the sixth line, reversed and prolonged, the fifth line would have been 9,468 poles, instead of 8,820 poles, in length, an increase of 948 poles, or about 3 miles, and the sixth line 5,518 poles, instead of 3,150 poles in length,

an increase of 2,368 poles, or over 7 miles. To obviate the alteration in the course and distance of the sixth line, or the large increase in the distance of both the fifth and sixth lines, if run according to their courses, the court below, after running the fourth line the course and distance of the call, and thus fixing the fifth corner, went back to the beginning, reversed the call, ran the sixth line the course and distance of the patent, and fixed the sixth corner. The fifth and sixth corners thus fixed, it joined by a line of its own, having neither the course nor distance of the patent, the course being N. 67° 54′ E., instead of N. 55° E., a change of 12° 54′, and the distance being 8,156 poles, instead of 8,820 poles, a shortage of 664 poles, or about 2 miles.

We have already given the areas of the different locations. On the one side, it is contended that a location containing 96,184 acres in excess of that called for by the patent (as is the case with the location of Judges Barr and Evans) is by that fact alone put under suspicion; while, on the other hand, it is insisted that a grant of 93,552 acres (the area covered by the location of the Court of Appeals of Kentucky), although 7,552 acres in excess of the amount called for by the patent, will be reduced by existing prior grants, far below the 86,000 acres paid for, and to which the patentees were justly entitled. It appears in the record that the appellee's surveyor made a map showing the overlaps upon the location made by Judges Barr and Evans, and estimated they amounted to 105,000 acres, leaving about 87,000 acres. This estimate was not, however, supported by the production of the map, although it was said to be in existence, and the court refused afterwards to reopen the case for the purpose of going carefully into the overlaps, holding the inquiry not to be material at that stage of the case. We must therefore regard the testimony upon this point as unsatisfactory. Whatever might be shown, our conclusion would remain unaffected. If the patentees got more than 86,000 acres within the granted boundaries, it could not be said that they have been defrauded because of overlaps reducing the patentable amount below 86,000 acres. They took the risk of the overlaps when they laid down the survey where they did.

There was much discussion as to the effect which should be given the decision of the Court of Appeals of Kentucky in the case of Creech v. Johnson, 116 Ky. 441, 76 S. W. 185. The appellant relies largely upon the holding in that case. The appellee suggests that the case was between parties having but a slight interest in the main controversy; that it was prearranged, while the present case was in the lower court, to secure a location by the Court of Appeals of Kentucky, which would be controlling; and that that court did not have the advantage of a full presentation of their side by the present owners of the Ledford patent. The matter of the location of the patent was brought to the attention of the Court of Appeals in Asher v. Howard, 70 S. W. 277, 24 Ky. Law Rep. 961; Id., 72 S. W. 1105, 24 Ky. Law Rep. 2118, where the court refused a rehearing and declined to locate the patent because the necessary data were not then before it. The court evidently appreciated at that time the large interests involved, for it says so. The motion to advance and the briefs in the case of Creech v. Johnson further advised it of the importance of the main question. Under the circumstances, we must hold that whether the location of the Ledford patent, involved

in Creech v. Johnson, ought to have been heard and adjudicated, was one for the Court of Appeals to pass upon, and, since it entertained jurisdiction and delivered a considered opinion, which appears in the Reports of the court prepared for publication, we must accept its conclusions as its deliberate judgment upon the location of the patent, entitled to the weight such judgments usually are. Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 219, 17 Sup. Ct. 305, 41 L. Ed. 683.

We have been referred to a number of cases bearing upon the effect which should be given by a federal court to a decision of the court of a state upon a question of local law. Preston v. Bowmar, 6 Wheat. 580, 5 L. Ed. 336; Williamson v. Berry, 8 How. 495, 12 L. Ed. 1170; Suydam v. Williamson, 24 How. 427, 16 L. Ed. 742. But it has not become necessary for us to determine nicely the applicable rule, because, treating the location as an original matter, we have reached the same conclusion as the Court of Appeals of Kentucky did.

In conclusion: The present owners of the patent stand in the shoes of the patentees. The deed from the patentees, under which they hold, warned them of a possible mistake in the patent by expressly excepting "any part of the 86,000-acre tract which may be found to lay outside of the state of Kentucky." If they lose some land by this location, it was the patentee's fault, for which they must stand good. The patentees selected, and through the surveyor located, the land, and described it in the patent issued, which by the settled law of Kentucky is to be construed most strongly against the patentees. If they saw fit not to have the land actually surveyed, but a mere "call" survey by protraction made, they took the risk. As one of the witnesses, a surveyor of the early days, referring to such surveys, said:

"If you hit the land, you save it; and if you miss it, you lose it."

It closed and bounded a tract of land, but it was laid down in the wrong place. There was an overlap into Virginia and Tennessee. It cannot be presumed that Kentucky intended to grant land outside its boundaries, thus covered by its patent; nor can it be presumed that it intended to make good such a mistake by conveying land inside its boundaries not covered by its patent, as the patentees located it. All that Kentucky intended to grant was the land inside of Kentucky embraced within the boundaries of the patent, and such a grant is effected by locating the patent the way in which, concurring with the Court of Appeals of Kentucky, we have located it.

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

GRAND TRUNK W. RY. CO. et al. v. CHICAGO & E. I. R. CO.

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

No. 1,111.

1. EQUITY—JURISDICTION—PREVENTING MULTIPLICITY OF SUITS.
A contract by a lessee railroad company to run its trains over the tracks and use terminal facilities of the lessor during the term of a lease for 999 years and to pay rental on a wheelage basis, if clearly established and valid, is specifically enforceable in equity on the ground of the avoidance of a multiplicity of suits, which would be vexatious and expensive and in which the relief obtainable would be inadequate.

2. RAILROADS—LEASE OF TERMINAL FACILITIES—ENFORCEMENT BY CO-TENANTS.
A series of leases and agreements in renewal between a terminal railroad company and its constituent companies as tenants, providing for the use by them of the tracks and facilities of the lessor and the payment of rentals on a wheelage basis, construed, and *held* not to contain any covenant on the part of one tenant to use such facilities which could be enforced by the others in their own right.

3. SAME—COVENANT TO USE.
Such contracts also *held* to contain no covenant, express or implied, binding a lessee in favor of the lessor to use the tracks and facilities during the term, but merely to grant the right to such use to the extent desired upon the terms stated.

4. CONTRACTS—MERGER OF PRIOR AGREEMENTS.
In the absence of allegation of fraud or mistake, a lease is presumed to express the deliberate contract of the parties, although it differs in terms from a prior contract, pursuant to which it was executed. In such case the prior agreement is merged, and the rights of the parties are governed by the new contract.

[Ed. Note.—For cases in point, see vol. 95, Cent. Dig. Contracts, §§ 1129, 1130.]

5. EQUITY—ISSUES—ABSENCE OF NECESSARY PARTIES.
A defendant cannot be required to litigate questions which directly involve issues with third persons not before the court, and which cannot be adjudicated in their absence.

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

The appellants, the Grand Trunk Western Railway Company (styled for brevity the "Grand Trunk Company"), Chicago & Erie Railroad Company (styled for brevity the "Erie Company"), Chicago, Indianapolis & Louisville Railway Company (styled for brevity the "Monon Company"), and the Wabash Railroad Company (styled for brevity the "Wabash Company"), brought suit against the Chicago & Eastern Illinois Railroad Company, the appellee (styled for brevity the "Eastern Illinois Company"), to restrain the latter from diverting its passenger business at Chicago from the Dearborn Street Station of the Chicago & Western Indiana Railroad Company (styled for brevity the "Western Indiana Company") to the terminals at La Salle Street Station of the Chicago, Rock Island & Pacific Railway Company. Prior to May, 1879, the Eastern Illinois Company owned and operated a line of railway from Danville northward to Dolton, Ill., then 13 miles south of the city limits of the city of Chicago, reaching the city over the lines of the Cincinnati, Pittsburg & St. Louis Railroad Company from Dolton to the terminus of the latter company on the West Side of the city. In May, 1879, the Eastern Illinois Company, desiring terminal facilities on the South Side of the city, entered into contract with one J. B. Brown, dated May 6, 1879, which provided for the organization by Brown of the Western Indiana Company for the purpose of securing to the Eastern Illinois Company "an independent and perpetual railway entrance into the city of Chicago." The

company so to be created was to construct a line of railway connecting at Dolton with the northern terminus of the railway of the Eastern Illinois Company, and to extend into the city of Chicago, the passenger terminus to be on the South Side, and as far north as Sixteenth street, which line, when constructed, the Eastern Illinois by express covenants agreed to enter into possession of and use, maintain, and operate for the full term of 999 years. By this contract it was contemplated that the Eastern Illinois would assume all obligations of the Western Indiana Company; that it would conduct and develop the local passenger and freight business of the road to its fullest extent, and would pay $3,000 per annum on account of taxes on the main line of the road during the full term. The Western Indiana was to have the right to admit other companies to the use of the property, subject, however, to the right granted to the Eastern Illinois Company to conduct the entire local business, the subsequent tenants to have the right of passage for their through trains only. After the admission of other tenants, the expenses incurred by the Eastern Illinois Company in maintaining and operating the road were to be shared by the subsequent tenants upon a wheelage basis. The Eastern Illinois Company agreed to guaranty the payment of $800,000 of bonds to be issued by the Western Indiana Company, and to provide by proper lease for the payment of the interest and, by means of a sinking fund, of the principal of such bonds at maturity; and after the payment of such bonds the Eastern Illinois Company should be absolved from the payment of rentals, except for the repair, renewal, maintenance, and payment of taxes and assessments. The contract further provided that, upon the coming into existence of the proposed new corporation, the Western Indiana Company should enter into proper written agreement with the Eastern Illinois Company covering all the points specified in the contract. In July, 1879, the Western Indiana Company was organized, Brown becoming its president, the contract above stated being assigned to it by Brown, and the company agreed to keep and perform the covenants of Brown. This company was incorporated to build a terminal system, and was authorized to construct a line of railway from the Indiana state line and from Dolton into the city of Chicago, and there to provide terminal facilities for as many railroads as might become its lessees.

On October 24, 1879, the Western Indiana and the Eastern Illinois Companies entered into an agreement denominated in the record as the "original lease," in which the agreement is spoken of as a lease, and the parties as lessor and lessee, respectively. The document is voluminous, and the recitals and covenants are many. It recites that proper terminal facilities in the city of Chicago are necessary for the proper management of the business of the Eastern Illinois Company, that those in course of construction by the Western Indiana Company are adequate for the use contemplated; and then the Western Indiana Company: "In consideration of the premises and of the rents reserved, and the covenants and agreements on the part of the party of the second part [the Eastern Illinois Company], to be by the said party of the second part kept and performed as hereinafter mentioned, has granted, demised, and leased, and by these presents does grant, demise and lease unto the said party of the second part the right and privilege of using and running locomotives, cars, and other rolling stock of the said party of the second part over and upon the main track or tracks of the railroad of the party of the first part [meaning only the direct main track or tracks between Dolton and the terminus in Chicago] from its junction with the road of the party of the second part, at or near Dolton, in the county of Cook, state of Illinois, to the passenger depot of the said party of the first part in the city of Chicago, when constructed, and to the freight buildings, engine houses, repair shops, switchyards, and dock property, the use of which is vested in the party of the second part, and which are more particularly hereinafter described, as well as the right to use all switches and turnouts appertaining to the said track or tracks for all purposes of the traffic of the said party of the second part; also the right and privilege of using for the purposes of such traffic the passenger depot and its appendages of the said party of the first part, in the city of Chicago, when constructed; and also the exclusive right and privilege of using for the purpose of such

traffic, the freight buildings, engine houses, repair shops, switchyard, and dock property," a particular description of which follows, "and together with all the franchises, rights, and privileges of the said party of the first part thereto belonging, or in any wise appertaining, only to the extent, however, that may be necessary and sufficient to enable the party of the second part to use and enjoy the rights and privileges hereby intended to be granted, demised, and leased: Provided always, and it is hereby expressly understood and agreed, that the right and privilege of using the track, the passenger depot, and the other property and premises * * * hereby granted, demised, and leased * * * shall be exercised in common with the Western Indiana Company and such other company or companies as may from time to time obtain the grant of similar rights, privileges, and use of the same." The habendum clause is for the use of the freight buildings, engine houses, repair shops, switchyard, and dock property exclusively, and the use of the track, passenger depot, and other premises in common with the Western Indiana and such other companies as may thereafter obtain leases therefor, and right to use the same for the full term of 999 years from the 30th day of October, 1879; the Eastern Illinois Company yielding and paying yearly, and every year during the said term, the yearly rental thereinafter specified, and keeping and performing the covenants. Then follow certain express covenants upon the part of the Eastern Illinois Company as follows: (1) To pay $5 annually on January 1st during the entire time mentioned. (2) To pay all taxes, assessments, liens and water rents, whether state, municipal, or other, lawfully imposed "upon this lease and upon the freight buildings, engine houses, repair shops, switchyard, dock and other property," the exclusive use of which is vested in the Eastern Illinois Company, and upon the franchises, earnings, traffic, and business of the premises demised, or in any way derived therefrom. (3) To pay yearly and in every year during the term the sum of $3,000 on account of taxes and assessments imposed upon the main line of the road from Dolton into the city of Chicago, and, in the event of extension of the road beyond Fourteenth street, to pay such additional sum as would be its proper and just share of the additional taxes and assessments, according to the proportion of its wheelage per mile over the main line. (4) To pay by way of further rental the sum of $4,000 monthly, until the sum of $800,000 shall have been paid, such payments to commence upon possession being taken by the Eastern Illinois Company; but the monthly rental shall be diminished pro tanto as the capitalized rental, $800,000, is reduced by operation of the sinking fund thereinafter provided. (5) The Eastern Illinois Company to pay upon the first of each month during the term commencing July 1, 1884, such a sum of money as, together with the monthly rental of $4,000 provided for, will, within 35 years from January 1, 1885, pay 6 per cent. per annum upon the capitalized rental of $800,000 before it shall be reduced by the operation of the sinking fund on the 1st day of January, 1885, and after that time 6 per cent. per annum upon the amount of the capitalized rental as reduced; and also so much by way of sinking fund as will pay off and extinguish the principal of said capitalized rental of $800,000 within 35 years from January 1, 1885.

The instrument recites that the Western Indiana Company had executed a mortgage dated July 1, 1879, to Anthony J. Thomas, as trustee, to secure the payment of bonds to the amount of $1,600,000, that the Eastern Illinois Company had guarantied the payment of series A of said bonds, amounting to $800,000; and it was understood that the rental of $4,000 per month should be used and applied for the payment of interest upon the bonds so guarantied, and the sinking fund should be applied to the payment of such bonds; and that the rental and the sinking fund should be paid by the Eastern Illinois Company to the trustee in the mortgage, and should be applied to the payment of the interest upon the bonds, and to the extinguishment and cancellation of the bonds so guarantied. Like provisions are contained in the instrument for further payments in case of the construction of the road beyond Fourteenth street to Van Buren street, with respect to which the Eastern Illinois Company should have the same rights and use as provided with reference to the other part of the line. It recites that the Western Indiana Company contemplated making a new mortgage for $4,000,000, and that the prior mort-

gage and bonds to Thomas should be satisfied and canceled, and bonds to the amount of $800,000 under the proposed new mortgage should be substituted, and applies the stipulations of the agreement with like force and effect to the new mortgage. There is a further provision that, as the Eastern Illinois Company should during the term conduct the entire local business between Dolton and the city of Chicago, and other companies, to whom leases may be made, and with whom operating and traffic arrangements may be entered into by the Western Indiana Company, should have passage over the line for through trains only, it was agreed that the Eastern Illinois Company should be entitled to conduct, and will conduct, the entire local business between Dolton and the terminus in Chicago in such manner that the business shall be fully developed and preserved, and that the public shall be afforded all practical facilities and conveniences, and that the Eastern Illinois Company shall and will, at its own expense, "exercise the rights and privileges hereby granted as fully as the party of the first part, as the owner thereof or otherwise, is now, or may be by law required to do, and at the same time in such manner as not to interfere with or obstruct the full and free use of the main track or tracks, passenger depot, sidings, turnouts, and the other property which may from time to time be used by it in common with the party of the first part and other companies, or the traffic and business of the party of the first part and said other companies over the same, and shall and will keep up, maintain, and operate the stations, freight buildings, engine houses, repair shops, switchyards, dock and other property used by it exclusively in thorough repair, working order and condition, using the best and most suitable materials for renewals of the same, as renewals shall from time to time become necessary, so as to be suitable at all times for the transaction of the traffic and business aforesaid"; that the Eastern Illinois Company should perform all the duties by the laws of the state or ordinances of towns and cities which should be now or hereafter required in regard to the rights, privileges, and premises granted, and should pay to the Western Indiana Company its proportion of the expenses incurred or paid by it in maintaining and keeping in thorough repair and working condition the main track or tracks, passenger depot, terminal facilities, and other property, the common use of which has by agreement been reserved, and in supervising the use and managing the same, and other proper joint expenses and charges arising from the tracks, depot, terminal facilities, and other property used in common, and the traffic over the same, such proportion to be determined by the wheelage of the Eastern Illinois Company and of the other companies over the part of the line so used in common. It was mutually covenanted that the Western Indiana Company should have the general control, management, and supervision of the main line, passenger depot, grounds, and other property which may be used by the Eastern Illinois Company in conjunction with others, and the sole control and direction of the management, use, location, improvement, and repair of the same, the appointment and supervision of all officers, agents, and employés necessary for such purpose, and to establish and enforce such reasonable rules and regulations as may be necessary; and the Eastern Illinois Company should have the exclusive right to manage, maintain, and keep in order, at its own cost and expense, such portion of the main track as it may use exclusively of others, and, so soon as any such portion of the track should come into the use of another company in conjunction with the Eastern Illinois Company, that portion of the track should immediately fall into the management of and be maintained and kept in order by the Western Indiana Company. The Eastern Illinois Company also agreed to keep the buildings upon the premises occupied by it exclusively fully insured against loss by fire, loss, if any, payable to the Western Indiana Company, and to pay a proportional part of the premiums for insurance upon the property used in common, said proportion to be determined by the wheelage of each company using the same; the proceeds of such insurance in case of loss to be applied to the repair, rebuilding, and restoration of the property destroyed. There are the usual covenants to be found in a lease with respect to the surrender of the property demised at the expiration of the term, and the usual provisions for default in respect of the covenants of the lease.

On October 25, 1879, the Western Indiana Company executed to the Wabash Company an agreement or lease of a portion of its main line from its junction with the Western Indiana, near Seventy-Fifth street. On July 1, 1880, it executed to the Grand Trunk Road a similar agreement or lease of that portion of its line north of the junction with the Grand Trunk, near Forty-Ninth street. On November 1, 1880, the Western Indiana Company executed a similar agreement or lease with the Erie Company from the junction of its road with the line of that company, near Hammond, Ind. On December 1, 1881, it executed to the Monon Company a similar agreement or lease of a portion of its main line from the state line. All these agreements or leases covered the line of railway from the point of junction to the passenger station, when constructed. The rights granted to the Wabash Company were made subject to the exclusive right of the Eastern Illinois Company to conduct local business. The Wabash Company was to pay its wheelage proportion of the maintenance and operation expenses of the Western Indiana Company, and its wheelage proportion of the taxes upon the common property. The provisions as to local business and payment of taxes were the only provisions in which the lease differed from the "original lease" with Eastern Illinois. The leases to the other roads were similar to that to the Wabash Company The amount of rental differed to some extent in each, and the exclusive freight facilities also differed, but in all other respects the leases were in exactly the same terms as the lease to the Wabash Company. In none of these leases or agreements, except that of the Eastern Illinois Company, is any obligation assumed to conduct local business between Dearborn Station and Dolton.

The Western Indiana Railway was completed to Twenty-Second street in the spring of 1880, and in April of that year the Eastern Illinois entered into possession under its agreement. Later in that year the road was extended to Fourteenth street, and in 1882 to Dearborn Station at Polk street. The freight terminals, the use of which was granted to the Eastern Illinois, were located between Thirty-First and Thirty-Fifth streets, and between Fourteenth and Fifteenth streets; the former being the outer yard and roundhouse, and the latter, the freight depot and team tracks. Commencing in April, 1880, and for several years thereafter, all freight trains of the Eastern Illinois Company used the Western Indiana tracks from Dolton to the yards at Thirty-First street or Fourteenth street, and all passenger trains ran to the northern passenger terminus, which was moved successively from Twenty-Second to Fourteenth street, and in 1882 to Dearborn Station at Polk street. On December 1, 1880, a second and supplemental agreement or lease was executed between the Western Indiana and the Eastern Illinois Companies, granting to the latter the use of additional exclusive property and of additional common property to a station to be constructed to the south of the south line of Twelfth street. It recites that it is the intention that the additional rights and franchises granted should be used and held in the same manner, affected by the same recitals, subject to the rights, liabilities, and conditions as to each party as are contained in the original lease, except as to the commencement, amount of rentals and payments, and the basis of calculating taxes on main passenger tracks. As to the latter, the Eastern Illinois Company, in the manner provided in the original lease, agreed to pay its share upon the proposed extension of line in the proportion that its passenger wheelage over that part of the main line used jointly with other companies should bear to the total passenger wheelage over the same.

In 1882 additional funds were found to be necessary to complete the railroad. The original mortgage of $1,600,000 was canceled. A new mortgage, called the "first mortgage," was executed, amounting to $4,000,000, and still another mortgage, called the "general mortgage," dated January 1, 1882, was issued, amounting to $10,000,000; and it was contemplated to issue a further mortgage to secure bonds to be issued to retire all outstanding bonds. New several leases were executed between the Western Indiana Company and its several lessees, each of which is dated November 1, 1882. The one with the Eastern Illinois Company recites the two prior leases, the proposed construction of a larger and more convenient passenger station, and the inability of the Western Indiana to furnish station accommodations for passenger busi-

ness, as required by the terms of the original lease, unless it should be paid additional rental. It then grants, in addition to the premises and uses already granted, the right and privilege of using the passenger station, railway tracks, and appendages thereafter to be constructed, etc. The covenants of the lessor and lessee in the original leases are repeated in this third lease, changed only as to the amounts and times of the rental and sinking fund payments to secure the additional issue of bonds. The covenants in the original lease to pay the lessor the lessee's wheelage proportion of operating expenses is amplified with respect to what shall be considered operating expense; but the expenses are to be paid in proportion to the wheelage, subject to the $3,000 tax commutation agreement in the original lease. The fourteenth paragraph in each of the leases to the five tenants contained a new provision as follows: "It is further agreed between the lessor and lessee that the lessee herein shall have the right at any time to use and enjoy any part of the common lines and property of the lessor as herein defined, not now included in the lease of October 24, 1879, and the supplemental lease of December 1, 1880, or in this lease, for an increase in the rent to be paid by such lessee equal to such proportion of 6 per cent. upon the cost of such lines and property thus newly used as the use by the said lessee bears to the use and enjoyment thereof by all of the lessees using the same. In case the lessor shall be obliged to provide additional facilities by reason of such additional use, the lessee or lessees so availing themselves of the right to such use under this clause shall pay by way of additional rental not less than six per cent. upon the cost of whatever additional facilities the lessor is obliged to provide by reason of such additional use, and any lessee availing itself of this privilege shall also provide and pay such monthly sinking fund payment as shall extinguish the capital of such additional rental within forty-five years from the time such lessee shall begin to make use of such lines or property as provided for in this article: but this provision is subject to the exclusive rights of the Chicago & Eastern Illinois Railroad Company to do the local business over the main line of the lessor as provided by the lease to the Chicago & Eastern Illinois Railroad Company under date of October 24, 1879, and it is also understood and agreed that this does not apply to what is known as the 'Belt Division' of the property of the lessor."

On November 1, 1882, an agreement was made between the Western Indiana of the one part and the five tenant companies of the other part, which recites that the five companies are severally tenants of the Western Indiana Company under lease agreements, and that such five companies have acquired, and own in equal proportions, the entire capital stock of the Western Indiana Company, amounting to $5,000,000, which they have purchased for the purpose of securing control of the railway and property of the Western Indiana Company, in order to prevent its passing into possession of any other railroad companies whose interests may be hostile to the interests of the parties lessees; recites the organization of the Belt Railway Company with a capital stock of $12,000,000, of which $6.100,000 is the property of the five lessee companies in equal proportions of $1,220,000 each, and that the Belt Company had leased from the Western Indiana Company in perpetuity its Belt Railroad and elevator; recites the agreement that the stock of both the Western Indiana and the Belt Companies shall be issued in equal proportions to the five lessees, and shall be nonnegotiable by being stamped that it is held subject to the right of other stockholders to purchase it, and that each of the lessees shall be represented by one person upon the board of directors of each of the companies, and shall be authorized to fill any vacancies that occur. It is therein agreed that the working expenses of the Western Indiana shall be paid by the several lessees monthly in proportion to their wheelage over the main line or such part of the main line and property of the Western Indiana as is not set apart for the exclusive use of either; that, as to the Dearborn passenger station and tracks immediately south, the cost of maintenance shall be divided in proportion to the number of passenger cars and engines entering thereon, but not to affect the Eastern Illinois tax commutation provision in its original lease. It was further agreed that while the Western Indiana should have the general control and management of all the

common property, and the employment and supervision of officers and employés, its acts and doings should be such only as the parties lessees should unanimously approve.

On August 1, 1890, a second main track, between Dolton and Oakdale, the point of junction of the Dolton and State Line branches, was proposed for construction, and thereupon a further agreement was made between the Western Indiana of the first part, the Eastern Illinois Company of the second part, the trustee of the mortgage of the third part, and the lessee appellants of the fourth part, providing for this construction by the Western Indiana; the Eastern Illinois covenanting to make rental and sinking fund payments sufficient to pay the interest and principal of the bonds to be issued to meet the costs of such second main track and its appurtenances. It is expressly stated that the prior leases were to be in no effect altered, and that the effect of the present instrument was to give additional rentals and sinking fund, and to demise additional property, as if they had been included in the former instruments, and the property was to be used together with and as part and parcel of the property, privileges, rights, and franchises demised by the previous leases. The lessee appellants, the parties of the fourth part to the agreement, joined therein to evidence their assent to the making of the improvements and additions provided for by the lease, and to the making of the lease thereof to the Eastern Illinois Company and each of the appellants severally, and for itself agreed that, if it shall exercise its right of user of the track or tracks or property of the Western Indiana Company lying between Oakdale and Dolton, it will pay for the use an increase of rental equal to such proportion of 6 per cent. upon the cost of the line and property so newly used, as it now exists, as the use of such lease bears to the use and enjoyment thereof by all the lessees using the same.

On September 30, 1890, the question having arisen between the Western Indiana and one of the lessee companies as to liability for damage claims arising from injuries at railway crossings by trains of lessee companies, where the Western Indiana Company had neglected to properly protect the crossings by gates or signal men, resolutions were adopted by the lessee companies that in respect of all questions concerning the exclusive liability of either tenant for damages in the use made of the property, by reason of any casualty or of any negligence of commission or omission on the part of the Western Indiana Company, the several leases between the tenants and the Western Indiana Company should be thereafter interpreted and understood as constituting the Western Indiana Company the mere medium or agency through which the several tenants, each for itself, controls, operates, manages, maintains. and repairs the railroad and other property; and that the officers and employés of the Western Indiana Company shall be considered as solely and exclusively the officers and employés of the tenant for the doing of all acts which they may have done, and for the doing of such acts as they have omitted to do, the doing or omission of which have given rise to such damage or claim for damage; and that, as between the Western Indiana and each of the tenants, the tenant company shall be exclusively liable for all damages, and shall be considered as having separately indemnified the Western Indiana Company against all claim for damages resulting from the use by such tenant, as fully as if such tenant were in the sole and exclusive control of the railroad and appurtenances, and without reference to the cause of the casualty or the circumstances under which the claim arose.

On December 1, 1890, another agreement or lease called the fifth lease, in the general form of the earlier leases, was executed between the Western Indiana Company and the Eastern Illinois Company, reciting the prior leases and their provisions, and granting to the Eastern Illinois Company the exclusive right and privilege of using for its traffic certain real property described, being a strip of land and a certain track connecting therewith, in connection with its freight facilities, the property to be used as part and parcel of the property, privileges, and rights demised by the three prior leases.

On November 1, 1891, further enlargements of the main right of way and common property of the Western Indiana Company becoming necessary to

accommodate the increasing traffic of the tenants, the Western Indiana Company entered into a further agreement with the Eastern Illinois Company, granting the right and privilege of using, for the purposes of its traffic and running its locomotives, cars, and other rolling stock thereon, so much of the enlargements, additions, and improvements which the Western Indiana shall make upon its railroad as shall be appurtenant to or parcel of that part of the line of railway which the Eastern Illinois has or shall have the right to use and enjoy under the grants recited. The lease provides for additional rentals to cover one-fifth of the proposed issue of 2,000,000 of bonds. All the covenants of the lessee are like the covenants in the original lease, and there is a proviso that the instrument shall not affect or abridge any of the corporate franchises or powers of the Western Indiana Company to use and operate the railway in its own behalf, or to lease it or make tracks for use by other railway companies, and to furnish facilities similar to those granted to the Eastern Illinois Company. Similar leases to each of the other four tenants, the appellees, are recited in the lease stated.

An agreement bearing the same date was made between the Western Indiana Company and the five lessee companies, providing in substance that while, under the five leases of that date entered into, each tenant was required to pay additional rentals sufficient to meet the interest, and by way of sinking fund the principal of the $2,000,000 mortgage, as interest on that sum, the rental should be equalized as between the five tenants on the basis of their respective wheelage uses of the portions of the common property upon which the $2,000,000 was to be expended. It also recites that the five lessees are the beneficial owners of equal parts of the capital stock of the Western Indiana Company; that each of them holds, under leases made by that company, the right to use for the purposes of its traffic, in common with the other lessees, and with the Western Indiana Company and other railroad companies to whom similar rights of user have been and may be granted, certain portions of the railway and property of the Western Indiana Company.

On July 1, 1902, it having become necessary for the Western Indiana Company to elevate its tracks as required by the city of Chicago, and to raise a large amount of money for that purpose, the Western Indiana Company entered into an agreement with its five tenants, dated July 1, 1902, which recites that each of the tenant companies holds in severalty certain portions of the property of the Western Indiana Company, and also the right to use for the purposes of its traffic, in common with the Western Indiana Company, and with other railroad companies to which the Western Indiana Company has granted certain portions of the railroad and property of that company, which rights and properties are reserved to said lessees by the several leases specified and hereinbefore stated. The agreement provided for a new issue of bonds, under a consolidated mortgage, to an amount not exceeding $50,000,000, which should take up outstanding bonds and repay to the several tenants their respective payments into the sinking fund under prior mortgages for the cancellation of the principal of prior bonds, and provide funds for the improvements contemplated and such as should become necessary. The agreement confirmed the existing rights of user held by the respective tenants, provided for the equalization of such rights by two new provisions—the one canceling the Eastern Illinois' exclusive right to the local freight and passenger traffic on the Western Indiana line between Dolton and Chicago; the other, canceling the provision of the inter-tenant agreement of November 1, 1891, which redivided certain rentals for interest on the basis of the wheelage use of the portions of the line improved by expenditure of the $2,000,000 thereby provided. It also canceled the Eastern Illinois Company's special privilege and exemption under its $3,000 commutation clause in its original lease, and provided that thereafter each of the lessees should have equal right to use of the common property of the lessor upon like terms and conditions. It provided that the Western Indiana Company, the lessor, should pay the Eastern Illinois Company $551,246.50 as compensation for the release of the special tax commutation privilege, and for the release of its exclusive right to conduct the entire local business between Dolton and Chicago, and should pay the Grand Trunk Company, as compensation for its release of its pecuniary benefits under the agreement of

November 1, 1891, $20,665.35 per annum from that date until it shall use for its traffic the railroad of the lessor south of Forty-Ninth street. It granted, demised, and leased unto each of the lessees, in addition to the rights, privileges, property, and franchises already granted and leased to said lessees, respectively, the equal right and privilege of using, for the purpose of its traffic, all and singular the railroad, railway tracks, stations, and appendages, and terminal facilities of the lessor of which a common use had been granted under any of the leases, meaning thereby the direct main track or tracks between the two south termini—the one at the state line near Hammond, and the other at Dolton—and the northern terminus at the city of Chicago at the intersection of Polk and Dearborn streets, comprising what is known as the "common property" of the lessor, but with the limitation that the rights and privileges granted should be exercised in common with the lessor and with each of the other lessees, and with such other company or companies as have obtained or may hereafter obtain a grant or lease of similar or other rights, and reserved to the lessor the right to use and operate the railroad on its own behalf, and to grant terminal facilities, similar to those granted, to one or more companies. The grant was for the full term of 999 years from the 1st of July, 1902, and the rental reserved was: First, each lessee to pay $5 per annum rental during such term; second, to pay monthly to the trustee of the mortgage during the first 50 years of the term, and by way of additional rental to that reserved by the existing leases, a sum of money equal to one-half of one-twelfth of the annual interest of all outstanding bonds issued under the consolidated mortgage; third, each lessee to pay for the exclusive use of such portions of the property held by such lessee in severalty, in addition to the rentals reserved by the then existing leases, a sum of money equal to one-twelfth of the annual interest on bonds issued from time to time under the consolidated mortgage and used for certain purposes specified, to wit, improvements and enlargements, refunding bonds, and the repayment of the sinking fund; fourth, at the end of 50 years, and at the maturity of the bonds, each lessee should pay one-fifth of the principal of the bonds for the purpose specified. The thirty-second paragraph of the lease is as follows: "That whenever any lessee, party of the second part, shall surrender for cancellation to the trustee under said consolidated mortgage an amount of bonds secured thereby equal at their par value to the total original cost aforesaid of such lessee's exclusive property, such lessee shall be entitled to receive a quitclaim deed of its said exclusive property from the Western Indiana Company, and a release thereof from the lien of said consolidated mortgage, but such deed shall expressly provide, and said conveyance shall be upon the condition, that said property shall not be leased, sold, aliened, nor conveyed by such lessee, until it shall have given written notice to the lessor of its purpose to lease, sell, convey, or alien the same; and that thereupon the lessor and, after it, each of the other said lessees, shall have the option of buying said exclusive property at its original cost and four per cent. interest from the date of such deed from the lessor to such lessee, or of leasing the same at an annual rental of not to exceed four per cent. on such original cost plus four per cent. interest thereon from the date of such deed; and that if the lessor shall fail to exercise such option within sixty (60) days after the receipt of such written notice, and none of the said lessees shall exercise its option within twenty days after the expiration of said sixty days, such lessee shall thereupon have the right to lease, sell, convey, or alien the said property free and clear from all liens or claims of any nature on the part of the Western Indiana Company." The thirty-third paragraph of the lease is as follows: "That after the date hereof the lessor shall exclusively manage, operate, and maintain every portion of the common property; and the entire cost of the management, operation, maintenance, repair, and renewal of, and of all taxes, liens, water rents, and assessments on, said railroad, buildings, and facilities, the common use of which is reserved to the parties hereto, and the entire cost of the management, operation, maintenance, repair, and renewal of, and all taxes, liens, water rents, and assessments on, all enlargements and improvements thereof, and additions thereto, and on, and to any other railroad hereafter acquired by the lessor for the

common use of the parties hereto, shall be borne by said lessees in the proportion of their several wheelage uses of the various portions of said railroad to the total wheelage use thereof: and, for the purpose of distributing such cost, the lessor shall divide, by lines across and at right angles with its right of way, its said railroad and property, including all appurtenances, into such sections as shall be necessary in order to equally distribute such cost of the management, operation, maintenance, repair, and renewal of, and all taxes, liens, water rents, and assessments on, said several sections among the parties of the second part in proportion to their respective wheelage uses of such sections; and it may, from time to time, change such sectional divisions the better to subserve the purpose and intent aforesaid." The fourteenth paragraph states that the lessees have severally covenanted and agreed, each for itself, to and with the lessor, and to and with the trustee—the covenants of the leases being several and not joint—as stated in the document.

Under date of July 1, 1903, the Western Indiana Company granted to the Eastern Illinois Company the exclusive use of certain acquired additional freight facilities, upon the covenant of the latter company to pay the interest and principal of the bonds under the consolidated mortgage for the purchase of the premises. The former leases are referred to, and the covenants in the former leases are extended to the property granted, the demised property to be used as part and parcel of the property theretofore demised. This property had not been owned by the Western Indiana Company prior to the date of the lease. The title to it was held by a trustee for the benefit of the Eastern Illinois Company, and it had been used by the latter company for many years as a part of its exclusive freight yards. The change in the title is said to have been made to enable the Eastern Illinois Company to convert its ownership held by the trustee into a lease-hold, so that it might receive the cash value thereof, being the consideration paid by the Western Indiana Company, as recited in the lease. In 1903 the Chicago, Rock Island & Pacific Railway Company, which is the owner of an undivided half of the La Salle Street Station, obtained control of the Eastern Illinois Company through the ownership of the stock of another company which had before that time become the owner of the stock of the Eastern Illinois, or of so much of the stock as to give it control. The Eastern Illinois Company then asserted its right to divert certain of its passenger trains from Dearborn Street Station to the La Salle Street Station, and thereby relieve itself pro tanto from the expenses of management, supervision, operation, and maintenance of the Dearborn Street Station and the tracks and facilities appurtenant thereto. The appellants, the other lessee companies, thereupon filed this bill in equity to enjoin the appellee, the Eastern Illinois Company, from the threatened breach of its obligation to use Dearborn Street Station for its passenger traffic at Chicago, alleging that by such diversion the appellants would be required to pay in proportion the working expenses of the Dearborn Street Station theretofore borne by the Eastern Illinois Company, which the covenant of the latter company required it to continue to bear to the extent of its passenger traffic at Chicago, and would deprive the appellants of the benefit theretofore derived from the passenger wheelage of the Eastern Illinois Company between Seventy-Ninth street and Dearborn Station, and the benefits to each of them from the receipt and delivery by the Eastern Illinois Company of all its Chicago passengers at Dearborn Station. The appellee claimed that its agreement amounted only to a trackage agreement, and vested in it no estate, but that it acquired under the agreements and leases the right to use the terminal facilities or not, as it should from time to time see fit, and that it has violated no obligation assumed by it under the leases and agreements stated, and it was also claimed that the agreements, if they should be construed to contain covenants to use, were against public policy, and that the appellants, if any right of theirs had been infringed, had adequate remedy at law; that the proposed diversion of the passenger business to the La Salle Street Station was owing to the failure of the Western Indiana Company to furnish adequate passenger facilities; that the Western Indiana Company is an indispensable party to the suit, and that no decree should be entered without its presence; and that the appellants here have no interest in the respective contracts or leases between

the Western Indiana Company and the Eastern Illinois Company, or in the enforcement thereof.

The court below, upon hearing, dismissed the bill for want of equity, and the cause is brought here for review.

G. W. Kretzinger and Edgar A. Bancroft, for appellants.

William H. Lyford, for appellee.

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

JENKINS, Circuit Judge (after stating the facts). The prayer of the bill seeks the specific performance by the Eastern Illinois Company of certain supposed covenants—express or implied—contained in the agreements or leases between that company and the Western Indiana Company, and to restrain the Eastern Illinois Company from diverting its freight and passenger business, or any part of it, from the railway and the Dearborn Station of the Western Indiana Company, and from using the terminal facilities of any other company for its traffic at Chicago.

The questions arising upon this record are these: First, whether the appellants have an adequate remedy at law; second, whether the agreements contain any covenant, express or implied, on the part of the Eastern Illinois Company to the appellants, enabling them to maintain this suit; third, whether the Eastern Illinois Company is obligated by any covenant, express or implied, in the agreements or leases with the Western Indiana Company to use the Dearborn Station and the appurtenant tracks during the entire terms specified, or whether the right of user exists without the obligation to use; fourth, whether such a covenant, if one exists, is contrary to the policy of the state, preventing its enforcement in equity; fifth, whether the Western Indiana Company is a necessary and indispensable party to this suit.

We cannot doubt that if the contract obligation is clear, and no public interests intervene to prevent, equitable jurisdiction should be exercised, since thereby a multiplicity of suits is avoided that would prove vexatious, unsatisfactory, expensive, and the relief obtainable thereby would be inadequate to the situation. Pennsylvaina Railroad Company v. Saint Louis, Alton & Terre Haute Railway Company, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; Joy v. Saint Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; Union Pacific Railway Company v. Chicago, Rock Island & Pacific Railway Company, 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265; Western Union Telegraph Company v. Baltimore & Ohio Telegraph Company, 42 N. J. Eq. 311, 11 Atl. 13; Wolverhampton Railway Company v. London Railway Company, 16 L. R. Eq. Cas. 433.

A careful scrutiny of the intertenant agreement of November 1, 1882, the joint resolution and agreement of September 30, 1890, the joint agreement of November 1, 1891, and the joint supplemental lease, so called, of July 1, 1902, discloses no covenant of any kind between the Eastern Illinois Company and the appellants, or either of them. The first, called the inter-tenant agreement, is between the

Western Indiana Company of the one part and the five tenant companies of the other part. It recites the ownership of the entire capital stock of the Western Indiana Company by the five tenant companies in equal proportions; that it was purchased by them to secure control and to prevent the passing of the Western Indiana Company into hostile interests. It provides with respect to the directorate of that company, restricts the disposition of the stock by any one of the five owners, provides for the general control and management of the property by the Western Indiana Company, and that no other railway company shall be admitted to the use of the property, except by the unanimous consent of the tenant companies; that the working expenses of the Western Indiana Company should be paid by the several lessees, the proper proportion of each to be determined by the proportion which the engine and car mileage of each bore to the gross engine and car mileage of all over those parts of the main line and property not set apart for the exclusive use of either; and that the cost of maintaining and operating the passenger station, including certain tracks specified, should be divided in proportion to the number of passenger cars and engines entering the same. It may be that, with respect to the expenses specified, the agreement to pay the mileage proportion may be deemed a covenant directly with the other tenant, so that on failure by one to pay to the Western Indiana Company its proper proportion as stipulated, and payment thereof to that company by another tenant company, the latter might have its action to recover the amount paid. This, however, is far from being a covenant to use. It is merely a covenant to pay for use.

The resolution of September 30, 1890, merely provides that in respect to questions concerning the exclusive liability of either tenant for damages by reason of casualties arising from the use of the property, occasioned by the negligence of commission or omission on the part of the Western Indiana Company, the several leases between the tenants and the Western Indiana Company should be interpreted as constituting the latter company the mere medium or agency through which the several tenants, each for itself, operates the railway and property. That interpretation is limited to the one subject of liability for damages for injuries. We do not perceive that it can be given any effect in the consideration of the questions before us.

The agreement of November 1, 1891, recites that the lessees are the beneficial owners in equal parts of the capital stock of the Western Indiana Company, and are lessees of that company, with the right to use, in common with the other named tenants, with the Western Indiana Company, and with such other railway companies to whom similar rights of user have been or may be granted, the "common property" of the railway and the necessity of the enlargement of the facilities; that each of the five tenants should equitably pay in equal proportions, share and share alike, the $2,000,000, the principal of the bonds proposed to be issued necessary for the proposed improvement; and that the interest on the principal sum should be borne by them, respectively, in proportion to the use which they shall severally

make of the several parts of the railway and property upon which the principal sum should be expended. The recital with respect to the payment of the principal of the bonds is manifestly referable to the equal ownership by the five tenants of the stock of the Western Indiana Company. The obligation to pay, if any, is the obligation of stockholders, and is not the covenant of lessees as such. The payment of the interest is referable to the use made by each tenant, and the proportion to be paid by each is dependent upon the wheelage by each. These agreements are far from amounting to a covenant to use.

The "joint supplemental" lease of July 1, 1902, contains no covenants on the part of the tenants to each other. It distinctly provides that the lessees severally covenant, each for itself, to and with the lessor, and to and with the trustee. It provides that the cost of management, operation, maintenance, repair, and renewal, and of taxes, water rents, liens, and assessments, should be equitably distributed among the tenants in proportion to their respective wheelage use.

We are not able to discover in any of these agreements any covenant by the Eastern Illinois Company to the other tenant companies availing to enable the latter in their own right to maintain this bill.

We come then to the question whether there is an existing covenant, express or implied, with the Western Indiana Company, resting upon the Eastern Illinois Company to use the Dearborn Station and the appurtenant facilities during the period mentioned in the leases.

By the contract with Brown, of May 6, 1879, the Eastern Illinois Company by express covenant agreed to enter into possession of and to use and operate the railway and facilities for the period of 999 years. It agreed to assume all the obligations which should devolve upon the Western Indiana Company proposed to be incorporated; to develop the local passenger and freight business of the road to its fullest extent; to pay during the full term $3,000 per annum on account of taxes on the main line of the road. Other tenants, who might be admitted to the use of the property, were to have the right of passage for through trains only. This contract, however, was abrogated by and merged in the "original lease," so called, of October 24, 1879. Brown, the original lessor, had organized the Western Indiana Company, as was contemplated, and became its president, and in the name of the company executed this "original lease." So far, therefore, as the covenants of the two leases are in conflict, those of the former lease are superseded by those of the latter. In the absence of allegation of mistake or fraud, it must be presumed that the "original lease" expresses the deliberate contract of the parties; and, if the provisions of the latter are inconsistent with the provisions of the former, the latter evidences a new agreement, by which, and by which alone, the rights of the parties—as between the two agreements—are to be judged. The Brown lease reserved in the Western Indiana Company no right to operate the road. The "original lease" reserved to the lessor the entire control of the property, and the right to maintain and operate the railway on its own account in common with the right of operation

then granted to the Eastern Illinois Company, and with such rights of operation as might be granted to subsequent lessees; the local business being confined to the Eastern Illinois Company. By the former lease all obligations of the Western Indiana Company were assumed by the Eastern Illinois Company. By the latter lease the Eastern Illinois Company assumed only such obligations as related to the business actually conducted by it. The expense of performance by the Western Indiana Company was to be divided among all the tenants using the road in proportion to their several usage upon a wheelage basis. It may be greatly doubted whether this "original lease," so called, was other than a mere operating agreement as to what is termed the "common property." Union Pacific Railway Company v. Chicago, Rock Island & Pacific Railway Company, 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265.

The several agreements or leases, executed during a period of 25 years, indeed impress one with the conviction that the Eastern Illinois Company during that period thought to make use of the facilities granted during the term mentioned in the lease, but that subsequent events have changed its purpose. The question, however, is not what that company then supposed would be its course, but what has it obligated itself to do? To ascertain the extent of obligation assumed, we must have reference to these instruments. We must ascertain from them what that company has in express language covenanted to do. By the Brown contract it had obligated itself for a period of 999 years to use and operate the railway. That was an express covenant, by which the company was bound. But by the subsequent "original lease," so called, the contract between the parties was changed. It did not therein so obligate itself, but it was therein stipulated that it should have the mere right to use in common; and such right to use without obligation to use is found in every subsequent agreement between it and the Western Indiana Company. This is strong to show, if it be not absolutely convincing, that the Eastern Illinois Company did not contract to assume an obligation to use for that long period of time; that it kept itself free to use these privileges or not, as its interests might dictate, stipulating to pay for such use as it made of them. It is true that with respect to the payment of rental for the "exclusive property," so called, it bound itself for the entire term, and it does not here contest its obligation in that respect. During the period of 25 years there were in all 13 agreements or leases with the Eastern Illinois Company. In each of them there is manifested a careful avoidance of statement of any obligation to use. The like feature is observable in each of the leases to the several appellants. These papers were undoubtedly drafted by experienced counsel. They are voluminous in their terms and conditions, and evidence careful study and skill in the drafting of them. It cannot be possible that throughout these many documents an obligation to use was omitted otherwise than by design. There was the absolute obligation in each of them to pay during the term the prescribed rental with respect to the exclusive property. There is, in respect of the common property, no obligation to pay on the part of either tenant, except upon

the basis of the use actually had. There is no express obligation to use. It has been well suggested that, if an owner gives one the right of way over his lands in common with others at a certain compensation for each use of the right of way, an obligation to use is not imposed; the extent of the use being optional. We find in these various instruments no express covenant to use.

There is at least one provision in the agreement of July 1, 1902, called the "joint supplemental" lease, which is in antagonism to any idea of an express obligation to use. By the terms of the leases there was an express obligation on the part of the lessee to pay the specific rental during the term for the exclusive property held by it. The thirty-second paragraph of the lease referred to has reference to this exclusive property. It gives to each lessee, upon surrender of consolidated mortgage bonds equal at their par value to the total original cost of each lessee's exclusive property, a right to receive a deed of the property from the Western Indiana Company, with the release thereof from the consolidated mortgage, and provides that such property, so conveyed, should not be sold or leased or conveyed by the grantee, except that the Western Indiana Company and, after it, each of the other lessees, should first have the option of buying the property at the original cost and interest, or of leasing the same at a specified sum, and, upon failure to exercise such option, the grantee should have the absolute right of disposition of the property. By this provision a lessee could stop payment of rental of the exclusive property at any time, notwithstanding the obligation to pay during the entire term. It is true that this paragraph was abrogated by the agreement of December 29, 1903, but that cancellation does not do away with the effect that the paragraph should have upon the construction of the contract of 1902. It seems quite inconsistent with the theory of a covenant to use the common property that the lessees should have the right of acquisition and of disposition over the exclusive property

It also seems to us that the practical construction placed by the parties upon these contracts during a quarter of a century of action thereunder is not consistent with the existence of a covenant to use. The several instruments imposed like obligations upon both the appellants and the appellee as to every part of the common property, including the railway from Dearborn Station to Dolton, and the railway from Hammond Junction to the state line. The Dolton branch has never been used by the appellants, nor has the Hammond branch ever been used by the appellee or by the Grand Trunk. The appellants have not contributed to the maintenance and operating expenses of the Dolton branch nor have the appellee and the Grand Trunk contributed to the maintenance and operating expenses of the Hammond branch, nor have they been required to do so. The lessee companies have had the same right to use the nine passenger stations between Eighty-Third street and Dearborn Station that the appellee has had. The paragraph in the leases to that effect provides that the lessee has the right to use upon the terms stated any passenger station which may be erected upon the main line, and, if the lessee should wish to use such other or additional depot, it shall have the right to do so upon terms as favorable as those conceded to the Eastern Illinois Company. The obligation to use the Dearborn Station

is no greater than that contained in the provision referred to. The appellee has used these nine passenger stations. The appellants have refrained from their use, and have severally declined to pay for their use and maintenance, operation, repair, renewals, and taxes. The several lessees have diverted to the terminals of other railroad companies freight cars and trains consigned to the city of Chicago as was deemed convenient for the accommodation of the consignees. That course of business seems to have been recognized as a right of each party, and none of the leases make distinction between freight and passenger traffic or the rights or obligations of the parties in relation thereto. We think, therefore, that the practical construction placed upon these leases by the parties in interest supports the construction which we are constrained to give them, that, with respect to the "common property," there was no covenant to use, but merely a covenant to pay certain charges in the proportion that its use by the covenantor bore to the whole use.

It is further urged that the court should imply a covenant on the ground that it is necessary to aid the execution or performance of the express covenant of the Western Indiana Company to maintain the road and the station. We need not be curious to ascertain the limit which the law places upon the doctrine of implied covenants, or to consider that question, because, if a covenant to use may properly be implied here, it is to be implied in favor of the Western Indiana Company, the lessor, which is not a party to this suit. It seems to us novel doctrine that a covenant is to be implied in favor of co-tenants, when its implication is not sought by the lessor. The bill, seeking to establish such an implied covenant, affects corporate rights and liabilities of a corporation that is not a party to the bill and such rights are enforceable only by the corporation affected, and in such case the corporation is not merely a necessary, but an indispensable, party. Swan Land & Cattle Company v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577. As was said by the court in that case, no decree made could conclude the absent party.

"The defendants cannot be required to litigate those questions which primarily and directly involve issues with third parties not before the court."

See, also, Minnesota v. Northern Securities Company, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499.

The appellants, as lessees of the Western Indiana Company, and without the presence of the latter company, seek to have established, by construction of a contract made between the latter company and a third party, covenants to use, which shall endure for nearly 1000 years. Such covenants, if established, would run to and inure to the benefit of the Western Indiana Company, and could only properly be enforceable by it. Finding no covenant here on the part of the Eastern Illinois Company running to the appellants or either of them, we are not able, without the presence of the Western Indiana Company, to establish and enforce covenants in favor of the latter company, although the appellants might be pecuniarily benefited by the establishment of such right on the part of the Western Indiana Company.

The decree is affirmed.

NOTE.—The following is the opinion of Seaman, District Judge, in the court below:

SEAMAN, District Judge. The bill is founded on the alleged contract obligations of the defendant under so-called leases or trackage and terminal agreements with the Chicago & Western Indiana Railroad Company, wherein the complainants have rights and interests as co-tenants under certain supplemental agreements and a so-called "joint supplemental lease." Relief in equity is sought upon the two-fold contentions: (1) That the contracts obligate the defendants to use the tracks and station for all passenger trains throughout the term specified, and (2) that no adequate remedy for the breach thereof is afforded at law. Both of these propositions are controverted on behalf of the defendant, and these further objections are urged against the relief prayed for: (3) That the Western Indiana Company is a necessary party to the controversy in any view of the contract, and (4) that public policy forbids enforcement in equity. I appreciate the importance of the interests and questions involved, and have carefully considered the contracts, the various contentions, and the authorities cited. The need is obvious for an early decision, and an extended discussion of the grounds thereof is neither practicable nor can it serve any useful purpose for an ultimate review. So a brief summary of my conclusions will premise the entry of decree. The objections referred to which do not touch the merits of the controversy are none of them free from difficulty, but I am so strongly impressed with the view that the contracts in suit are not entitled to the construction sought on behalf of the complainants that the determination will rest mainly thereon. For orderly consideration the points are taken up inversely.

1. As to jurisdiction in equity. On the theory of the bill that a covenant for use, either express or implied, appears in the contracts, while it is true that the wheelage charges for maintenance would remain ascertainable after diversion of trains to the Rock Island station, I am not satisfied that the remedies at law for breach would be adequate to the extent of barring equitable jurisdiction. The authorities cited sanction relief by injunction where the contract obligation is unmistakable and no public interests are involved. So the objection to the jurisdiction is overruled.

2. Is the Western Indiana Company a necessary party to the bill? I am of opinion that this objection is well taken, under the general rule (Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 610, 13 Sup. Ct. 691, 693, 37 L. Ed. 577) that "the defendant cannot be required to litigate those questions which primarily and directly involve issues with third parties not before the court." The so-called lessor is the primary party in interest, and the incidental interest of the co-tenants will not authorize final adjudication, as I view it, without the presence of the lessor.

3. The question whether enforcement of the alleged covenant would be contrary to public policy is not clearly ruled by any authority cited; but, if its solution were deemed controlling, I am impressed with the view that there is force in this objection. Specific performance of the alleged covenant is sought by way of injunction, and it is the settled rule of equity to extend no aid "unless it is in accordance with policy to grant the help," as such relief upon contracts "is the exception, and not the rule, and courts would be slow to compel" performance "in cases where it appears that paramount interests will, or even may, be interfered with by their action." Beasley v. Texas & P. Ry. Co., 191 U. S. 492, 497, 24 Sup. Ct. 164, 166, 48 L. Ed. 274. The railroad is a public utility and the interest and convenience of the public must be recognized, so that equity will not interfere to enforce the covenant in controversy, if found in the contracts, unless it is free from liability to affect public interests, but will leave the parties to their redress at law, with the defendant company at "liberty to follow the course which its best interests and those of the public demand." Id.; Texas, etc., Ry. Co. v. Marshall, 136 U. S. 393, 405, 10 Sup. Ct. 846, 849, 34 L. Ed. 385. The contentions on the one side and the other as to advantages or disadvantages of the respective stations in structure, use, and location do not seem to present serious difficulty; but the fact that the tracks are now elevated in the one case and not in the other—though work is in progress to that end—with other phases which appear or may arise, would make it questionable, to say the least, whether a covenant

clearly expressed to make no change of station would be enforced in equity under the doctrine thus indicated.

4. Are the so-called leases in suit obligatory for use of the Western Indiana station throughout the term? The inquiry thus presented is the main subject of controversy between the Western Indiana Company and the defendant, whereby the latter obtained and preserved its entry into Chicago with excellent terminal and station privileges, were obviously prepared with deliberation, skill, and forethought, and the final contract of July 1, 1902, called the "joint supplemental lease" (wherein the complainants were joined as several parties), with the supplement thereto of December 29, 1903, were framed and executed in the light of and with reference to all the prior arrangements, understandings, and conditions. That none of the successive agreements were leases, in the legal sense of that term, is unquestionable under the authorities (Union Pacific Ry. Co. v. Chicago, etc., Ry. Co., 163 U. S. 564, 583, 593, 16 Sup. Ct. 1173, 41 L. Ed. 265; Chicago, Rock Island Ry. Co. v. Rio Grande R. R. Co., 143 U. S. 596, 618, 12 Sup. Ct. 479, 36 L. Ed. 277); the grant being "the right and privilege to move and operate its trains over the tracks" and to and from the station (163 U. S. 593, 16 Sup. Ct. 1173, 41 L. Ed. 265). The two cases, therefore, cited in support of an implied covenant for use—So. Ry. Co. v. Franklin Ry. Co. (Va.) 32 S. E. 485, 44 L. R. A. 297, and Schmidt v. Ry. Co. (Ky.) 41 S. W. 1015, 38 L. R. A. 809—are not strictly applicable, though instructive. Examination of the terms in the several instruments pointed out on behalf of complainants as express covenants for use, on reference to the context, fails to convince me that such interpretation is authorized. The strongest expression cited to that end appears in the ninth provision of the agreement of August 1, 1890, and subsequently renewed; but, as well indicated in the brief for the defendant, the construction sought is not borne out by the other provisions and the obvious understanding of the parties, especially in its insertion in the joint agreement of 1902, with the independent uses of various portions of the tracks there contemplated. The parties were equally capable and well advised to make an express covenant in clear terms, if such were intended, and I am of opinion that the court cannot construe the vague general terms referred as expressing such intention.

The more difficult question is whether the covenant will be implied from all or any of the instruments, considering their nature and the circumstances of the case. The general rules which govern the interpretation are well settled and need no repetition; and, otherwise than by way of exemplification of those rules, no authority is called to my attention which seems to be in point, except that of Hudson Canal Co. v. Pennsylvania Coal Co., 8 Wall. 276, 284, 288, 19 L. Ed. 349. Under the rules referred to and on the authority of that case—which is not modified by Railroad Co. v. Richmond, 19 Wall. 584, 22 L. Ed. 173, cited on the briefs—I am satisfied that no implication arises to support the complainants' contention of covenant to use the Western Indiana station throughout the term. The parties have carefully refrained from exacting or entering into express covenant to that effect—plainly departing from terms in the preliminary Brown agreement of May 6, 1879, which might have borne such interpretation—and none can be imposed by the court under the terms so selected and renewed by the parties. Moreover, the view of public policy, before stated, would forbid such implication.

In conformity with these views, the bill must be dismissed for want of equity, and decree may be prepared to that end.

SOUTHERN PINE CO. OF GEORGIA et al. v. SAVANNAH TRUST CO.

(Circuit Court of Appeals, Fifth Circuit. December 12, 1905.)

No. 1,459.

1. BANKRUPTCY—FINDINGS OF REFEREE—REVIEW.

Findings of fact made by a referee in bankruptcy upon the conflicting testimony of witnesses examined before him have every reasonable presumption in their favor, and should not be set aside or modified unless it clearly appears that there was error or mistake on his part.

2. SAME—RIGHT TO RECLAIM PROPERTY—DELIVERY WITHOUT PAYMENT THROUGH MISTAKE.

Claimant contracted to sell to a car company, which subsequently became bankrupt, boards to be used in the manufacture of cars, the same to be paid for in cash on or before their delivery. The first shipment was paid for before it was delivered, but subsequently, for the accommodation of the president of the car company, and on his assurance that the boards would not be delivered to the company until payment was made, delivery to him was permitted, to enable him to check up the shipment before payment. During the absence of such president, and also of the officer of claimant with whom such arrangement was made, through the oversight of an employé, a shipment went into the hands of the car company without prepayment, and was used in the manufacture of certain cars which came into possession of the trustee in bankruptcy. The cars were afterwards sold under an agreement that the proceeds should be held to await the determination of claimant's rights therein. *Held*, that the transaction was not a conditional sale with a reservation of title, within the provisions of Code Ga. 1895, § 2776, which makes such reservation void as to third parties unless in writing, but that the contract was for a cash sale in which payment was a condition precedent to the sale, and, as the payment was not made and there was in fact no intentional delivery to the car company, the title remained in claimant by operation of law, and it was entitled to recover the value of the boards from the proceeds of the cars.

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

The referee in bankruptcy, before whom this cause was primarily heard, filed the following statement and findings of fact:

"On June 27, 1904, the Savannah Trust Company, trustee in bankruptcy of the Georgia Car & Manufacturing Company, made application to this court for leave to sell 50 box cars, alleged to be the property of the bankrupt estate. On the same day the Southern Pine Company of Georgia and John Schwarz, sheriff of the superior court of Chatham county, Ga., interposed objections to the sale of the cars, reciting that a certain bail trover action had been filed by them against the car company, prior to the bankruptcy proceedings, in the superior court of Chatham county, Ga., by virtue of which these cars and the siding, lining, and roofing contained therein had already been levied on under the proceedings in the superior court, and alleging that the title to the boards was in the pine company, and that the possession was in the superior court through its sheriff, of which it had been summarily deprived by the United States marshal under receivership proceedings in the present bankruptcy case, and praying that the property be restored to the custody of the superior court, or that the sale be suspended until the issue in the superior court be determined. The trustee filed its answer to these objections. The answer, in brief, denied the legality of the levy by the sheriff of the state court, it being within four months prior to the bankruptcy proceedings, by reason of which it became invalidated; alleged that the marshal took possession peaceably and without opposition by any one at the time, and delivered it to the receiver, and he in turn to the trustee; denied the claim of title by the pine company in the lumber; alleged that its claim amounted in value to only $1,136.06 and that it would be inequitable to delay the sale when sufficient of the proceeds could be held up to protect the claim, which can be litigated in the bankruptcy court; and, lastly, denied that the claim to the lumber and cars, or the proceeds of their sale, is preferential or has any priority. A hearing was had on July 8, 1904, at which evidence was taken and the objections to the jurisdiction, as well as the merits of the controversy, were argued; but afterwards, by a stipulation between counsel, it was agreed that the objections to the jurisdiction would be withdrawn, and that the claim case be determined by this court, proceeding as an intervention, using the testimony already taken, and any additional evidence which might be offered. It appears from the

evidence that the principal office of the pine company was located at Savannah, Ga., and that one of its mills was located at Nicholls, Ga. The business of the pine company consisted in manufacturing lumber into boards at Nicholls, and selling them through its office at Savannah. It had special facilities for getting out the class of lumber required for the siding, lining, and roofing of cars. The car company was located near the junction of the Atlantic Coast Line Railway with the Ogeechee Road, about one mile from Savannah, and, as its name indicates, was engaged in manufacturing cars.

"Mr. Foster, president of the car company, and Mr. Stillwell, secretary and treasurer of the appellant, entered into certain business arrangements respecting the furnishing of boards. The boards were to be sold by the pine company to the car company for cash, and they were to be shipped to the pine company at Savannah; but before the boards should come into the possession of the car company the pine company was to be paid cash, and Mr. Foster was to see that this be done. Upon the first shipment from Nicholls, Ga., to the pine company at Savannah, Ga., the latter was paid cash before the boards were removed from its yards. Later Mr. Foster complained about mixing his books, because of the difference between the mill's checking and his checking, and asked Mr. Stillwell to allow him (Mr. Foster) to check the cars up, and said that if this was done he would act as trustee for the pine company, and he would guaranty that the boards would not leave his possession until the cash was paid to the pine company at its office. Mr. Stillwell consented, and the lumber was sent on this basis and delivered to Mr. Foster. The principles and terms of this agreement as to a modus vivendi, so entered into and acted upon, were never altered or expressly changed between them subsequently. Later on Mr. Stillwell was called out of the city on business. During his absence, and that also of Mr. Foster, the boards now in controversy were delivered without prepayment of cash being made by the car company, and, owing to a press of business, it was overlooked by the young man in the pine company's office, whose duty it was, presumably, to have required payment. In the meanwhile, the boards were taken by the car company and used up in the construction of 50 box cars. Mr. Stillwell testifies that this was the true nature of the transaction, and that on his return he had a conversation with Mr. Foster, in which he taxed the latter with having received the boards as trustee for the pine company, and with wrongfully permitting them to get into the possession of the car company. In reply, Mr. Foster testified that he did not remember the exact language of the conversation. He did not deny Mr. Stillwell's version of it, but he said that Mr. Stillwell put the word 'trustee' in his mouth. Notwithstanding the testimony of Mr. Foster, which denies this view of their relations in other parts of his testimony, especially any undertaking to be personally liable, we think that a fair and reasonable conclusion from the entire testimony is that Mr. Stillwell was correct in his statement of the transaction. On the whole, we find that the arrangement was that the goods were to be sold for cash, to be paid for at or before the delivery, and that the prepayment of the purchase price was a condition precedent of the sale. The delivery was a qualified delivery, merely for the purpose of checking up the lumber. A bona fide delivery was wanting in this case."

The hearing before the referee resulted in a judgment in favor of the appellant, the Southern Pine Company, against the appellee, as trustee in bankruptcy of the Georgia Car & Manufacturing Company, for the sum of $1,136.08, representing the value of the boards sold by the Southern Pine Company to the Car Company, with interest thereon at the rate of 7 per cent. per annum from December 18, 1903, the same to be paid out of the proceeds arising from the sale of the 50 box cars. Upon a review of the proceedings, the District Court set aside the order of the referee; and from the order thus made the Southern Pine Company has appealed to this court.

Wm. E. Kay and Wm. W. Gordon, Jr., for appellants.
T. M. Cunningham, Jr., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

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

In the consideration of this case, application of legal principles will be made to the facts as found and reported by the referee. The record discloses conflicts in the testimony, particularly as to the witnesses Stillwell and Foster, the chief actors in the contract to sell the boards which were used by the Georgia Car & Manufacturing Company in the construction of its cars. Upon the trial of the issues before him the referee had the opportunity of seeing and hearing the witnesses, and he was therefore in a better position to judge of their credibility than are courts, which have before them nothing but the printed record. The established rule in such cases, from which we see no reason for departing in the present instance, seems to be that the findings of fact, dependent upon conflicting testimony, by a judge, master, or a referee, who sees and hears the witnesses testify, have every reasonable presumption in their favor, and should not be set aside or modified, unless it clearly appears that there was error or mistake on his part. Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; Callaghan v. Myers, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547; In re West (D. C.) 116 Fed. 767; In re Stout (D. C.) 109 Fed. 794; In re Lafleche (D. C.) 109 Fed. 307; In re Waxelbaum (D. C.) 101 Fed. 228; In re Rider (D. C.) 96 Fed. 811.

The principal question in the present case is whether the appellant is in a position to assert title to the boards, as against the appellee, the trustee in bankruptcy of the car company. To determine this question resort must be had to the contract of the parties, and effect should be given to the intention therein expressed, unless such intention should be found to be in contravention of the statute law of Georgia. It appears from the record that the appellant sold or contracted to sell to the car company certain boards, to be used in the manufacture of cars. The boards were sold for cash, and payment was to be made at or before their delivery. Upon the first shipment cash was paid before the boards were removed from the yards of the appellant. Subsequently, as a matter of convenience to Foster in checking up the cars, and upon his assurance that the boards would not be delivered to the car company until payment was made, delivery to him was permitted by Stillwell for the purpose suggested; and during the absence of Stillwell and Foster, and through oversight on the part of an employé in the office of the appellant, the boards went into the hands of the car company without prepayment of cash, and were used by it in the construction of the cars. It is evident that, upon entering into the arrangement for the sale and purchase of the boards, the parties contemplated purely a cash transaction—the payment of the purchase price at or before delivery.

Credit was not extended nor requested, there was no condition affixed to the sale that the title should remain in the vendor, and the delivery of the boards to Foster was a qualified one and for the special purpose above suggested, and not an actual delivery to the car company. The fact that the boards, in the absence of Stillwell, went into the possession of the car company through mistake or oversight on the part of a subordinate employé of the appellant, would not operate to effect a delivery and thereby deprive appellant of valuable property rights, contrary to the expressed agreement and intention of the parties. In the present case the payment of cash was a condition precedent to the sale, and, as cash was not paid, the title remained, by operation of law and not by agreement of the parties, in the appellant. The transaction was at most an executory contract to sell. The principle announced is clearly stated by the Supreme Court of Georgia, in Bergan v. Magnus & Co., 98 Ga. 514–516, 25 S. E. 570. In that case an attachment in favor of Bergan against Allen was levied upon a barrel of whisky, a claim to which was interposed by Magnus & Co. The plaintiff's theory was that the whisky had been sold by the claimants to Allen, and that the title had passed into the latter before the attachment was levied. On the other hand, the contention of the claimants was that, under the terms of the contract between themselves and Allen, the sale had never become complete, and that he had never acquired title. There was some question as to whether Allen had ever obtained possession of the whisky; the claimants insisting that they had exercised their right of stoppage in transitu, and the plaintiff denying that this was true. Mr. Justice Lumpkin, delivering the opinion of the court, said:

"In the view we take of the case, however, this question is immaterial; for, even upon the assumption that Allen actually obtained possession, we are of the opinion that the judge, who tried the case without a jury, rightly found for the claimants. The evidence fully and amply warranted him in reaching the conclusion that the sale from Magnus & Co. to Allen was for cash, which the latter was to pay upon delivery of the whisky, and that prepayment of the price was a condition precedent to the sale. There was no pretense that Allen had paid the price. This being so, even if Allen had in fact obtained possession, the title did not pass to him under the contract, for the reason that he failed to comply with the condition upon which the sale depended. 'If the sale be for money to be immeditately paid, or to be paid upon delivery, payment of the price is a precedent condition of the sale, which suspends the completion of the contract until the condition is performed, and prevents the right of property from passing to the vendee, unless the vendor chooses to trust to the personal credit of the vendee.' The foregoing is an extract from the opinion of Washington, J., delivered in the case of Copland v. Bosquet, 4 Wash. C. C. 588, Fed. Cas. No. 3,212, cited in 1 Benj. on Sales, § 336. To the same effect, see Tiedeman on Sales, § 206."

It was further said by the court:

"The same doctrine was recognized in Harding v. Metz, 1 Tenn. Ch. 610, in which it was held that: 'If personal chattels be sold upon the express condition that they are to be paid for on delivery, and they are delivered upon the faith that the condition will be immediately performed, and performance is refused upon demand in a reasonable time, no title passes to the buyer.' And see Armour v. Pecker, 123 Mass. 143; Salomon v. Hathaway, 126 Mass. 482; Mathewson v. Belmont Flouring Mills Company, 76 Ga. 357."

See, also, Harkness v. Russell, 118 U. S. 667, 668, and 672, 7 Sup. Ct. 51, 30 L. Ed. 285.

It is, however, insisted by the appellee that the transaction in question was a conditional sale, with reservation of title in the appellant until the payment of the purchase price, and, not being in writing, was invalid as to third parties. In support of this contention section 2776 of the Georgia Code of 1895 is invoked. The section referred to provides as follows:

"Whenever personal property is sold and delivered with the condition affixed to the sale that the title thereto is to remain in the vendor of such personal property until the purchase price thereof shall have been paid, every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing and not otherwise. And the written contract of every such conditional sale shall be executed and attested in the same manner as mortgages on personal property; as between the parties themselves the contract as made by them shall be valid and may be enforced, whether evidenced in writing or not."

The statute invalidates a sale of personal property, as to third parties, when the property is delivered with the condition affixed to the sale that the title is to remain in the vendor until the payment of the purchase price. We have endeavored to show that, in the case before us, the parties contemplated a cash transaction, and that, in the absence of cash payment, there was no sale. Hence there was no divestiture of the appellant's title. It has been further shown that there was no agreement by the parties that the title should remain in the vendor. Under the contract as made the law intervenes and fixes the status of the title, and declares that the ownership of the property shall remain with the appellant until paid for. Finally, delivery of the boards in the manner stated was not a delivery within the intention of the parties, nor within the meaning of the law. We are therefore of the opinion that section 2776 of the Georgia Code of 1895 is inapplicable to the facts of this case, and that the contract between Stillwell and Foster is valid and binding, not only as between themselves, but as to such simple contract creditors as are represented by the trustee in bankruptcy. Questions affecting the rights and status of lien creditors and subsequent purchasers are not here involved, and hence are not determined.

It is further intimated by counsel for the appellee that Bergan v. Magnus & Co., supra, is in conflict with the two later cases of Penland v. Cathey, 110 Ga. 431, 35 S. E. 659, and Harp v. Patapsco Guano Company, 99 Ga. 752, 27 S. E. 181. An examination of the Penland and Harp Cases will disclose the error into which counsel have fallen. In Penland v. Cathey, the sale was a credit sale, and by agreement of the parties title was reserved in the vendor until the mare was paid for. Mr. Justice Little, speaking for the court, said:

"The evidence in the record makes a clear case of such a conditional sale of personal property as is contemplated in section 2776 of the Civil Code of 1895. The property sold and the price to be paid were ascertained and determined, there was no act of the vendee to be performed before the sale was completed, and the delivery was unconditional. This contract not being in writing, the reservation of title was not valid against third parties. Civ. Code 1895, § 2776. The object of the statute is to prevent fraud and perjury. Harp v. Patapsco Guano Co., 99 Ga. 752–758, 27 S. E. 181."

In the Harp Case was involved the sale of a mule. The following clause of the syllabus plainly differentiates that case from the one at bar:

"When personal property was sold and delivered under a parol contract, a condition therein that the title should remain in the seller until the property was paid for was, under section 1955a [now 2776] of the Code, inoperative as to third persons."

The transaction between Stillwell and Foster was characterized by fairness and good faith, there being an utter absence of proof in the record tending to show that there was any intention on their part to defraud the creditors of the car company. In addition the case, as developed by the evidence, demonstrates that it does not fall within the inhibition and denunciation of section 2776 of the Georgia Code of 1895. It must be held, therefore, that the appellee, the trustee of the bankrupt car company, took no better title to the boards than that held by the bankrupt itself at the date of adjudication. Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Collier on Bankruptcy (5th Ed.) p. 554; Brand. Bankruptcy (3d Ed.) § 1148; Loveland, Bankruptcy (2d Ed.) p. 367, and authorities cited.

The question remains whether the appellant is entitled to payment of its property in preference to other simple contract creditors represented by the trustee. We have seen that the title to the boards remained in the appellant, and the proof is clear that the identical boards were used by the car company in the manufacture of its 50 cars. These cars, subsequent to the adjudication of bankruptcy, were delivered to the appellee as a part of the bankrupt's estate. The value of the boards was admitted to be $1,136.08, and in order to expedite the closing of the bankruptcy proceedings it was agreed by the parties that a sum sufficient to compensate the appellant should be set aside from the sale of the cars, the same to be paid to it in the event of recovery. The car company, upon obtaining possession of the boards in the manner above indicated, held them as trustee or bailee for the appellant, and the latter, as between the parties to the record before us, is entitled to their value, notwithstanding they may have been negligently or by mistake intermingled with other boards of the car company in the manufacture of cars. The equitable principle, applicable to cases of this character, is clearly stated by Sir George Jessel, Master of the Rolls, whose language is quoted approvingly by the Supreme Court in National Bank v. Insurance Company, 104 U. S. 68, 26 L. Ed. 693. It was shown by Sir George Jessel, said Mr. Justice Matthews, that:

"The modern doctrine of equity, as regards property disposed of by persons in a fiduciary position, is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. If they cannot be identified, by reason of the trust money being mingled with that of the trustee, then the cestui que trust is entitled to a charge upon the new investment to the extent of the trust money traceable into it; that there is no distinction between an express trustee and an agent, or bailee, or collector of rents, or anybody else in a fiduciary position; and that there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account."

See, also, In re Woods & Malone (D. C.) 121 Fed. 599; Hall v. Page, 4 Ga. 428, 48 Am. Dec. 235; Claflin v. Continental Works, 85 Ga. 27, 11 S. E. 721; 6 Am. & Eng. Enc. Law (2d Ed.) pp. 594–599.

It follows from what we have said that the ruling of the trial court was erroneous. It is therefore ordered that the decree be reversed, and that a decree be here rendered in favor of the appellant for the sum of $1,136.08, with interest thereon at the rate of 7 per cent. per annum from December 18, A. D. 1903, with costs of suit to be taxed, and that such sum be paid by the appellee from funds in its hands arising from the sale of the 50 box cars.

Reversed and rendered.

NOTE.—The following is the opinion of Speer, District Judge, on the hearing in the District Court:

SPEER, District Judge. In this case the court finds it difficult to assent to the conclusions reached by the referee in his very clear and comprehensive report. Roy C. Foster was the agent of the Georgia Car & Manufacturing Company before it went into bankruptcy. He afterwards became its president. John J. McDonough was a stockholder in that company, and also held a fiduciary relation to the Southern Pine Company; the latter engaged in the manufacture of boards suitable for the uses of the car company. For ethical reasons, it seems, relating to the double trust held by McDonough, the pine company resolved that none of its product should be sold to the car company. It does not appear that this resolution was adopted because of any apprehension that the car company would become insolvent. It was designed to protect Mr. McDonough, and both companies, from the injurious results usually flowing from an avoidance of the well-known doctrine of the law of agency, which forbids an agent to sell if he is appointed to buy and forbids him to buy if he is appointed to sell. It turned out, however, that this resolution became very inconvenient to the pine company, which had boards to sell, and to the car company, which had boards to buy. As appears from the evidence, it soon became necessary for Mr. Foster, representing the car company, and for Mr. Stillwell, representing the pine company, to do business with only formal deference to the resolution. Negotiations began on March 2, 1903. This appears from a letter of that date, written by Foster, as president of the Georgia Car Company, to Mr. Stillwell, secretary of the Southern Pine Company. The pertinent recital of the letter is: "We would order from you as shown by the enclosed order. Orders will be signed by our purchasing agent, Mr. C. B. Deming, and will be approved by myself, as president. Orders coming to you in this manner you would know would have my personal sanction. On the other hand, if neither of the methods is satisfactory, I would hand you my own personal order for the lumber to be given to the car works and settle with you on either a thirty day or cash basis, whichever you would prefer."

Now this is clear notification to Mr. Stillwell that the purchase of the lumber was sought to be made, not for Mr. Foster, but for the car company. It is true Mr. Stillwell replied "No" over the telephone to this application, and also, as appears by a pencil memorandum on the letter, it is stated that he made no written reply. Thereafter, however, on various dates from November 21st to December 18th, inclusive, lumber was delivered and, as was originally intended, was worked up into the cars of the car company. It is contended by the counsel for the pine company that this lumber was sold for cash, and that there was a verbal stipulation that the title was not to pass until the cash was actually received. This may be true. It is also true, however, that the lumber was actually delivered and by the Georgia Car Company, by its operatives, the use of machinery, and the expenditure of its resources, or, more accurately, the resources of its creditors, it was worked up into the finished product. It was made into the sides and tops of about 50 cars. Now, in the manufacture of this lumber, the values represented by the equities of all the creditors of this car company, the machinery which was not paid for, the wages of labor, the

cost of supplies, and everything else needed to keep it a going concern and enable it to manufacture cars, was utilized or expended in the daily operations of the company. Much of these values and of this outlay, like the lumber delivered by the pine company, was furnished on credit. The car company became bankrupt. A trustee was appointed. Eo instante the title of all its assets passed to the trustee for the benefit of the creditors. How, then, can it be said that the Southern Pine Company has a greater claim upon the finished product or any part thereof than the creditors who furnished nails, bolts, wheels, trucks, or the skilled mechanics who did the work, or the manufacturers who furnished the machinery?

A case is cited from the Supreme Court of Georgia (Bergan v. Magnus, 98 Ga. 514, 25 S. E. 570) in support of the contrary view, where it was held that, where the vendor agreed to sell a barrel of whisky and stipulated that the title should not pass until it was paid for, he had a superior claim to that of an attaching creditor of the vendee who had levied on the whisky. It seems, however, that there is a palpable distinction between that case and this. Nothing was done with the whisky. It was found in the original package. Recaption was easy. The equitable right of the third person was involved. It is quite otherwise here; for the claims of every creditor represented by the expenditures necessary to the daily operations of a considerable manufacturing concern all contributed to the common result, namely, the manufacture of cars, and all stand upon the same footing as that of the Southern Pine Company, which merely furnished a portion of the lumber to the business. It cannot be said that this is a conditional sale under the law of Georgia, because there is no compliance with the statute relating to such sales. This section 2776 of the Civil Code of 1895, provides, in order to render such reservation of title effectual as against third parties, the contract must be reduced to writing and attested as a mortgage on personalty. The purpose of this statute is announced by the Supreme Court of the state (Harp v. Patapsco Guano Co., 99 Ga. 752, 27 S. E. 181) "to cut off, as far as possible, the numerous opportunities for fraud which would arise if parties to such secret agreements were permitted at pleasure to assert that the contract of sale, though resting in parol merely, and notwithstanding actual delivery of the property had been duly made, was conditional only, and passed no title to the purchaser. Therefore it is that the parties to such agreements are required to reduce their contracts to writing and have the same duly attested and recorded as mortgages on personalty. If they fail to do so, the law treats delivery of the property as unconditional, rendering the contract of sale complete, and effectually passing title so far as the rights of third persons are concerned." It is to be observed also that the term "third persons," as used by the Georgia statute, does not relate exclusively to those holding liens created subsequently to the date of the original conditional sale. The term includes, we think, all persons whose equities stand upon the same footing as those of the vendor in such sale, had no reservation of title in fact been made.

No matter how Messrs. Stillwell and Foster may have attempted to gloss over this sale, so as to avoid an apparent disregard of the resolution of the Southern Pine Company, it was in all of its nakedness a simple contract of sale between the two companies, which dealt with the manufactured products of one to be used in completing the manufactured products of the other. The court cannot be blind to this obvious and undeniable fact. It is also true, however strenuously it may be insisted that it was a sale for cash, that it was not so treated by either party; for no cash was paid and the deliveries were made at various periods for nearly if not quite a month. In our judgment the effort to recover these boards delivered under these circumstances, after they had been worked into freight cars, by the proceeding in bail trover, must have been defeated. The effort to subject them, or a fund representing the supposed or agreed upon value, to the claim for recaption of the Southern Pine Company, must be equally futile. Creditors of that general class all stand on the same footing. It is a case where equality is equity. They must share alike in the distribution of the fund which remains to requite their unfortunate ventures.

SPRINKLE et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. November 9, 1905.)

No. 606.

1. CRIMINAL LAW—EVIDENCE—DECLARATIONS OF CODEFENDANTS—RES GESTÆ.
Where defendants on trial were jointly indicted with others, charged with engaging in and carrying on business as rectifiers in the names of certain companies organized by them with intent to defraud the United States of the taxes on spirits so rectified by them, although conspiracy is not charged, statements made by the defendants not on trial are admissible in evidence to show intent, where so connected with the acts and transactions charged as to constitute a part of the res gestæ.

2. SAME—JOINT TRIAL OF DEFENDANTS—EVIDENCE.
On the trial of defendants jointly indicted and tried for defrauding the United States of taxes on distilled liquors, evidence is admissible, although it apparently relates to one or more, but not all, of the defendants, and especially where proof of the corpus delicti depends on establishing a variety of different facts covering a long period of time and widely separated one from the other.

3. INTERNAL REVENUE—PROSECUTION FOR OFFENSES—EVIDENCE.
On the trial of defendants, charged with a violation of the internal revenue laws, the instructions, rules, and regulations prescribed by the Commissioner of Internal Revenue, as authorized by statute, are admissible in evidence where pertinent to the issues.

4. CRIMINAL LAW—RULING ON MOTION FOR NEW TRIAL—REVIEW.
In the federal courts the ruling of the trial court on a motion for new trial in a criminal case is not reviewable.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3067.]

5. SAME—CIRCUMSTANCES AS EVIDENCE.
Circumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence.

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

The plaintiffs in error were indicted jointly with H. C. Sprinkle and J. T. Sprinkle for violation of the internal revenue laws. The indictment contains ten counts. The first count charges that the five persons named carried on the business of rectifiers of spirituous liquors, with intent to defraud the United States of the tax on the spirits rectified by them. The third, fifth, seventh, and eighth counts charge the said five defendants with engaging in and carrying on the business of rectifiers of distilled spirits in the names, respectively, of the Oak Grove Liquor Company, the Milton Liquor Company, the Reidsville Liquor Company, and in the name of William Young, with intent to defraud the United States of the tax on the spirits so rectified by them. The second, fourth, and sixth counts charge the said five defendants in the names, respectively, of the Oak Grove Liquor Company, the Milton Liquor Company, and the Reidsville Liquor Company, with knowingly making the false entries in certain books required by law to be kept in the rectifying business carried on in the names of the said three companies. The ninth count charges that said five defendants did unlawfully and willfully remove, and aid and abet in removing, one cask of distilled spirits, on which the tax had not been paid as required by law, to a place other than a distillery warehouse provided by law; and the tenth count charges that said five persons did unlawfully and willfully conceal one cask of distilled spirits, on which the tax had not been paid, which had been removed to a place other than a distillery ware-

house required by law—all contrary to the form of the statute in such case made and provided. The sections of the revised statutes violated are, for carrying on the business as rectifiers of distilled spirits, section 3317, Rev. St. (as amended by Act March 1, 1879, c. 125, 20 Stat. 339); for making false entries, section 3318, Rev. St. (as amended 20 Stat. 339 [U. S. Comp. St. 1901, p. 2164]); and the removal and concealment, section 3296, Rev. St. [U. S. Comp. St. 1901, p. 2136].

The plaintiffs in error, in the absence of the defendants H. C. and J. T. Sprinkle, who were fugitives from justice, on the 26th day of April, 1904, appeared in person and by counsel, and upon being arraigned pleaded not guilty; and a jury was impaneled for their trial, which lasted from thence to the 4th day of May, 1904, a great mass of evidence having been introduced in behalf of the government, at the conclusion of which none was offered by the defense. Thereupon, after full argument had, and an appropriate charge by the court, a verdict was returned on the 4th day of May, 1904, finding the three defendants named guilty as charged in the first nine counts of the indictment. A motion for a new trial was entered and overruled. The plaintiff in error B. F. Sprinkle was sentenced to two years in the penitentiary and to pay a fine of $5,000; the plaintiff in error T. M. Angle, to a term of one year in the penitentiary, and to pay a fine of $1,000; and the defendant William Young to a term of six months in jail in said district and to pay a fine of $1,000. Sundry exceptions were regularly taken pending the trial, and assignments of error properly presented, and this writ of error allowed.

The government's contention, briefly, is that these several defendants were acting in concert, and in so doing used the names of the Oak Grove Liquor Company, the Milton Liquor Company, and the Reidsville Liquor Company, and William Young, in order more effectively to accomplish their object and defraud the government; that said companies and William Young were in fact one and all the same; that in order to carry out their unlawful purpose they caused to be started what was known as the Jones Company, of Louisville, Ky., the Diamond Distillery Company, of Louisville, Ky., the Merchants' Liquor Company, of Indianapolis, Ind., and the Danville Distributing Company, of Danville, Ill.; that the fraud upon the government was principally committed by these last-named companies, at their respective places of business, purchasing what was known as wholesale liquor dealers' stamps at low proof, and sending them to the companies in North Carolina, more particularly to the Oak Grove and Milton Companies, and the proof raised so as to put out on the market, under the color of these stamps, large quantities of distilled spirits that had not in fact paid taxes to the United States; that said stamps were not sent into North Carolina upon packages of spirits at all, but by a more rapid transit than ordinary freight, and there utilized by one or more of the North Carolina companies upon packages of distilled spirits which had not therefore paid the tax; that the stubs of the stamps so issued from Louisville, Indianapolis, and Springfield, and the serial number of the same stamps, as shown by the rectifiers' reports and the gaugers' reports at the Oak Grove Liquor Company, the Milton Liquor Company, and the Reidsville Liquor Company, showed that the stamps which were issued at 9 and 10 proof at Louisville, Indianapolis, and Springfield aforesaid, had been brought into North Carolina, and raised to 188 and 190 proof; and that the said defendants had been credited by the collector of internal revenue in North Carolina, upon this fraudulent change in these stamps, whereby the government was defrauded of taxes amounting to over $100,000. The government further contends that the defendants, by one or more of their rectifying companies, bought distilled spirits from Fleischman and others, in Cincinnati, Ohio, at low proof of 50 or 60 per cent.; that the stamps attached to the packages of spirits thus bought, were sent to one or more of their companies; that there the basis of the rectifier's credit was so changed as to show a proof of 188 to 190, this affording another opportunity for putting upon the market distilled spirits on which the tax had not been paid; and also that the defendants, particularly Angle and Young, made false entries in their rectifiers' books used in their business.

The plaintiffs in error insist on the other hand, briefly, that they knew nothing of the conduct of the business of the companies in Louisville, Indianapolis, and Danville, and the Oak Grove, Milton, and Reidsville Companies, and that there was no evidence to connect them with these transactions, and insist, further, that the Reidsville Company was owned and operated by the defendant J. T. Sprinkle, and the Oak Grove and Milton Liquor Companies were owned and operated by the defendant H. C. Sprinkle; that the business of the plaintiff in error Young, as a rectifier and wholesale liquor dealer, was entirely separate and distinct from their business; that they had no interest in it, and that, as to those other companies, the transactions in regard to checks, orders for sale of liquor, and soliciting sales of liquor, and the order to one company, and the sale by another company, were nothing more than ordinary transactions of business, carried on by persons engaged in similar undertakings. The following extract from the charge of Judge Boyd, of the lower court, who by reason of his ability and long official experience in revenue matters, is particularly well qualified to speak, is here inserted, with the view of making clear just how distilled spirits are stamped and put upon the market, and the business of rectifiers of distilled spirits conducted:

"It may be well that I should call to your attention the method by which distilled spirits are stamped and put upon the market. All taxes are paid upon distilled spirits in the bonded warehouse. Every registered distiller is required to have what is known as a bonded warehouse, and the product of his distillery, when it is produced, is carried from his cistern room to this bonded warehouse, and there it is reported to the collector—the number of wine gallons, and the number of proof gallons in each package, the date of its production and the date on which it was put in the warehouse, and the package numbered by the storekeeper and gauger. When the distiller desires to put that spirits upon the market, he sends up to the collector what is known as withdrawal papers, in which he describes the spirits, and if the spirits is 100 proof or upwards, he pays $1.10 upon every proof gallon. The stamps are affixed and canceled by the storekeeper and gauger, and that pays the tax upon a gallon of distilled spirits. No further tax is ever collected upon that spirits. That is the payment of the tax, and is what the government requires. Rectifying establishments change distilled spirits from its original character in the tax paid packages. That is what they do. They don't produce distilled spirits, but they take them in the original packages, in stamped packages, and they change their proof and character without the payment of any further tax. They simply pay the license for the purpose of carrying on the business of rectifiers. To illustrate: If one is a rectifier of distilled spirits, he buys a 50-gallon barrel of 100 proof spirits. 100 proof is the standard. That spirits has paid $1.10 per gallon on 50 gallons, and the stamp is upon it to indicate that that tax has been paid, and the stamp is canceled upon the head of the barrel and the bung staves are marked so as to identify and describe the package. The rectifier takes that 50-gallon package, and says to the collector: 'I wish to dump this package for rectification; that is, I wish to pour it out of this package and change its proof and character, and put it upon the market'—and he describes that spirits, and thereupon a gauger is sent to his establishment to see if that package is what he describes it to be, and upon the gauger's report he is authorized to add coloring to it, or do whatever he sees proper, and put it upon the market. If he takes 50 gallons of 100 proof and reduces it so as to make 500 gallons of rectified stuff without the addition of a single dollar—he pays no further tax. In order, then, to put his spirits upon the market, he has to have wholesale liquor dealer's license and stamps. A rectifier, in order to sell in quantities of five gallons and upwards, must be a wholesale dealer, and upon his certificate, they furnish him these wholesale stamps. So, then, gentlemen, if the rectifier, after he has bought the 50-gallon barrel of 100 proof spirits, reduced its proof and made 500 gallons, gets the stamps for nothing, and uses them for high proof spirits, he defrauds the government. That is, to take a 10 proof stamp, and certify to the collector that it was on a package of 190 proof spirits, is a fraud; for that gives the rectifier credit for having stamps for 190 proof, instead of only 10 proof, increases his credit 19 times. In order to give evidence to the collector of the proof of the

spirits in the packages, these stamps are so constructed that in the middle of them is what is known as the 'clip.' The clip is simply a history of the package printed upon it, the number of the stamp, the name of the collector who issued it, and the number of proof and wine gallons in the package. There is a piece of red paper under the clip, and, when it is adjusted to the barrel, this clip can be cut out so as to be sent to the collector's office, and that is the evidence to the collector that that particular package of whiskey is in that rectifying establishment for the purpose of being rectified."

Reuben D. Reid, E. J. Justice, S. B. Adams, and William P. Bynum, Jr., for plaintiffs in error.

A. E. Holton, U. S. Atty., and A. H. Price, Asst. U. S. Atty.

Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

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

The questions presented for our consideration relate almost exclusively to the correctness of the rulings of the court below upon the admission or rejection of evidence pending the trial, the refusal of the court to give certain instructions asked for by the plaintiffs in error, and to the entry by the lower court of judgment upon the verdict of the jury against them; they having interposed no objection to the indictment by way of motion to quash plea in abatement, or demurrer thereto, introduced no evidence in their own behalf, and made no objection to the charge of the lower court as given.

Plaintiffs in error insist that the evidence offered by the government as to the acts, conduct, and transactions of the several defendants, in the different states, had in connection with the purchase of stamps, together with declarations made by any of them in procuring such stamps, or had and made in connection with the several businesses alleged to have been organized, owned, and conducted by them, could only have been introduced against the defendants J. T. and H. C. Sprinkle, the parties making such declarations, or owning such companies, and not against the defendants on trial, the plaintiffs in error here, who disavow all knowledge of and connection with such transactions; there being no count in the indictment charging them as conspirators, and had there been such count, only declarations made in furtherance of the common undertaking should have been admitted. The character of the case under consideration has necessarily to be taken into account in passing upon questions affecting the admission and exclusion of evidence, in order to determine how far the acts, conduct, transactions, and declarations of any of the co-defendants may have been admissible; the government disputing as a matter of fact that any such declarations were admitted.

The defendants are jointly charged in the first, third, fifth, seventh, and eighth counts of the indictment with engaging in and carrying on business as rectifiers of spirituous liquors, with intent to defraud the United States of the taxes on the spirits so rectified by them. The Supreme Court in United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819, passed upon the meaning of the language "knowingly and unlawfully engaging in and carrying on the business of a distiller,

with intent to defraud the United States" in the purview of its revenue laws, in which the court held that the intent to defraud the United States was of the very essence of the offense; that the commission of the act complained of, coupled with the intent to defraud the government, was what constituted the crime; that, unless both conditions existed, no crime was committed; and that the existence of fraud in connection with the business of distilling must be established by satisfactory evidence—the court concluding (page 364 of 96 U. S. [24 L. Ed. 819]):

"Such intent may, however, be manifested by so many acts on the part of the accused, covering such a long period of time, as to render it difficult, if not wholly impracticable, to aver with any degree of certainty all the essential facts from which it may be fairly inferred."

"The means of effecting criminal intent," says Mr. Wharton, "or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to go to the jury, to demonstrate the intent, and not necessary to be incorporated in the indictment." 1 Whart. § 292. The reason for this rule of evidence, where the question of the intent with which a particular act may have been committed or transaction entered into becomes material, is very apparent, and the necessity of arriving at such intent from a full and fair consideration of all the facts and circumstance, including the acts of the accused, is manifest. In many cases the purpose and intent with which a person acts can only be reached by fair inference, and reasonable conclusions to be drawn from what he does, or his acts and conduct, would necessarily indicate. A contrary view would not unfrequently most seriously affect the innocent.

The objections apparently rest upon the theory that, inasmuch as the indictment did not contain a count for conspiracy, evidence of this character should for that reason be rejected. But this position is manifestly not well founded. In St. Clair v. United States, 154 U. S. 134, 149, 14 Sup. Ct. 1002, 38 L. Ed. 936, a case of the indictment of three persons jointly for murder upon the high seas, the court said, speaking of this very position as to the necessity of the charge of conspiracy:

"These objections seem to rest upon the general ground that the indictment did not charge St. Clair, Sparf, and Hanson, as co-conspirators. The evidence was not for that reason to be rejected. St. Clair, Sparf, and Hanson were charged jointly with having killed and murdered Fitzgerald. The acts, appearances, and declarations of either, if part of the res gestæ, were admissible for the purpose of presenting to the jury an accurate view of the situation as it was at the time the alleged murder was committed."

Continuing, the court said:

"Circumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence."

Continuing on the subject of the res gestæ, the court further said:

"'These surrounding circumstances, constituting part of the res gestæ,' Greenleaf says, 'may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge according to the degree

of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description.' 1 Greenleaf (12th Ed.) § 108. See, also, 1 Bishop's Cr. Proc. §§ 1083–1086. 'The res gestæ,' Wharton said, 'may be, therefore, defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander. They may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculating policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act.' 1 Wharton, Ev. (2d Ed., 1879) § 259."

In the present case, five persons are charged with the conduct of a business, lawful in itself, but which became unlawful because of the intent with which it is charged to have been carried on; and it is alleged in the indictment, that the purpose of the three companies within the state of North Carolina was the better to effect the unlawful object; and from the proof it appears that four companies in three different states of the Union were also used to effect such unlawful undertaking—that is, to defraud the United States—and that the said defendants jointly, as individuals and in the names of the said companies, were knowingly engaged in defrauding, and did defraud, the government of its revenue. This necessarily involved a variety of transactions, covering many times and places, long distances one from the other, and during a period of some 12 months. But, so far as the crime is concerned, when once established, they all were and became a single transaction, and in that view clearly admissible. Ought not the acts, conduct, and doings of each of the defendants—not their statements, declarations, or admissions necessarily, but what they or either of them may have done—in and about any material transaction forming a necessary part of the business in hand, whereby the government was defrauded of its revenue, manifestly be submitted to the jury, with a view of determining the bona fides of their acts; that is, their intent in the premises? They should, of course, be the necessary incidents of the litigated act, and such acts, incidents, and doings as are necessarily and unconsciously associated with the crime as committed. The fact that the circumstances attending a particular transaction, when so interwoven with each other and with the principal fact that they cannot be separated without depriving the jury of what is essential, may be submitted to the jury, seems now well recognized and settled. St. Clair v. United States, 154 U. S. 149, 14 Sup. Ct. 1002, 38 L. Ed. 936; Beaver v. Taylor, 68 U. S. 637, 742, 17 L. Ed. 601; Insurance Co. v. Mosley, 75 U. S. 397, 407–8, 19 L. Ed. 437; Clune v. U. S., 159 U. S. 590, 592, 16 Sup. Ct. 125, 40 L. Ed. 269; Wiborg v. U. S., 163 U. S. 632, 657, 16 Sup. Ct. 1127, 41 L. Ed. 289.

In Insurance Co. v. Mosley, 75 U. S. 397, 19 L. Ed. 437, supra, a case involving liability under an insurance policy, and how far the statements of the insured made as to the manner and extent of his injury prior to the time of his death, could be introduced by his estate in his behalf, Mr. Justice Swayne, speaking for the Supreme Court, said:

"To bring such declarations within this principle, generally, they must be contemporaneous with the main fact to which they relate. But this rule is by no means of universal application. In Rawson v. Haigh, 2 Bingham, 99, a debtor had left England and gone to Paris, where he remained. The question was whether his departure from England was an act of bankruptcy, and that depended upon the intent by which he was actuated. To show this intent, a letter written in France, a month after his departure, was received in evidence. Upon full argument, it was held that it was properly received. Baron Park said: 'It is impossible to tie down to time the rule as to the declarations. We must judge from all the circumstances of the case. We need not go the length of saying that a declaration, made a month after the fact, would, of itself, be admissible; but if, as in the present case, there are connecting circumstances, it may, even at that time, form a part of the whole res gestæ.' Where a peddler's wagon was struck and the peddler injured by a locomotive, the Supreme Court of Pennsylvania said: 'We cannot say that the declaration of the engineer was no part of the res gestæ. It was made at the time—in view of the goods strewn along the road by the breaking up of the boxes—and seems to have grown directly out of and immediately after the happening of the fact.' The declaration was held to be 'a part of the transaction itself.' In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud and falsehood as to both; but there is no ground of objection to one that does not exist equally as to the other. To reject the verbal fact would not unfrequently have the same effect as to strike out the controlling member from a sentence, or the controlling sentence from its context. The doctrine of res gestæ was considered by this court in Beaver v. Taylor, 1 Wall. 637, 17 L. Ed. 601. What was said in that case need not be repeated. Here the principal fact is the bodily injury. The res gestæ are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted, and were in progress. Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The res gestæ are the declarations tending the show the reality of its existence, and its extent and character. The tendency of recent adjudications is to extend, rather than to narrow, the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority."

"Where an offense is the termination of a continuous transaction, it is admissible to show the entire train of connected facts leading up to and forming part of the preparation for the commission of the offense, whether consisting of conduct, declarations, or other occurrences." 24 Am. & Eng. Ency. Law, 675, and note 1; State v. Prater, 52 W. Va. 132, 43 S. E. 230; Hall v. State, 48 Ga. 607, 608; Eagon v. Eagon, 60 Kan. 697, 706, 57 Pac. 942; Chicago & E. Ry. Co. v. Cummings, 53 N. E. 1026, 24 Ind. App. 192; Pinney v. Jones, 64 Conn. 545, 30 Atl. 762, 42 Am. St. Rep. 209; Com. v. Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; Jordan v. State, 81 Ala. 20, 30, 1 South. 577.

It once appearing that the stamps, upon which the proof had been raised so as to defraud the government of its revenue, were used

by the plaintiffs in error in the conduct of their business, and by them used at such increased proof, were the same stamps purchased in the states of Illinois, Kentucky, and Indiana, in the names of the companies alleged by the government to have been fraudulently used by said plaintiffs in error for such purpose, then, manifestly, every fact and circumstance tending to throw light upon the issue of such stamps to the said last-named companies became material, and was so related to the main transaction by which the government was defrauded as to constitute the same a part of the unlawful act of which the government complained; and, upon this condition so appearing, the lower court properly declined to direct the jury to disregard the evidence that had been admitted conditionally upon the proof of the commission of the corpus delicti, or of the connection of the defendants one with another. To maintain the contention of the plaintiffs in error in this respect would be to place them in the position of objecting to the government's developing a fraud upon its revenue to which they themselves were, from their standpoint, innocent parties. In this case, while we are inclined to think the authorities abundant to have justified the lower court in admitting as a part of the res gestæ any of the declarations or admissions that may have been made by the defendants in connection with the issuance and use of the stamps alleged to have been purchased for the purpose of committing the fraud upon the government, still we do not find it necessary to pass definitely on that question, as it is not clear from the record that such declarations were admitted. We are convinced, however, and that is all that is necessary to be determined for the purposes of this case, that the fact of the purchase of such stamps, and all the circumstances connected therewith, including the acts, conduct, and transactions of any of the defendants, acting either as individuals or in the name of any or all of said companies, as well in the issue as in the subsequent use of said stamps, is admissible in evidence against the plaintiffs in error, who either as individuals, or by means of the corporations owned and operated by them in North Carolina, appear to have fraudulently received and unlawfully used the said stamps in the conduct of their business to defraud the government.

Many of the exceptions relate to the admission of evidence that was for the moment apparently applicable to one or more of the defendants in the indictment or on trial, and not to them all. This is almost inevitable where persons are jointly indicted and tried, and particularly in a case like the one under consideration, where the commission of the offense, or proof of the corpus delicti, depended on the establishment of such a variety of different facts, covering a long period of time, and widely separated one from the other. It was, of course, in order to make such evidence avail or material, necessary to connect the same with or show its pertinency to the case of one or more of the defendants; but it was not necessary that a particular fact in proof should be shown to be applicable to all of the defendants, its bearing upon the whole case being apparent. An election of the defendants to be tried separately, the granting of which would have been in the discretion of the trial court, would have lessened

the embarrassments arising from this condition. But no such motion was made; and we are convinced that the trial court committed no error in the particulars complained of, of which the defendants under trial have any just cause of complaint. The question of the conduct of trials, and the time and manner of the introduction of evidence, is a matter largely within the discretion of the trial judge; and while in this case the exceptions taken were many, and involved nearly every conceivable phase that could likely arise, still, as to most of the objections, they presented no questions of serious difficulty, the same arising only by reason of the trial of several persons together, and the effort, first, to show the commission of the crime, and then the connection of the defendants with such crime. As illustrative of the embarrassment arising from the joint indictment of all the defendants and the trial of three of them, the plaintiffs in error by two of their exceptions say, first, that it was error to prove that the absent defendant J. T. Sprinkle was a boy only 19 years of age; second, that another of the absent defendants, H. C. Sprinkle, who was the ostensible owner of the Oak Grove and Milton Companies, was a young man who, in point of fact, gave no attention to the businesses, and did not appear to be engaged in or about their conduct. On first view, each of these inquiries might appear irrelevant; but in the prosecution, when the government's entire case was based upon the fact that the five defendants named in the indictment were jointly engaged in defrauding the government and were using the names of the three North Carolina companies to more effectually accomplish their purpose, and that the Kentucky, Indiana, and Illinois companies were used for a like purpose, one of the defendants, J. T. Sprinkle, a young man 19 years old, a son of the plaintiff in error B. F. Sprinkle, being the person engaged in the conduct of the nonresident companies, as well as the apparent owner of one of the North Carolina companies, and H. C. Sprinkle, the apparent owner and proprietor of the remaining two North Carolina companies, the fact of the age of one or both of these absent defendants, their relation to the plaintiffs in error, B. F. Sprinkle, and of the improbability of either of them being thus largely engaged in business, and that the one in North Carolina gave little or no attention to the two companies ostensibly owned and operated by him, became matters of material moment, and the jury had a right to know the connection of the parties and companies, and to draw proper inferences from such circumstances.

Exceptions reserved in connection with the admission of evidence also present the question as to whether the instructions, rules and regulations prescribed by the Commissioner of Internal Revenue, and properly applicable to those engaged in the business of the plaintiffs in error, and in force at the time of the commission of the offense alleged against them, were improperly admitted as evidence to the jury. Sections 321 and 3291 of the Revised Statutes [U. S. Comp. St. 1901, pp. 186, 2132] authorize the Commissioner of Internal Revenue to prescribe such instructions, rules, and regulations, and pursuant to which those offered in evidence, revised April 5, 1901, were

promulgated; and there was no error in their admission as evidence, though there was no necessity for their formal introduction, they being matters of which the courts of the United States take judicial notice. This was expressly decided by the Supreme Court in passing on the necessity of the introduction of certain rules and regulations of the interior department in Caha v. United States, 152 U. S. 212, 14 Sup. Ct. 513, 38 L. Ed. 415; the court citing the following decisions as bearing upon the general question: United States v. Teschmaker, 63 U. S. 392, 405, 16 L. Ed. 353; Romer v. United States, 68 U. S. 721, 17 L. Ed. 627; Armstrong v. United States, 80 U. S. 154, 20 L. Ed. 614; Jones v. United States, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691; Knight v. United States Ass'n, 142 U. S. 161, 169, 12 Sup. Ct. 258, 35 L. Ed. 974; Jenkins v. Collard, 145 U. S. 546, 12 Sup. Ct. 868, 36 L. Ed. 812.

2. The several exceptions to the action of the lower court in refusing to give to the jury instructions asked for by the plaintiffs in error, together with their assignments of error covering such exceptions, have been fully and carefully considered by the court; and our conclusion is that said instructions, which in many instances raise but the same questions covered by the exceptions taken to the rejection and admission of evidence, and in others matters not justified by the evidence, were one and all properly refused; that the court's charge, to which the plaintiffs in error did not except, fully and fairly submitted the case to the jury; and that said plaintiffs in error have no just cause of complaint, either because of the instructions refused or the charge given by the court.

3. The plaintiffs in error excepted to the action of the lower court in overruling their motion made for a new trial. This ruling is not the subject of review by this court. Blitz v. United States, 153 U. S. 308, 312, 14 Sup. Ct. 924, 38 L. Ed. 725; Wheeler v. United States, 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244; Addington v. United States, 165 U. S. 184, 17 Sup. Ct. 288, 41 L. Ed. 679.

4. The plaintiffs in error also excepted to the action of the lower court in entering judgment against them upon the verdict of the jury. This is a writ of error, which presents for consideration errors of law properly presented by a bill of exceptions or arising upon the record. Bucklin v. United States, 159 U. S. 680, 682, 16 Sup. Ct. 182, 40 L. Ed. 304, 305; Ætna Life Ins. Co. v. Ward, 140 U. S. 76, 91, 11 Sup. Ct. 720, 35 L. Ed. 371; Foster's Fed. Pr. § 496. No motion or request was made that the jury be instructed to find for the defendants, or either of them, which motion would, if made, overruled, and properly excepted to, have left open to this court to consider whether there was any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. Wiborg v. United States, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; Humes v. United States, 170 U. S. 212, 18 Sup. Ct. 602, 42 L. Ed. 1011; Clyatt v. United States, 197 U. S. 207, 221, 25 Sup. Ct. 429, 49 L. Ed. 726. Being of the opinion, after maturely considering all of the assignments of error, as well those particularly passed upon as those not in terms enumerated and referred to herein, that no error

of law has been committed of which the plaintiffs in error can complain, and that the facts, of which the jury was the judge, fully warranted their finding, the exception taken to the action of the lower court in entering judgment is overruled.

The action of the lower court, being without error, will be, and is hereby, in all respects affirmed.

REEVE v. NORTH CAROLINA LAND & TIMBER CO. et al.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1905.)

No. 1,387.

1. PUBLIC LANDS—GRANT OF STATE LANDS—VALIDITY UNDER TENNESSEE STATUTE.
   Under the statutes of Tennessee governing grants of state lands, as construed by its Supreme Court, a valid entry is not essential to a valid grant, and the older of two conflicting grants, each based on a void entry, passes the state's title.

2. EXECUTION—VALIDITY OF SALE—PRESUMPTION OF REGULARITY.
   That one assumed to be an officer, and made a levy and return under an execution directed only to a lawful officer, is sufficient, on collateral attack, to raise a presumption that he was such officer, although the fact is not stated in his return.

3. SAME.
   On a collateral attack upon an execution sale, made 26 years after the execution of a trust deed on the property by the owner, the presumption is that the debt secured by the deed was satisfied and that the sale passed a good title.

4. EXECUTORS—POWERS—CONVEYANCE OF PROPERTY.
   An executor, having power under the will to sell and convey any part of the testator's property, had authority to direct the making of a sheriff's deed, to which the testator was entitled, to a third party, who had acquired the equitable title, notwithstanding the fact that the remainder of the estate had been closed, where he had not resigned or been discharged.

5. EXECUTION—VALIDITY OF DEED—POWER OF SUCCEEDING SHERIFF.
   Under Shannon's Code Tenn. § 4783, which provides that a sheriff who makes a sale of lands may make a deed to the purchaser, or any one succeeding to his rights, "at any time, either within or after the expiration of the two years allowed for redemption," and section 4785, which authorizes a sheriff to execute deeds for lands sold by a former sheriff, without any limitation as to time, the mere lapse of time does not affect the validity of such a deed made by a subsequent sheriff.

6. EQUITY—PROOF OF TITLE—RIGHT TO BRING IN CURATIVE DEED BY SUPPLEMENTAL BILL.
   Where plaintiff had an inchoate title to land in suit, but which was imperfect because of the invalidity of a sheriff's deed, it was not error to permit the bringing forward by supplemental bill of a curative deed executed pending the suit.

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

This cause came on to be heard upon April 13, 1905. An opinion reversing the decree of the Circuit Court upon the ground of the invalidity of the complainant's grant was filed May 2, 1905. The ground upon which we proceeded,

as well as the facts of the case, is fully set forth in our former opinion, which was as follows:

"Bill to restrain trespass a tract of wild mountain land, valuable only for its timber, and to cancel the grant and deeds under which the defendants claim in so far as same conflict with the grant and deeds under which the complainant asserts title to the land upon which trespasses are being committed. There was a decree for the complainant, and the defendant, M. P. Reeve, has appealed.

"LURTON, Circuit Judge, delivered the opinion of the court.

"The complainant deraigns title to the land in dispute from a grant to John Burgner, for 5,000 acres, dated November 29, 1841. The defendant deraigned title from a grant to Richard West, for 1,900 acres, dated October 3, 1843. Both grants are from the state of Tennessee. Neither party has had any such possession as to perfect a title under statute of limitations. The West grant laps upon the older Burgner grant. To what extent does not appear. The question made by the issues and decided by the court below was the single question of superiority of title. The Burgner grant is the oldest, and, in the absence of both the Burgner and West entries, is the superior title if a valid grant. The contention is that the grant to Burgner is void because issued without any authority of law.

"That grant, upon its face, recites that it issued upon an entry dated November 29, 1838. By an act passed November 28, 1839, it was provided that entries theretofore made might be surveyed at any time prior to September 1, 1841, and 'the further time of two years, from and after the passage of this act, to have such surveys granted;' and that 'if such surveys shall not be made and grants obtained thereon, as provided in this act, such entries and surveys, as the case may be, shall be null and void as against subsequent entries.' The time within which a grant might issue under this extension act expired November 28, 1841. Complainant's grant issued November 29, 1841, one day after the expiration of the law. The West entry was, at the date of this hiatus, an existing entry junior to that of Burgner, and upon it the West grant issued subsequent to this hiatus and junior to the Burgner grant. The fact that the Burgner grant issued upon an entry which, by the express terms of the act of 1839, was null and void, is apparent from the date of the entry recited in the grant itself. November 30, 1841, another extension act was passed, which extended the time within which all entries theretofore made might be carried into grants. But the Burgner grant can obtain no benefit from this act because it issued one day after the expiration of the act of 1839, and one day before the act of 1841 was passed.

"We need not stop to consider what would have been the effect if Burgner's grant had not issued until after the later extension act of 1841 had passed. That it would have resuscitated his entry and furnished the foundation for a grant, in the absence of any intervening rights in favor of a younger enterer, may be conceded. Blevins v. Crew, 3 Sneed, 154; Williamson v. Throop, 11 Humph. 265; Tipton v. Sanders, 2 Head, 690; Henegar v. Matthews, 88 Tenn. 132, 14 S. W. 554; Sheafer v. Mitchell, 109 Tenn. 181, 71 S. W. 86. The plaintiff's grant can obtain no support from subsequent extension acts, but must stand or fall upon the question of the power of the state's officials to issue a grant upon an entry which, under the law, was null and void. As this is a collateral attack, it will be of no avail unless the Burgner grant is void and not merely voidable by a direct proceeding. Fowler v. Nixon, 7 Heisk. 725; Curle v. Barrel, 2 Sneed, 66. A grant of the vacant land of Tennessee must have its origin in a valid entry, and a grant which has no other basis than a void entry is void, wherever impeached, if the facts are apparent upon the face of the grant, or otherwise appear by record evidence of like dignity. Jackson v. Honeycut, 1 Overt. (Tenn.) 31; Cobb's Heirs v. Conway's Heirs, 3 Hayw. (Tenn.) 21; McLemore v. Wright, 2 Yerg. 326; Polk v Wendell, 5 Wheat. 293, 5 L. Ed. 92; Crutchfield v. Hammock, 4 Humph. 203; Roach v. Boyd, 1 Sneed, 134; Woodfolk's Lessee v. Nall, 2 Sneed, 674.

"In Crutchfield v. Hammock, cited above, vacant lands lying in one surveyor district were entered in another of which they constituted no part. A

grant was nevertheless issued. The trial court instructed the jury that if the lands included in the plaintiff's grant did not constitute a part of the district in which they were entered, that the entry and grant were void. In the Supreme Court it was contended that inasmuch as the surveyor of the district of entry had actually included the lands in question in his district and placed it down upon the plans thereof, that the plaintiff had a right to enter it in that office, and that the state having issued a grant therefor, all persons were precluded from going behind the grant. To this the court replied: 'This argument cannot be sustained. Ever since the case of Polk's Lessee v. Wendell and others, decided by the Supreme Court of the United States [5 L. Ed. 92] and [Polk's Lessee v. Wendell], reported in 2 Tenn. 433 [Fed. Cas. No. 11,251], it has been held that entries and grants are void, and may be resisted in a trial in ejectments whenever there is want of property in the grantor, or want of power in the officers appointed by the Governor to receive the entries or issue the grants. The principles of this decision have been recognized by the Supreme Court of this state in the cases of Fentress' Lessee v. Western, decided at Charlotte in 1820, not reported, and in the case of McLemore's Lessee v. Wright, decided at Reynoldsburgh in 1829, and reported in 2 Yerg. 326. In the case now under consideration, the lands in dispute, constituting a part of the Hiawassee district, were not included by the lines of the Ocoee district. The surveyor, then, in extending the lines so as to embrace it, was acting out of the sphere of the authority invested in him, and his act was void. Being void, the act cannot be construed to have made these lands a part of the Ocoee district. Not being such, the entry taker had no power to receive entries therefor, as his power was limited to the reception of entries of land in the Ocoee district; he having no power to issue grants except upon valid entries. The lessor of the plaintiff, then, had no title to the premises in dispute, and the judgment of the circuit court must be affirmed.' This case was followed in Roach v. Boyd, cited above, where it was held that an entry made in an entry office which had been closed was a nullity and 'that the grant founded upon it was void.'

"Crutchfield v. Hammock and Roach v. Boyd were affirmed and applied in Woodfolk's Lessee v. Nall, cited above. Woodfolk's Lessee v. Nall was an action of ejectment. Each party claimed the land in dispute under conflicting grants. The plaintiff's entry and grant were junior to the entry and grant of the defendant. But plaintiff claimed that, although his entry and grant were junior, they constituted the only valid entry and grant, and that defendant's grant was void. This claim was rested upon the fact that at the date of defendant's entry there was an interval of a short time during which there was no authority of law for making an entry within that portion of the state where this land was, and that the law closing the entry office had required all claims to be presented and entries made thereon on or by a date named, or be 'forever thereafter barred.' The office was again opened. But during the interval defendant's entry was made and spread upon the entry book, and so remained after the office was again opened. Defendant's grant issued after the reopening of the office. The court, after holding that the entry did not become a good entry by remaining upon the entry taker's book, having been originally placed there in violation of official duty, and that 'nothing short of an express legislative enactment could have had the effect of legalizing the pretended entry, or making it operative for any purpose,' said: 'It is clear, therefore, that the entry in question is utterly void; and of necessity the grant founded upon it must be held void likewise. The case before us is free from all the supposed difficulties that have embarrassed the question in regard to the jurisdiction of a court of law to declare a grant void. It clearly falls within a principle long recognized in our jurisprudence as an exception to the general rule upon this subject. The case of an entry attempted to be made without or against the authority of positive law is obviously distinguishable from those cases where the entries were authorized by law, but errors or inequalities intervene in the course of proceeding. See Crutchfield v. Hammock, 4 Humph. 203; Roach v. Boyd, 1 Sneed, 135.'

"The cases of Craig's Lessee v. Vance, 1 Overt. 183; Wood v. Elledge, 11 Heisk, 611; Webb v. Haley, 7 Baxt. 602, 603, and Berry v. Wagner, 13 Lea,

594, 598, have been cited as holding that an entry is not essential to the issuance or validity of grant. Craig's Lessee v. Vance seems to have been an obiter by a single judge at nisi prius. But if Judge Overton had in mind grants upon military warrants prior to the act of April 12, 1784, he was right, for it was not until the act last mentioned that there was any provision of law requiring an entry book in respect of locations under military warrants. It was, before that act, 'agreeable to law' that the surveyor should indorse upon the back of the warrant the location made by the holder, and for a grant to issue upon the warrant and location so made. After the act of April, 1784, entry takers were appointed and entry books provided, and all entries required to be made in the proper district. The history of the matter may be read in Lester v. Craig's Trustee, Cooke (Tenn.) 482, 484. Wood v. Elledge presented only the question of whether the plaintiff's younger grant could be carried back to the date of his entry, which was older than that of the defendant. Both entries were in evidence. The oral evidence tended to show that the objects called for in plaintiff's entry could not be located, while the localities in defendant's entry were notorious. In this state of the case, plaintiff's grant could not by relation go back to such an entry, and his title was therefore only of the date of his grant. The case is one under the well-settled Tennessee doctrine that a grant based upon a special entry relates to the date of its entry, and will override an older grant upon a younger entry. Anderson v. Cannon, Cooke (Tenn.) 27, 31; Parrish v. Cummins, 11 Humph. 297; Bleidorn v. Pilot Mountain Co., 89 Tenn. 169, 204, 15 S. W. 737. Webb v. Haley has no bearing whatever upon the question of the necessity of a valid entry.

"The book of an entry taker is a record, and copies taken from it constitute record evidence. The entry taker must furnish the surveyor with a copy of his record on which he makes his survey. This entry and the survey are furnished to the register or Secretary of State and constitute the authority for issuing a grant. Sampson v. Bone, 4 Heisk. 702, 704. Such an entry constitutes an incipient or equitable right to the land, and constitutes the state's voluntary agreement to grant the land if the enterer shall apply for a grant within the time required by law. If an entry of vacant lands made in the wrong surveyor's district, or in a closed entry taker's office, or of land not included within any surveyor's district, is a void entry and a grant based thereon void, it is because a lawful entry is the only authority of law for the issuance of a grant. We can but conclude, from the cases we have cited above, that the state officials issuing the Burgner grant did so without any authority of law. It was not a case of the exercise of judgment or discretion upon any question of law or fact submitted to their decision by the law. It was not a case of vague, indefinite, or voidable entry, but a plain case of an entry which had expired, an entry which by plain terms of the law was null and void. It is not distinguishable in principle from McLemore v. Wright, 2 Yerg. 326; Polk v. Wendell, 5 Wheat. 293, 5 L. Ed. 92; Crutchfield v. Hammock, 4 Humph. 203; Roach v. Boyd, 1 Sneed, 134 and Woodfolk's Lessee v. Nall, 2 Sneed, 674.

"The authority of the Secretary of State and Governor to sign and deliver the state's grant is dependent upon the enterer's application within the time limited by law for the issuance of a grant upon the entry. A grant after an entry has expired is an act beyond the scope of the power conferred by law and an absolute nullity. Such an entry may be revived by an act of legislation which does not affect the vested right of another. But in the case under consideration there had been no resuscitation of the nullified entry of Burgner when he applied for and obtained his grant. The fact that an act was subsequently passed extending the time within which he might obtain a grant is of no consequence, aside from the junior entry of West, because he did not obtain such grant during the currency of the extended law. The case of Woodfolk v. Nall, 2 Sneed, 674, 675, presented much such a question. There an entry made and recorded in an entry office which had been temporarily closed by law was held not to be validated from date of reopening of the office.

"A grant or a patent for vacant public land, though bearing the great seal, is nevertheless a ministerial act, and if the land purporting to be granted was not in fact the property of the state, or subject to grant under existing law, or if the officials issuing it were without the authority of law, the grant is void and not merely voidable, and is subject to impeachment whenever offered in evidence in an action involving title. This is a well-settled general rule both in the courts of Tennessee in respect of the impeachment of grants of vacant public lands and of the United States when the validity of their patents is collaterally questioned. McLemore v. Wright, 2 Yerg. 326, 328; Polk v. Wendal, 9 Cranch, 87, 3 L. Ed. 665, and Polk v. Wendell, 5 Wheat. 293, 5 L. Ed. 92, being cases arising under Tennessee grants. See Crutchfield v. Hammock, 4 Humph. 203; Roach v. Boyd, 1 Sneed, 134; Woodfolk's Lessee v. Nall, 2 Sneed, 674; Curle v. Barrel, 2 Sneed, 63; Patterson v. Winn, 11 Wheat. 380, 6 L. Ed. 500; Smelting Co. v. Kemp, 104 U. S. 636, 641, 26 L. Ed. 875; Wright v. Roseberry, 121 U. S. 488, 519, 7 Sup. Ct. 985, 30 L. Ed. 1039; Doolan v. Carr, 125 U. S. 618, 625, 8 Sup. Ct. 1228, 31 L. Ed. 844; Knight v. U. S. Land Association, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; and Stockley v. Cissna, 119 Fed. 814, 56 C. C. A. 324, a decision by this court, where a grant of land, in form regular, was held void, because not authorized by the law under which it purported to be made.

"Since the case of Polk's Lessee v. Wendal, 9 Cranch, 87, 3 L. Ed. 665, a case in which the circumstances under which a North Carolina or Tennessee grant might be collaterally impeached, there is an unbroken line of Tennessee authority holding, to quote from Curle v. Barrel, cited above, that a grant is to be considered void and open to collateral attack in a court of law, 'when the state had no property in the land granted, or when the officers had no power to receive the entry and issue the grant.'

"In Doolan v. Carr, cited above, the principle prevailing in Tennessee and in the courts of the United States is thus stated by Justice Miller: 'There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity; subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject-matter of the patent, not merely voidable, in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is nevertheless a clear distinction, established by law, and it has been often asserted in this court, that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.' The learned justice, after referring to Polk's Lessee v. Wendal, 9 Cranch, 87, 3 L. Ed. 665, as the earliest case where the subject received full consideration, said of that case, that: 'In that case, the court held that it could be shown as a defense to the patent, that the entries on which it was granted were never made, and that the warrants were forgeries; in which case no right accrued under the act of 1777, and, no purchase of the land having been made from the state, the grant was void by the express words of the law, and that in rejecting the testimony on this point the Circuit Court erred. The judgment was, therefore, reversed.'

"In the case at bar the plaintiff's grant recites that it was issued in consideration of an entry made on November 29, 1838. The grant itself was issued November 29, 1841. The fact impeaching this grant is therefore apparent on its face, for the entry received was null and void. The ministerial act of issuing the grant was therefore wholly unauthorized by law. To quote from Judge Catron in McLemore v. Wright, 2 Yerg. 326, 328: 'It was by

powers conferred, not powers withholden, that they were authorized to receive entries and issue grants.' We have examined the cases, cited by the counsel for appellees, of Conn's Lessee v. Haislip, 1 Swan, 30; Parker v. Claiborne, 2 Swan, 565; Webb v. Haley, 7 Baxt. 600; Berry v. Wagner, 13 Lea, 594. They are cases of mere irregularities or mistakes of fact made by officials whose duty it was to act, making a grant voidable only, and in no wise conflict with the conclusion we have reached, that the grant to Burgner was void and not merely voidable, and therefore subject to collateral impeachment.

"Decree reversed. As complainant has failed to deraign a superior title the bill must be dismissed in so far as any relief is sought against defendants."

We are now asked to reverse our opinion that a grant is invalid which issued during an hiatus between two extension acts, for the reason that this conclusion conflicts with the last adjudication upon this subject by the Supreme Court of Tennessee. In support of this insistence, counsel file a manuscript copy of an opinion of the Tennessee Supreme Court in the case of Sampson Heirs v. Chester Heirs, 91 S. W. 43. This opinion is as follows:

"Sampson Heirs v. Chester Heirs. Chancery Docket, Dyer County.

"This is an action of ejectment to try title to vacant land. There was a demurrer in the court below which was sustained, and complainants were denied any relief, and have appealed. The court is unanimously of opinion that the decree of the chancellor should be affirmed, and it is done with costs. While the several members of the court arrive at the same result, they do so upon somewhat different grounds. The majority is of opinion that the entries upon which both the complainants' and defendants' grants are based are invalid and void; the defendants' entries, because made at a date when there was no hiatus and no authority under the law to make such entries; and the complainants' are invalid, because the complainants did not, within the life of any extension act, perfect the same by a grant. The matter, therefore, turns upon which has the older grant, the complainants or defendants, without regard to the entries, and there can be no question but that the defendants have the older grant. It is held that an entry is not indispensably necessary to the validity of a grant, Craig's Lessee v. Vance, 1 Overt. 182. The conflict being then narrowed down between two grants, neither supported by a live and valid entry, the court will give effect to the older, upon the theory that it passed all the right of the state to the grantees in that grant, and a subsequent grant would be of no avail to pass any title. The decree of the court below is affirmed, with costs."

Mr. Justice Wilkes agreed with the conclusion, but rested his assent upon another ground, and filed a separate opinion, which reads as follows:

"This is an action of ejectment brought by the heirs of Isaac Sampson against the heirs of Robt. I. Chester. The complainants claim 1,316⅝ acres of land under seven separate grants as follows: No. 17,303, dated July 17, 1900, based upon entry No. 113, which was an extension entry for 199 acres made on the 20th day of July, 1840, by virtue of a one-acre entry, No. 117, in the name of Jno. W. Rogers. The said entry was assigned to said Sampson and surveyed for him on the 25th day of November, 1841. 17,304, dated July 17, 1900, based upon an extension entry, No. 118, July 20, 1840, in the name of Geo. C. Hatch, for 199 acres by virtue of a one-acre entry. This was assigned to said Sampson and surveyed for him November 25, 1841. 17,305, dated July 17, 1900, based upon an extension entry for 198 acres, May 23, 1840, made in the name of Lucy W. North, by virtue of a two-acre entry. This was assigned to said Sampson and surveyed for him November 25, 1841. 17,306, dated July 17, 1900, based upon an extension entry for 198 acres made in the name of Jas. Smith on May 23, 1840, by virtue of a two-acre entry. This was assigned to said Sampson and surveyed for him November 26, 1841. 17,308, dated July 17, 1900, based upon an extension entry for 198 acres, made in the name of Jacob C. Fisher, on the 23rd day of May, 1840, by virtue of a two-acre entry. This was assigned to said Sampson and surveyed for him on the 26th day of November, 1841. 17,309, dated July 17, 1900, based on an extension entry

for 140 5-8 acres, made in the name of Etson Eaves on the 20th day of July, 1840, by virtue of a one-acre entry. This was assigned to said Sampson and surveyed for him November 28, 1841. 17,310, dated July 17, 1900, based upon an extension entry for 184 acres made by Enoch P. Earle, December 2, 1841, by virtue of a one-acre entry. This was assigned to said Sampson and surveyed for him on December 6, 1841. All these several entries were made by the original enterers under and by virtue of Occupant Law 1840, p. 144, c. 62 (Whitney's Land Law, p. 280). The defendants in this case, who are the heirs of the late Robert I. Chester and those who hold under them, claim the said land covered by the above grants under and by virtue of a grant for 2,000 acres, No. 5,119, dated July 22, 1846, based on entry No. 450, dated June 2, 1843, of land issued to the said Robert I. Chester, as assignee of Samuel J. Hayes.

"The bill shows that these are wild bottom lands and they have never been actually occupied, and avers that the complainants, having the older entries, though the younger grant, are entitled to recover said land. The bill charges further by way of amendment that the title which was obtained by the said Robert I. Chester on his junior entries inured to the benefit of the original entries, and that he and his heirs under him hold the said title in trust for the benefit of the holders of the original enterers or their assigns, and prays that the title be divested out of them and vested in the complainants.

"The defendants interposed five grounds of demurrer to the bill, the first three of which were overruled by the court, and there was no appeal. The fourth and fifth, which were sustained by the court, are as follows: '(4) That said bill shows on its face that the complainants are seeking to eject the defendants from lands, when the title of the defendants thereto and therein is superior to that of complainants, in that the grants exhibited and relied upon by the complainants were issued without authority of law, the bill showing that the grants were issued in July, 1900, to the complainants as the heirs of Isaac Sampson, deceased, on extension entries made in 1840. (5) That the said bill shows on its face that the ancestor of the complainants, Isaac Sampson, had abandoned the entries on which said grants, exhibited by the complainants are based, and took no steps to perfect the title in said lands in his lifetime.' From the action of the court sustaining the above grounds of demurrer and dismissing complainants' bill, complainants appealed, and assign the following errors: First. The court erred in holding that the defendants had the better title to the land sued for. Second. The court erred in holding that the entries on which complainant's grants are based had been abandoned by the complainants. Third. The court erred in holding that complainants' grants were issued without authority of law.

"The several extension entries in this case were based upon a small entry which it appears, but not very definitely, was founded upon a warrant from the state of North Carolina, and were made under the provisions of Acts 1840, p. 144, c. 62, § 2, compiled in Whitney's Land Law on page 280, and is as follows: 'Where any person is now or hereafter may become the owner by deed, grant, entry, or occupant reservation of a less quantity than 200 acres of land, the owner or owners thereof may enlarge the same to any quantity not exceeding 200 acres, provided always that they do not interfere with any occupant settler, and that no person shall be entitled to the benefit of this section who may be, at the time he may wish to make such enlargement, the owner of 200 acres of land.' The title of this act recites that 'it is for the benefit of the occupant settlers south and west of the congressional reservation line—and in that limit the lands in controversy lie.' Complainants, having the older entries though the younger grants, must prevail, unless it appears that their entries were abandoned, or the grants to them were unauthorized, unwarranted, and invalid. It is said that grants to the complainants having issued in 1900, the court cannot look behind them, but must accept them as final and conclusive evidence of their validity and of complainants' rights thereunder. But it is evident that the mere issuance of a grant by the Governor and Secretary of State is not conclusive of its validity in every instance. And it has been held that entries and grants may be questioned and

declared void wherever there is a want of property in the state at the time they issue, as, when a grant issues for land already validly granted, or, when there is a want of power in the officers appointed by the government to receive the entries or to issue the grants apparent on the face of the papers, or as a matter of law. Polk's Lessee v. Windel, 2 Overt. 433, Fed. Cas. No. 11,251; McLemore v. Wright, 2 Yerg. 326; Crutchfield v. Hammock, 4 Humph. 204; Roach v. Boyd, 1 Sneed, 134; Curle v. Barrel, 2 Sneed, 65; Woodfolk's Lessee v. Nall, 2 Sneed, 678; Fowler v. Nixon, 7 Heisk. 725; Moss v. Gibbs, 10 Heisk. 284; Galloway v. Hopkins, 11 Heisk. 353. It is a rule well settled and not now questioned that a complainant in ejectment must recover, if at all, upon the strength and perfectness of his own title, and not upon any supposed defect in that of the defendants. Garrett v. Belmont Land Co., 94 Tenn. 479, 29 S. W. 726; King v. Coleman, 98 Tenn. 570, 40 S. W. 1082; Lowry v. Whitehead, 103 Tenn. 397, 53 S. W. 731. And it is from this standpoint that we proceed to examine the present controversy.

"It is insisted that complainants' title in this case is defective because their entries were abandoned before grants issued, and that this must be presumed from great lapse of time, and because there was no power in the officers of the government to issue the grants as was done on the 17th day of July, 1900. These questions can more satisfactorily be treated together than separately. It has been held by this court that a title to land will not be presumed to be abandoned for mere lapse of time, but there must be some affirmative act to constitute and positive proof to establish abandonment, and that the burden of proof is upon the party claiming the abandonment to prove it. This was so held in Woods v. Bonner, 89 Tenn. 411, 18 S. W. 67, and Carson v. Stevens Lumber Co. (no opinion filed). In Woods v. Bonner, 89 Tenn. 411, 18 S. W. 67, the outstanding title which it was claimed was abandoned was one based upon a deed delivered, registered, and preserved as a muniment of title. Page 415 of 89 Tenn., page 68 of 18 S. W. In Carson v. Stevens Lumber Co. it was held that the title was not abandoned because the plaintiff took out a grant at a time when he was authorized by law so to do upon his entry; in other words, when there was a law in force authorizing the issuance of a grant upon such an entry as was held by complainant. In that case the entries were made in 1840. The grant was issued in 1872. At the latter date Acts 1869, p. 25, c. 24 (Whitney, p. 678), was in force, and under its provisions further time of 20 years from its passage, or until December 1, 1889, was given to all persons to perfect their titles to lands upon all entries made prior to that time. Under that act the complainant in the case of Carson v. Stevens Lumber Co. took out his grant and perfected his title, and had the authority of that act for so doing. That act would have expired by its own limitation December 1, 1889, and would have been no authority to issue a grant on the 17th day of July, 1900, when the grants in the present case issued. But that act of 1869 was repealed by Acts 1873, p. 120, c. 82, approved March 24, 1873 (Whitney, p. 218), and the time was limited to persons to perfect their titles by the latter act of two years from the date of that act, or until the 24th day of March, 1875. Since the date of March 24, 1875, there has been no act extending the time within which titles may be perfected, and a grant issued in 1900 upon an inchoate title or entry previous to 1873 is without warrant of law, and is void and inoperative. We need not, therefore, inquire critically into the title of defendants, as the title of complainants is not based upon any subsisting title at the time the grant was issued, July 17, 1900, and this must be so whether it stands upon its own merits alone or whether it interferes with any other intervening rights or titles.

"Complainants' entries were made in 1840. Since that time the Legislature has time and again extended the time within which he might perfect his title and obtain his grants: On 30th of November, 1841, the time was extended two years. On 12th of October, 1843, the time was extended two years. On 26th of January, 1846, the time was extended two years. On 24th of January, 1850, time was extended to September, 1851. On 3d of November, 1851, time was extended to March 1, 1854. On 20th of December, 1853, time was extended to April 1, 1856. On January 22, 1855, time was extended to November 1, 1857. On 30th of October, 1857, time was extended two years. On 20th of

October, 1859, time was extended 12 months. On 5th of December, 1866, time was extended two years. On 1st of December, 1869, time was extended 20 years. On 24th of March, 1873, time was extended two years, and the Act of December 1, 1869, was repealed. Since the act of March 24, 1873, there has been no act extending further time to perfect prior entries. These are general extension laws. Special extension acts relating to lands south and west of the congressional reservation line close with the act of 1847, p. 50, c. 20, and that act extends the time to perfect titles to September 1, 1849; and since the latter date there has been no extension act relating specially to lands south and west of the congressional reservation line, where the lands in controversy lie. See Whitney's Land Laws, pp. 619 to 624, inclusive. Under none of these acts have complainants sought to perfect their title and obtain a grant, and it is only after the lapse of 50 years that they have obtained grants. In the meantime it appears that the lands have remained wild and unoccupied, and with no apparent assertion of ownership; and it is not even alleged that there has been the payment of taxes by complainants.

"It is evident that a different rule must prevail in regard to the abandonment of incomplete and inchoate titles vesting in entries from that which obtains as to titles perfected by deeds or grants. In case of a deed or grant the grantee may simply remain inactive, as nothing further is required of him to perfect his title, and he is in no danger except from an actual adverse holder with or without color of title. But when the title is incomplete and the holder of it fails, refuses, or declines to perfect it or to avail himself of opportunities offered him to perfect it coupled with legislative threats of forfeiture, if he does not do so, it is a strong circumstance to show abandonment. That an entry may be abandoned is held in Bullock v. Tipton, 2 Head, 408, where Cochrane made an entry during a hiatus, and could no doubt have perfected his title, but abandoned it when he ascertained that it conflicted with Tipton's prior entry. The court held that, being abandoned, no equity or right to a grant could be predicated on it. The same principle was announced prior to that date in Vaughn & Brown v. Hatfield, 5 Yerg. 235, in which case the court, through Judge Peck, held that the caveatees had abandoned their entry in making their survey.

"The whole body of extension acts passed by the state, giving from date to date further time to perfect titles upon previous entries is based upon the idea of abandonment of such prior entries. A large number of these acts, while extending time to perfect previous entries, expressly provide that in case of failure to perfect such titles under the act, the entries or rights shall be void, and the land subject to entry by any other person under the law. We refer to only a few of these acts, to wit: Acts 1823, c. 35 (Whitney, p. 239); Acts 1842, p. 39, c. 34 (Whitney, p. 285); and Acts 1847, p. 50, c. 20 (Whitney, p. 303), the latter being the last extension act especially relating to lands and titles south and west of the congressional reservation line. In Acts 1823, c. 35 (Whitney, p. 237), it is expressly provided that upon a failure to comply with its provisions the entry shall be voidable and the lands liable to appropriation as other vacant lands in the state. And in Sampson v. Taylor, the court, through Judge Caruthers, in 1854, said that act had never been altered by any of the extension acts during the 31 years since its passage; nor has there been any such act subsequent thereto. It is clearly the holding of the court in all the cases that in the absence of any statute extending the time for perfecting titles based on old entries, such old entries could not be carried into grants, and during the hiatus between the several extension acts such entries could not be perfected by grants.

"This idea is recognized, if not expressly held, in Tipton v. Sanders, 2 Head, 690; in Williamson v. Throop, 11 Humph. 265; in Sampson v. Taylor, 1 Sneed, 600; in Blevins v. Crew, 3 Sneed, 155; in Henegar v. Matthews, 88 Tenn. 132, 14 S. W. 554; in Scott v. Price, 2 Head, 536. In Tipton v. Sanders, 2 Head, 690, the court says, 'the effect of the acts of 1851–52 and 1853–54 was to resuscitate the right [to a grant] and prolong the time for perfecting the plaintiff's title to a period beyond the date of his grant,' recognizing the necessity for a resuscitating act to authorize the grant. In the case of Williamson v. Throop, 11 Humph. 265, the court, speaking through Judge Green, held that

it was competent for the Legislature to give validity to an entry previously made by force of such subsequent extending law, and this was also a recognition of the necessity for such reviving or authorizing act. In Sampson v. Taylor, 1 Sneed, 600, the court, through Judge Caruthers, said: 'Then, in order to preserve the advantages of priority of entry, the same must have been made and the grant obtained in the specified time prescribed by the act of 1823 or within some period of extension. These are conditions imposed by the state, and they must be complied with by all who set up claim to her lands.' In the case of Blevins v. Crew, 3 Sneed, 155, lands in the Hiawassee district were involved. The extension acts specially relating to that district simply extended time within which grants might be obtained, but did not declare any forfeiture for failure to do so. The court held that there was no difference in principle between that case and the cases of Williamson v. Throop and Sampson v. Taylor; in the first of which cases it was held that if the older entries were not perfected by grants within a certain time they should be void as against younger entries and grants; and in the latter case, that the older entries should be voidable and the land subject to appropriation as other vacant lands under Acts 1823, c. 35, § 10. In Henegar v. Matthews, 88 Tenn. 132, 14 S. W. 554, the court, through Judge Lurton, says: 'Between November 16, 1839, and January 25, 1840, there was no law under which a grant could have issued upon Henegar's entry—but the act of 1840 resuscitated this entry.' In Scott v. Price, 2 Head, 536, the court, speaking through Judge Wright, holds that occupant extensions may lose their prior rights by not perfecting their titles before a hiatus, and also states that it is unlawful for a general enterer to interfere with any occupant right, unless it be during some hiatus in the law by which they are secured. Indeed, this idea of the necessity for a resuscitating act is the sole basis for all our extension laws, and unless this was the view of the Legislature and the courts, there was no necessity for any extension acts whatever.

"We have been cited to no cases, and have been unable to find any, where a grant issued upon an old entry during a hiatus and not based upon an extension or resuscitating act has been held valid. We are at a loss to know how there could be such holding, in the face of the manifest purpose of the various extension laws to confer authority to perfect titles, and the manifest policy of the state to force claimants to perfect such titles so that they might not rest in an incomplete and inchoate state or condition. Every opportunity was afforded by means of these extension acts, and at the same time every caution was given to claimants to avail themselves of the opportunity thus extended. It is the policy of the state that titles should be at rest, and. after giving extensions of time for the perfection of titles from time to time from 1779 in the case of military titles, and from 1821 in regard to titles south and west of the congressional reservation line, until September 1, 1849, and generally to sections of the state until March, 1875, the Legislature has made no further provision to validate titles that are based on entries prior to 1873. That a resuscitating act was considered necessary appears also from the provisions of the act of October 20, 1859 (Laws 1859–60, p. 1, c. 1; Whitney, p. 617), when it is provided that any hiatus that might occur under the act should not impair the rights of infants, married women, persons of unsound mind, etc., which was passed soon after the decision of the several cases in 2 Head, when the hiatus question was so fully treated, and clearly implies that the rights of adults should be forfeited as a consequence of such acts, but a like result should not apply to persons under disability.

"We think the present case does not fall within the rule laid down in Fogg v. Williams, 2 Head, 474, and Egnew v. Cochrane, 2 Head, 325. Those cases involve titles based upon North Carolina warrants which, under the cession act, the compact, the Constitution, and earlier acts of Tennessee, were to be protected and perfected in preference to all others. In the case of Fogg v. Williams, 2 Head, 474, it was held by the court, through Judge McKinney, not that the subsequent entries and grants were void, but that the parties took titles under them, but, under the cession acts, etc., they held them in trust for the North Carolina warrant owners; and in Egnew v. Cochrane, the court did not hold that complainant's inchoate title was void, but simply that com-

plainant had abandoned it. But the titles in this case are extension titles, and while based upon a seed grant of about 6 or 10 acres, possibly, though the facts do not appear, upon a warrant from the state of North Carolina, yet they arise under the operation of Tennessee law, and are not titles derived from the state of North Carolina or based on North Carolina warrants, except in the sense stated, and no trust exists in favor of these titles.

"We conclude that in view of the long delay to perfect complainant's titles—the persistent failure or refusal to take advantage of any of the numerous resuscitating or enabling acts for a period of 50 years—the fact that no real occupation and no apparent ownership or assertion of title, not even the payment of taxes during that time, has been made of the lands, the complainant must be held to have abandoned his titles, and the issuance of a grant in July, 1900, after the lapse of a hiatus of 25 years, during which there has been no authority to issue a grant upon such an entry, cannot revive or resuscitate his title or infuse new life into his dead entries. And this must be the effect without regard to the validity and strength of defendant's title. Whether that would prevail in an action of ejectment brought by defendants we need not consider. We cannot try an action of ejectment upon a comparison of titles [Lowery v. Whitehead, 103 Tenn. 397, 53 S. W. 731], but we conclude that complainants have not shown a perfect title and cannot recover, and the decree of the court below is affirmed with costs."

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

H. H. Ingersoll, for appellant.

J. A. Susong, for appellee.

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

The opinion of the Tennessee Supreme Court in Sampson's Heirs v. Chester's Heirs, though announced before this case was originally heard by this court, was unreported, and, being unknown to counsel, was not called to our attention. The question in that case arose between two Tennessee grants covering the same land. The court held that both grants were based upon invalid entries; the complainants' entry, because not carried into a grant during the life of any extension act, and the defendants, because junior to the complainants and not made during any hiatus. The court, in this situation of matters, held that an entry was not indispensably necessary to the validity of a grant, citing for this, Craig's Lessee v. Vance, 1 Overt. 182, a case referred to and commented upon in former opinion of this court. Neither grant being based upon a valid entry, the court held that the state's title passed under the older of the two grants.

Inasmuch as counsel for the defendant have very earnestly urged that the decision of the question of the validity of the grant based upon no entry or upon one which had expired was not necessarily involved, and is not, therefore, an authoritative opinion of the Tennessee court which we should follow, we have set out the opinion of the court elsewhere, as well as the dissenting opinion by Justice Wilkes. The dissenting opinion makes it plain that a majority of the Tennessee court chose to place the opinion and decision, not upon the ground so strenuously urged by Justice Wilkes, that the complainants had failed to show a perfect legal title and could not recover, however weak the title of the defendants, but upon the ground that, although the entries upon which both grants were based were void, that an entry was not essential to the validity of a grant and, there-

fore, the older of the two conflicting grants passed the state's title. This view of the decision is emphasized so strongly by the dissenting opinion that we cannot escape the conclusion that the Tennessee court has most positively decided that an older grant based upon an expired entry passes the legal title as against a younger grant based upon a younger entry made when there was no hiatus. It is true that the Tennessee court does not in express terms overrule Crutchfield v. Hammock, 4 Humph. 203, and the other cases following that, which are cited in the opinion of this court. But it is impossible to reconcile the opinion with those cited by us, some of which are noticed in the dissent of Judge Wilkes, or with the interpretation which we placed upon them, and this is made very evident by the whole tenor of the dissenting opinion. The question is one so peculiarly local in character, involving as it does the title to Tennessee land under the Tennessee statutory provisions concerning the granting of the state's land, that we feel under the highest obligation to conform our decision to the construction of the Tennessee statute law as announced by the Tennessee Supreme Court in his latest authoritative conclusion.

The Burgner grant, the grant under which the complainant deraigns title, is the oldest grant. It issued upon an expired entry. The West grant laps upon the Burgner grant. It is junior in date and issued upon a junior entry made at a time when the Burgner entry was a live entry. Under the decision in Sampson v. Chester, the Burgner entry when the Burgner grant issued was void, and under the same decision the West entry, so far as it conflicts with the Burgner entry, was also void, because made when there was no hiatus. The case is therefore governed by the decision in Sampson v. Chester. Neither entry is in evidence. Neither was valid when carried into a grant, so far as the younger conflicted with the senior entry. But this does not affect the validity of the grant to Burgner. It carried the state's title as of the date of the grant, and the state had no title to grant when the West grant issued to the land covered by the Burgner grant. There can be no doubt but that if this case were being heard in the Supreme Court of Tennessee, the Burgner grant would be held a valid grant. We shall therefore withdraw our former opinion, and hold that the complainants' title under the Burgner grant is the superior title, and affirm the decree of the Circuit Court in so far as it held the Burgner grant to be superior to the extent that the one interfered with the other. The Circuit Court did not decide the extent of this interference, and gave the parties leave to try out this question of boundary in another suit if they shall be so advised. The assignments which go to the complainants' deraignment of title under the Burgner grant have been considered. We conclude that the Burgner land was sold and title passed under the levy, condemnation proceedings, and order of sale under the Sevier judgment.

E. S. Mathews, executor of Alexander Mathews, redeemed from Sevier and obtained a good title under the Sevier proceedings. It is therefore unimportant whether his own levy and sale was regular or irregular. The description of land sold under the Sevier levy and

condemnation proceedings was, in our judgment, sufficient. The identification was such as to give information to the owner, and such as would enable a purchaser to learn what land he had bought. Stephens v. Taylor, 6 Lea, 307, 309.

The levy of the Sevier execution is objected to because made by one J. G. Feller, who does not append to his signature upon his return the office held by him. That he was in fact a constable at the time appears from his designation as such just before and just after upon other process in same case, as well as from parol evidence that he was exercising the functions of a constable. That he assumed to be an officer and made a levy and return under a writ directed only to a lawful officer is enough, upon a collateral attack, to justify the presumption that he was such at date of his levy. Keely v. Sanders, 99 U. S. 441, 447, 25 L. Ed. 327.

There is nothing in the objection that the legal title at date of levy 1867 was not in Burgner, but in one Tilford as trustee under a mortgage made by Burgner in 1841. It is not satisfactorily shown that the land described in the trust deed is any part of the land now claimed by complainant. Aside from that, the time which had elapsed between the making of the trust deed to Tilford and the levy by Sevier was such as to justify a presumption that the debts secured thereby had been satisfied; in which event the title would revert to the grantor, the trust having been executed. That trust deed was made December 8, 1841. The levy was made May, 1867. Upon a collateral attack, and in absence of all evidence that any of the claims so secured were still unpaid, a presumption may be indulged in favor of the satisfaction of the deed. Thompson v. Thompson, 2 Head, 405. After so great a lapse of time every reasonable presumption should be indulged in favor of the validity of the proceedings now attacked collaterally. Pope v. Couts et al., 16 Lea (Tenn.) 82; Sheafer v. Mitchell, 109 Tenn. 182, 71 S. W. 86.

One link in complainant's chain of title was a sheriff's deed made April 30, 1890, to G. W. Tilford. Tilford at the time was dead. Pending the litigation appellee, complainant below, filed a supplemental bill for the purpose of bringing into the case a curative sheriff's deed, made pending the suit, for the same land, direct to complainant by direction of the executor of Tilford. Several objections are made to this deed. Tilford redeemed this land in 1869, from E. S. Mathews, executor, who had redeemed from Sevier, but took no deed from the sheriff. In April, 1890, the sheriff then in office and successor to the sheriff in office at date of Tilford's redemption, made a deed to Tilford, not knowing that Tilford was dead. This sheriff's deed was one of the links in the complainant's title when this bill was filed. Being made to one who was dead the deed was ineffectual. Weihl v. Robertson, 97 Tenn. 458, 37 S. W. 274, 39 L. R. A. 423. To cure this defect, complainants procured a written direction from West, executor of Tilford, to the sheriff then in office, to make a deed direct to them, they having acquired Tilford's equitable title. This was done and another deed executed by the sheriff then in office, being the successor to the sheriff who made the sale under the

condemnation procedings under the Sevier judgment referred to heretofore. This deed was made in 1903. The authority of Tilford's executor to dispose of any interest Tilford may have had by virtue of his redemption of this land from Mathews is challenged upon the ground that Tilford had been dead 16 years and his estate wound up. But West had not resigned or been removed, and this asset remained to be administered. He had ample power under Tilford's will to sell and convey any part of Tilford's estate, real and personal, and we see no reason for doubting the validity of his direction to the sheriff to make deed to the complainant company. It is next said that this sheriff's deed was made 33 years after the execution sale of the land conveyed. The Tennessee Code (Shannon's Code, § 4783), authorizes the sheriff who makes such sale to make deed to the purchaser or any one succeeding to the rights of such purchaser "at any time, either within or after the expiration of the two years allowed for redemption." Section 4785 of same Code provides that any sheriff in office may execute deeds for lands sold by former sheriff, and that such deed "shall be as valid as if executed by such former officer." The statute prescribes no time within which a deed may be made by the successor of a sheriff or other officer who made a sale, and we see no reason for denying the power in this case. Sheafer v. Mitchell, 109 Tenn. 203, 71 S. W. 86, et seq.

Finally, it is said that a complainant can not acquire a title pending his suit and bring it forward by supplemental bill. That is not this case. The complainants had an imperfect but inchoate title when they brought this suit. They simply perfected the existing title by obtaining a valid sheriff's deed in place of an invalid one which attempted to convey the same title. It was not error to permit a curative deed to be thus brought forward. Gibson's Suits in Equity, 650; 2 Daniel Pl. & Pr. (4th Ed.) 1515 and 1516, and notes; Mutter v. Chanvel, 5 Rus. 42; Sadler v. Lovett, 1 Moll. 162; Jaques v. Hall, 3 Gray (Mass.) 194.

The decree of the lower court must be affirmed.

UNION IRON WORKS v. SPOTTSWOOD et al.

(Circuit Court of Appeals, Fifth Circuit. March 6, 1906.)

No. 1,505.

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

Harry T. Smith and Gregory L. Smith, for appellant.
H. Pillans, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. We find that this case was correctly ruled in the District Court (The Nimrod, 141 Fed. 215), and the judgment appealed from is therefore affirmed.

KANSAS UNION LIFE INS. CO. v. BURMAN.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1905.)

No. 2,217.

1. CONTRACTS—BREACH OF ONE OF TWO INTERDEPENDENT CONTRACTS.

Where two contracts are made between the same parties on or about the same day, the later of which was demanded by the plaintiff as a condition for executing the first, so as to make the observance of both obligatory, and the plaintiff himself breaches the first, it places him in no position to maintain action against the other party for an alleged breach of the later signed contract.

2. INSURANCE—CONTRACT WITH AGENT—BREACH BY PRINCIPAL—ESTOPPEL.

It is a wholesome rule of law that where a party assigns a reason for his conduct and decision touching the matter involved in the controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration. Where an agent for an insurance company, under a salary contract and for certain commissions, sends in his resignation to the company, specifying the grounds thereof, *held* that, in a subsequent suit against the insurance company for breach of the contract of employment, the plaintiff is estopped from alleging other grounds as the cause of his resignation.

3. MASTER AND SERVANT—DISCHARGED EMPLOYÉ—ACCOUNTING—SUIT FOR DAMAGES—BREACH OF CONTRACT.

Where an employé sues the employer for damages for wrongfully terminating the contract of employment, he must render an accounting for salary and profits received in other employment covering the time in question.

[Ed. Note.—Mitigation of damages for wrongful discharge by failure of servant to seek or accept other employment, see note to Alaska Fish & Lumber Co. v. Chase, 64 C. C. A. 5.

For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 54–56.]

4. INSURANCE—CONTRACT WITH AGENT—PERFORMANCE—DECREE OF COURT.

A contract between two insurance companies was entered into, whereby the business and policies of one were taken over by the other, and the agent of the transferror company took service under the transferee company under an agreement with it to guaranty his commissions on premiums on renewal policies as paid to the company; but before any such premiums were collected, by a decree of court, at the suit of stockholders in the transferror company the transfer agreement was declared to be ultra vires, the statu quo before the transfer agreement re-established, the transferee enjoined from collecting such renewal premiums, and the agent was enjoined from paying the same, save to the transferror company. *Held*, that the vis major which prevents performance in such case is the interposition of the court, and that such decree rendered impossible of performance of said contract between the transferee company and the agent.

5. SAME.

The plaintiff, holding a contract of employment as agent of the Kansas Mutual Life Insurance Company for a fixed salary and commissions on premiums on renewal policies, after he had obtained policies sufficient to entitle him to such commissions, the said insurance company, by convention, transferred its business and policies to the Union Life Insurance Company. In consideration of plaintiff continuing in the service of the latter company as agent on an agreed salary and commissions on new business, the latter company guarantied the performance of the mutual company's contract with the plaintiff for commissions on renewal policies as paid. The said contract so guarantied provided that in case the employment should end for any cause, the company would pay his commis-

sions on renewed policies as the same were paid to the company. Before any such premiums were collected or paid to the company, by a decree of court the agreement between the two companies was declared void and the statu quo re-established. *Held*, that the plaintiff could not maintain action against the Union Life Insurance Company for the estimated value of such renewal policies on the ground that the defendant company had wrongfully rendered the contract impossible of performance.

(Syllabus by the Court.)

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

The Kansas Mutual Life Insurance Company was a mutual life insurance company organized under the laws of the state of Kansas. On the 14th day of April, 1898, it entered into a contract with the defendant in error, Frank Burman, appointing him state manager for the state of Nebraska. His compensation consisted of certain commissions on the first five years' premiums on policies obtained by him, varying from 50 to 70 per cent., and renewal commissions on premiums paid subsequent to the first year's premium of 7½ per cent., "as paid to the company," to be paid so long as he should remain in the active employ of the company under the contract, and in the event of the termination of the contract from any cause after two years from its date the company was to continue to pay him, if living, or to his executors, administrators, or assigns, the renewal commissions "as they accrue and are paid, less any indebtedness, for as many years as the party of the second part shall be in the employ of said company, provided there should not be less than $500,000 of insurance in force on the books of the company at the time of such termination, written by Burman or his agents. In case of collection of renewals by the company, 2½ per cent. should be deducted to cover the cost of said collection."

There were certain supplementary contracts between the parties modifying the first contract, which are not material to the questions to be decided. The plaintiff in error was organized as an old-line life insurance company under the laws of the state of Kansas. On the 18th day of December, 1902, the Kansas Mutual Life Insurance Company (hereinafter for convenience called the "Mutual Company") and the said Kansas Union Life Insurance Company (hereinafter for convenience called the "Union Company") entered into an agreement whereby the Mutual Company in form transferred to the Union Company all its assets and business controlled or possessed by it, whereby the Union Company undertook to reinsure all of the risks of the Mutual Company. Upon the execution of this contract between the companies, of which the defendant in error was advised, under a parol agreement he took service under the plaintiff in error in continuation of the business in the state of Nebraska. On the 10th day of January, 1903, the said agreement and transfer between the two said companies was assailed by certain of the stockholders of the Mutual Company, by suit instituted in the United States Circuit Court for the District of Kansas, on the ground that the said contract and transfer were ultra vires. The two companies were made defendants in said suits. On the 5th day of February, 1903, on preliminary hearing, Judge Hook, the presiding judge, granted a temporary injunction, staying the further prosecution of said arrangement between the two companies, and appointed three trustees, with the powers of receivers, to take possession of all the property attempted to be transferred by said contract of December 18, 1902. With full knowledge of the pendency and object of said suit, the defendant in error entered into a written contract with the plaintiff in error, said Union Company, of date January 30, 1903, whereby the plaintiff in error agreed to continue the defendant in error as the state manager for Nebraska for one year, on a salary basis of $200 per month. In consideration of this special salary contract and the remuneration hereinafter named the said Frank Burman covenanted and agreed to devote his whole time, talents and energies in promoting the best interests of said company in every way, under direction and co-operation with its executive committee. The parol evidence

admitted by the court tended to show that the defendant in error was unwilling to enter into this salary contract unless the plaintiff in error would guaranty to him the commissions as provided under his contract with the Mutual Company; and that accordingly a written contract was entered into between them, of date January 31, 1903, which recited:

"That, whereas, on the 18th day of December, 1902, a contract in writing was entered into by and between the Kansas Union Life Insurance Company and the Kansas Mutual Life Insurance Company of Topeka, Kansas, wherein and whereby all of the outstanding risks of the Kansas Mutual Life Insurance Company were reinsured in the Kansas Union Life Insurance Company; and whereas, in said contract of reinsurance the said the Kansas Union Life Insurance Company guarantied to and did assume all of the outstanding liabilities of the Kansas Mutual Life Insurance Company of every kind, nature and description whatsoever. Now, therefore, in consideration of the payment of one dollar and other valuable consideration to the party of the first part in hand paid by the party of the second part hereto the receipt of which is hereby acknowledged, the party of the first part doth hereby guaranty unto said party of the second part to carry out all the terms and provisions of the certain contract made and entered into on the 14th day of April, in the year 1898, between the said the Kansas Mutual Life Insurance Company of Topeka, Kansas, party of the first part, and Frank Burman, of Omaha, Nebraska, party of the second part; and doth further guaranty to the said party of the second part to carry out all of the terms of the certain supplemental agreements made and entered into between the said the Kansas Mutual Life Insurance Company and the said Frank Burman at various times prior to this date; and in consideration of this guaranty the said party of the second part agrees on his part with the party of the first part hereto to carry out all of the terms of said last named contracts."

The salary contract above referred to was signed on behalf of the Union Company by J. P. Davis and W. M. Wellcome, executive committee; and the guaranty contract was signed on behalf of the company by J. P. Davis, president, and attested by John E. Moon, secretary. The validity of these contracts is denied by the plaintiff in error on the ground that under the by-laws of the association such contracts could only be executed by the executive committee, which at the time consisted of five members, the president, vice-president and secretary together with two other members of the board; and that the execution of these instruments was not authorized by the executive committee. The defendant in error on being advised of such action in the United States Circuit Court had some correspondence with the president of the Union Company respecting the matter; and on the 13th day of February, 1903, he sent in his resignation in the following letter:

"Omaha, Neb., Feb. 13, 1903.

"Mr. J. P. Davis, Pt., Topeka, Kansas—Dear Sir: In view of the decision of Judge Hook in the recent case testing the legality of the transfer of the Kansas Mutual into the Kansas Union and placing it in the hands of trustees, thereby making it impossible for me to be of any service to your company, I have decided to sever my connection with the Kansas Union Life Insurance Company, as you and the public generally are aware the complications that have arisen in this matter are such that a conscientious agent of the Kansas Union or the Kansas Mutual would be doing both himself and the company he undertook to represent an injustice in attempting to write insurance at the present time. And it will be at least some time before this embarrassment can be overcome. I have worked faithfully for your company and had the brightest prospects for the present year's work, and would have had the same prospects had not the Kansas Union interfered with the Kansas Mutual by undertaking to absorb it in the manner that has now been decided by the court to be contrary to law. My contract with the Kansas Mutual expired January 31st last, in so far only as the salary and expense provision applies, but is still in full force and effect as to the renewal commissions, which for several years would have earned me a considerable sum of money had not this illegal transfer been made. It is evident that this union of the two

companies has very materially damaged me with reference to my Kansas Mutual contract, and as the Kansas Mutual Life Insurance Company is directly responsible for this loss to me, I will, as soon as I can estimate my actual damages, present a claim against your company for such damages. And while I will make this claim against your company, I do not in any manner waive any rights I have against the Kansas Mutual Life Insurance Company under all my contracts with that company. I therefore by these presents tender my resignation as state manager for Nebraska, to the Kansas Union Life Insurance Company to take effect March 1, 1903, but desire it to be distinctly understood by the company that, by so doing, I do not waive any rights I have under my contract with your company, whereby your company has guaranteed my renewal commissions due and to become due under my contracts with the Kansas Mutual Life Insurance Company. I regret very much that I have been forced to take this step, but I have no apologies to make, in view of the fact that I am in no sense responsible for the disruption of the company. Yours very truly,

"[Signed] Frank Burman, State Mgr."

On the 18th day of February, 1903, this resignation was formally accepted by letter from the president of the company. The evidence tended to show that between the date of the said contracts of January 30th and 31st and the formal resignation of the defendant in error, he had received proposals from the Fidelity Mutual Life Insurance Company to enter its service in the same field in the state of Nebraska, which proposals he held in abeyance. On the next day after his resignation, to wit, the 14th day of February, 1903, he entered into a contract with the said Fidelity Company as superintendent of the state of Nebraska, at a salary of $200 per month, with a bonus of 6 per cent. of the gross premiums received from its business in excess of the premiums received in the state of Nebraska for the previous year. He drew his salary from the plaintiff in error to the 1st of March, 1903, and his occupation with the Fidelity Company began on the date of his contract, so that from the 14th day of February to the 1st day of March he drew pay from the two companies, which fact was not then known to the plaintiff in error. By the said interlocutory order of the court of February 5, 1903, inter alia, it was ordered that: "All agents, attorneys and subordinates whatsoever of the Kansas Union Life Insurance Company, having in their possession any money or property of whatsoever nature or description, belonging to or derived from the Kansas Mutual Life Insurance Company, either directly or indirectly, be and they are hereby ordered and directed, when so demanded, to account for and turn over the same to said trustees above appointed."

In conformity therewith the plaintiff in error, its servants and employés, turned over to the trustees the property and business received under the contract of December 18, 1902. Said interlocutory order, declaring the arrangement between the Mutual and the Union Companies void as ultra vires, was made final on the 23d day of March, 1903. Subsequently, on the 27th day of June, 1903, all the property and business attempted to be so conveyed by the Mutual Company to the Union Company was, under order of the court, transferred and sold by the trustees or receivers to the Illinois Life Insurance Company (the latter company, by an enabling statute of the state of Kansas being authorized to so acquire said property). Both in the decree nullifying the transfer arrangement between the Mutual and the Union Companies and in the order of sale to the Illinois Life Insurance Company, the court imposed the obligation upon the trustees of the Mutual Company and the transferee, the Illinois Life Insurance Company, to assume and pay all outstanding obligations of the Mutual Company. On the 10th day of March, 1903, the defendant in error brought this action, by which he sought to recover the present value of the renewal premiums (commissions) under the terms of the contract with the Mutual Company, and the loss and damages resulting from the failure to fulfill the contract for continuous employment for one year; treating the contracts between the defendant in error and the plaintiff in error as having been broken by the latter, so as to entitle him to recover the full present value of all commissions on renewal premiums. The court, by

its instruction, limited the recovery to the present value of commissions on renewal premiums; and under its charge the jury so found and returned a verdict for $4,750, the present value of the renewal commissions. The trial court proceeded upon the theory that it was not necessary for the defendant in error to prove the amount of the renewal premiums in fact paid to the company as provided under the contract of April 14, 1898; but that he might recover the present value thereof, past and prospective. To reverse the judgment, entered on this verdict, the Union Company prosecutes this writ of error.

C. J. Evans and L. A. Stebbins (W. W. Phelps, on the brief), for plaintiff in error.

Clifford Histed and Frank Lincoln McCoy (Robert H. Olmsted, W. H. Rossington, and Charles Blood Smith, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

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

This action is predicated of two written contracts of January 30, and 31, 1903. We are unable to perceive what advantage can be claimed by the defendant in error in having it conceded that the two contracts of January 30th and 31st "were made, executed and delivered at the same time and as part of one transaction." If they are to be treated as interdependent, so as to be an inseparable legal unit, the action should fail when no recovery was or could be had for a breach of the salary contract. Indeed, if, as his counsel insists, the inducement for the guaranty of the contract between the parties was the acceptance of service as agent under the plaintiff in error, and the defendant in error, of his own motion, resigned that agency, it would follow that the consideration between the parties for the two contracts should be held to have failed, and therefore the plaintiff in error would be absolved from liability on both. As the judgment was predicated alone of the contract of January 31st, it must stand or fall as the right of recovery thereon shall be decided.

The first contention is that the plaintiff in error broke the salary contract of January 30th by refusing to go on with its execution, independent of the interference of the court in annulling the contract of December 18, 1902, between the two companies; and second, by reason of its failure to renew the license to do business in the state of Nebraska. A brief review of the correspondence between the parties between January 31st and February 13th, the date of defendant in error's resignation, and the letter of resignation, will demonstrate that the resignation was voluntary, and that the contention now made respecting the obligation of the plaintiff in error to retain the defendant in error under the salary contract and the failure to renew the license, is a mere afterthought. In the letter of February 5th, advising the defendant in error of the decision of Judge Hook and the purpose of the court to perpetuate the business of the Mutual Company, Mr. Davis, president of the Union Company, after saying that "the decision was a great disappointment," said:

"In the meantime, the officers of the company are instructed to continue the business, but pay out no money until the trustees are qualified to take possession, which we assume will be within the next few days. The trustees are instructed to continue the present officers and clerks, with a view of making the Kansas Mutual a going concern, doing a general business, until such time as the trustees and court agree upon a plan of reorganization. * * * It is our very earnest wish and desire that the Kansas Mutual be perpetuated. Whether there will be any amalgamation with the Kansas Union is a doubtful question. It is a question of expediency whether to undertake to build up a new and independent company from the start. From the fact that the court found against the company it seems to us plain that it would be quite difficult for the agents to write business for either company. On receipt of this letter kindly give me your views in regard to the advisability of undertaking to perpetuate the Kansas Union."

The response made to this letter by Mr. Burman was a demand to return to him a check for the amount of premiums paid on his own policy and that of his wife for the month of January; thus contributing to discredit the business and bring about lapses on policies. In this letter he made complaint of the failure to pay his salary. On the same day Mr. Davis wrote him informing him that under the order of the court the officers, clerks, agents, and collectors, should collect premiums under the supervision of the trustees appointed by the court, and remit them to the office as usual, and generally carry on the business of the Mutual Company as theretofore; that these officers were directed to pay out no money at the present time, and for that reason they were restrained from paying the February salary and March rent, until the trustees qualified and took charge of the business, promising to call their attention to this matter. In another letter of the same date Mr. Davis advised Mr. Burman of a conference had that morning with a number of the agents and the attorney, and that it was decided under the order of court that the officers, clerks, agents, etc., were expected to render their services to the Kansas Mutual Life, and therefore he advised that they proceed with the solicitation of applications for the Mutual Company.

On the 7th of February Mr. Burman wrote Mr. Davis in answer to the letter of the 6th, making inquiry as to whether the Kansas Mutual had authority to do business in Nebraska, as its certificate expired on the 1st of February, in which letter he said:

"It is my opinion that the Kansas Mutual Life will never succeed in reorganization, although I earnestly hope that they may do so. This reinsuring in the Kansas Union and then the reorganization of the Kansas Mutual has done irreparable harm. * * * Will you kindly advise me where I stand? I hold a contract with the Kansas Union Life Insurance Company, and also a guaranty with them that my renewal commission contract with the Kansas Mutual will be taken care of. And in the absence of a contract with the Kansas Mutual, I shall hold the Kansas Union for my salary and expenses. I shall be pleased to receive full instructions in regard to this matter. The impression of our policy holders and the public in general is that the company is insolvent and in the hands of receivers. * * * If this is not a fact, equal prominence should be given to repudiate that statement, and it also seems to me that every policy holder should receive an explanation as to the company's status and future and that cannot be done any too quickly."

This is the only reference made by Mr. Burman to the expiration of the license to do business in the state of Nebraska. On the same

date Mr. Davis wrote Mr. Burman, in explanation of why his salary had not been paid, that it was customary to remit the salary on receipt of itemized expense bill, which was not received until the 5th instant, and that he had no thought that the funds would be tied up as they were by Judge Hook's decision; otherwise a check would have been forwarded without waiting for the expense account. The letter inclosed an extract from the interlocutory order of the court holding the Kansas Union harmless from loss on account of the reinsurance contract, and to protect it against legal claims or demands against the Mutual Company prior to December 18, 1902, further stating:

"The Kansas Union has no other thought or intention but of being true to you and every other agent and employé, and have arranged for the Kansas Mutual to protect the Kansas Union along every line. * * * In the meantime, please use your influence in keeping the policy holders in line and also the agents in your employ."

On February 10th Mr. Davis, replying to a letter of Mr. Burman of the 7th instant, said:

"You ask the question where do you stand, holding a contract with the Kansas Union and also a guaranty that renewal commission under your Kansas Mutual contract will be taken care of. The Kansas Union expects to take care of your contract fairly and honorably, and from inclosures you will notice that the court provides that the Kansas Mutual shall protect and hold the Kansas Union harmless on account of any agent's contracts taken over from the Kansas Mutual Life Insurance Company. * * * Please be patient and kind about the matter, and you will receive a check for salary and all other expenses at an early date. You ask how about the policies issued by the Kansas Union. Of course, the Kansas Union will take care of and protect the interest of its policy holders."

On February 11th the trustees wrote to Mr. Burman, advising him that the business of the Mutual Life would be continued on the lines as near as possible conducted prior to the 18th of December, 1902; that he was authorized and directed to solicit applications for insurance in the Mutual Company on the same conditions as set forth in his agency contract; and directing him to encourage the policy holders to pay renewal premiums when due. The only response made to all this was the letter of resignation of February 13th, which shows on its face that the sole ground of resignation was his conclusion that the decision of Judge Hook, annulling the contract between the two companies, made "it impossible for me to be of any service to your company," and in which he stated that:

"The complications that have arisen in this matter are such that a conscientious agent of the Kansas Union or the Kansas Mutual would be doing both himself and the company he undertook to represent an injustice in attempting to write insurance at the present time. And it will be at least some time before this embarrassment can be overcome. * * * It is evident that this union of the companies has very materially damaged me with reference to my Kansas Mutual contract, and, as the Kansas Mutual Life Insurance Company is directly responsible for this loss to me, I will, as soon as I can estimate my actual damages, present a claim against your company for such damages. And while I will make this claim against your company, I do not in any manner waive any rights I have against the Kansas Mutual Life Insurance Company under all my contracts with that company. I therefore by these presents tender my resignation as state manager for Nebraska to the Kansas Union Life Insurance Company to take effect March 1, 1903,

but desire it to be distinctly understood by the company that by so doing I do not waive any rights I have under my contract with your company, whereby your company has guaranteed my renewal commissions due and to become due me under my contracts with the Kansas Mutual Life Insurance Company."

The letter of resignation shows on its face that this astute insurance agent was stating his case with a view to litigation with the plaintiff in error, and with ingenious particularity he specified the reasons that influenced his surrender of the agency. It was not upon the ground that the Union Company was unwilling to proceed to carry out the salary contract, or on the ground of a failure to renew the license. It is a wholesome rule of law, instinct with fair play, expressed by Mr. Justice Swayne, in Railway Company v. McCarthy, 96 U. S. (6 Otto) 267, 24 L. Ed. 693:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

This principle has been applied in the following instances: Davis v. Wakelee, 156 U. S. 690, 15 Sup. Ct. 555, 39 L. Ed. 578, where a bankrupt obtained his discharge, claiming that the judgment against him was not affected by it, it was held he could not, in a subsequent action on the judgment, deny its validity. In Davis, etc., Company v. Dix (C. C.) 64 Fed. 411, where it was held that the purchasers of a creamery repudiating the contract on the ground of fraudulent representations, could not thereafter set up an interpolation in the contract. In Harriman v. Meyer, 45 Ark. 40, where it was held that the defense that a tender was not made in ready money was not admissible where the prior objection was to inadequacy of price. In Wallace v. Minneapolis, etc., Elevator Company, 37 Minn. 465, 35 N. W. 269, where it was held that a bailee refusing to deliver wheat because claimed by another, could not afterwards refuse on the ground that the charges were not paid. In Harris v. Chipman, 9 Utah 105, 33 Pac. 243, where it was held that a plaintiff rejecting title for want of administrator's bond, could not be heard to object afterwards that letters of administration were not under seal. In Ballou v. Sherwood, 32 Neb. 689, 49 N. W. 796, where it was held that title objected to because of pending litigation, the purchaser could not afterwards object for want of seal on the deed. In Frenzer v. Dufrene, 58 Neb. 436, 78 N. W. 720, where it was held that where a party alleged his wife's recalcitrance as a reason for not executing a contract, he could not afterwards be heard to allege other reasons.

This rule should have especial application to this case for the palpable reason that had the defendant in error assigned as a reason for resigning his agency the neglect to renew the license, he would have afforded the company an opportunity to remove the objection. By not assigning the delay or omission as a reason for his refusal to continue his agency, and making no claim either in his letter of resignation or in fact in the petition that the plaintiff in error was unwilling to go ahead with the salary contract, he, in effect, said such ground is not relied on. The truth is that the most persuasive

influence for his hasty action in resigning his agency, within 13 days after the making of the contract between him and the plaintiff in error, was the one he carefully concealed in his letter of resignation, and that was that before he acted as the agent of the Mutual Insurance Company he had acted as the agent of the Fidelity Insurance Company, and that during the time between January 31st and February 13th he was conducting a correspondence with the president of the Fidelity Insurance Company, looking to the taking of service under it in the Nebraska field and to carry over to it, not only his own influence, but the services of his entire employés in that field, and he hastened into that new arrangement immediately after sending in his letter of resignation, without waiting even for the formal acceptance of said letter. And the evidence shows that in one of his letters to the president of the Fidelity Insurance Company he requested that the contract between them be concealed. And he drew salaries from both of these companies up to the 1st day of March, 1903.

By his own statement, in the letter of resignation, he recognized that the only obligation of the Union Company for his commissions on premiums was under the contract of assumption for the liability of the Mutual Company; and he only made claim for his salary up to the 1st of March. The whole gravamen of the petition as a basis for the claim for damages under the salary contract is the alleged failure of the plaintiff in error to renew its license in the state of Nebraska. Moreover, on the trial, on ruling on the demurrer to the evidence and in its charge, the court expressly ruled that no damages by way of profits on anticipated business which the defendant in error might do for the plaintiff in error within the year, were recoverable; but in the submission to the jury limited the inquiry to supposable commissions on renewal premiums. The defendant in error sued out no writ of error on this ruling, and he is, therefore, in no position to complain here thereof. He has had his day in court on that issue, and that controversy has passed in rem judicatum. What possible basis did or could Burman furnish for estimating such profits? During the year he was doing business in the same field under a salary contract of $200 per month and traveling expenses, with a bonus or sum equal to 6 per cent. of the gross premiums received on business from the date of the contract with the Fidelity Company, which took effect February 14, 1903, in excess of the premium receipts from said state for the previous year. This contract, according to the proofs, he deemed more advantageous to himself than his salary contract with the plaintiff in error. As he could not have served both masters in the same field during the same year, to furnish any possible basis for estimating profits in this action an accounting of his salary and commissions earned under his contract with the Fidelity Insurance Company would have to be taken to show his loss, if any. His claimed damages in this respect, therefore, were entirely speculative, if not imaginary.

Treating the two contracts of January 30th and 31st as divisible, as the defendant in error must do to sustain his judgment, he must maintain the position, not only that the plaintiff in error, on the 13th day of February, 1903, had broken the contract of January 31st, but had

so far repudiated it as to entitle him to then demand of it his whole expectancy on the policy contract obtained for the Mutual Company, both of earned commissions and renewal commissions. As the contract by its very terms was one of guaranty of the contract between the defendant in error and the Mutual Company in respect of such commissions, we are remitted to that to ascertain what in fact and law the plaintiff in error guarantied. The ninth paragraph of said contract expressly declares:

"That no commissions shall be due or payable to said party of the second part upon any policy, except upon the actual payment in cash to said company of the premium stipulated in that policy for the terms for which the commission is claimed."

And respecting renewal commissions it declares that:

"The renewal commissions under this contract on all forms of policies shall be 7½ per cent. of the annual premium, as paid to the company."

As the guaranty is no broader than the thing guarantied, the only undertaking by the plaintiff in error in this respect was, first, to pay to the defendant in error commissions upon the policies obtained by him "upon the actual payment in cash to said company of the premiums," and, second, the renewal commissions as the premiums should be "paid to the company." The petition neither avers, nor did the defendant in error make proof, that any such payments had been made after the execution of the contract in question or any prior thereto unaccounted for. And if any such premium had been collected or received by the plaintiff in error, unaccounted for, it was by the decree of the court required to be turned over to the trustees appointed by the court. To escape from this obvious purport of the contract of guaranty, counsel for the defendant in error was driven to the position of seeking to maintain the right to recover the entire amount of prospective premiums on the theory that by its wrong the plaintiff in error had broken the contract so as to render it impossible of performance. This contention took form and was made the basis of recovery in the following portion of the court's charge to the jury:

"However, if you find from a preponderance of all the evidence in this case, that the defendant company and the property it received from the Kansas Mutual Life Insurance Company were, by the decision of this court, placed in the hands of trustees appointed by this court and afterwards turned over to the Illinois Life Insurance Company, under order of the court, and that the appointment of said trustees and the decision of this court rendered impossible the fulfillment of the contract, and that this was occasioned by the fault of the defendant company in entering into its contract with the Kansas Mutual Life Insurance Company, then and in that event the breach of the contract between plaintiff and defendant was in law occasioned by the defendant."

From which it is made clear that the learned trial judge was not willing to say that if all the property and benefits which the plaintiff in error received from the Mutual Company were by the decision and order of the court taken away from it and placed in the hands of trustees of the court, and under its order turned over to the Illinois Life Insurance Company, whereby the contract was rendered impossible of fulfillment, the defendant in error was entitled to recover as for a breach

of the contract; but in its ultimate analysis the right of recovery was made to depend upon the further fact that this action of the court was occasioned by the fault of the plaintiff in error in entering into the contract with the Mutual Life Insurance Company. There being no dispute as to the facts about the decree and orders of the court, and no dispute about the plaintiff in error having entered into the contract with the Kansas Mutual Life Insurance Company, it was simply a conclusion of law for the court whether or not the acts constituted a breach of contract; and yet, by the charge of the court, this question was turned over to the jury without instructive direction, in some indefinable way, to determine for themselves whether the plaintiff in error was at fault in entering into the contract with the Kansas Mutual Company, and whether that, as a matter of law, made it liable to this action.

An actionable breach of contract, in its very nature, must be supervenient. It must arise after the making of the contract, from some affirmative act in disregard of its mandate. The act of entering into the contract with the Kansas Mutual Life Insurance Company occurred 40 days prior to the contract in question with the defendant in error. The existence of the contract between the two companies was fully known to the defendant in error when he entered into the contract with the plaintiff in error on January 31, 1903. More than that, he then knew that the validity of that contract was being tested in court; and it was as much within the contemplation of the defendant in error as in that of the plaintiff in error that the possibility of carrying out the contract of guaranty depended upon the result of that suit. When the defendant in error entered into the contract with the Mutual Company no contractual relations existed between it and the defendant in error, and it owed him no duty in that regard. In so far as he was concerned, the plaintiff in error could enter into any arrangement with the Mutual Company to take over its business and reinsure its outstanding risks, without incurring any liability to any agent of the Mutual Company, except its liability to account in equity to such agent for any fund transferred to it by the Mutual Insurance Company, or thereafter received by it under the contract of transfer, when such fund might be chargeable in its hands with some lien, express or implied, in favor of such agent. No adjudicated case has ever gone further in this direction.

The case of Schrimplin v. Farmers' Life Association, 98 N. W. 613, 123 Iowa, 102, is an apt illustration. In that case the Bankers' Guaranty Life Association made a contract with an agent which inured to the benefit of the complainant, Schrimplin, by which the agent became entitled to a stipulated commission on premiums obtained by him, and on renewals thereof for a designated period. The contract contained the express stipulation that no transfer of management or change of name of the association or reinsurance by any other concern, should affect the plaintiff's right to receive the stipulated income from the renewals of said policies. Under this contract the agent effected a large amount of insurance, when the said association, by convention between it and the Union Life Association, transferred

its assets and business to the latter company. At the time of this transfer a right to renewal commissions, etc., had accrued to the agent. The written contract between the old company and the agent was passed over and delivered to the Union Life Association. Negotiations between the latter company and the agent for the latter's entering into its service failed of consummation. Thereafter the agent filed his bill in equity against the Union Company, on the theory that the complainant was entitled to recover from the defendant upon the quarterly or annual renewals of insurance secured by him to the same extent he would have been entitled to recover from his principal had the transfer not been made; and to that end he prayed that the defendant be required to make an accounting of all such renewals as it had received since said transfer. It was held that as the defendant company took with full knowledge of the plaintiff's contract with the old company, which created an equitable lien on the funds collected to the extent of the amount of commissions, it took cum onere. But it was distinctly held that the defendant was liable only to account for commissions on premiums actually collected by it. The court said:

"Then, and not till then, did any indebtedness arise to plaintiff for which it could be held liable. It has received these moneys not only with notice of the charge attaching thereto for the benefit of plaintiff, but with promise to pay the same, and it will not now be permitted to retain them and shield itself behind the plea of ultra vires against the plaintiff's demand for an accounting. * * * We must not overlook the fact, already suggested, that to hold defendant liable for the payment of plaintiff's claim does not in reality add a single dollar to the burden of its original members. Defendant is required to account only for the renewal payments made to the expense fund by the membership taken over from the Union Association."

Commenting upon the case of Twiss v. Guaranty, 87 Iowa, 733, 55 N. W. 8, 43 Am. St. Rep. 418, the court said:

"If, in the case before us, plaintiff's claim was one which had accrued or become payable from the Union Life Association before the transfer of the business to the defendant, or if it was shown that defendant had received and retained nothing of value by reason of such transfer, * * * then the precedent cited would perhaps be in point."

What difference can it make that the action at bar is based upon an express contract between the parties rather than on one which the law implies? The same obligation and the same consequences arise and flow from each. The express undertaking was to account to the defendant in error for his commissions as the premiums should be paid to the company, and not otherwise. On the authority of this Iowa Case, invoked by counsel for defendant in error, it mattered not if the contract between the two companies was ultra vires, the purchasing company was estopped from interposing such defense, on the ground that having knowingly, by virtue of the transfer, received and retained the fund impressed with a trust in favor of the complainant, it was unconscionable to withhold it from the cestui que trust. But in the case at bar, not only has the plaintiff in error not received any fund to which the claim of the defendant in error attaches in its hands, but the very compact it made, by which alone it could ever collect or receive a cent of premiums, was nullified by the decree of court, and it

was enjoined from ever receiving such premiums, and the defendant in error was prohibited from paying to it any such premiums, out of which his commission was to come. The decree re-established the statu quo of the Mutual Insurance Company, and there is no claim made that it was insolvent. There is no charge made in the petition of any fraud or collusion on the part of the plaintiff in error by which that decree was brought about. On the contrary, the record shows that the plaintiff in error resisted the suit, and up to the very time of Judge Hook's ruling, on the 5th day of February, 1903, that the transaction was ultra vires, it stoutly asserted its validity. And when the judicial announcement came it tried to persuade the defendant in error to continue his services, as he of all men occupied such position towards the business as would save it from injury by reason of the interposition of the court. It is true that when the case came on for final decree the plaintiff in error consented thereto, with the same grace that a man submits to execution when resistance can no longer avail. Instead of the defendant in error loyally standing to his post of duty to protect the policies of the Mutual Insurance Company against lapses, he left it to sink or swim, while in his letter of resignation he declared that he proposed to hold it equally with the plaintiff in error to the payment of the unearned renewal commissions.

As already suggested, the defendant in error knew when he entered into the contract with the plaintiff in error that the validity of the transfer from the Mutual Company was being tested in court; and that the ability of the plaintiff in error to perform the contract by accounting to him for commissions on premiums paid depended upon the result of that suit. And one remarkable feature of the court's ruling on the demurrer to the evidence was in the following paragraph:

"I have refused to allow evidence here as to damages for anticipated profits on this contract, because the plaintiff in this case knew, or by the exercise of any ordinary care might have known, that the Kansas Union had placed itself in such a position under the law that it could not comply, and I have relieved the case of that element of damages."

If the plaintiff was disentitled to recover damages for anticipated profits because he knew that the Kansas Union had placed itself in such position under the law that it could not comply, for the same reason, and by the same logic, he was not entitled to recover any other damages resulting from the alleged breach of the contract.

In his letter of resignation the defendant in error said:

"In view of the decision of Judge Hook in the recent case testing the legality of the transfer of the Kansas Mutual into the Kansas Union and placing it in the hands of trustees, thereby making it impossible for me to be of any service to your company, I have decided to sever my connection with the Kansas Union Life Insurance Company."

If the decree absolved him from his contractual obligations, by making it impossible for him to be of any service to the company, by the same token, mutatis mutandis, it should follow that it operated to acquit the company from further performance.

In People v. Globe Mutual Life Insurance Company, 91 N. Y. 174, it was held that where a life insurance company had entered into a contract with an agent for a specified term, at a stipulated salary, etc.,

and before any breach of the contract by it, it was restrained from the further prosecution of its business under its franchise by order of the court, and a receiver was appointed, the agent had no valid claim upon the fund in the hands of the receiver for damages resulting from an alleged breach of the contract by causing a discontinuance of his employment, in the absence of evidence that it was some fault of the company which had induced the superintendent of the insurance department to make the certificate upon which the Attorney General instituted the suit; that the action of the court was not the action of the corporation, whatever may have been the cause prompting the the act. The court distinguished such action of law, in a judicial proceeding, from that class of cases where the company stopped payment before any intervention of law, and by a voluntary refusal of performance breached the contract; and also from that class of cases which affect property rights and survive the death of the parties, in which instance performance can be made by the assignees or successors, where there was no incapacity affecting both parties alike.

In principle there can be no distinction between an injunction granted on the interposition of the state, in the exercise of the soveriegn right of visitation, and one granted by the court at the suit of a stockholder on the ground that the transaction of the two corporations is in contravention of the charter granted by the sovereign. The decree of the court rendered it illegal for the plaintiff in error to collect or receive a dollar of premiums on the policies issued by the Mutual Company; and it prevented the agent from paying over a dollar to the plaintiff in error of any such premiums. And as there was no evidence that the plaintiff in error either induced or connived at the action taken by the stockholders of the Mutual Company, the case seems to us to come within the ruling in People v. Globe Mutual Insurance Company, supra, the reasoning of which commends itself to our approval. This case is followed and approved by Judge Simonton in Malcomson v. Wappoo Mills et al. (C. C.) 88 Fed. 680, holding that damages are not recoverable against a corporation for its failure to perform a contract for the sale and delivery of merchandise where performance was prevented solely by the action of a court in appointing a receiver for the corporation, and enjoining all others from interfering with its business or property. The vis major, which prevents performance in such cases, is the interposition of the court.

The situation is little different, in the concrete, from that where, on account of the nature of the contract, it is evident that the parties dealt on the assumption of the continued existence of the thing to which it relates, the subsequent destruction of which, in law, will excuse performance. The substantive thing contracted about by the parties here was the collection of renewal premiums on the policies theretofore issued by the Mutual Company, on which depended the right of the defendant in error to commissions. And when the court, without default on the part of either party, and against the resistance of the plaintiff in error, impounded the subject-matter—took it into custodia legis—and prohibited the plaintiff in error from collecting or receiving any such premiums, and required the agent to attorn to the trustees appointed by the court, it in effect put an end to the

existence of the thing—the subject of the contract—in so far as the parties to that contract were concerned. While the act of the Mutual Company in undertaking to transfer its business to another corporation was revocable at the suit of a stockholder, as between it and its agent there was nothing in the contract of employment which would prevent it, in the economy and conduct of its own business affairs, from wholly abandoning the field in Nebraska or from going entirely out of business, or changing its business from that of a mutual company to that of a level premium company. In re English & Scottish Marine Insurance Company, 5 L. R. Chan. Appeal, 737; Pellet v. Mfrs. & Mer. Insurance Company, 104 Fed. 502, 43 C. C. A. 669; Stier v. Imperial Life Insurance Company (C. C.) 58 Fed. 843.

Aside from the liability of the Mutual Company to the defendant in error for commissions on premiums collected, the only limitations or conditions imposed by the contract between him and the Mutual Company are found in the 12th paragraph, which declares that:

"In the event of the termination of this contract from any cause after two years from date hereof, the company will continue to pay to said Frank Burman, if living, or to his executors, administrators or assigns, the renewal commissions under this contract as they accrue and are paid, less any indebtedness, for as many years as the party of the second part shall have been in the employ of said company under this contract; provided, there shall not be less than $500,000 of insurance in force upon the books of the company at the time of such termination, written by said party of the second part and his agents; provided, further, that if at any time the renewal premiums or any portion of them are collected by or at the expense of said company, or in the event of the termination of this contract from any cause whatsoever, there shall be deducted from the renewal commissions due said party of the second part, 2½ per cent. of the annual premium as collected, to cover cost of said collection."

So if the attempted transfer by the Mutual Company to the Union Company warranted the agent, Burman, in treating his agency for it at an end, the situation came clearly within the purview of said paragraph 12, as a termination of the contract from any cause after two years from its date (the contract at that time having been in force more than two years), whereby he would, as against it, be entitled to be paid by it "the renewal commissions as they accrue and are paid." If such renewal premiums are paid to the Mutual Company or to its transferee, with notice, or under a guaranty or assumption, the agent would be entitled to his commissions or renewals as they accrue and are paid and not otherwise. He cannot be placed in a better position by a termination of his contract from any given cause than the contract expressly stipulates. Where the parties by contract have expressly provided for the liability of one of the parties by reason of its termination, it is not for the court to substitute a different and additional liability.

Other errors complained of in the progress of the trial, and the charge of the court to the jury, need not be considered. As the case stood at the conclusion of the evidence, the court should have directed a verdict for the defendant below. The judgment of the Circuit Court is, therefore, reversed, and the cause is remanded with direction to grant a new trial and for further proceedings herein in conformity with this opinion.

LEAHY et al. v. HAWORTH.

(Circuit Court of Appeals, Eighth Circuit. November 7, 1905.)

No. 2,168.

1. EQUITY—AMENDMENT OF BILL.

Where an English executor filed a bill in equity in a federal court, in his individual capacity as the legal owner, to foreclose a mortgage owned by his testator, and which matured after his death, it was within the power of the court to permit the filing of an amended bill by complainant, in his representative capacity as executor, setting up the same cause of action.

2. EXECUTORS—RIGHT TO SUE IN EQUITY IN FOREIGN JURISDICTION—SUBSEQUENT QUALIFICATION.

A foreign executor may institute a suit in equity in a federal court to foreclose a mortgage belonging to the estate of his testator, and if the bill is filed within the time allowed by the statute of limitations his subsequent taking out, before the hearing, of ancillary letters testamentary or of administration in the local jurisdiction will relate back to the date of the filing of the bill, not only for the purpose of qualifying him to maintain the suit, but also for the purpose of the statute of limitations.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2380.]

3. SAME—QUALIFICATION—NEBRASKA STATUTE.

Comp. St. Neb. 1901, §§ 2677, 2678, providing for the appointment and qualification of executors, does not require an executor to take an oath as such, and the fact that he does not do so will not affect his right to maintain a suit to collect assets of the estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 142.]

4. BILLS AND NOTES—TRANSFER BY INDORSEMENT—GUARANTY.

Under Comp. St. Neb. 1901, § 3380, which provides that "all bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order, or to any person or assigns, shall be negotiable by indorsement thereon so as absolutely to transfer and vest the property thereof in each and every indorsee successively," as construed by the Supreme Court of the state, a written guaranty, signed by the payee on the back of a note payable to his order, constitutes an indorsement with an enlarged liability, and transfers the legal title free from equities existing between the maker and payee.

5. SAME—ASSIGNMENT.

A written assignment on the back of a promissory note payable to the order of the payee, signed by such payee, is the equivalent of a blank indorsement to transfer title to the note free from equities, either under the law merchant or Comp. St. Neb. 1901, § 3380, which makes a note negotiable by indorsement where payable "to any person or order or to any person or assigns."

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

On July 12, 1887, the appellants borrowed $3,000 from a Massachusetts corporation, called the Dakota Mortgage Loan Corporation, and executed their note or bond for that sum payable to the order of the corporation, maturing July 1, 1892. This note was negotiable on its face. To secure its due payment, appellants hereinafter called defendants, executed and delivered to the corporation, a mortgage conveying real estate owned by them and situated in the state of Nebraska. Soon after receiving the note the corporation sold it, together with the mortgage, to John Stuart & Co., brokers, of Manchester, England, and placed on the back of the note the following indorsements:

(1) "For value received the Dakota Mortgage Loan Corporation hereby assigns and transfers the within note and coupons, together with all its right, title and interest under the real estate mortgage securing the same, without recourse, to ———. The Dakota Mortgage Loan Corporation, by Allison Z. Mason, Treasurer."

(2) "The Dakota Mortgage Loan Corporation in consideration of value received, hereby guarantees the payment of each coupon at maturity and collection of the within bond; provided, however, that the said corporation reserves the right to repurchase this bond at any time, at its face and accrued interest to the time of repurchase, and a refusal to legally convey the bonds and mortgage deed shall release said corporation from further liability. In witness whereof the Dakota Mortgage Loan Corporation has signed and delivered these presents by its treasurer, this 13th day of August, 1887. By Allison Z. Mason, Treas."

Subsequently, and before maturity of the note, John Stuart & Co. sold the note and mortgage for value to Walter Haworth, a citizen of Great Britain and resident of Manchester, England, who died before the maturity of the note. Jesse Haworth and Isaac H. Morris became executors of his will by appointment of an English tribunal. Morris died, and Jesse Haworth, the appellee, was left the sole surviving executor under the English appointment. Prior to the maturity of the note the name of the Dakota Mortgage Loan Corporation was by an act of the Legislature of Massachusetts changed to Globe Investment Company. Shortly after the maturity of the note the defendants Mary, Richard, and Joseph Leahy borrowed from their codefendant, William Eugene Hayward, $3,000, executing to him as security therefor a mortgage on the same premises which they had before conveyed to secure the loan to the Dakota Mortgage Loan Corporation, and with this money paid the Globe Investment Company the entire amount of principal and interest then due and owing on the first-mentioned loan. At the time of making this payment defendants had no actual knowledge that the Globe Investment Company was not the owner of the note and mortgage. The Globe Investment Company, instead of remitting the money to England and actually paying the note in question, appropriated the same to its own use and continued to report to John Stuart & Co. that the debt remained unpaid and that the borrowers were paying interest semiannually. The Globe Company for some time remitted to John Stuart & Co., the semiannual installments of interest as they were supposed to accrue. These remittances were received by the last-named company, for itself or its transferee, with no knowledge of the payment made to the Globe Investment Company. Subsequently the Globe Company failed, the remittances to England ceased, and shortly thereafter, on September 23, 1896, this suit, a bill in equity to foreclose the mortgage, was instituted in the Circuit Court for the District of Nebraska, by Jesse Haworth and Isaac H. Morris, the English executors, not in their capacity as executors, but as owners and holders of the note and mortgage in question. Subsequently, and after the death of Isaac H. Morris, Jesse Haworth, hereinafter called complainant, filed an amended bill disclosing the death of his co-complainant, but still seeking to recover in his individual capacity. The suit came on for trial and after an intimation by the trial judge that complainant could not maintain the action, he took leave to file an amended bill. This last amended bill was filed June 28, 1902. It was a suit to foreclose the mortgage first mentioned, given to secure the note for $3,000 held by Walter Haworth at the time of his death. It differs in no respect from the former bills, except that the complainant styles himself "sole executor of estate of Walter Haworth, deceased." He sets forth his own and Isaac H. Morris' appointment as executors of the estate of Walter Haworth in England, their due qualification, the death of Isaac H. Morris, and his sole survivorship in the trust. He further alleges that afterwards he applied to the probate court in Harlan county, in the state of Nebraska, having jurisdiction over such matters, and was on September 20, 1902, duly appointed executor of the last will and testament of Walter Haworth, deceased; that he still is the acting and qualified sole executor of such estate. Issues were properly joined and on the trial a de-

cree of foreclosure was rendered. To reverse this decree an appeal was duly prosecuted to this court. There are 14 assignments of error, but counsel for defendants in their brief reduce them, for the purpose of our consideration, to the following 3: "(1) That the court erred in assuming that the complainant had qualified as executor under the laws of Nebraska and had thereby qualified himself to sue in his representative capacity. (2) That the court erred in holding that, although the proceedings in the probate court in Nebraska were not commenced until more than 10 years after the maturity of the debt, still that those proceedings might relate back to the date of the filing of the last amended bill, not only for the purpose of qualifying the plaintiff to sue, but also for the purpose of bringing the suit within the period of the statute of limitations. (3) That the court erred in holding that the assignment placed upon the back of the note had the same legal effect as an indorsement."

T. J. Mahoney (J. A. C. Kennedy, on the brief), for appellant.
C. C. Flansburg (R. O. Williams, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

The first and second assignments of error arise from facts so interwoven that they may well be considered together. By the statutes of Nebraska in force at the time the transactions now under consideration were had the statute of limitations barred complainants' right to foreclose the mortgage in question in 10 years after the maturity of the note. Section 5596, Comp. St. Neb. 1901. The note was executed in 1887, payable July 1, 1892. On June 30, 1902, therefore, the right to foreclose the mortgage given to secure the payment of the note was barred. The suit instituted in 1896 by the English executors in their individual capacity was on the theory that, inasmuch as Walter Haworth died before the note matured, he having at the time of his death no cause of action against the defendants, no such cause of action descended to or was vested in his executors; that what was vested in them was the legal title to all chattels of the testator in trust for the purpose of administration under the law; and that as such legal owners they might, in their own names, sue to recover the same or to enforce any right, like that of foreclosure, incidental to the ownership of the chattels. This seems to have been a recognized theory of the common law. See Griffith v. Frazier, 8 Cranch, 9, 3 L. Ed. 471; Kane v. Paul, 14 Pet. 33, 10 L. Ed. 311; Giddings' Executors v. Green (C. C.) 48 Fed. 489, and cases cited. But the learned trial judge ruled that this common-law right was superseded by sections 5618 and 5621 of the Compiled Statutes of Nebraska of 1901 relating to civil actions. He made this ruling on June 13, 1902, and gave complainant 15 days within which to amend his bill. Complainant, instead of standing on his right to sue in his individual capacity, acquiesced in the ruling and availed himself of the leave to amend, and on June 28, 1902, two days before the statute of limitations had run, filed his last amended bill. In this he made substantially the same averments as were made in the prior original and amended bills concerning the execution of the note and mortgage and the breach of the condition of the mortgage and further made allegations showing the original appointment in Great Britain

of himself and Isaac H. Morris, the death of Morris, and that he afterwards, on September 20, 1902, was duly appointed executor by the probate court of Harlan county, in Nebraska.

In this last-mentioned bill Haworth remained complainant as before, but in a new capacity; then as an individual, now as sole executor of the estate of Walter Haworth, deceased. The cause of action remained as it was from the beginning, a breach of condition in the mortgage, entitling complainant to foreclose the same, and the action remained the same as at the beginning, an action to foreclose the mortgage given to secure payment of a note for $3,000 held at all times by himself. Such being the case, the amendment, as we have heretofore held, was permissible practice, and related back to the commencement of the suit. McDonald v. State of Nebraska, 41 C. C. A. 278, 101 Fed. 171, and cases cited. See, also, Herron v. Cole, 25 Neb. 692, 41 N. W. 765, and Hines v. Rutherford, 67 Ga. 606.

The next question for consideration is whether the filing of the last amended bill by complainant without having secured his appointment as executor in Nebraska until after the filing thereof is fatal to his right of recovery. In considering this question it should be borne in mind that complainant had an interest in the subject matter of foreclosing the mortgage in question even though he did not have a standing in court to do so. He was, by virtue of his appointment in Great Britain, the holder and owner of the note secured by the mortgage, and had a duty imposed upon him by law to collect it. No appointment as ancillary executor in Nebraska could add anything to his legal title or to his right to collect the same. Such ancillary administration is required as a matter of public policy to insure the satisfaction of local creditors out of local assets before they are withdrawn from the state or turned over to the domiciliary adminstrator for that purpose. This policy is equally subserved, whether the appointment as executor actually occurs before or after the institution of the suit, provided, only, that it shall be made before trial. From these considerations it is obvious that whether the appointment of an ancillary executor be made before the bringing of a suit or afterwards, but before the trial, is purely formal and technical.

In the case of Swatzel v. Arnold, 1 Woolw. 383, Fed. Cas. No. 13,682, Mr. Justice Miller, when presiding in this circuit, had before him a question similar to that which now confronts us. In his case the plaintiff brought in Nebraska his suit as administrator to foreclose a mortgage. His only right to sue as administrator rested upon his appointment by the probate court of a county in the state of Kansas in which decedent was domiciled at the time of his death. He held that the Kansas administrator might institute suit in the courts of Nebraska before taking out ancillary letters of administration in that state, and upon taking out such letters might by amendment show the fact. In that case he gives forcible reasons for the conclusion reached by him. He says:

"The present plaintiff as administrator of the domicile had a right to receive for final distribution, the sum due on the mortgage. He had an inchoate right to be appointed administrator here, and if any one else had been ap-

pointed, that person would have been liable to account to him for what was in hand after paying the debts in that jurisdiction. * * * The incapacity of the foreign administrator not being radical so as to entirely deprive him of power to proceed with his cause, the fact of his taking out letters in this state was matter which he might aver by amendment and maintain his suit thereon. * * * The impediment to the exercise of the full powers of an administrator in a jurisdiction foreign to that granting his letters is essentially technical and formal and should not be strained beyond its necessary application"—citing Yeaton v. Lynn, 5 Pet. 224, 8 L. Ed. 105.

Judge Shipman in Black v. Allen Co. (C. C.) 42 Fed. 618, 624, 9 L. R. A. 433, after quoting with approval some of Mr. Justice Miller's remarks in Swatzel v. Arnold, supra, says:

"The court early found relief in cases of equity from too strict adherence to technicality upon the ground that 'in equity a plaintiff may file a bill as administrator before he has taken out letters of administration, and it will be sufficient to have them at the hearing, which is not the case at law.' * * * Therefore in Humphreys v. Humphreys, 3 P. Wms. 349, where the next of kin had brought a bill without administering, and the defendant demurred, the Lord Chancellor allowed the demurrer and then permitted the complainants to take out letters of administration, which, when granted, he said, related to the time of the death of the intestate, and to allege the same by way of amendment or by supplemental bill."

In the case of Humphreys v. Humphreys (supra), a bill was filed by an administratrix as such. To this a plea was filed alleging that the taking of administration was subsequent to the filing of the bill.

"The Lord Chancellor [according to the report] with great clearness, and not without some warmth in respect of the delay, overruled the plea, observing that the mere right to have an account of the personal estate was in the plaintiff, * * * as she was the next of kin and it was sufficient that she had now taken out letters of administration, which, when granted, related to the time of the death of the intestate, like the case of an executor before his proving the will, brings a bill, yet his subsequent proving the will makes such bill a good one, though the probate be after the filing thereof."

In 1 Daniell's Chancery Pl. & Pr. p. 318, it is said:

"If an executor, before probate, file a bill, alleging that he has proved the will, such allegation will obviate a demurrer. He must, however, prove the will before the hearing of the cause, and then the probate will be sufficient to support the bill, although it bear date subsequently to the filing of it. In like manner, a plaintiff may file a bill as administrator before he has taken out letters of administration, and it will be sufficient to have them at the hearing."

Chancellor Kent, in Doolittle v. Lewis, 7 Johns. Ch. 45, 11 Am. Dec. 389, in discussing a kindred subject, says:

"If the party sues as executor or administrator, without probate, or taking out letters of administration, the taking them out, at any time before the hearing, will cure the defect, and relate back so as to make the bill good from the beginning. * * * In a light so merely formal is that omission viewed."

Bates, in his work on Federal Equity Procedure (volume 1, § 52), says:

"In equity a plaintiff may file his bill as administrator before he has taken out letters of administration, and it will be sufficient to have the letters at the hearing, which is not the case at law. It is a general rule in equity pleading and procedure that facts which have occurred after the filing of the bill must be brought before the court by supplemental bill and not by way

of amendment; but, as an exception to that rule, an executor or administrator appointed in one state may sue as such in another state and subsequently take out letters testamentary or of administration in the latter state, and set up that fact by way of amendment."

In the case of Hodges v. Kimball, 91 Fed. 845, 34 C. C. A. 103, the Circuit Court of Appeals for the Fourth Circuit had before it the same question we are now considering, and after an exhaustive examination and citation of authorities announced the rule in harmony with that already stated, to the effect that domiciliary administrators might institute a suit at law in a foreign state without having first taken out letters of administration, and might afterwards secure letters of administration in that state and by amendment to their original cause of action make the same appear and proceed as if letters had been granted prior to the institution of the suit. The court in its opinion says:

"It was virtually conceded in argument that in an equity suit an amendment showing the subsequent taking out of letters of administration could be made and the suit maintained, but it was strenuously insisted that a different rule existed in the courts of law."

To the same effect is the case of Henry v. Roe and Burnside, 83 Tex. 446, 18 S. W. 806; Hatch v. Proctor, 102 Mass. 351; Goodrich v. Pendleton, 4 Johns. Ch. 549; Osgood v. Franklin, 2 Johns. Ch. 1, 7 Am. Dec. 513.

From the foregoing authorities, and many others cited and referred to in them, we think the rule is well settled in equity practice, however it may be at law, that an executor named in a will may file a bill in his capacity as executor before probate of the will and maintain an action as such executor, provided he secures probate of the will before the hearing of the cause. Learned counsel for appellant have favored us with no authorities sustaining the opposite view; neither have we, in our examination found such. Accordingly we are constrained to hold that the fact that Haworth had not qualified as executor in Nebraska on June 28, 1902, the time he filed his last amended bill (he having so qualified later, on September 20, 1902) is not a defense to the present action. The qualification related back at least to the date of filing the amended bill. The amended bill was filed two days before the statute of limitations would have barred the action. Whether, therefore, the amended bill related back to the commencement of the action, which the authorities already cited indicate, is quite immaterial. The action in any event, was not barred by the statute of limitations.

A point is made in appellants' brief that because complainant failed to take an oath to faithfully discharge his duties as executor he was never qualified as such, and accordingly was not entitled to recover in this action. An examination of the statutes of Nebraska discloses that no such oath is required in that state. Sections 2677 and 2678 of the Compiled Statutes of 1901, alone relate to the qualification of executors. They read as follows:

"Sec. 2677. When a will shall have been duly proved and allowed, the Probate Court shall issue letters testamentary thereon to the person named executor therein if he is legally competent and he shall accept the trust and give bond as required by law.

"Sec. 2678. Every executor, before he shall enter upon the execution of his trust and before letters testamentary shall issue, shall give bond to the judge of probate in such reasonable sum as he may direct, with one or more sufficient sureties with conditions as follows: * * *"

No provision is here or elsewhere in the statutes found for the taking of an oath to faithfully discharge the duties of the office. The matter of qualification is purely statutory. The statutes of Nebraska require the executor to give bond and that is the only act of qualification contemplated by the statutes.

The remaining assignment of error relied on by defendants' counsel relates to the transfer on the back of the note. It is claimed that it is not an indorsement within the meaning of the law merchant and that it did not pass the legal title to subsequent holders free from equities existing between the makers and payee. The facts of the case show that soon after the maturity of the note the makers paid the payee the full amount of the note. This note was payable "to the order of the Dakota Mortgage Loan Corporation," and is conceded to be a negotiable instrument. At the time the makers paid it to that corporation under its new name of Globe Investment Company they necessarily knew the negotiable character of the note and the possibility of its having been negotiated. They nevertheless paid it without requiring the surrender of the note or the mortgage given to secure its payment. In these circumstances the payment was at their own risk. If the money found its way to the owner and holder of the note, if negotiated, it amounted to payment; otherwise not. Weldon v. Tollman, 15 C. C. A. 138, 67 Fed. 986; Swift v. Bank of Washington, 52 C. C. A. 339, 114 Fed. 643.

No legal justification of this payment is attempted in argument or brief by defendants' counsel. Their reliance is upon the proposition, involved in this assignment of error, that the note was not so indorsed as to vest title in the indorsee so as to cut off the equities existing between the makers and payee. The note and mortgage by express stipulation of the parties, is to be construed according to laws of the state of Nebraska. We must therefore examine the transactions in the light of those laws.

Section 3380, Compiled Statutes of Nebraska of 1901, is as follows:

"All bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order, or to any person or assigns, shall be negotiable by endorsement thereon, so as absolutely to transfer and vest the property thereof in each and every endorsee successively, but nothing in this section shall be construed to make negotiable any such bond, note or bill of exchange, drawn payable to any person or persons alone, and not drawn payable to order, bearer, or assigns: Provided, that all such bonds, promissory notes, and bills of exchange, made payable to bearer shall be transferable by delivery without endorsement thereon. * * *"

From this statute it appears that promissory notes, payable "to any person or order," or "to any person or assigns," are made negotiable by indorsement. This statute impresses us, with a twofold meaning: First, as a modification of the law merchant concerning what is a negotiable instrument. By the law merchant, in order to be nego-

tiable, a note must be payable to the order of some person or to bearer. By the statute of Nebraska negotiability is extended to a note payable to some person or his assigns. And, second, in the event a note be payable as last stated, the assignment may be made by a blank indorsement. In other words, the indorsement of the name of the person to whose assigns the note is payable, on the back of the note, operates to perform the function of the usual written assignment. It is apparent from these considerations that we are now dealing with a subject somewhat different from the accepted inland bill of exchange, or (since the statute of Anne) promissory note known in commerce or by the law merchant; so different, indeed, that the parties to the original transaction out of which the present suit arose saw fit to stipulate for the supposed different, if not greater, advantage found in the application of the laws of the state of Nebraska.

Tested, now, by these laws, as interpreted by the Supreme Court of Nebraska, how does the case stand? It is first strongly urged by counsel for complainant that the guaranty clause on the back of the note is in and of itself an indorsement by which the legal title of the note is divested from the payee and invested in the transferee upon delivery of the note to him. The payee's contract of guaranty as found on the note is perfect of its kind. It acknowledges receipt of the necessary consideration and (referring to the "note" and "interest" as "bond" and "coupons") guaranties the payment of each coupon as it should mature and finally the collection of the bond itself. The fact that the payee reserved the right to repurchase the bond at any time providing for a release from its guaranty in case of refusal to sell the same to it, on demand, in no manner affects its primary obligation to guaranty the payment of the interest and the collection of the principal. It was on a contingency, which, in this case never happened, that the guaranty became subject to defeasance. By this contract the payee for an acknowledged consideration obligated itself absolutely to pay the principal of the note, if payment could not be obtained from the maker by the exercise of due and reasonable care. Such is the accepted definition of a contract of guaranty. Brackett v. Rich. 23 Minn. 485, 23 Am. Rep. 703, and cases cited. This contract is more comprehensive aud unconditional than the contract of indorsement. By the latter the failure to present a note to a maker at its maturity and to demand payment thereof and notify the indorser of nonpayment are essential and necessary conditions to the creation of any liability against him by reason of his indorsement.

But we need not dwell on these elementary thoughts. The Supreme Court of Nebraska has frequently considered this question and pronounced upon it in no uncertain voice. Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811, was a suit upon a promissory note payable to the order of V. J. Williams & Co., and indorsed only as follows:

"For value received I hereby guarantee payment of the within note and waive presentation, protest, and notice. [Signed] V. P. Williams & Co."

The suit was in favor of the transferee of the note. Defendant's counsel contended that the note never was, in fact negotiated because

the guaranty written upon the back did not amount to an endorsement so as to transfer title. The court, speaking on this point, says as follows:

"We find some conflict of authorities, but we adopt the law and the language of Day, C. J., in Robinson v. Lair, 31 Iowa, 9: 'We confess ourselves unable to give effect to the contract of guaranty of payment and waiver of demand and notice, if the payees still intend to retain the title. The writing simply constitutes an indorsement with an enlarged liability' "—citing many cases.

State National Bank v. Haylen, 14 Neb. 480, 16 N. W. 754, was an action for the foreclosure of a mortgage given to secure a negotiable promissory note signed by defendants, payable to the order of Thomas P. Kennard, and by him indorsed as follows:

"Collection guaranteed and notice of protest waived this 26th day of April, 1880. [Signed] Thomas P. Kennard."

Defendants set up as their defense usury, fraud, etc., practiced upon them by the original payee. Plaintiff replies, alleging purchase in good faith, before maturity, for value and without notice of any equity. The court, in disposing of the case, uses the following language:

"There is no question made in the evidence of the plaintiff bank being the bona fide owner and holder of the note and mortgage, nor that it received the same before maturity in the ordinary course of business and without notice of any infirmity. * * * But the district court let in the defense of usury for the reason, as is stated in the judgment, 'it [the plaintiff] holds the note as assignee, and not as indorsee.' * * * This is exactly the form of indorsement which in Heard v. Dubuque County Bank, 8 Neb. 10, we held, following Robinson v. Lair, 31 Iowa, 9, to constitute an indorsement with an enlarged liability. * * * It will be admitted that the possession of the note, with the payee's name written across the back, is evidence of ownership in the plaintiff. Yet it is claimed that while this would be the case if the payee's name stood alone on the back of the note, that here there are other words over the payee's signature to which it applies and upon which it has spent its force. Let us admit this, and then see whether the words taken together, including the signature, do not furnish still stronger evidence of a transfer of title in the note from the payee to the holder. By virtue of these words the payee agrees that he will pay the note in case of the holders using due diligence and being unable to collect it from the makers. He furthermore agrees that his ultimate liability to pay the note shall not be affected by reason of the neglect or failure of the holder to present it to the maker at maturity for payment, or to notify him, the payee, in case of its nonpayment. Now what meaning could any of these words have except upon the proposition understood that the payee had disposed of the note, and parted with the title to it to some other person, to whom he guaranteed the payment and in whose favor he waived the duty of presentation and notice? * * * I therefore see no reason for departing from the doctrine of Heard v. Dubuque County Bank, and it will be adhered to. The note and mortgage having been indorsed and delivered to the plaintiff before maturity and received by it for value in the ordinary course of business, without notice of any infirmity, it holds the same free from the taint of usury."

Weitz v. Wolfe, 28 Neb. 500, 44 N. W. 485, was a suit to recover the amount due on a promissory note made by one Jennings, and payable to the order of Weitz. Before maturity Weitz sold and transferred the note to Wolfe, making only the following endorsement upon the same:

"I guarantee the payment of within note, waiving demand and protest. [Signed] T. T. Weitz."

Jennings and Weitz were both made defendants. The court says:

"The indorsement in this case being signed by the payee, operated as a transfer of the note. * * * The liability of Weitz was not lessened because the indorsement contained the word 'guarantee.' He is an indorser and was properly sued with the maker in the same action."

Buck v. Savings Bank, 29 Neb. 407, 45 N. W. 776, 26 Am. St. Rep. 392, was a suit in replevin for cattle mortgaged to secure the payment of a note payable to the order of one Mowry. He sold the note, placing on the back thereof, the following words only:

"Demand, notice, and protest waived, and payment guaranteed. [Signed] Welcome Mowry."

The court says two questions are presented by record: First, is the writing on the back of the note an indorsement or merely a guaranty?

In Heard v. Dubuque County Bank, 8 Neb. 10, the writing on the back of the note was as follows:

"For value received I hereby guarantee payment of the within note, and waive presentation, protest, and notice."

This was held to be an indorsement with an enlarged liability. State National Bank v. Haylen, 14 Neb. 480, 16 N. W. 754. The writing on the back of the note in question, therefore, was a valid indorsement with an enlarged liability. To the same effect, also, is the case of Pollard v. Huff, 44 Neb. 892, 63 N. W. 58.

From the foregoing it appears that under the laws of Nebraska, as interpreted by its highest judicial tribunal, the guaranty written on the back of the note before maturity and at the time of its sale to John Stuart & Co. constitutes in and of itself a transfer of the legal title, equivalent to a blank indorsement, such a transfer as entitles the transferee or subsequent holder to maintain an action for its collection free from equities existing between the makers and payee. Possibly we might here appropriately end our consideration of this case, but as we find in the assignment, so called, written on the back of the note a very satisfactory solution of the question before us we proceed to its consideration.

It is conceded, of course, that the mere indorsement of the name of a payee on the back of a negotiable note, commonly called a "blank indorsement," evidences a complete transfer of title, one recognized by the law merchant, and certainly good under the laws of Nebraska. Daniel on Negotiable Instruments, vol. 1, § 688c, says:

"The mere signature of the payee indorsed on the paper expresses an executed contract of assignment with its implications, and also an executory contract of conditional liability with its implications. The assignment would be as complete by the mere signature, as with the words of assignment written over it."

By this standard let us test the so-called assignment. It reads as follows:

"For value received the Dakota Mortgage Loan Corporation hereby assigns and transfers the within note and coupons, *together with all its right, title*

and interest under the real estate mortgage securing the same, without recourse, to ———. [Signed] The Dakota Mortgage Loan Corporation, by Allison Z. Mason, Treasurer."

Eliminating the words italicized, which relate to the transfer of the mortgage security and which were doubtless employed ex industria to expressly do what the law by necessary implication does, there remains the bare statement that the payee of the note, for value received, assigns and transfers it to ———. This statement contains all the elements of a blank endorsement. It is merely the writing out of the implications of such indorsement, it is written on the back of the note; it acknowledges the receipt of a consideration; it employs apt words to transfer the full and complete title to the note, and actually purports to make such transfer. Any one receiving it with such a transfer in blank may treat it as a blank indorsement and transfer it by delivery or may so fill it up as to make it a special indorsement. Evans v. Gee, 11 Pet. 80, 9 L. Ed. 639; Lovell v. Evertson, 11 Johns. 52; Everett v. Tidball, 34 Neb. 803, 52 N. W. 816.

In the case of Maine Trust & Banking Co. v. Butler, 45 Minn. 506, 48 N. W. 333, 12 L. R. A. 370, the Supreme Court of Minnesota, considering a question similar to that now before us, makes use of the following language:

"It would seem obvious that, when writing out upon the back of the paper just what would have been inferred from his signature, the indorser has incurred no greater liability—has done no more than he would, had he placed his signature there. How can it be said then that he has done less, in the absence of that clear declaration of his intent to exempt himself mentioned in all of the authorities as necessary in the case of a qualified indorsement?"

There is abundant authority for the effect which we give to the indorsement in question. In Markey v. Corey, 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117, 62 Am. St. Rep. 698, the court, after reviewing and citing many sustaining authorities, held that the following indorsement on the back of a note, namely: "I hereby assign the within note to Matthew M. Markey and Catherine Sunders"—was a good commercial indorsement, subjecting the payee who signed the same to the liability of indorser under the law merchant. In Adams v. Blethen, 66 Me. 19, 22 Am. Rep. 547, it is held that a defendant, the payee of a negotiable note who signed his name on the back of the note under these words, "I this day sold and delivered to Catharine M. Adams the *with not*," thereby assumed all the liabilities of an endorser. The court there says:

"The defendant declares that he sold and delivered the note. Every indorser of a bill or note impliedly says the same thing by his indorsement. The defendant did sell and deliver the note, and by making that declaration over his name on the back of it, he also agreed to pay the note to the plaintiff according to its tenor, upon seasonable notice, if the maker did not pay it."

In Davidson v. Powell, 114 N. C. 575, 19 S. E. 601, it was held that the indorsement of a negotiable note in these words, "I assign over the within note to S. M. Powell," does not limit the indorser's liability. In Sears v. Lantz, 47 Iowa, 658, it is held that where the payee of a note wrote on the back thereof the following words: "I hereby assign all my right and title to Louis Meckley," and signed his name

thereto, he thereby subjected himself to all the liabilities of an indorser. In Merrill v. Hurley, 6 S. D. 593, 62 N. W. 958, 55 Am. St. Rep. 859, it is held that when the president of a corporation to which negotiable interest bearing bonds are payable, places upon the back thereof the words, "For value received I hereby assign the within bond, together with all our interest in and all our right under the mortgage securing the same to Mary E. Merrill without recourse," and signs the same as such president, the same constitutes a contract of indorsement and is not a mere assignment of the instrument. Bisbing v. Graham, 14 Pa. 14, 53 Am. Dec. 510, was a suit on a note by the endorsee against the maker. The note was payable to the order of David Paynter. He indorsed it as follows: "For value received I assign to William Graham, or order, all my right, title and interest in the within note, without recourse"—and signed his name thereto. The court held this to be an indorsement, protecting the indorsee from equities existing between the maker and payee, making use of these words:

"Nor is the fact that the transfer of the note assumes the form of an ordinary assignment, such a departure from the usual course of business as to put the indorsee on his guard against the indorser. Although a blank indorsement in our commercial towns is the usual mode, yet in the country it is so frequently otherwise that it seldom, if ever, provokes inquiry or observation."

In the light thrown upon this so-called assignment by the authorities cited we are unable to treat it merely as an assignment of a chose in action, subjecting the assignee to such defenses as might be made against the assignor. In our opinion it is, in all essential respects, the equivalent of a blank indorsement, and relieves an innocent holder from equities existing between the makers and payee. This, we think, would be true under a proper application of the principles of the law merchant; but we are especially satisfied of it in view of the provisions of the statute of Nebraska. By that statute a note, whether payable to a person or his assigns, or to a person or his order, is equally negotiable. Whether payable one way or the other, the statute, treating them practically alike, for the purpose, doubtless, of facilitating the transaction of business, sanctions the transfer of title by mere endorsement. If the note is payable to a person or assigns, an assignment by the payee using the words employed in this case, "hereby assigns and transfers," would be the technically correct method of transferring the legal title of such a note. Again, treating them in pari materia, the technical assignment, like that above indicated, when containing no words of a restrictive or conditional character from which an intent not to transfer the legal title could be reasonably drawn, should transfer the legal title as effectually as the mere endorsement. The statute discloses a general policy in the state of Nebraska, and from it we are at liberty to draw all reasonable deductions.

The decree below was for the right party and is accordingly affirmed.

FIRST NAT. BANK OF CHICAGO v. BAIRD.

(Circuit Court of Appeals, Eighth Circuit. November 29, 1905.)

No. 2,266.

1. CHATTEL MORTGAGES—TRANSFER—NECESSITY OF RECORDING ASSIGNMENT.
Rev. St. Wyo. 1899, § 2812, while it authorizes the recording of assignments of chattel mortgages, does not require it, in order to render a chattel mortgage valid in the hands of a transferee as against subsequent purchasers of the property from the mortgagor, nor affect the general rule that an indorsement before maturity of negotiable notes, secured by such a mortgage duly recorded, carries the mortgage with it, although no assignment is made.

2. SAME—DISCHARGE—PAYMENT TO MORTGAGEE AFTER TRANSFER OF NOTES.
Defendant purchased a large number of cattle, with knowledge that some of the same were subject to a mortgage executed by the seller to secure negotiable notes, and in accordance with the right given by the contract to pay the mortgage from the purchase money defendant, after the cattle were delivered, paid the amount thereof to the mortgagee and obtained releases from it. Prior to the sale the mortgagee had sold and indorsed the notes secured to plaintiff. *Held*, that such indorsement operated to transfer the mortgage, which could thereafter be released only by plaintiff, even though no assignment was taken or recorded, as might have been done under the statute, and that defendant was not protected by his payment to the mortgagee, which could not produce the notes and was not authorized by plaintiff to receive such payment.

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

Edgar M. Morsman, Jr. (C. W. Burdick, on the brief), for plaintiff in error.

John W. Lacey, for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

CARLAND, District Judge. This action was commenced by the bank against Baird to recover damages for the conversion of 60 bulls and 550 two year old steers and spayed heifers. At the trial the following facts appeared. On March 21, 1903, one Henry N. Flato executed and delivered to the Flato Commission Company his two certain negotiable promissory notes, due October 21, 1903, for the sum of $10,000 and $13,186.72, respectively. On the same day, in order to secure the payment of said promissory notes, Flato executed and delivered to said Flato Commission Company a chattel mortgage which so far as is material to the questions raised on this writ of error, is in words and figures as follows:

"Know all men by these presents, that Henry N. Flato, of the county of Converse, state of Wyoming, party of the first part, in consideration of the sum of twenty-three thousand, one hundred and eighty-six and 72-100 dollars to him paid by the Flato Commission Company, a corporation, party of the second part, the receipt whereof is hereby acknowledged, has bargained, sold, assigned, and transferred, and by these presents does bargain, sell, assign and transfer, unto said party of the second part and its successors and assigns, all the following articles of personal property, situated in the county of Converse and state of Wyoming, to wit: Ten hundred and ninety

(1090) head of cattle 2 year old and upwards, average weight about ——— pounds, and worth $30,000.00 now. For further and better description said cattle are marked and branded with one or more of the marks and brands as follows, viz: 1,000 head of high-grade two year old steers and spayed heifers branded * * * on left side, 90 head of Hereford and Shorthorn bulls branded * * * or FT on left side—and it is the intention of the mortgagor by these presents to cover all the cattle of this description owned and controlled by him. * * * Provided, always, and these presents are upon this express condition, that if said party of the first part shall pay, or cause to be paid unto the said party of the second part, its successors or assigns, the commission heretofore stated and agreed upon, and the aforesaid sum of twenty-three thousand, one hundred and eighty-six and 72-100 dollars ($23,186.72) according to the terms of two certain promissory notes of even date herewith, executed by Henry N. Flato to the order of the Flato Commission Company, and payable as follows: One note for $13,186.72, dated March 21st, 1903, payable Oct. 21st, 1903, after date. One note for $10,000.00 dated March 21st, 1903, payable Oct. 21st, 1903, after date. * * * All payable at the office of said the Flato Commission Company, So. Omaha, Neb., and all with interest thereon at the rate of 9 per cent per annum from maturity * * * then these presents * * * shall be void."

A copy of said mortgage was duly filed for record in the office of the register of deeds for Converse counnty, Wyo., on March 27, 1903. On the 30th day of April, 1903, the Flato Commission Company duly indorsed, sold, and delivered, for value and before maturity, said promissory notes, together with said chattel mortgage, to the plaintiff bank, which has ever since remained the lawful owner and holder of the same, and no part of the amount due on said notes has been paid to said bank. On June 2, 1903, Henry N. Flato, the maker of said notes, made and entered into a written agreement with the defendant, Baird, which, so far as material, was in words and figures following:

"This agreement, made and entered into this 2d day of June, A. D. 1903, by and between Henry N. Flato of Douglas county, Wyoming, of the first part, and W. M. Baird, of Weston county, Wyoming, party of the second part, witnesseth: That for and in consideration of one dollar in hand paid, and other good and valuable considerations hereinafter named and set forth, the said party of the first part has this day sold and transferred to said party of the second part four thousand head of cattle, more or less, as said cattle are rounded up and found on the ranges in the state of Wyoming, all of said cattle being branded with one or more of the following brands: * * * Said brands being located on left side or hip, and also all cattle branded * * * on left side and * * * on left shoulder. That all sucking calves are to be thrown in, and also all sucking calves branded since January 1st, 1903. That said cattle are to be delivered at '21' Ranch on Black Thunder Creek in Western county, Wyoming, during the seasons of 1903 and 1904, as they are rounded up by said party of the first part, * * * together with the party of the second part. That the said party of the second part shall pay said party of the first part the sum of $28.50 for each and every head of cattle delivered * * * by the said party of the first part in accordance with and under the terms of this agreement. * * * That said party of the second part is to place in escrow as part payment for the above described goods and chattels a good and sufficient deed in writing to 654 acres of land described as follows, to wit: Lots seven (7), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), and twenty (20), in section one (1), township seventy-eight (78), of range thirty-two (32), and the west half of the southwest quarter of section six (6), township (78), range thirty-one (31), in Guthrie county, Iowa, containing 654 acres, which said land is valued at $33,200.00. That said deed is to be placed in escrow in the Union Stock Yards National Bank

of South Omaha, and to remain in escrow in said bank until sufficient cattle have been delivered under this contract to pay for said land, and, when the mortgage upon the cattle so delivered has been released, then the said deed is to be delivered by said bank to said party of the first part or his representative. That the possession of the above described premises is to be delivered to the party of the first part from and after this date; said party of the first part assuming full management of said premises from and after June 1st, 1903, and being responsible therefor. That after the above described land has been paid for as herein specified, and in accordance with the terms of this agreement, all cattle thereafter delivered and received by said party of the second part are to be paid for at the rate herein specified and agreed upon, and the money due therefor shall be deposited in the Union Stock Yards National Bank of South Omaha to be delivered to the Flato Commission Company, when the said Flato Commission Company furnishes the proper releases of the mortgages held upon the cattle so delivered."

On July 4, 1903, Flato delivered part of the cattle described in said contract at the place designated therein and subsequently and prior to October 30, 1903, delivered the remainder. When the cattle were delivered at the ranch of defendant, Baird, they were branded "21" and turned loose on the range. T. B. McPherson was the cashier of the Stock Yards National Bank at South Omaha, Neb. James C. Dahlman was secretary and manager of the Flato Commission Company, also of South Omaha. The Stock Yards National Bank and Flato Commission Company occupied the same building. Henry N. Flato had no interest in the Flato Commission Company. When cattle were delivered by Flato at Baird's ranch under the contract, Baird gave Flato a receipt for the same and Flato sent the receipt to Dahlman. Dahlman would then take the receipt to McPherson, and McPherson, upon receiving a release of the cattle from Dahlman of the Flato mortgage, would give Dahlman a check for the cattle; the check being signed "Baird, by McPherson." During all the time of these payments by McPherson for cattle delivered by Flato to Baird the Flato Commission Company was largely indebted to the Stock Yards National Bank. The transaction between Flato and Baird was closed satisfactorily so far as appears. Baird paid for all the cattle received from Flato at the contract price. The plaintiff bank, before commencement of this action, claiming to be the owner and entitled to the possession thereof by virtue of a special property therein under the chattel mortgage given by Flato to the Flato Commission Company, demanded from Baird the possession of the cattle covered by the mortgage, which demand was refused. Evidence was also introduced tending to show that Baird had received by purchase from Flato the cattle, or some of them, covered by the chattel mortgage and also the value of the same. No assignment of the mortgage was ever filed or recorded in the office of the register of deeds of Converse county, Wyo. Baird had actual knowledge of the mortgage when he purchased the cattle but no knowledge of the assignment to plaintiff bank. There was no evidence that would warrant a finding by court or jury that plaintiff bank knew of or authorized the sale of the cattle by Flato to Baird. At the close of all the testimony the trial court charged the jury, and the following portions of the charge, among others, were duly excepted to.

"(1) It is conceded by all that no assignment of this mortgage to this plaintiff was ever recorded, and it was suggested by counsel at the argument that no assignment of the mortgage was ever taken; that the notes were transferred and the transfer of the notes carried with it the transfer of the this case, that would not relieve the plaintiff from the necessity of obtaining and filing an assignment or some notice of record, so that innocent purchasers might be protected, under the statutes of this state. (2) The statutes of Wyoming provide for recording in the county clerk's office assignments of chattel mortgages. This is for the purpose of giving notice of the rights of the assigns to persons dealing with the property. In this case the plaintiff bank failed to record any assignment of the mortgage and thereby failed to use one of the recognized methods of protecting its rights. Now a notice filed of record in this case would have protected both Mr. Baird and this bank. If, under these circumstances, the defendant made all reasonable investigations and inquiries as to the ownership of the mortgage, and that he must do, and upon the information so obtained in good faith purchased the cattle in controversy, paying full value therefor, upon the faith of the release of the mortgage executed by the Flato Commission Company, the apparent owner of the mortgage, and without any knowledge on his part—that is, on the part of the defendant, Baird—then you are authorized to find for the defendant. (3) I do not think that the plaintiff, under our recording acts, can escape its duty to file notice, to protect innocent purchasers, of the transfer of the mortgage by simply saying, as counsel has in argument, that we took no assignment, but the transfer of the notes carried with it the mortgage. While that is true, the recording act, as I understand it, requires an assignment to be recorded, but even if the court is in error about that, it is certainly authorized and I think, if that be the case, it is all sufficient. In other words, I think parties purchasing paper of this character are bound to comply with the recording acts for the purpose of protecting innocent purchasers. (4) The testimony in this case shows, and I think there is no conflict, that Mr. Baird paid for these cattle, and there is no controversy but that the bank purchased these notes mentioned in the mortgage, which mortgage secured the notes, but where one of two innocent parties must suffer, the one, if one is shown to be negligent, is the one who must suffer Now, in this case, as I said to you a moment ago, if this bank had filed a notice of record by way of an assignment, or otherwise, which I think it was its duty to do, both the bank and Mr. Baird would have been protected in this transaction."

In relation to the matters referred to in the above excerpts from the court's charge, counsel for plaintiff bank requested the court to charge the jury as follows:

"(1) The jury are instructed that payment by Baird to the Flato Commission Company and the purported execution by the Flato Commission Company of the releases for the bulls and two year old steers and spayed heifers do not constitute a valid discharge of the lien of plaintiff's mortgage upon said cattle."

Which request was by the court refused and an exception taken. Counsel for plaintiff bank also requested the court to charge the jury as follows:

"(2) The jury are instructed that the evidence fails to show that either Dahlman or the Flato Commission Company were the agents of the plaintiff either in making the sale to Baird or in receiving payment for the cattle, and the acts of said Dahlman and the said Flato Commission Company are not binding on the plaintiff."

Which said request was by the court refused and an exception taken. In lieu thereof, the trial court of its own motion charged the jury as follows:

"(3) There is some testimony in the case tending to show that Mr. Dahlman figured in the matter of this sale of these cattle to the defendant, and as there is some controversy between counsel and perhaps some conflict in the evidence as to the extent of his authority, I give you this rule in relation to that: If you find from the evidence that the plaintiff bank authorized Mr. Dahlman, the secretary of the Flato Commission Company, to dispose of the cattle in controversy, and that Mr. Dahlman thereafter joined in the sale of the cattle to the defendant, Mr. Baird; and that before the purchase was completed gave notice of the trade to the plaintiff bank, and that notwithstanding these things the plaintiff bank took no steps to inform intending purchasers of its rights in the mortgage, and if you further find from the evidence that under these circumstances that the defendant Baird purchased the property in good faith, paying full value therefor, relying upon the release of the mortgage by the Flato Commission Company, the apparent owner of the mortgage, with no knowledge whatever of any rights therein in the plaintiff bank, then you will find for the defendant. And if you find from the evidence that Mr. Dahlman was authorized by the bank to dispose of the cattle in controversy and was also authorized to release the mortgage in controversy, and that Mr. Dahlman, while so authorized and acting for the bank and the Flato Commission Company joined in making the sale of the cattle to the defendant Baird, and if you further find that the defendant Mr. Baird purchased the cattle in good faith, paying full value therefor upon the faith of a release of the mortgage of the Flato Commission Company and without knowledge of the rights of the plaintiff bank, your finding should be for the defendant."

Although the case was in form submitted to the jury the practical effect of the court's charge was to direct a verdict for the defendant, and if the court's view of the law was correct a direction in favor of the defendant was justified. As the case stood at the close of the testimony the plaintiff bank was entitled to go to the jury on the question as to how many cattle Baird had converted and the value thereof, or the defendant Baird was entitled to a directed verdict in his favor. A strong and persuasive argument is made by counsel for defendant Baird on the theory that Baird was a purchaser of the cattle from Flato in good faith relying upon the release of the chattel mortgage obtained from the Flato Commission Company. The evidence introduced at the trial shows a very different case than the one argued by counsel for defendant so far as this feature of the case is concerned. The evidence shows without contradiction that Baird, or McPherson, who acted for him, never received a release of any kind until after every head of cattle described in any release had been delivered to Baird at his ranch. The language of the contract of June 21, 1903, between Flato and Baird declared "that said party of the first part has this day sold and transferred to said party of the second part."

If the contract itself did not constitute a completed sale as between the parties thereto, then all that was necessary was a delivery of the cattle under contract, and delivery of the cattle thereunder was made before any release of the chattel mortgage was in existence, so that to say that Baird purchased on the faith of the release is not in accordance with the evidence. The sale and purchase of the cattle was one thing, the payment for the same quite another. Baird knew of the mortgage when he purchased the cattle. He recognized it as a valid and existing lien. He had provisions inserted in the contract which would permit him to pay the mortgage and have the payment deducted from the amount coming to Flato. After the cattle had been

sold and delivered to Baird he would not pay the purchase price until he had a release of the mortgage. This was not buying on the faith of the release, it was directly the contrary. He did not trust any one to pay the mortgage except himself, and he paid the money due thereon to the original payee of the notes without the production of the notes and mortgage and, so far as the record shows, without even asking for them. This in the face of the fact that the notes as described in the mortgage, which mortgage Baird had seen was payable to the Flato Commission Company, its successors or assigns. It thus appears that Baird before and after he had purchased the cattle, and after they had been delivered to him, knew of the Flato Commission mortgage, knew that it had not been paid or discharged, knew of this before he paid a dollar of the purchase price and with the world open to him as a field of inquiry, he paid the money to one who was not the owner and holder of the notes and mortgage, and could not produce the same. It is not disputed but that the indorsement and delivery of the Flato notes to the plaintiff bank constituted in law an assignment of the mortgage securing the same. Therefore the payment of the amount due thereon to the Flato Commission Company did not discharge the lien of the mortgage, unless there is something in the statutes of Wyoming which renders the assignment of the mortgage to the plaintiff bank void as against Baird.

It is claimed by counsel for Baird that the laws of Wyoming rendered the assignment of the mortgage to plaintiff bank void as against Baird, for the reason that said assignment was not recorded in the office of the register of deeds of Converse county, Wyo., or that said laws furnished an opportunity for recording the assignment of the mortgage and the bank having failed to have the same recorded was guilty of negligence which will defeat a recovery in this action. The statutes of Wyoming (Rev. St. 1899) bearing upon the subject are as follows:

"Sec. 2811. Every mortgage, bond, conveyance or other instrument intended to operate as a mortgage of goods, chattels or personal property which shall not be accompanied by immediate delivery and be followed by an actual and a continued change of possession of the goods, chattels and personal property so mortgaged shall be absolutely void as against the creditors of the mortgagor, and as against subsequent mortgagees or purchasers in good faith, unless said mortgage, bond, conveyance or other instrument intended to operate as a chattel mortgage shall be filed as hereinafter provided.

"Sec. 2812. Every such mortgage, bond, conveyance or other instrument intended to operate as a chattel mortgage shall be filed in the office of the county clerk where the property is, and shall be indexed by the clerk of said county in a book to be kept by such clerk to be called the 'Chattel Mortgage Index.' Upon the filing of such mortgage, conveyance or other instruments intended to operate as a chattel mortgage, the county clerk shall enter in said index the name of the mortgagor, the name of the mortgagee in alphabetical order, the date of said instrument, the day and hour of filing, the amount for which it is security, and the date of the maturity of said mortgage, together with a brief description or reference to mortgaged property, and upon the release, discharge and assignment thereof, he shall enter in suitable columns opposite the original entry of filing, the date of said assignment, the date of the filing of said assignment, and the assignee thereof, or in case of the release of said instrument, the date of said discharge, satisfaction or release, and by whom released, satisfied or discharged. The release,

satisfaction, discharge or assignment of the chattel mortgage may be endorsed upon the original instrument on file in the clerk's office, or by an instrument of release and discharge or assignment executed and acknowledged in the manner provided for a chattel mortgage, which shall be filed with, and by the clerk be attached to the original instrument in his office. For filing and indexing a chattel mortgage the county clerk shall collect and pay into the county treasury a fee of twenty-five cents to be paid by the party requesting the filing of such instrument, and for each assignment, release or discharge, the county clerk shall collect and pay into the county treasury a fee of fifteen cents, to be paid by the party requesting such service."

It would extend this opinion to an unwarrantable length to review all the decisions of the courts bearing upon the questions raised by the instructions of the court given and those requested by counsel for defendant Baird and by the court refused. Speaking without reference to the statutes of Wyoming, it may be stated that it is now the settled law in this court that the indorsement of the two negotiable promissory notes before maturity to the plaintiff bank carried with them the chattel mortgage executed as security therefor, and that plaintiff bank alone could thereafter discharge the mortgage lien. That the payment of the mortgage debt by Baird under the circumstances detailed in the evidence in this case is not sufficient to protect Baird as against the lien of the mortgage which passed to plaintiff bank prior to such payment. Swift v. Bank of Washington, 114 Fed. 643, 52 C. C. A. 339; City National Bank v. Goodloe, McClellan Co., 93 Mo. App. 125; State National Bank v. Cudahy Packing Co. (C. C.) 126 Fed. 543; Cudahy Packing Co. v. State National Bank, 134 Fed. 538, 67 C. C. A. 662; First National Bank v. National Live Stock Bank (Okl.) 76 Pac. 130; Kerfoot v. State Bank of Waterloo (Okl.) 77 Pac. 46; Martindale v. Burch, 57 Iowa, 291, 10 N. W. 670; Tilden v. Stilson, 49 Neb. 384, 68 N. W. 478; Eggert v. Beyer, 43 Neb. 711, 62 N. W. 57; Weldon v. Tollman, 67 Fed. 986, 15 C. C. A. 138; Mary Leahy et al. v. Jesse Haworth, Executor, etc. (decided by this court November 7, 1905) 141 Fed. 850.

We have carefully examined the authorities cited by counsel for defendant, and find them all arising under statutes regulating the recording of instruments relating to real estate, where said statutes declared void conveyances and assignments as against purchasers or incumbrancers in good faith, or under a state of facts which would not make the equitable doctrines therein referred to applicable to the case at bar. The statutes of Wyoming heretofore quoted do not require an assignment of a chattel mortgage to be recorded, in order that it may be valid as against subsequent purchasers or incumbrancers, so the assignment of the Flato mortgage was not rendered void by those statutes for want of record. See Graham v. Blinn, 3 Wyo. 746, 30 Pac. 446. In the case referred to the Supreme Court of Wyoming used the following language:

"There was no written assignment of this mortgage, but that was not necessary. Our law on chattel mortgages does not require this, although it makes provision for a record of such assignments."

It is claimed, however, that the statutes of Wyoming afford an opportunity of recording assignments of chattel mortgages and that because the plaintiff bank did not procure a written assignment of the

Flato mortgage and have it recorded, it was guilty of such negligence as would defeat its lien on the cattle purchased by Baird. If the statute did not require the assignment to be recorded, then the recording of the same would not have been constructive notice to any one. Negligence only arises from the violation of some legal duty owing by one individual to another. Let us then inquire as to what legal duty the plaintiff bank owed to purchasers of the Flato cattle. The plaintiff bank was the owner and holder of the Flato notes and mortgage. The mortgage was duly recorded. No person could purchase the cattle without actual or constructive notice of the mortgage. There was, therefore, no duty resting on the plaintiff bank to notify any one of the mortgage. Was there any legal duty resting upon it to notify any one that it owned the debt secured thereby? We think not. We think the plaintiff bank had the right to rely upon the fact that all persons purchasing the cattle with knowledge of the mortgage, with knowledge that the notes were negotiable, with knowledge derived from the face of the mortgage that the debt thereby secured was payable to the Flato Commission Company, its successors or assigns, were bound to use ordinary care to see that the person to whom the debt was paid was the owner and holder of the notes. Especially when this fact could be ascertained by simply asking the person who was about to receive payment to produce the evidence of the indebtedness. Any other view would greatly impede the circulation of negotiable paper and largely destroy its value. We have carefully examined the evidence in the record upon the question as to whether the plaintiff bank ever knew of or authorized the sale of the cattle by Flato to Baird, or whether it ever authorized the Flato Commission Company to receive payment of the notes, and we can find no competent evidence upon which the jury would be authorized to find in the affirmative on the propositions stated. We therefore are of the opinion that the trial court erred in charging the jury as it did in the excerpts quoted in this opinion and also erred in refusing to charge as requested by counsel for plaintiff bank.

The judgment, therefore, of the trial court must be reversed, and a new trial ordered.

THE LACE HOUSE v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 12, 1905.)

No. 1,454.

1. CUSTOMS DUTIES—UNDERVALUATION—FORFEITURE—CONDITION PRECEDENT—LEGAL APPRAISEMENT.

   Tariff Act July 24, 1897, c. 11, § 32, 30 Stat. 211 [U. S. Comp. St. 1901, p. 1924], providing for the forfeiture of merchandise the "appraised value" of which exceeds the entered value more than 50 per cent., is not applicable unless there has been a legal appraisement.

2. SAME—APPRAISEMENT—METHOD OF PROCEDURE.

   An appraising officer, having no knowledge as to the value of certain imported articles, sent samples to the appraiser at the port of New York for information. *Held*, that this was legal, and that the right so to do or

to use any other available means was conferred by Customs Administrative Act June 10, 1890, c. 407, § 10, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1922], authorizing appraising officers to "use all reasonable ways and means" in their power in ascertaining the value of merchandise.

3. SAME—VALIDITY OF APPRAISEMENT—CONDITION PRECEDENT—CERTIFICATE OF APPRAISEMENT.

Under section 2950, Rev. St. [U. S. Comp. St. 1901, p. 1940], and Customs Administrative Act June 10, 1890, c. 407, § 13, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932], relating to certificates of officers appraising imported goods, it is intended that the appraisement should be reduced to writing. The certificate of the appraising officer is the legal evidence of appraisement, and if it is not made the appraisement is illegal.

4. SAME—TREASURY REGULATIONS—DIRECTORY PROVISIONS.

While the customs regulations are valuable as showing the practical construction placed by the Treasury Department on the customs laws, many of them are merely directory, and an appraisement might be valid, and yet not in strict conformity with every requirement of the rules prescribed for the conduct of appraisements.

5. SAME—APPRAISEMENT—ADVANCE IN VALUE—NOTICE TO IMPORTERS.

Where an appraiser who has advanced the value of imported merchandise fails to give notice of the advance to the importer as required by the customs regulations, the importer thus being deprived of the right of appeal for reappraisement, the appraisement is invalid, and does not afford a proper basis for the forfeiture and condemnation of the goods for undervaluation, under Tariff Act July 24, 1897, c. 11, § 32, 30 Stat. 211 [U. S. Comp. St. 1901, p. 1924].

6. SAME—UNDERVALUATION—SEIZURE—RIGHT OF REAPPRAISEMENT.

The fact that goods have been seized for undervaluation does not deprive the consignee or owner of the right of reappraisement given in Customs Administrative Act June 10, 1890, c. 407, § 13, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932].

7. SAME—FALSE INVOICE—FAILURE TO SPECIFY GOODS.

The fact that three lace dresses in a package by themselves were found in a case of laces and embroideries, but were not mentioned in the invoice does not by itself warrant the infliction of the penalties provided in Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 130 [U. S. Comp. St. 1901, p. 1895], for entering merchandise by means of a false or fraudulent invoice.

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

This was a proceeding in rem brought by the United States in the court below to condemn certain merchandise which had been imported into the United States. The goods consisted of laces, embroidery, edging, and insertion which had been manufactured in Saxony and Switzerland, and of three lace dresses. It is alleged in the information that the invoice of the goods (1) did not contain a true and full statement of the actual market value and wholesale price of said merchandise at the time of the exportation thereof to the United States in the principal markets of the country from whence said merchandise was exported, and (2) that the said invoice was a false invoice, in this: that, when the case of laces and embroideries was opened in Atlanta, Ga., it contained three lace dresses, valued at $20.42, which were not on the invoice. The information elaborately charged the consignee with a scheme to defraud the government by means of a false and fraudulent invoice in making the entry of the imported merchandise.[1]

The Lace House, a corporation under the laws of Georgia, intervened and claimed the goods, and answered the information. The answer averred that

[1] See Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895].

the value of the goods declared was the reasonable value thereof; that the reasonable duty on the merchandise to which the United States was entitled had been paid; that the claimant tendered the amount of duty alleged to be due, even though said amount is excessive; that neither the claimant nor any of its officers or agents had any knowledge that the three lace dresses were in the package until the same was opened; that it was not the purpose of the claimant to defraud or deprive the United States government of any of its lawful duty on the goods; that the omission to put the lace dresses on the invoice was an accident or mistake, and was not done with intent to injure or defraud the government.

The government offered the following evidence:

Marcellus O. Markham testified: "I am a surveyor of customs for the port of Atlanta, Ga., and in my official capacity received a box of lace goods shipped from London, England, to the Lace House at Atlanta, under an invoice which I here present. This box contained the articles specified in the invoice, and in addition thereto contained three lace dresses. These three lace dresses were in a package by themselves, and the lace goods described in the invoice were done up in packages corresponding with the enumeration on the invoice. I sent for Mrs. Hunter, president of the Lace House, and she came to my office, and I then presented to her the declaration, which I also have. I do not know if Mrs. Hunter read this paper, and I do not recall that I read it to her, but I handed it to her and requested her to sign it, and she did sign it and made the affidavit entered thereon. I sent that invoice on to New York for valuation or appraisement, and sent with it samples of the goods. I received in reply to my communication this letter and the statement attached thereto. I made the statement attached to that letter my appraisement of the goods. I do not know anything about the value of the lace goods. I do not know of my own knowledge which is correct, the valuation given in the invoice or the valuation on the paper which I adopted as my appraisal. I afterwards cited Mrs. Hattie Hunter and Vance Hunter up for examination, and they testified, and their testimony is in writing and in the hands of the district attorney. My clerk, Smith Easley, made calculations of the value of the goods in pounds, shillings, and pence, according to the invoice, and in pounds, shillings, and pence according to my appraisal."

Smith Easley testified: "The three lace dresses were not on the invoice, and I made a calculation of the value of the goods as shown in the invoice and as shown on the list sent from New York, about which Surveyor Markham has testified. If you take all the goods on the invoice according to the invoice valuation, and take all the goods on the appraisal adopted by the surveyor, I find as follows: According to the invoice, exclusive of the lace dresses, the amount was $315. According to the appraisement, they were worth $461.33. There is a difference of $146.33. The increase of the appraised value of the whole over the invoice was 46 per cent. Three packages or parcels in the box numbered 1461, 4839, and 5927, or numerically considered from the top, 1, 2, and 4, amounted to 66 per cent. by the appraised value more than the invoice price. Each of these separate items exceeded 50 per cent. by appraised value over the value as given in the invoice. The three lace dresses were not included in the total of the value of the goods according to the invoice, and are included in the value of the goods in the appraised value which the surveyor testified he adopted as his appraisal."

The government offered in evidence the following letter and statement, both referred to by the witness Markham:

"Office of the Appraiser of Merchandise, Christopher and Washington Streets.

"New York, N. Y., April 21, 1903.

"Hon. M. O. Markham, Surveyor of Customs, Atlanta, Ga.—Sir: Your favor of the 9th instant, regarding a shipment of laces and embroideries, invoice No. 5,524, dated at London, March 16th, to the Lace House, Atlanta, Ga., at hand. The samples covering this shipment also received. In reply to your request for a detailed appraisement of same, I inclose herewith a list of the pattern numbers with the appraised value of each in the country of production and in the currency thereof. The embroidered laces were man-

ufactured in Plauen, Saxony; the embroideries in St. Gall, Switzerland. The London values would naturally be appreciably higher.

"Respectfully, G. W. Whitehead, Appraiser,
"1 enclosure. E. A. H."

The statement which was offered with the letter, and presumably the inclosure referred to in the letter, consisted of a list of the pattern numbers of the lace with its appraised value per metre, aune, and dozen. The list was not signed, dated, or certified by anyone, and covers two and a half printed pages. It may be well shown by the first and last parts or divisions, which are as follows:

4,839 Lace.			Appraised Value.
Pat. No. 4,839	Mks.	3 00 per	metre.
" " 4,848	"	1 50 "	"
" " 5,559	"	2 25 "	"
" " 5,678	"	4 00 "	"
" " 4,853	"	4 00 "	"
" " 4,907	"	2 50 "	"
* * * * * * * * * * *		* *	*

31. Box 7.			Appraised Value.
Pat. No. 126,074	Fcs.	.70 per	doz.
" " 84,904	"	.60 "	"
" " 86,974	"	.60 "	"
" " 86,976	"	.70 "	"
" " 86,977	"	.90 "	"
" " 84,978	"	.80 "	"

The claimant objected to the introduction of this letter and paper in evidence on the ground that it was unofficial, that in itself it showed no appraisal of the property, and that it was a mere communication from a department of the government without any statement as to who made it, how it was made, or the knowledge and capacity of the person making it to arrive at the conclusions of value therein stated; and on the further ground that it was not authenticated in any official manner, or by any officer of the law in his official capacity; and on the further ground that Mr. Markham, having declared that he had no knowledge of the value of the goods and that he based his opinion entirely and alone upon that paper, had not made in fact any appraisal, and that the paper was therefore incompetent and inadmissible in evidence; and on the further ground that Mrs. Hunter had not been shown to have had any notice of the appraisal, nor any opportunity to appeal therefrom. The court thereupon admitted the letter and paper in evidence, and the claimant excepted. The invoice of the goods, signed, "Vance Hunter, Charles Elstob, Agent," and the declaration of the consignee, signed, "Lace House, H. Hunter, President," both in the usual form, were in evidence.

The government having rested, the claimant offered the following evidence:

Mrs. Hattie Hunter testified: "The Lace House is a corporation, and I own nearly all of it—all except one share, which my husband, Vance Hunter, owned. I was sent for by M. O. Markham, surveyor, when the case of the lace goods arrived. Vance Hunter was sick at the time and unable to attend to the business, and this was the first time that I had been called on in a matter of that kind. I had never made a declaration before, and Mr. Markham handed me a paper which I signed without reading, or without any knowledge of its contents. The fact was that I thought it was a mere matter of form, and I did not know what was in the box, and had paid no particular attention to what was in the invoice. I did not know until I heard about the lace dresses being in the box that they were in it. I do not know who put them in or how they came to be left off of the invoice. No one had authority to ship goods to the Lace House without having them on an invoice. I do not know what the market value of these goods was in the country where they were bought. I never had any intention of getting goods in at less than their value. When I heard that Mr. Markham thought the goods were undervalued, I gave notice that I was willing to pay duty on the real value. I

knew nothing about sending samples on to New York. I did not know that the goods were to be appraised in New York. The first thing I knew of the matter after signing the declaration was a summons to appear and be examined, and I testified at that examination under oath. The next I knew I was arrested under a warrant in a criminal case, and after that I was served in this case now on trial. I asked Mr. Hunter, who is now dead, what about the lace dresses, and he said he did not know they had been sent, and the only knowledge he had of lace dresses was that he had talked in Europe several years ago with a gentleman with whom he had long dealt and from whom he had bought in the past many goods, and this gentleman said, 'Some of these times I will make your wife a present of some lace dresses,' but that he did not know when, and had no idea they would be sent in this case, or that they would be left off of the invoice. Mr. Hunter generally attended to buying goods and making declarations, I suppose; because, if that is always necessary, he must have attended to it, because I never did a thing like that, except in this instance, and only then because he was seriously sick. Mr. Hunter was not in Europe within a year of the time these goods were shipped from London."

C. E. Dooly testified: "I am a clerk in the Lace House. I was present when the box was opened, and I cut off at the request of Mr. Markham samples of the laces contained in the box. I did not know anything about the appraisement. I am not familiar with the prices of such goods in Europe. Sometimes job lots can be picked up at low prices."

It was also shown that the Lace House, claimant, paid to M. O. Markham, surveyor, as duty on the goods $189, the same being the duty according to the invoice, but the surveyor did not receive, and declined to accept, any duty on the three lace dresses not on the invoice. The duty was paid by Mrs. Hunter before the package was opened, and before the alleged appraisement was made.

At the close of the argument, the court, upon motion of the district attorney, directed a verdict as follows: "The statute in question reads: 'That if the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he rebut such presumption of fraudulent intent by sufficient evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise, or the value thereof, in the case or package containing the particular article or articles in each invoice which are undervalued.' Now, it would seem under this statute that if any single article in the case is undervalued more than 50 per cent. that would be sufficient. But in this case the proof of the government goes farther than that, and takes them by lots, as you have heard them called here, and two of those lots at least were undervalued, one 68 per cent. and one 73 per cent. The evidence of that is in the testimony of the surveyor's clerk. So this seems to be a clear violation of the terms of the statute. Of course, the intention of the statute is very apparent. It provides that undervaluation up to 50 per cent. the consignee simply pays the extra duty on the undervalued goods. But, when it goes over 50 per cent. of the appraised value, then it shall be presumptively fraudulent, and the claimant of the goods must rebut that presumption by proof. I think this appraisement a perfectly good appraisal, and I do not see but one course to pursue, and that is to give the government a verdict in this case. The statute is plain. The evidence is uncontradicted that one of those lots was 68 per cent. under the appraised value (which is more than 50 per cent.), and consequently the whole of the merchandise is forfeited to the government. Of course, as to the three lace dresses, counsel for the claimant makes no question but that they would be forfeited in any event. You can prepare a verdict, and I will get Mr. Harwell to act as fore-

man, and sign it. You can have an exception to that, Capt. Ellis. Let an exception be noted."

The claimant duly excepted to the action of the court in directing a verdict. The jury returned a verdict as directed, and the court entered judgment of forfeiture thereon, and the claimant brings the case here on error. It is assigned by claimant, the plaintiff in error here, that the Circuit Court erred (1) in receiving in evidence the letter and statement copied herein, and (2) in directing a verdict for the government.

W. D. Ellis (Ellis, Wimbish & Ellis, on the brief), for plaintiff in error.

E. A. Angier, U. S. Atty.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

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

The merchandise condemned by the judgment of the Circuit Court was shipped from London, England, to New York, the port of arrival, and was forwarded to Atlanta, Ga., the port of entry. The invoice described the case of goods as consisting of lace and embroidery, and stated their value in English money. The claimant, by its president, paid the duty on the goods according to the invoice. There were in the case three lace dresses—in a separate package—on which the duty was not paid; the government's officer declining to receive the same, because the dresses were not listed in the invoice. The surveyor at the port of Atlanta had no knowledge of the value of laces. He wrote and sent samples of the lace to an appraiser in and for the port of New York for expert advice on the subject, and received a reply inclosing a list and description of the laces by pattern numbers, and a statement of their value per metre, aune, and dozen, in the currency of Switzerland and Saxony, the countries where the laces and embroideries were made. The Atlanta surveyor's clerk, Smith Easley, made a calculation of the value of the goods as shown in the invoice, and as shown in the statement sent the surveyor from New York, and found that, among the many packages contained in the case, there were three "that amounted to 66 per cent. by the appraised value more than the invoice price." By the appraised value the witness meant the value as stated on the list sent the surveyor from New York in answer to his inquiry. "Each of these separate items," said the witness, "exceeded 50 per cent. by appraised value over the value given in the invoice." The surveyor, Markham, testified that on the receipt of the list with the valuation of the laces, sent in answer to his letter, he adopted the same as his appraisement. No written appraisement was made by the surveyor in any manner. No notice of any kind was given to the claimant, the consignee, or to any one, that any change had been made of the valuations stated in the invoice. The court received the evidence offered, and held that it proved a valid appraisement of the goods, and directed the jury to return a verdict for the government and against the claimant. The correctness of these rulings presents the questions to be decided. The court directed the verdict for the government because the appraised value of the merchandise

exceeded the value declared in the entry by more than 50 per centum. The part of the statute directly in point (Tariff Act July 24, 1897, c. 11, § 32, 30 Stat. 211 [U. S. Comp. St. 1901, p. 1924]) was quoted by the court in its instruction to the jury, and is copied in the foregoing statement of the case. The entry is presumptively fraudulent when the "appraised value of the merchandise exceeds," etc. To make the statute applicable there must be a legal appraisement. The correctness of the court's rulings, therefore, depends on the legality of the appraisement in question.

It should be noted in the beginning that the act of February, 1881, made Atlanta, Ga., a port of delivery and provided for the appointment of only "a surveyor of customs." Act Feb. 28, 1881, c. 92, 21 Stat. 373 [U. S. Comp. St. 1901, p. 1753]. There is no collector at the port of Atlanta, and no appraiser. At a port of delivery where there is no collector the surveyor may be invested with such of the powers and duties of collectors as are appropriate to such ports. Rev. St. U. S. §§ 2628, 2629 [U. S. Comp. St. 1901, pp. 1811, 1812]; Customs Regulations (1899) art. 1612. And where there are no appraisers, appraisement may be made by the collector or other proper officer. Customs Regulations (1899) arts. 1241, 1603. It is true, therefore, as contended by the United States Attorney, that Markham, as surveyor of customs of the port in which the merchandise had been entered, had the authority "to cause the actual market value or wholesale price at the period of exportation, in the principal markets of the country from which the same has been imported, to be appraised, and such appraised value shall be considered the value upon which duty shall be assessed" (Rev. St. U. S. § 2906 [U. S. Comp. St. 1901, p. 1923]), and that he was authorized to ascertain this value by "the use of all reasonable ways and means in his power." Act June 10, 1890, c. 407, § 10, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1922]. There being no collector and no appraiser at the port, Markham, the surveyor, was charged with the duty of appraisement. He had no knowledge of the value of the goods. Therefore, by sending samples, he sought information on the subejct. His right to use Whitehead's letter and the statement it contained, or any other available means is unquestioned. The statute clearly confers such right on him. He testified: "I made the statement attached to that letter my appraisement of the goods." It may be conceded that the letter and statement contained sufficient information from which the surveyor could have made an appraisement of the goods. That is immaterial. The controlling question is, did he make a valid appraisement as required by law? Is it not required by law that the appraisement should be shown by some writing, memorandum, or certificate, signed by the officer making it? These questions are answered, we think, by the statutes:

"Where merchandise shall be entered at ports where there are no appraisers, the certificate of the revenue officer to whom is committed the estimating and collection of duties of the dutiable value of any merchandise required to be appraised, shall be deemed and taken to be the appraisement of such merchandise required by law to be made by such officer." Rev. St. § 2950 [U. S. Comp. St. 1901, p. 1940].

And in Act June 10, 1890, c. 407, § 13, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932], it is enacted that:

"At ports where there is no appraiser, the certificate of the customs officer to whom is committed the estimating and collection of duties, of the dutiable value of any merchandise required to be appraised, shall be deemed and taken to be the appraisement of such merchandise."

By article 1246, Customs Regulations (1899), it is made the duty of the officer acting as appraiser "to appraise the actual market value." etc. "These facts will be indorsed upon the invoice and signed by the appraiser * * *"; and article 1266 requires that the advances on invoices shall be made "by writing on the invoice opposite each item advanced the words, 'Add to make market value,' stating in numerals the amount necessary to make the price per unit."

While these regulations are valuable as showing the practical construction placed by the Treasury Department on the customs laws, we understand, of course, that many of them are merely directory, and that an appraisement might be valid and yet not in strict conformity with every requirement of the rules prescribed. U. S. v. Loeb, 107 Fed. 692, 46 C. C. A. 562. But looking to the statutes themselves we cannot avoid the conclusion that it was intended that the appraisement should be reduced to writing. Commenting on the regulations and statutes we have cited, the Treasury Department on May 26, 1904, in a formal letter of advice to collectors as to their duties when acting as appraisers, informed them that "the certificate of the collector is the legal evidence of appraisement." And the Secretary added:

"And the certificates or the returns of values on invoices of goods, in order to be accepted as final, must be signed by you in your official capacity as appraiser, as required by law." 7 Treasury Decisions, pp. 844, 845 (T. D. 25,321).

There are other statutory provisions that point to the same conclusion. If the importer of merchandise is dissatisfied with the appraisement, he may within two days give notice to the collector in writing and require a reappraisment (section 13, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1932]), and on the reappraisement being made by the appraiser the consignee was entitled to an appeal to the board of three general appraisers. Customs Regulations (1899) art. 1274. Unless the appraisement is put in writing and signed, or in some way identified by the officer making it, and notice of it be given, it seems impossible to give effect in practice to the statutes intended to allow a review of the appraisement. This right of review is a valuable one, and a construction of the statutes that ignores it cannot be correct. The fact that the statute confers on the importer or consignee the right to require within two days after the appraisement a reappraisement indicates that it was the intention that the appraisement should be in writing, and that notice should be given to the owner or consignee. The Treasury Department evidently puts that construction on the statutes, because such notice is required to be given by its regulations. "The addition made by the appraiser having been thus noted on the invoice and certified by him [referring to procedure under article 1266], the invoice will be forwarded to the collector, who will at once give notice of the advance to the importer." Customs Regula-

tions (1899) art. 1267. The notice required to be given by the Treasury Department states that the "merchandise has been appraised in accordance with law," and states the amount which the appraisement exceeds the amount declared as the value on entry. And the notice concludes:

"If you appeal from this appraisement, it will be necessary to do so within two official days after the day of this notice."

When the goods are legally appraised, the fact that they are seized for undervaluation does not deprive the consignee or owner of the right of reappraisement. It is in just such cases that the right is most valuable. In the case of United States v. Nasser, heard before Judge Grosscup in 1894, the appraisement of the goods had been made in the usual manner, but the surveyor of customs denied the importer the right to appeal, because the goods were then under seizure for violation of the customs laws, and the court said "that as the defendant had been denied the full right of appeal the lawful appraisement on which to base the government's claim is wanting. * * * " Synopsis of Decisions, Treasury Dept. (1894) T. D. 14,778, p. 185. Where the appraisement is not made in writing, and no notice of it is given to the consignee, who is the claimant, the claimant being thereby deprived of the right to demand reappraisement, it seems to us that the intention of the statutes would be defeated should we hold that such appraisement was valid and a proper basis for the forfeiture and condemnation of the goods. We are of opinion that the record does not show such a compliance with the statutes and treasury regulations as to make the appraisement binding on, and conclusive against. the claimant, and that the evidence offered to show an appraisement should have been excluded on the claimant's objections, and that there was error in directing a verdict for the government.

No questions are raised by the record making it necessary to comment on the fact that the case contained three lace dresses which were not listed on the invoice. Collectors and other officers of the customs have directions from the Treasury Department as to the return to make on the invoice in such cases. It is sufficient to say now that the fact that the dresses were not on the invoice did not justify the instructions given the jury.

The judgment of the District Court is reversed, and the cause remanded, with instructions to grant a new trial.

CONNECTICUT FIRE INS. CO. v. BUCHANAN.

NATIONAL FIRE INS. CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. September 27, 1905.)

Nos. 2,193, 2,194.

1. INSURANCE—POLICY—CONDITION RELATING TO USE AND OCCUPANCY OF BUILDING CONSTRUED.

One of the policies in suit insured a building as a "normal school and dwelling," and the other insured it "occupied and only while occupied as a normal school and dwelling." Both declared: "If the occupants

should be changed, except change of occupants without increase of hazard, or if the use be changed, * * * it shall be held to be an election on the part of the insured to cancel said policy, and the said policy shall stand canceled." And also: "This entire policy * * * shall be void * * * if the building, * * * whether intended for occupancy by owner or tenant, be or become vacant or unoccupied." *Held*, these provisions are consistent, certain, and unambiguous; the difference in the two policies is one of words, not of meaning or legal effect; and both plainly contemplate use and occupancy of the building as a normal school and dwelling, and make the same a condition to the acceptance and continuance of the risk.

2. SAME—EVIDENCE—BREACH OF CONDITION SHOWN.

At the time of the loss the building was used for the temporary storage of the library and a portion of the household effects of a teacher formerly living therein. Its use for school purposes had been suspended for an indefinite period, not in the sense of an ordinary recess or vacation, but in the sense of an absolute suspension of the school by those who had been conducting it. A lease contemplating the establishment of another school of the same character had been negotiated, but the tenant had not arrived or taken possession. No one was living in the building, and it was not the abode of any one who was only temporarily absent. *Held*, that the condition respecting the use and occupancy of the building was broken, and that there was no liability under the policies for the loss.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 751–753.]

3. EVIDENCE—PAROL EVIDENCE TO VARY TERMS OF WRITTEN POLICY.

In the absence of fraud or mutual mistake, no representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations, as to the terms or legal effect of the resulting written contract, can be permitted to prevail, either in law or in equity, over the plain provisions and proper interpretation of the contract.

4. SAME—PRINCIPLE OF ESTOPPEL IN PAIS NOT APPLICABLE.

The theory that proof of prior and contemporaneous negotiations and representations, though not admissible to vary the terms or legal effect of the written contract, may be received for the purpose of raising an estoppel in pais, is a mere evasion of the salutary rule which protects written contracts from impeachment by loose collateral evidence, and upon principle and authority is not tenable.

(Syllabus by the Court.)

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

These cases are so nearly alike that they may be considered together. In separate actions at law upon two policies of fire insurance, one issued by the National Fire Insurance Company, of Hartford, Conn., and the other by the Connecticut Fire Insurance Company, of the same place, E. M. Buchanan, the insured, recovered verdicts and judgments against the insurers. The actions related to the same loss by fire and were consolidated for purposes of trial. The policies covered the same building at Humeston, Iowa, were issued by the same local recording agent, bore the same date, April 1, 1903, and were to continue in force one year from that date, unless avoided or terminated as therein provided. The insurance stipulated for in one policy was "against all direct loss or damage by fire, except as hereinafter provided, * * * on the two and three story frame building * * * occupied, and only while occupied, as a normal school and dwelling house," and that stipulated for in the other policy was "against all direct loss or damage by fire, except as hereinafter provided, * * * on two and three story frame normal school and dwelling house." It was further stipulated in both policies: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the building herein described, whether intended for occupancy by owner or tenant, be or become vacant or

unoccupied. It is understood, and the insured by accepting this policy so agrees, unless permission be indorsed hereon, that * * * if the possession be changed, or if the occupants should be changed, except change of occupants without increase of hazard, or if the use be changed, * * * then in every such case it shall be held to be an election on the part of the insured to cancel said policy and the said policy shall stand canceled from the happening of any one of the foregoing events, and the insured shall be entitled to receive, on return of this policy to the company, the unearned premium from date of surrender. It is understood, and the insured by the acceptance of this policy so agrees, that * * * any change of use, or any change of occupancy (except change of tenants without increase of hazard), is in each instance an increase of hazard within the meaning of section 1743, Code of Iowa. 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, except the manager of this company in Chicago, shall have power to waive, change, or modify any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative, except the manager of this company in Chicago, shall have such power or be deemed or held to have waived, changed, or modified such provision or conditions, and such waiver, if any, shall be written upon or attached hereto, nor shall any privilege nor permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." No indorsement upon or written addition to either of the policies was made, at the time of their issuance or afterwards, by either the local recording agent or the manager in Chicago.

The building was destroyed by fire May 20, 1903. The principal defense interposed to the actions upon the policies was that at the time of the fire and for a long time prior thereto the building was not used or occupied as a normal school or as a dwelling, but was vacant and unoccupied, by reason of which the policies were inoperative and void. With their answers the defendants paid into court and tendered to the plaintiff the amount of the premiums paid on the policies, with interest thereon from the date of payment. The plaintiff replied, denying that the building was vacant or unoccupied, and stating that it had been used for normal school purposes to within six months of the fire; that at the time the policies were issued and thence to the time of the fire the household furniture and library of one Heskett was stored in the building; that the recording agent who issued the policies had at the time actual knowledge of how, and the extent to which, the building was used and occupied, and that by reason thereof the defendants were estopped from interposing the defense of vacancy and nonoccupancy, and had waived the stipulations in the policy respecting the use and occupancy of the building. Another matter alleged in an amendment to the reply—that these stipulations had been orally waived by the agent after the policies were issued—need not be considered, because there was no evidence to sustain it.

The facts shown by the evidence were these: The building was designed and arranged for use as a normal school and dwelling, and was so used and occupied for several years; the school being conducted during nine months of each year, and one of the teachers, with his family, living in the building throughout the year. The use for normal school purposes ceased in the summer of 1902, and had not been resumed at the time of the fire, May 20, 1903, although a lease contemplating the resumption of that use was negotiated three months before. The tenants had not arrived or taken possession. Heskett, the former resident teacher, with his family, moved out of the building in December, 1902, leaving his library and a portion of their household effects, not required for living purposes in their new abode, stored in some of the rooms. Shortly thereafter one Dotson, with his family, moved into two of the living rooms and resided there until about March 18, 1903, when they went elsewhere. At that time one Sires moved his household effects into some of the rooms, and also put his dog in the building. April 7th, Sires, with his family, set up housekeeping there. May 4th they went elsewhere with their effects,

including the dog. No one was actually living in the building, nor was it the home or abode of any one who was temporarily absent, either when the policies were issued, April 1st, or when the fire occurred, May 20th.

Referring to the extent to which he exercised a supervision over his effects, which remained stored in the building until the fire, Heskett testified: "I visited the building a part of the time twice a day. The visits were to the part designated as the kitchen on the first floor. The period I was there every day was two or three months commencing from the beginning of the winter until the 1st of May, say from the middle of December to the 1st of May. When I went to the room alone, I went for the purpose of getting ground feed for my cow. This was the kitchen on the first floor. There were stored in there some articles of kitchen furniture and the feed that I used for my cow. That was the purpose for which I went there every day. * * * I went to and through the rooms our goods were in two or three times a week. I went there for the purpose of getting articles I wanted to use, and sometimes I went in to see that all of the goods were intact." In like manner, but referring only to the period intervening between March 18th and April 7th, Sires testified: "We had a dog there that remained in the normal school building. I kept it there and fed it there. * * * I went back and forth to the rooms, and went into the rooms. Did not remain there very long."

The evidence relating to the negotiations leading up to the issuance of the policies, and relating to the knowledge possessed by the local recording agent, Calbreath, at that time, respecting the condition of the building, was as follows: Calbreath testified: "When I wrote the policies sued upon I knew the conditions and manner in which the building was occupied on the 1st day of April, 1903. It was occupied by Mr. Heskett. No one else occupied it to my knowledge. I knew Mr. Heskett occupied it. I do not know what Mr. Heskett had in the building, because I never was in the rooms. At the time I wrote the risk I did not know of any one occupying the building in any manner than in the manner I stated it was occupied by Mr. Heskett. I knew that at the time the policies were written and delivered. * * * I did not know whether a tenant had moved in when Mr. Heskett moved out, nor whether a tenant had moved out and another moved in or not, when these policies were issued. * * * I didn't know whether a family was living in those rooms or not when I issued the policies. I knew that Mr. Heskett had moved out. Moved his family to the hotel. I knew he was at the hotel. I don't know the Dotsons that moved in there after Mr. Heskett moved out. Didn't know that Mr. Dotson was in there at all. Q. Then for aught you knew, or these companies, the building was occupied by a family when these policies were issued? A. That was my understanding. It was my understanding that Mr. Heskett remaining and keeping the building in control was an occupancy. That is the reason why— Q. You did not know whether any other family was living in there or not? A. No, sir. * * * When I issued the policies I had a conversation with Mr. Buchanan. I went to him about the renewal of the policies. I did not go to Mrs. Buchanan. My conversation was with her agent. He told me the building was to be occupied as a normal school building. I think he said the man was to be there either in May or June. Did not ask him whether he was going to move there with his family. All that was said was that he had about rented or had rented the building, and the man was going to occupy it as a normal school. There was nothing said about the present occupancy of the building. Not a word, I think." C. E. Buchanan, who was the husband of the plaintiff, managed the property for her, and obtained the issuance of the policies, testified that he told Calbreath "how the building was occupied" and showed him the lease before named, and that in a conversation occurring about a week before the policies were issued, and having reference to whether or not it would be necessary to obtain a vacancy permit and to pay extra insurance, Calbreath said: "You don't have to. I understand the occupancy, and you don't have to do anything of the kind. The man [new tenant] is coming here, and school is going to open right away, and you don't have to do anything of the kind."

Calbreath's duties as agent of the defendant companies, save as his authority may have been restricted by the terms of the policies, were those of

soliciting insurance, writing and delivering policies, receiving premiums, and making the necessary endorsements and transfers.. There was no evidence of any act or conduct of Calbreath, after the policies were issued, upon which a waiver of any of their conditions could be predicated, even if he was authorized to waive them. Much of the evidence here recited was admitted over the objections of the defendants, and their request for a directed verdict in their favor, made at the conclusion of the evidence, was denied.

The Iowa Code of 1897 contains these provisions:

"Sec. 1743. Any condition or stipulation in an application, policy or contract of insurance, making a policy void before the loss occurs, shall not prevent recovery thereon by the insured, if it shall be shown by the plaintiff that the failure to observe such provision or the violation thereof did not contribute to the loss: Provided, however, that any condition or stipulation referring * * * to vacancy of the insured premises, * * * or to a change in the occupancy or use of the property insured, if such * * * change or use makes the risk more hazardous, * * * shall not be * * * affected by this provision."

"Sec. 1749. Any person who shall hereafter solicit insurance or procure application therefor shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application or on a renewal thereof, anything in the application, policy or contract to the contrary notwithstanding.

"Sec. 1750. * * * Any officer, agent or representative of an insurance company doing business in this state who may solicit insurance, procure applications, issue policies, adjust losses or transact the business generally of such companies, shall be held to be the agent of such insurance company with authority to transact all business within the scope of his employment, anything in the application, policy, contract, by-laws or articles of incorporation of such company to the contrary notwithstanding."

George H. Carr, James P. Hewitt, A. C. Parker, and Craig T. Wright, for plaintiffs in error.

Lewis Miles and C. W. Steele, for defendant in error.

Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

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

One of the policies insured the building as a "normal school and dwelling," and the other insured it "occupied and only while occupied as a normal school and dwelling." Both declared:

"If the occupants should be changed, except change of occupants without increase of hazard, or if the use be changed, * * * it shall be held to be an election on the part of the insured to cancel said policy, and the said policy shall stand canceled."

And also:

"This entire policy * * * shall be void * * * if the building, * * * whether intended for occupancy by owner or tenant, be or become vacant or unoccupied."

These provisions are consistent, certain, and unambiguous, and counsel for the insured do not even suggest that they are otherwise. The difference in the two policies is one of words only, not of meaning or legal effect. Both plainly contemplate use and occupancy of the building as a normal school and dwelling, and make the same a condition to the acceptance and continuance of the risk. Words could hardly have been chosen to better or more certainly express the purpose of the parties to exclude liability on the part of the insurers for

any loss occurring when the building was without the care, supervision, and protection involved in such use and occupancy. The only use made of the building at the time of the fire was as a place for the temporary storage of the library and a portion of the household effects of a teacher formerly living therein. Its use for normal school purposes had ceased, not in the sense of a temporary suspension of school work during an ordinary recess or customary vacation, but in the sense of an absolute suspension of the school by those who had been conducting it. A lease contemplating the establishment of another school of the same character had been negotiated, but the tenant had not arrived or taken possession. No one was actually living in the building, and it was not the home or abode of any one who was only temporarily absent. Occasional visits were made to the building by the former resident teacher, in connection with his library and effects, which were temporarily stored therein; but he and his family were living elsewhere. In these circumstances the building was unquestionably without the care, supervision, and protection necessarily incident to its use and occupancy as a normal school and dwelling, and was vacant and unoccupied within the meaning of the policies. Limburg v. German Fire Ins. Co., 90 Iowa, 709, 57 N. W. 626, 23 L. R. A. 99, 48 Am. St. Rep. 468; Feshe v. Council Bluffs Ins. Co., 74 Iowa, 676, 39 N. W. 87; Ashworth v. Builders' Mutual Fire Ins. Co., 112 Mass. 422, 17 Am. Rep. 117; Corrigan v. Connecticut Fire Ins. Co., 122 Mass. 298; Herrman v. Adriatic Fire Ins. Co., 85 N. Y. 162, 39 Am. Rep. 644; Halpin v. Phœnix Ins. Co., 118 N. Y. 165, 174, 23 N. E. 482; Halpin v. Ætna Fire Ins. Co., 120 N. Y. 70, 23 N. E. 988; Cook v. Continental Ins. Co., 70 Mo. 610, 35 Am. Rep. 438; American Ins. Co. v. Padfield, 78 Ill. 167; Bennett v. Agricultural Ins. Co., 50 Conn. 420; Moore v. Phœnix Ins. Co. (N. H.) 6 Atl. 27, 10 Am. St. Rep. 384; Continental Ins. Co. v. Kyle (Ind.) 24 N. E. 727, 9 L. R. A. 81, 19 Am. St. Rep. 77; Watertown Fire Ins. Co. v. Cherry (Va.) 3 S. E. 876; Weidert v. State Ins. Co. (Ore.) 24 Pac. 242, 249, 20 Am. St. Rep. 809.

Counsel for the insured neither concede nor controvert the conclusion last stated, but make this contention: The condition of the building when the fire occurred was the same as when the policies were issued. The recording agent issued the policies with full knowledge of that condition, and his knowledge was the knowledge of the insurers. "Oral testimony is competent to show the knowledge of the agent. * * * Certainly if the plaintiff in error knew the condition of the property as to occupancy at the time the policy sued on herein was issued, it is estopped from setting up said condition as a defense in this suit. If the property was not occupied, and the plaintiff in error knew that fact at the time the policy was issued, then it appears to us that the law is well settled that the plaintiff in error waived any condition in the policy as to the matter of occupancy." In the view which must be taken of the attempt to thus vary and contradict the terms of the written policies, it will not be necessary to consider some of the matters discussed in the briefs, viz.: Whether the condition of the building when the fire occurred was the same as

when the policies were issued; whether Sires' intervening occupancy of a portion of the building as a dwelling terminated the claimed waiver and avoids an estoppel; and whether the statutes of Iowa (Code 1897, §§ 1749, 1750) are valid and have the effect of preventing any limitation upon the authority of insurance agents within that state.

The question for decision is this: When the parties to written policies of insurance have in plain and unambiguous terms declared it to be their intention that the insurance shall cover a described building while it is used and occupied as a normal school and dwelling, and shall be inoperative if and when the building is not so used or occupied, may it be shown by oral testimony—there being no charge of fraud or mutual mistake in reducing the agreement to writing, and the actions upon the policies being at law—that it was in fact the intention of the parties that the insurance should cover the building when not so used or occupied, but clearly vacant and unoccupied within the meaning of the policies? Although the question is discussed by counsel for the insured as if it were one of waiver or estoppel, its real character cannot be obscured or disguised. Stated in its simplest form, the question is whether or not, in actions at law upon written policies of insurance, oral testimony of the conditions existing when the policies were issued and of the contemporaneous and prior negotiations of the parties may be availed of to enable the insured to recover for a loss which the policies in plain and unambiguous terms declare shall give no right of recovery? Upon principle and upon the authority of controlling decisions of the Supreme Court of the United States the question must be answered in the negative. But in deference to the ruling to the contrary by the learned judge who presided at the trial a somewhat extended reference will be made to the authorities deemed applicable.

As much is said in the briefs respecting the statutes of Iowa, set forth in the foregoing statement (Code 1897, §§ 1749, 1750), and the decision of the Supreme Court of the state in Liquid Carbonic Acid Mfg. Co. v. Phœnix Ins. Co., 101 N. W. 749, holding that these statutes were enacted "for the express purpose of prohibiting the limitation of the agent's power by provisions in the contract," it will be assumed, without considering the validity or effect of the statutes, that the recording agent had full authority to represent the insurers and that the provisions in the policies designed to limit his authority are inoperative. In this connection, however, it should be observed that no question of the admissibility of oral testimony of the conditions existing when the policy was issued or of contemporaneous or prior negotiations was presented in Liquid Carbonic Acid Mfg. Co. v. Phœnix Ins. Co., but only the question whether subsequently to the issuance of the policy the agent could orally waive its conditions, notwithstanding the limitations attempted to be placed upon his authority. The conclusion was that these limitations were in conflict with the statutes and inoperative, and that he could orally waive conditions of the policy subsequently to its issuance, a question entirely apart from the present discussion.

The rule inhibiting resort to parol evidence of contemporaneous or prior conditions or negotiations to supersede, contradict, or vary valid written contracts is stated in Starkie on Evidence (10th Am. Ed.) 647, in this manner:

"It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirement of law or by the compact of parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy—of principle, because such instruments are in their own nature and origin entitled to a much higher degree of credit than parol evidence; of policy, because it would be attended with great mischief if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence."

This rule is fully recognized by the decisions of the Supreme Court of the state in which this controversy arose. Fawkner v. Lew Smith Wall Paper Co., 88 Iowa, 169, 55 N. W. 200, 45 Am. St. Rep. 230; Congower v. Equitable Mutual Life and Endowment Ass'n, 94 Iowa, 499, 505, 63 N. W. 192. It is also well stated, and sustained by the citation of many cases, in 17 Cyc. 567–571, 596, 606, 662.

In Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19, 36, 54 Am. Dec. 309, where the rule was applied in an action upon a policy of fire insurance, it was said:

"If we have the precise contract which the parties chose to make for themselves, and there be no imperfection or ambiguity in the language used to express the meaning of the parties, clearly we have no right to depart from the language, and travel out of the contract, to see if the parties did not, after all, mean something different from what is written. Why, we ask, resort to inferior and secondary evidence, such as inferences from supposed usages or circumstances, or the knowledge or the talk of the parties, at the time of entering into the contract? * * * The rule is well established that when the parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing. After this, to permit oral testimony of prior or contemporaneous conversation, or circumstances, or usages, etc., in order to learn what was intended or to contradict what is written, would be dangerous and unjust in the extreme."

Batchelder v. Queen Ins. Co., 135 Mass. 449, was an action upon a policy of fire insurance conditioned to be void if there was other insurance. To avoid the defense that there was other insurance when the policy was issued, the insured sought to show that the insurer had full knowledge thereof at the time, and claimed that the issuance of the policy with such knowledge was a waiver of the condition. Mr. Justice Holmes, then a member of the Supreme Judicial Court of Massachusetts, delivered the opinion of the court, saying:

"A breach of condition, happening after a policy is issued, may be waived, no doubt; but when the breach exists at the moment when, if ever, the contract comes into existence, it must be waived at that moment, if ever, and at that very instant the writing purports to establish and insist upon the condition. We must follow the decisions that parol evidence of such a waiver as is relied on in this case would contradict the written instrument upon which the suit is brought."

In Atherton v. Brown, 14 Mass. 152, it was held that the words in a policy "on board Spanish brig New Constitution" amounted to a warranty that the vessel was Spanish, and that it was not competent for the insured to show by parol, in avoidance of a breach of the warranty, that the insurer knew the true character of the vessel at the time of issuing the policy.

Jennings v. Chenango County Mutual Ins. Co., 2 Denio, 75, was assumpsit on a policy of fire insurance. There was a breach of the conditions of the policy respecting the occupancy and location of the insured building, and it was held the effect of the breach could not be avoided by parol evidence that the insurer was informed of and assented to the true occupancy and location of the building before the policy was issued.

In Higginson v. Dall, 13 Mass. 96, an underwriter sought to prevent a recovery by parol proof of a prior understanding that the policy should be conditional, when by its terms it was absolute. It was held this could not be done, Chief Justice Parker observing:

"The policy itself is considered to be the contract between the parties; and whenever proposals are made, or conversations had, between the parties, prior to the subscription, they are to be considered as waived, if not inserted in the policy, or contained in a memorandum annexed to it."

New York Ins. Co. v. Thomas, 3 Johns. Cas. 1, is a case wherein it was sought to explain by proof of the prior negotiations that a provision in a policy relating to prior insurance was intended to include subsequent insurance as well. Judge Kent, afterwards Chancellor, disposed of the matter in this manner:

"I know no rule better established than that parol evidence shall not be admitted to disannul or substantially vary or extend a written agreement. The admission of such testimony would be mischievous and inconvenient. Parol evidence is to be received in the case of an ambiguitas latens to ascertain the identity of a person or thing; but before the parol evidence is to be received in such case the latent ambiguity must be made out and shown to the court. In the present instance, there is no ambiguity. The language of the contract throughout is consistent and explicit. The general rule of law has been particularly and emphatically applied to policies. Skinn. 54. And, except in the special instance of explanations resulting from the usage of trade, they have never been allowed to be contradicted by parol agreements. Without, therefore, giving any opinion, what would be the effect of the parol proof, if admissible, we think it was inadmissible."

Dewees v. Manhattan Ins. Co., 35 N. J. Law, 366, is especially in point and is worthy of particular attention, as in Northern Assurance Co. v. Grand View Building Association, infra, the Supreme Court of the United States referred to the opinion and quoted therefrom at length, saying:

"It contains, as we think, an able and sound statement of the law on this important subject."

The action was assumpsit on an insurance on a building "occupied by the assured for country store" and on his stock of merchandise therein. One of the stipulations of the policy declared that it should be of no effect if the building should be subjected to more hazardous uses, one of which was that of keeping a private stable. It appeared on the trial that at the date of the policy and at the date of the fire a

portion of the building was applied to the excepted use, and that the agent of the insurer knew of this use when the policy was issued. In the course of delivering the opinion it was said by Chief Justice Beasley:

"The contract between these litigants, on the point which I shall discuss, is clear and unambiguous. The defendants agreed to insure a building occupied as a country store, and the stock of goods, consisting of the usual variety of a country store. This, by the plain meaning of the terms employed, is a warranty on the part of the insured that the building was used, at the date of the agreement, for the purpose specified. It was a representation on the face of the policy touching the premises in question and which affected the risk; and such a representation, according to all the authorities, amounts to a warranty. * * * It can be intended for no other purpose than to characterize the use of the building at the date of the insurance; for, unless this be done, there can be no restriction on the use of the property by the insured during the running of the risk. Unless this description has the force thus attributed to it, the premises could have been used for any of the most hazardous purposes. A building described in a policy as a 'dwelling house' could, except for the rule above stated, be converted into a mill or a factory. I think it is incontestably clear that the description of the use of the premises in this case was meant to define the character of the risk to be assumed by the defendants. * * * The contract of these parties, as it has been committed to writing, is that, if the plaintiff shall keep a stable on the premises insured, for the time being the policy shall be vacated. But it is said the agent of the defendants who procured this contract was aware that the real contract designed to be made was that the plaintiff might apply the premises to this use. This knowledge of the agent of the defendants, and which, it is conceded, will bind the defendants, is to have the effect to vary the obligations of the written contract. Upon what principle is this to be done?"

The want of power in a court of law to reform the policy on the ground of mutual mistake, if there were such, was adverted to, and the opinion proceeded:

"Nor do I think, if this court should sustain the present action, that it could be practicable to preserve in any useful form the great primary rule that written instruments are not to be varied or contradicted by parol evidence. The knowledge of the agent, in the present transaction, is important only as showing what the tacit understanding of the contracting parties was. Suppose, instead of proof of such tacit understanding, the plaintiff had offered to make a stronger case, by showing that the agent expressly agreed that the building might be used, not as a country store, as the policy stated, but also as a stable, and that the restraining stipulation did not apply to the extent expressed; can any one doubt that, according to the practice and decisions in this state, such proofs should have been rejected? A rule of law admitting such evidence would be a repeal of the principle giving a controlling efficacy to written agreements. The memory and understanding of those present at the formation of the contract would be quite as potent as the written instrument."

Referring to a case which was claimed to establish the doctrine that parol evidence of contemporaneous and prior negotiations, while not admissible for the purpose of altering or contradicting a written contract, was admissible to establish an estoppel in pais, it was further said:

"I think there is no doubt that this application of the doctrine of estoppel to written contracts is an entire novelty. In the long line of innumerable cases which have proceeded and been decided on the ground that parol evidence is not admissible as against a written instrument, no judge or counsel has ever intimated, as it is believed, that the same result could be substantially attained by a resort to this circuity. It is true that, if there be a substantial

ground in legal principle for its introduction, the fact that it is new will not debar from its adoption; but I have not been able to perceive the existence of such substantial ground. In my apprehension, the doctrine can be made to appear plausible only by closing the eyes to the reason of the rule which rejects, in the presence of written contracts, evidence by parol. That reason is that the common good requires that it shall be conclusively presumed in an action at law, in the absence of deceit, that the parties have committed their real understanding to writing. Hence it necessarily follows that all evidence merely oral is rejected whose effect is to vary or contradict such expressed understanding. Such rejection arises from the consideration that oral testimony is unreliable in comparison with that which is written. It is idle to say that the estoppel, if permitted to operate, will prevent a fraud or inequitable result. Most parol evidence contradictory of a written instrument has the same tendency; but such evidence is rejected, not because, if true, it ought not to be received, but because the written instrument is the safer criterion of what was the real intention of the contracting parties. In the case now criticised, the party insured stipulated against the existence of buildings within a definite number of feet from the insured property. By the admission of parol testimony this stipulation was restricted and limited in its effect. This result, no doubt, was strictly just, if we assume that the parol evidence was true; but, standing opposed to the written evidence, the law presumed the reverse. The alternative is unavoidable. It is a choice between that which is written and that which is unwritten. In the case cited the effect of the rule adopted by the court was to give a different effect to the written terms from that which they intrinsically possessed—a result induced by the admission of oral evidence. This, I cannot but think, was a palpable alteration of the agreement of the parties. The mistake of the court appears to have been in regarding simply the legal effect of the facts which were proved by parol. Receiving that testimony into the case, a clear estoppel was made out; but the error consisted in the circumstance that such oral evidence was, on rules well settled, inadmissible. The question presented was purely one as to a rule of evidence, but it was treated as a problem relating to the application of general legal principles to an additional state of facts. The case was not decided by a unanimous court. Three judges dissented, and, in my judgment, that dissent was based on satisfactory grounds. But it has been already observed that, even if the doctrine of this adjudication should be received by this court, such result could have no effect on our decision of the present case. The reason is that the facts now before us do not present the elements of an estoppel. Such a defense rests on a misconception as to a state of facts, induced by the party against whom it is set up. The person who seeks to take advantage of it must have been misled by the words or conduct of another. Now, in the present case, the agent did not make any statement, nor did he do anything, which led the plaintiff to alter his condition. The most that can be laid to his charge is that, from carelessness, he omitted properly to describe the use of the premises insured. But this was not a misstatement of a fact on which the plaintiff acted, because the plaintiff was aware of the circumstances that the building was put to another use. The alleged error in the description is plain on the face of the policy, and the law incontestably charges the defendant with knowledge of the meaning and legal effect of his own written contract. Certainly the entire state of things was as well known to the plaintiff as it was to the agent of the defendants. To found an estoppel on the ignorance of the plaintiff of the plainly expressed meaning of his own contract would be absurd."

Another case which was extensively and approvingly quoted from in Northern Assurance Co. v. Grand View Building Association, infra, is Franklin Ins. Co. v. Martin, 40 N. J. Law, 568, 29 Am. Rep. 271. The facts, so far as material to the present discussion, were these: The policy sued upon described the building insured as "occupied as a dwelling and boarding house." In fact it was also occupied as a country tavern, and one of the rooms was maintained as a billiard

room. This continued to be the condition at the time of the fire. The policy showed that taverns and billiard rooms were classified as extrahazardous risks. The trial court, having admitted evidence that the agent of the insurer inspected the building before issuing the policy and knew the manner in which it was used, left the question to the jury whether the parties did not intentionally use the term "boarding house" to describe the very thing that was insured. The opinion declares that the words "occupied as a dwelling and boarding house" defined the character of the risk assumed, and constituted a warranty that the building was at the time used for that purpose, and also holds:

"It is manifest that the theory that such parol evidence, though it may not be competent to change the written contract, may be received for the purpose of raising an estoppel in pais, is a mere evasion of the rule excluding parol testimony when offered to alter a written contract. A party suing on a contract in an action at law must be conclusively presumed to be aware of what the contract contains, and the legal effect of his agreement is that its terms shall be complied with. Extrinsic evidence of the kind under consideration must entirely fail in its object, unless its purpose be to show that the contract expressed in the written policy was not, in reality, the contract as made. A defendant cannot be estopped from making the defense that the contract sued on is not his contract, or that his adversary has himself violated it in those particulars which are made conditions to his rights under it, on the ground of negotiations and transactions occurring at the time the contract was entered into, unless the plaintiff is permitted to show, from such sources, that the contract as put in writing does not truly express the intention of the parties. The difficulty lies at the very threshold. An estoppel cannot arise except upon proof of a contract different from that contained in the written policy, and an inflexible rule of evidence forbids the introduction of such proof by parol testimony, when offered to vary or affect the terms of the written instrument. * * * The cases usually cited for the propositon that a contract of insurance is excepted out of the class of written contracts with respect to the admissibility of parol evidence to vary or control the written contract will be found on examination to be to a large extent those in which the proof has been received with a view to the reformation of the policy in equity, or to meet the defense that the contract was induced by false or fraudulent representations not embodied in the contract, or are the decisions of courts in which the legal and equitable jurisdictions are so blended that the functions of a court of equity have been transferred to the jury box. * * * How the contract was effected, whether directly with the insurer or by the intervention of agents, is of no consequence. The question of the admissibility of the testimony does not relate to the method by which the contract was made. It concerns the rule of evidence by which the contract, however made, shall be interpreted. Upon principle, it is impossible to perceive on what ground such testimony shall be received. A policy of insurance is a contract in writing of such a nature as to be within the general rule of law that a contract in writing cannot be varied or altered by parol testimony. If it be ambiguous in its terms, parol evidence such as would be competent to remove an ambiguity in other written contracts may be resorted to for the purpose of explaining its meaning. If it incorrectly or imperfectly expresses the actual agreement of the parties, it may be reformed in equity. If strict compliance with the conditions of insurance, with respect to matters to be done by the insured after the contract has been concluded, has been waived, such waiver may, in general, be shown by extrinsic evidence, by parol. Further than this it is not safe for a court of law to go. To except policies of insurance out of the class of contracts to which they belong, and deny them the protection of the rule of law that a contract which is put in writing shall not be altered or varied by parol evidence of the contract the parties intended to make, as distinguished from what appears by the written contract to be that which they have in fact made, is a violation of principle that will open

the door to the grossest of frauds. * * * A court of law can do nothing but enforce the contract as the parties have made it. The legal rule that in courts of law the written contract shall be regarded as the sole repository of the intentions of the parties, and that its terms cannot be changed by parol testimony, is of the utmost importance in the trial of jury cases, and can never be departed from without the risk of disastrous consequences to the rights of parties. In the present case the property insured was described in the policy as a dwelling and boarding house. There was no ambiguity in the terms used that justified resort to extrinsic evidence to explain the meaning of the contract. The effect given to the testimony on this subject by the charge of the court was to change the terms of the contract and reform it, and make another and a different contract. In this there was error, for which the judgment should be reversed."

It should be observed that in none of the cases to which reference has been made was the decision made to turn upon any limitation upon the authority of the agent, or otherwise than upon the application of the salutary rule which prevents the subordination of unambiguous written contracts to parol proof of contemporaneous and prior conditions and negotiations. That the rule announced and applied in these cases has been treated by the Supreme Court of the United States as fundamental and invariable is attested by repeated decisions of that court, among which may be mentioned The Delaware, 14 Wall. 579, 20 L. Ed. 779; Insurance Co. v. Lyman, 15 Wall. 664, 21 L. Ed. 246; Hearne v. Marine Ins. Co., 20 Wall. 488, 22 L. Ed. 395; Brawley v. United States, 96 U. S. 168, 173, 24 L. Ed. 622; Insurance Co. v. Mowry, 96 U. S. 544, 24 L. Ed. 674; Thompson v. Insurance Co., 104 U. S. 252, 26 L. Ed. 765; Simpson v. United States, 172 U. S. 372, 379–381, 19 Sup. Ct. 222, 43 L. Ed. 482; Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213.

In the case of The Delaware it was held it could not be shown in avoidance of a liability on a maritime bill of lading, the legal import of which, in the absence of a stipulation to the contrary, was that the goods should be stowed under deck, that in fact they were stowed on deck by the consent of the shippers and in pursuance of an oral agreement consummated before the goods were sent on board, and before the bill of lading was executed. The opinion contains this statement:

"Subsequent oral agreements in respect to a prior written agreement, not falling within the statute of frauds, may have the effect to enlarge the time of performance, or may vary any other of its terms, or, if founded upon a new consideration, may waive and discharge it altogether. Verbal agreements, however, between the parties to a written contract, are in general inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract."

In Insurance Co. v. Lyman, supra, where it was sought to recover on an oral contract of insurance differing from the written policy, the court held:

"Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved and become the foundation of a recovery, as in all other cases where contracts may be made either by parol or in writing. But it is also true that when there is a written contract of insurance it must have the same effect, as the adopted mode of expressing what the contract is, that

it has in other classes of contract, and must have the same effect, in excluding parol testimony in its application to it, that other written instruments have."

In Hearne v. Marine Ins. Co., supra, it was said that the rule excluding parol proof where it is inconsistent with the written contract is not confined to what is stated in express terms, because "what is implied is as effectual as what is expressed," and that to establish the inconsistency "it is sufficient if it appears that the parties intended to be governed by what is written and not by anything else."

Insurance Co. v. Mowry, supra, was an action upon a policy of life insurance. The facts and the ruling in respect to a claim of estoppel in pais similar to that now insisted upon are fully shown in the following portion of the opinion:

"By the express condition of the policy the liability of the company was released upon the failure of the insured to pay the premium when it matured; and the plaintiff could not recover unless the force of this condition could in some way be overcome. He sought to overcome it by showing that the agent who induced him to apply for the policy represented to him, in answer to suggestions that he might not be informed when to pay the premiums, that the company would notify him in season to pay them, and that he need not give himself any uneasiness on that subject; that no such notification was given to him before the maturity of the second premium, and for that reason he did not pay it at the time required. This representation before the policy was issued, it was contended in the court below and in this court, constituted an estoppel upon the company against insisting upon the forfeiture of the policy. But to this position there is an obvious and complete answer. All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, was there expressed, for the very purpose of avoiding any controversy or question respecting them. The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If by inadvertence or mistake provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company. The previous representation of the agent could in no respect operate as an estoppel against the company. Apart from the circumstance that the policy subsequently issued alone expressed its contract, an estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact—to a present or past state of things. If the representation relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances of which neither party can have any certain knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made. The doctrine of estoppel is applied, with respect to representations of a party, to prevent their operating a fraud upon one who has been led to rely upon them. They would have that effect if a party who, by his statements as to matters of fact or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his

power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine carried to the extent for which the assured contends in this case would subvert the salutary rule that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent."

In Thompson v. Insurance Co., supra, the court used this language:

"An insurance company may waive a forfeiture or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing."

A line of decisions sometimes claimed to be in opposition to those last cited is illustrated by the case of Insurance Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617, where an insurance company was held to be estopped from interposing as a defense to an action on a life policy the falsity of certain statements in the application upon which the policy was based, because these statements had been inserted in the application by the company's agent, notwithstanding truthful statements were made to him at the time by the insured. Referring to the rule which prevents written contracts from being contradicted or varied by parol, the opinion opens with this statement:

"The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long recognized that under proper circumstances and in an appropriate proceeding the instrument may be set aside or reformed, as best suits the purposes of justice."

Language is then used which, if construed broadly and without reference to the facts of that case, might give support to the theory that the rule mentioned can be practically defeated by the application of the principle of estoppel in pais; but, as if to restrain the force of this language, the opinion concludes:

"This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it."

This ruling was followed in Insurance Co. v. Mahone, 21 Wall. 152, 155, 22 L. Ed. 593, and in New Jersey Mutual Life Ins. Co. v. Baker, 94 U. S. 610, 614, 24 L. Ed. 268, to the extent only of holding the company estopped from asserting the falsity of statements in the application where it was prepared by the company's agent after truth-

ful statements were made to him by the insured. In Northern Assurance Co. v. Grand View Building Association, supra, Insurance Co. v. Wilkinson was relied upon by counsel for the insured as showing an abandonment of the doctrine announced and applied in earlier cases; but it was observed by the court, evidently to correct any misapprehension as to the extent of the decision relied upon, that the matter in respect of which parol testimony had been admitted—

"Was not a fact or statement contained in the policy sued on, but an extrinsic fact or statement contained in the application. The defense made upon that statement was, in legal effect, a denial of the execution of the statement—a defense that can always be sustained by parol evidence. However this may have been, we are unwilling to have the case regarded as one overthrowing a general rule of evidence. Some of the remarks contained in the opinion might seem to bear that interpretation, but not necessarily so. That Mr. Justice Miller did not intend, in the case of Insurance Company v. Wilkinson, to lay down a new rule of evidence in insurance cases, is clearly shown in the subsequent case of Insurance Co. v. Lyman, 15 Wall. 664, 21 L. Ed. 246, where the opinion was delivered by the same learned justice."

The case principally relied upon by counsel for the insured is Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341. That was an action upon a life policy issued in Iowa. The facts were these: The blanks in the application upon which the policy was based were filled in by the agent for the company. One of the questions propounded therein was, "Has the party [applicant] any other insurance on his life?" When the question was read the applicant truthfully stated that he had certificates of membership in certain co-operative associations and that he did not know whether they would be considered insurance. The agent, having replied that co-operative associations were in no sense insurance companies and that he did not consider the certificates insurance, wrote the answer "No other" into the application and it was signed by the applicant. The certificates did constitute other life insurance. The defense interposed by the company was that the answer to the question was false and avoided the policy, which contained provisions to the effect that it would be void if there were any false statement in the application, that no statement made to the agent would be binding on the company unless written into the application, that the contract should be deemed to be fully set forth in the policy and the application, and that none of its terms could be modified or waived by the agent. The decision may be summarized as follows: (1) Under the Iowa statute (section 1749, supra) the agent represented the company, and not the insured, in preparing the application, notwithstanding the provisions of the policy, and his act in writing the answer, alleged to be untrue, was the act of the company. (2) The purport of the word "insurance" in the question was not so absolutely certain as to preclude proof of what kind of insurance the parties had in mind when the question was answered, and such proof did not contradict the written contract. (3) In these circumstances the company was estopped from asserting that the answer was the statement of the insured, or that the question and answer embraced insurance in co-operative associations. The case is certainly not an authority for the admission of parol testimony to contradict or vary a plain and unambiguous stipu-

lation in a written contract, whether offered in support of a claimed estoppel in pais or otherwise. In respect of this question it is not different from Insurance Co. v. Wilkinson.

In this connection it will be well to refer to the case of Marston v. Kennebec Mutual Life Ins. Co., 89 Me. 266, 36 Atl. 389, 56 Am. St. Rep. 412, cited by counsel for the insured. It was there held, following Insurance Co. v. Wilkinson and Continental Life Ins. Co. v. Chamberlain, that where the application, upon which the policy is issued, is drawn by an unauthorized agent of the insurer, and the answers to the interrogatories are written by him, without fraud or collusion on the part of the applicant, the insurer is estopped from controverting the truth of such answers in an action upon the policy; the reason for the ruling being that the answers are not the statements of the applicant but of the insurer. The case, however, makes a clear distinction between admitting parol testimony to show that the statements in the application are those of the insurer, through its authorized agent, and admitting such testimony to contradict or vary a statement or stipulation of the policy itself, as in the present cases—a distinction pointed out, as before shown, in Northern Assurance Co. v. Grand View Building Association, in the observation there made respecting Insurance Co. v. Wilkinson. Referring to a prior case in which parol testimony of a contemporaneous representation or assurance of the agent relating to the time within which the premium could be paid was held inadmissible, the Supreme Judicial Court of Maine states the distinction in the following language in the case cited (page 276 of 89 Me., page 392 of 36 Atl. [56 Am. St. Rep. 412]):

"But we think that case is to be distinguished from the case at bar. In that case the provision in relation to the time of payment of the premiums was one of the express terms of the contract, as much as was the amount of the insurance, the party insured, or to whom it was payable. They constituted the essential elements of a completed contract, and, of course, could not be varied by parol. But the questions and answers in the application in this case, while they form the 'basis of the contract,' are really propositions for a contract, or proposals upon which it is to be issued, if satisfactory to the company. The evidence which was held inadmissible in the one case and that which is received in the other bears upon entirely distinct propositions. In the former, it was excluded because it tended to vary a written contract by parol; in the latter, it becomes admissible to show that the recitals in the application are not, under the circumstances, the representations of the applicant, although signed by him, but the statements of the company, which had full knowledge of all the facts and which is estopped from controverting the truth of these statements."

McMaster v. New York Life Ins. Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64, is also relied upon as sustaining the admission of oral testimony of the recording agent's knowledge of the condition of the insured building when the policies were issued and of his prior verbal assurance to the husband of the insured; and this, notwithstanding counsel make no claim that there is any inconsistency, uncertainty, or ambiguity in the provisions of the policies now in suit. That such is not the proper interpretation of the decision in that case is plain, for otherwise it would be in conflict, not only with many prior decisions which it does not mention, but also with the later decision in Northern Assurance Co. v. Grand View Building Association, which

does not mention it. The case was unusual in its facts, but it will sufficiently show what was presented for decision to say: The action was upon five life policies, which were dated and took effect December 18, 1893, but provided for the payment of annual premiums on December 12th in every year thereafter. The application was dated December 12, 1893, and contained a request that the policies bear the same date. The insured died January 18, 1895, without paying the second premiums. The policies provided for a grace of one month in the payment of premiums, and there was deemed to be an inconsistency and uncertainty in the provisions in respect of the period covered by the first premiums and of the forfeiture imposed for nonpayment of subsequent premiums. As to the second premiums, "it was conceded that payment on January 12th, in one view, and on January 18th, in the other, would have averted a forfeiture." In these circumstances it was held that oral testimony of extrinsic facts was properly received to show the interpretation which the parties put upon the inconsistent and uncertain provisions when the policies were issued, and to further show that the plaintiff was not estopped from asserting that the policies did not take effect in advance of their actual date, because the request respecting the dating of the policies, and therefore respecting the time when they should be effective, was inserted in the application by the company's agent without the knowledge of the applicant and was never assented to by him. The case is, therefore, like Continental Life Ins. Co. v. Chamberlain, which it cites and applies, and is not an authority for the admission of oral testimony to contradict or vary the plain and unambiguous terms of a written policy. Another matter which militates strongly against its use as such an authority is that the decision was ultimately rested upon the proper construction of the policies, irrespective of extrinsic facts, as is shown by the concluding portion of the opinion, which reads:

"The truth is the policies were not in force until December 18th, and as the premiums were to be paid annually, and were so paid in advance on delivery, the second payments were not demandable on December 12, 1894, as a condition of the continuance of the policies from the 12th to the 18th. And, as the policies could not be forfeited for nonpayment during that time, the month of grace could not be shortened by deducting the six days which belonged to McMaster of right. In our opinion the payment of the first year's premiums made the policies nonforfeitable for the period of 13 months, and inasmuch as the death of McMaster took place within that period the alleged forfeiture furnished no defense to the action."

If it be, as is insisted by counsel for the insured, that there is language in Continental Life Ins. Co. v. Chamberlain and in McMaster v. New York Life Ins. Co. which justifies the admission, by way of establishing an estoppel in pais, of oral testimony to contradict or vary the terms of a written contract in an action at law on the contract, such language cannot now be regarded as controlling, for the reason that the question has been ruled otherwise, in conformity with prior decisions, in the case of Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, which is the last deliverance of the court upon the subject; and, as illustrating that the decision in that case may properly be regarded as

having the effect of limiting any such language in the two intervening cases, it may be observed that the two learned members of the court who wrote the opinions in those cases dissented from the decision in the last one. It is, of course, the duty of this court to ascertain and follow the true rule of decision in the Supreme Court, as gathered from its several opinions upon the subject, and not to follow expressions in particular opinions, which upon consideration of all appear to be without the court's approval.

What has been said shows it is important to consider the circumstances under which Northern Assurance Co. v. Grand View Building Association was brought before the court, the questions presented for decision, and what was actually decided. It was an action at law upon a fire policy which contained two provisions which need be mentioned: One, that the policy should be void, unless otherwise provided in an indorsement thereon or addition thereto, if the insured then had or should thereafter procure other insurance on the property covered by that policy; and the other, that no agent could waive any provision of the policy, except by a written indorsement thereon or addition thereto. It was shown by oral testimony that there was other concurrent insurance on the property when the policy was issued and that the company's agent was so informed at the time. No consent to other insurance was indorsed on the policy or added to it. A judgment for the plaintiff was affirmed by this court; there being majority and dissenting opinions. 41 C. C. A. 207, 101 Fed. 77. The majority opinion applied the principle of estoppel in pais, and held that the written stipulation respecting other insurance was avoided or superseded by the oral testimony of the agent's knowledge of the existence of such insurance when the policy was issued. It also held that the stipulation limiting the agent's authority was not applicable to his acts at the inception of the contract, but only to such as might occur after the policy should become operative. The dissenting opinion was to the effect that the stipulation invalidating the policy if there was other insurance could not be contradicted or varied by parol, as was permitted by the majority opinion, citing, among others, certain decisions of the Circuit Court of Appeals for the Seventh Circuit, and that the other stipulation was an effectual limitation upon the authority of the agent at the inception of the contract as well as thereafter. Thus, when the case was removed to the Supreme Court by certiorari, two questions were distinctly presented: One whether, notwithstanding the rule which protects written contracts against contradiction or alteration by parol testimony, the act of the agent in issuing the policy with knowledge of the existing insurance could be shown by parol for the purpose of avoiding or superseding the stipulation against other insurance, through the application of the principle of estoppel; and the other, whether the other stipulation was an effectual limitation upon the agent's authority. In its opinion the Supreme Court cites with approval several of the decisions of state courts before mentioned, particularly commends the ruling in the two New Jersey cases that the principle of estoppel cannot be invoked to defeat the rule which prevents the contradiction or alteration of written instruments by parol, and then proceeds:

"It must be conceded that it is shown, in the able brief of the defendant in error, that in several of the states the courts appear to have departed from well-settled doctrines in respect both to the incompetency of parol evidence to alter written contracts and to the binding effect of stipulations in policies restricting the authority of the company's agents. * * * We do not consider it necessary or profitable to examine in detail the decisions of the Circuit Courts or of the Circuit Courts of Appeals. It is sufficient for our present purpose to say that the Circuit Court of Appeals for the Seventh Circuit has held consistently to the doctrines on this subject laid down by the English and American courts generally (United Firemen's Ins. Co. v. Thomas, 82 Fed. 406, 27 C. C. A. 42, 47 L. R. A. 450), and that the Court of Appeals for the Eighth Circuit in the present case has by a majority of its members adopted and applied the view that a written contract may in an action at law be changed by parol evidence, and that such clauses as restrict the power of agents of insurance companies to contract otherwise than by some writing should be given effect, if at all, as they respect such modifications of a policy as are made or are attempted to be made after it has been delivered and taken effect as a valid instrument, and should not be considered as having relation to acts done by the company or its agents at the inception of the contract. 101 Fed. 77, 41 C. C. A. 207. In such divergence of decisions, we have deemed it proper to have the present case brought before us by a writ of certiorari. As to the fundamental rule that written contracts cannot be modified or changed by parol evidence, unless in cases where the contracts are vitiated by fraud or mutual mistake, we deem it sufficient to say that it has been treated by this court as invariable and salutary. The rule itself and the reasons on which it is based are adequately stated in the citations already given from the standard works of Starkie and Greenleaf. Policies of fire insurance in writing have always been held by this court to be within the protection of this rule."

Prior decisions of that court are then reviewed, including Insurance Co. v. Wilkinson, and it is said (pages 361, 364 of 183 U. S., pages 153, 154 of 22 Sup. Ct. [46 L. Ed. 213]):

"What, then, are the principles sustained by the authorities and applicable to the case in hand? They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; * * * that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter; and where such limitation is expressed in the policy executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation. * * * This case is an illustration of the confusion and uncertainty which would be occasioned by permitting the introduction of parol evidence to modify written contracts and by approving the conduct of agents and persons applying for insurance in disregarding the express limitations put upon the agents by the principal to be affected. 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 a 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."

Thus the opinion shows that both of the questions presented in the case were deliberately determined by the Supreme Court, after full consideration of its prior decisions and of the conflicting decisions in the state courts; that, in respect of the first question, it was held that, in the absence of fraud or mutual mistake, unambiguous written contracts must be permitted to speak for themselves, and cannot, at the instance of one of the parties, be altered or contradicted by parol testimony; and that the theory that such testimony, although not competent to alter or contradict the contract, may yet be received for the purpose of raising an estoppel in pais, is a mere evasion of the true rule and wholly untenable. While that ruling is determinative of the present cases, there are also decisions of this court which would lead to the same result. Thus, in Laclede Fire Brick Mfg. Co. v. Hartford Steam Boiler Inspection Co., 9 C. C. A. 1, 3, 8, 60 Fed. 351, 353, 358, there was proof that the inspector, through whom a policy was obtained insuring seven boilers against explosion, had stated to the insured, in advance of the issuing of the policy, that if additional boilers were obtained, but not more than seven were used at the same time, the risk would be no greater and the policy would cover the additional boilers: but it was held that there was no liability under the policy for the explosion of an after-acquired boiler and that the inspector's statement "was merged in the written contract evidenced by the policy, and was not available to the plaintiff either as a representation, an agreement or an estoppel." So, also, in Traveller's Ins. Co. v. Henderson, 16 C. C. A. 390, 395, 69 Fed. 762, 768, which was a suit in equity to reform a policy, it was held:

"Where the class of risks intended to be insured against is clearly described in the policy, and the assured has a full and fair opportunity to read the instrument, the company will not be bound by representations made by its agent, in good faith, that the policy covers risks that are not in fact within its provisions."

In other cases it has been often stated that, in the absence of fraud or mutual mistake, no representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations, as to the terms or legal effect of the resulting written contract, can be permitted to prevail, either in law or in equity, over the plain provisions and proper interpretation of the contract. Wilson v. United States Cattle-Ranch Co., 20 C. C. A. 241, 73 Fed. 994; McKinley v. Williams, 20 C. C. A. 312, 74 Fed. 94; Green v. Chicago & N. W. Ry. Co., 35 C. C. A. 68, 92 Fed. 873; Union Selling Co. v. Jones, 63 C. C. A. 224, 128 Fed. 672; Kilby Mfg. Co. v. Hinchman-Renton Fire

Proofing Co., 66 C. C. A. 67, 132 Fed. 957; Rucker v. Bolles, 67 C. C. A. 30, 34, 133 Fed. 858; Davis Calyx Drill Co. v. Mallory (C. C. A.) 137 Fed. 332.

The decisions cited exhaust the argument upon the subject. Nothing could be added to what they contain. Because of the error in admitting parol testimony which enabled the insured to recover on policies different from those which the parties had made for themselves, and because of the error in refusing to direct verdicts for the defendants upon the evidence properly admitted, the judgments are reversed, with directions to grant a new trial in both cases.

COLORADO EASTERN R. CO. v. CHICAGO, B. & Q. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. November 9, 1905.)

No. 2,279.

1. INJUNCTION—TEMPORARY INJUNCTION—EFFECT—SHOWING REQUIRED.
   The granting of a temporary injunction does not determine the rights of the parties. The court need be satisfied no further than of a probable right and a probable danger, and that such right may be defeated without the interposition of a restraining order, and that the granting of such order will probably be attended with less injury to the respondent than to the complainant.

   [Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 302-309.]

2. COURTS—UNITED STATES COURTS—JURISDICTION—RESTRAINING CONDEMNATION PROCEEDINGS.
   Section 720, Rev. St. U. S. [U. S. Comp. St. 1901, p. 581], declaring 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, has no application to the instance of a nonresident owner of land entered upon by the defendant in condemnation proceedings instituted in the state court, to which such nonresident owner is not made a party, and does not prevent him from applying to the United States Circuit Court for an injunction to restrain the trespass upon his land.

3. EMINENT DOMAIN—REMEDIES OF OWNER—INJUNCTION.
   The provision of the state statute of Colorado (3 Mills' Ann. St. Rev. Supp. § 1716) authorizing the plaintiff in condemnation proceedings to proceed against the apparent owner of the land of record, and, after paying into court the prima facie damage to the land, to enter and begin the construction of a railroad thereon, does not preclude the real owner from enjoining the further entry and use of his land, especially where the petitioner for condemnation, before entry, has notice of the claim of title to the premises by such third party.

4. SAME—RIGHT TO BECOME PARTY.
   Section 1726, Mills' Ann. St. Colo., providing that any person not made a party to such proceeding may become such by filing a cross-petition at any time before hearing, setting forth that he is an owner or has an interest in the property sought to be taken, etc., and that the rights of such persons shall thereupon be fully considered and determined, is only permissive in character, and does not operate to deny such third party, a nonresident, the right to appeal by injunction to the United States Circuit Court to prevent the appropriation of his land. Such statutes do not meet the requirement of due process of law, as the law abhors a judgment without notice.

5. SAME—RELIEF GRANTED.

As the state statute of Colorado in condemnation proceedings authorizes the petitioner to institute the same in the state district court, with the right to amend the petition at any time before final judgment by bringing in a new party defendant, a temporary restraining order at the suit of a nonresident owner of the land, not made a party to the proceeding, ought not to enjoin the petitioner for condemnation from making such claimed owner a party defendant therein. Such nonresident, when made a party defendant, may remove the controversy into the federal court, and there try out the whole question of the right to appropriate by condemnation his land to the use of the petitioner.

(Syllabus by the Court.)

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

On the 15th day of April, 1905, the complainant, Chicago, Burlington & Quincy Railway Company, an Iowa corporation, filed in the United States Circuit Court for the District of Colorado its bill of complaint against the Colorado Eastern Railroad Company, a Colorado corporation, alleging that since the 20th day of November, 1901, the complainant has been the owner of two parcels of land, known as "Parcel No. 1" and "Parcel x or No. 2," within the corporate limits of the city of Denver; that it had obtained said property by mesne conveyances under the Republican Valley Railroad Company and the Burlington & Colorado Railroad Company; that said parcels of land had, long prior to said acquisition of title, been appropriated to the use of said railroad companies for railway tracks, switches, and terminal facilities; that at the time hereinafter complained of the same was being so actually used by the complainant, or such portions of it as were not being so actually used were absolutely necessary for its future uses in the development of its business; that in the latter part of the month of March, 1905, while the complainant was so in and entitled to the exclusive possession and occupancy of said tracts of land, the defendant, appellant, wrongfully, with force, entered thereon and excluded the complainant therefrom without warrant or authority of law; that if the defendant is permitted to continue its said wrongs and retain possession of said parcels of land the complainant will be deprived of the use thereof, and be forced to procure, by condemnation or otherwise, other tracts of land in the vicinity thereof for its legitimate railroad uses and purposes; that as to said parcel x or No. 2 the complainant, from the necessities of its increasing business and requirements for more extended terminal facilities, side tracks, and storage tracks, had, previous to the injuries complained of, commenced to grade and prepare the same for railroad tracks, to be used in connection with its railroad operations; that it was being prevented by defendant's said wrongs from improving said parcels and laying its railroad tracks thereon; that the possession of said parcels of land by the defendant is inconsistent with the use thereof by the complainant, and would prevent the complainant from using the same as hitherto and as it intends to use the same in the future, thus unduly interfering with the exercise of the complainant's franchise and use of said property as a railroad, which interference would be increased by the defendant further prosecuting its proposed work of construction of a railroad for its use on said property. From the map filed as an exhibit in the case, giving a survey of the proposed route of the defendant's railroad, it is shown to run longitudinally on the right of way of the complainant's railroad. The bill further alleges that the defendant threatens and intends to institute against the complainant proceedings, in some court of the state, to condemn to its use said parcels of land in the event the complainant does not acquiesce in said wrongs and injury, and thereby to undertake to deprive the complainant of said lands under the guise of devoting the same to its public use for railroad purposes, notwithstanding the fact that said parcels had already been purchased, acquired, dedicated, and appropriated to railroad uses and purposes by the complainant; that unless the defendant is enjoined by the equitable interposition of the court, it would continue its unlawful possession of said lands,

and to place thereon its railroad tracks and other structures, thereby depriving the complainant of its rightful use, and would forthwith proceed to tear up and destroy the complainant's railroad track located as aforesaid. It alleges want of power in the defendant corporation to exercise the right of eminent domain as to said lands, and the existence of any necessity therefor. The bill further charged the defendant with insolvency, and that the complainant had, prior to the bringing of this suit, instituted in said United States Circuit Court an action of ejectment against the defendant to evict it from said lands. The prayer of the bill is that the defendant, its officers, and agents be restrained and enjoined from continuing said possession, and from further trespassing thereon, or further constructing or attempting to construct any railroad or other structures thereon, and from interfering with the complainant in its use of said parcels of land, or with the complainant in constructing railroad tracks or other structures the complainant might desire to erect or construct thereon, and restraining the defendant from instituting or commencing in any court any proceeding whatever, in the nature of condemnation or otherwise against the complainant in relation to said parcels of land, and to enjoin the defendant from tearing up or in any way interfering with the railroad track of the complainant located thereon, until the further order of the court.

The court granted a temporary injunction, enjoining the defendant, its officers, agents, servants, and employes, from further working upon or trespassing upon either of said parcels of land, and from constructing or attempting to construct any railroad or structure over said parcels of land, and from in any manner interfering with the complainant in its use of its railroad track located on said parcel No. 1, and from interfering with the complainant in the use of said parcel No. 2, and further enjoining the defendant from instituting or commencing in any court any proceeding in the nature of condemnation or otherwise against the complainant in relation to said land, and from tearing up, touching or in any manner interfering with the railroad track of the complainant located upon said parcel No. 1. From this order the Colorado Eastern Railroad Company appealed to this court.

Lucius M. Cuthbert (Henry T. Rogers, Daniel B. Ellis, Lewis B. Johnson, and Pierpont Fuller, on the brief), for appellant.

Charles W. Waterman (Joel F. Vaile and William W. Field, on the brief), for appellee.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

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

Counsel for appellant has argued this case as if the appeal had been from a final decree making the injunction perpetual. This is a misconception. The case was heard on the bill for a temporary injunction, and the order of the court was only provisional—"until the further order of the court." The bill was sworn to, and no answer thereto has been filed. The allegations of the bill, therefore, for the purposes of a temporary restraining order, stood presumptively true. Affidavits were submitted by both parties on the hearing. Such affidavits are addressed to the consideration of the court in deciding for itself whether or not it should exercise, in the particular case, its judicial discretion in granting or refusing a temporary injunction. Such affidavits are ex parte, made without cross-examination by the adverse party, and not infrequently they are prepared with a free hand, and are often quite perfunctory. The character of

the affiants in this case is such as to entitle their statements to respectful consideration as far as they are material.

The order granting a temporary injunction "does not finally determine the rights of the parties to the action. Its only purpose and effect are to preserve the existing state of things until the case can be fully heard by the court and the entry of a final decree therein. And it is equally well settled that the granting of a provisional injunction rests in the sound discretion of the trial court, and that it is not necessary that the court should, before granting it, be satisfied from the evidence before it that the plaintiff will certainly prevail upon the final hearing of the cause. On the contrary, 'a probable right, and a probable danger that such right will be defeated without the special interposition of the court,' is all that need be shown as a basis for such an order." Sanitary Reduction Works v. California Reduction Company (C. C.) 94 Fed. 694, 696, 697. It is sufficient to the granting of a temporary restraining order that the complainant discloses the existence of a prima facie right, with a threatened injury to that right by the respondent, and that the granting of such order will probably be attended with less injury to the respondent than to the complainant. Charles v. City of Marion et al. (C. C.) 98 Fed. 166. And it may be granted for the purpose of preserving the statu quo "whenever the questions of law and fact to be ultimately determined in the suit are grave and difficult, and injury to the moving party will be immediate, certain and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted." City of Newton et al. v. Levis, 79 Fed. 715-718, 25 C. C. A. 161. Certain it is that the court should not enter into a nice calculation of the comparative inconvenience and probable loss of the respective parties, when it appears prima facie that without consent, without due notice to or legal process against the complainant, the defendant entered upon the right of way of the complainant railroad company in an attempt to construct thereon another railroad track. It is true that the bill of complaint discloses that the defendant had already entered upon complainant's right of way, and had begun the construction thereon of a railroad bed, and was preparing it for use as a railroad. But this preparation for the construction of defendant's railroad was not completed. It was only in progress. And the bill shows that the complainant had instituted an action of ejectment to evict the defendant, prior to the filing of the bill of complaint herein. The aid of such a bill to the action of ejectment is recognized in courts of equity, and at times is highly remedial and proper to maintain the statu quo and stay the hand of the alleged wrongful intruder from doing further acts upon the invaded premises, which, if not wholly irreparable, would likely produce complications and inflict injuries difficult to remedy. Buskirk et al. v. King, 72 Fed. 22, 18 C. C. A. 418, 25 U. S. App. 607; Natoma W. & M. Co. v. Clarkin, 14 Cal. 544, 548; Riemer v. Johnke, 37 Wis. 258, 261, 262; People v. Alberty, 11 Wend. 160, 162; Bush v. Phillips, 3 Wend. 428.

By affidavits and certified transcript of the record, the defendant on the hearing disclosed the fact that at the time of filing the bill.

of complaint, it was proceeding in the state district court to condemn the land in question to its use, for the construction thereon of its railroad. On this fact appellant's counsel advances the proposition that this suit in the federal court is an attempt to stay a proceeding at law, already instituted, in the state court, and is therefore interdicted by section 720, Rev. St. U. S. [U. S. Comp. St. 1901, p. 581], which declares that:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The bill of complaint does not disclose that any such condemnation proceeding had been instituted against the complainant, but the allegation is that the defendant threatens to begin such proceeding. The affidavits and the record presented by the defendant at the hearing only disclose the fact that in the month of March, 1905, just preceding the month in which the bill of complaint was filed, the defendant instituted such condemnation proceeding against the Burlington & Colorado Railroad Company, the apparent owner of record. This complainant was not named as a party defendant or served with any notice or process therein. This being conceded, the proceeding instituted in the state court, as to the complainant, was clearly res inter alios acta; and therefore the provision of said section 720 has no application, for the palpable reason that no jurisdiction was obtained of the subject or the parties involved in the bill of complaint. To escape this dilemma, the learned counsel for appellant has recourse to the provision of the Colorado statute (3 Mills' Ann. St. Rev. Supp. § 1716,) which provides, in condemnation proceedings, that "the names of all persons interested therein as owners or otherwise as appearing of record, if known, or if not known stating that fact," shall be set forth in the petition. The contention is that inasmuch as the record of the county in which the lands are located showed that the Burlington & Colorado Railroad Company was the ostensible owner, yet, notwithstanding it transpires, as shown by the affidavits in support of the bill as well as its allegations, that whatever right or interest the Burlington & Colorado Railroad Company had to this land had long prior to the institution of the proceeding for condemnation been conveyed to and vested in the complainant, the Chicago, Burlington & Quincy Railway Company, a separate, distinct body corporate, the proceeding nevertheless was sufficient to entitle the defendant to enter upon the complainant's right of way, and after ascertaining the amount of damages to the owner of the land and paying the same into court, as by statute provided, it had the right to enter and build its road; and that the only right now open to complainant is either to accept said money so paid into court, or to intervene in the condemnation proceeding, as provided by section 1726 of the statute (Mills' Ann. St.), which is as follows:

"Any person not made a party to such proceeding may become such by filing a cross-petition at any time before the hearing, setting forth that he is an owner or has an interest in the property sought to be taken or damaged by the petitioner, and stating the character and extent of such interest, and the rights of such person shall thereupon be fully considered and determined."

This position does not commend itself to our approval. It challenges the right to due process of law, that rule of justice which hears before it condemns, that proceeds upon inquiry, and renders judgment only after formal trial. The law abhors a judgment without notice. Under the federal Constitution and the judiciary act, passed pursuant thereto, the nonresident citizen, owning real estate in the state of Colorado, has the right to appeal to the federal court for the just protection of his property, whenever its ownership and enjoyment are invaded against his consent and without notice or legal process. No state Legislature under any pretense can strike down or condition this right.

As well put by appellee's counsel, under the construction of the statute contended for, it would result that if A., possessing the right of eminent domain, desired to appropriate a piece of land which he had reason to know belonged to and was in the possession of B., yet, if the record for registration of deeds showed the title to be in the name of C., the actual grantor of B., A. could, by the institution of condemnation proceeding against C., obtain an ex parte order of the court to oust B., and put A. in possession, with the only right left to B. to either accept the money paid into court, thereby creating an estoppel against him to contest the right of appropriating his land, or to intervene in the proceeding. In case of a nonresident owner he might never hear of the unpublished proceeding until the matter had passed into final judgment in the state court. The mere statement of such a proposition carries with it its own refutation.

The primary requirement of the statute is that the petition shall set forth "the names of all persons interested." Where the names of interested parties are not known, the statute, for the mere purpose of expediting the desire of the petitioner to construct a railroad, authorizes the institution of proceedings against the owner appearing of record, or if not known stating that fact. The statute does not and could not lawfully undertake to conclude the rights and transmute the title of the real owner without notice and having his day in court. More than that, if recourse is had to the affidavits in this case it appears that Mr. Rogers, the president of the Colorado Eastern Railroad Company, before the hearing of the condemnation proceedings, came into possession of facts sufficient to advise him that the complainant company was claiming an interest in this property, and that it would not come to any convention with the appellant respecting a concession of the right of way.

The right of the complainant as a nonresident citizen to appeal to the equity jurisdiction of the federal courts is not affected by the provision of said section 1726 of the Colorado statute, which authorized it to enter its voluntary appearance and become a party to said condemnation proceeding. It is mere permissive in character, and cannot be construed to operate as a denial of the nonresident's right to invoke the jurisdiction of the federal court to protect his property rights when invaded without due process of law. In Smyth v. Ames, 169 U. S. 466, 516, 18 Sup. Ct. 418, 422, 42 L. Ed. 819, where a like contention on principle was made, that a specific statute

of the state having prescribed a particular method for the protection of complainant's right, furnished the adequate remedy at law within the meaning of section 723, Rev. St. U. S. [U. S. Comp. St. 1901, p. 583], the court said:

"We cannot accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a state may be administered by the Circuit Courts of the United States [citing authorities]. But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of federal jurisdiction [citing authorities]. A party by going into a national court does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality; that the wise policy of the Constitution gives him a choice of tribunals [citing authorities]. So, 'whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts' [citing authorities]."

On the case presented we are of opinion that the complainant was entitled to a temporary injunction. This, without here deciding whether or not the land in question is subject to condemnation for the uses claimed by the appellant. That question should not be considered by the court until after issue joined on the merits, evidence taken and heard, in the due course of procedure. We are of opinion, however, that the temporary decree of the court went too far in enjoining the appellant from instituting condemnation proceedings against the appellee. It has been ruled in Union Terminal Company v. Chicago, Burlington & Quincy Railway Company (C. C.) 119 Fed. 209, and Madisonville Traction Company v. Saint Bernard Mining Company (C. C.) 130 Fed. 792, affirmed by the Supreme Court in 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462, that a condemnation proceeding instituted in the state court against a nonresident citizen owner may be removed by him into the federal court. And, as a corollary, it is to be conceded that the nonresident citizen may institute a condemnation proceeding in the first instance in the federal Circuit Court, as such a proceeding partakes of the quality of a suit at law. This appellee, however, is not seeking to have any land condemned for a public use, but resists the appropriation by appellant of its land. As the statute which confers the exercise of the power of eminent domain on the petitioner authorizes it to institute such proceeding in the local district court, and as by section 1719 of said statute (Mills' Ann. St.) the petitioner is authorized to amend the petition by bringing in a new party at any stage of the proceeding, we are unwilling to

deny to it this statutory right. It is probable that the appellant might, by cross-bill in the present suit, present the question of condemnation, and, if entitled thereto, obtain a decree of condemnation by this court. If, however, it should desire to proceed under the state statute in the state court by bringing in the appellee, it should have the right to do so, leaving the appellee free to remove the case into the federal court. In either event the question of the right of appellant to appropriate by condemnation the lands in controversy would have to be tried out in the federal jurisdiction.

The temporary decree made by the Circuit Court is affirmed, save as to that portion which enjoins the appellant from instituting condemnation proceedings in the state court or otherwise; and the cause is remanded to the Circuit Court with directions to set aside and vacate such provision of the decree, and for further proceedings in accordance with this opinion. The costs of the appeal to be taxed one-half against the appellant and one-half against the appellee.

RICKERD v. CHICAGO, ST. P., M. & O. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. September 27, 1905.)

No. 2,232

1. MASTER AND SERVANT—KILLING OF RAILROAD FIREMAN—ASSUMED RISK.
   It cannot be said as matter of law that a railroad fireman, who was killed by the derailment of the train on his usual run, assumed the risk of such derailment as one of the dangers of his employment, where there was evidence tending to show that the engine, which was being operated backward, was run at an unusual and dangerous speed on a very rough track and on a downgrade terminating in a curve at the point where the derailment occurred.

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

2. SAME—NEGLIGENCE OF RAILROAD COMPANY—EVIDENCE OF CUSTOM OF OTHER COMPANIES.
   Upon issues as to whether a defendant railroad company was chargeable with negligence in the killing of an employé because of the manner of ballasting its track, or because of the running of an engine with a train backwards at a high rate of speed, while evidence that it was customary for other railroads to use the same methods of ballasting and to run engines backward at higher rates of speed is competent, it is not conclusive, where there is other testimony that such practices are dangerous to trains, and does not warrant an instruction that there was no negligence as matter of law; it being the province of the court and jury to determine the question of negligence under all the evidence, and not of other railroad companies.

3. SAME—ACTION FOR DEATH OF SERVANT—QUESTIONS FOR JURY.
   In an action to recover for the death of a railroad fireman, who was killed by the derailing of the train on his usual run, it was shown that the train, consisting of eight freight cars, a passenger coach, engine, and tender, was run on a downgrade on a rough track, the engine operated backward, at a speed of from 35 to 40 miles an hour, to a point where the track curved and commenced to ascend a steep upgrade where the derailment occurred; also, that a flange of one of the wheels of the tender was broken either before or after the derailment. There was also evidence tending to show that the track was rough and in bad condition, owing to insufficient

ballasting and decayed ties, and that the speed of the train at the time was greater than usual. Under the law of the state the railroad company was liable for injuries to employés caused by the negligence of fellow servants. *Held*, that such evidence presented a case for the jury, and that it was error to direct a verdict for defendant.

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

On the 26th day of October, 1903, William B. Rickerd, while performing the duties of fireman on one of defendant in error's trains in the state of Wisconsin, was killed by the derailment of the engine on which he was employed. Laura Rickerd, as administratrix, sued the railway company to recover damages for said killing. She alleged in her complaint that the proximate cause of the killing was negligence on the part of the railroad company in certain particulars, specified in her complaint as follows: (1) That the roadbed and railroad track at the point where said engine and train became derailed was unballasted, unsurfaced, and so very rough and uneven that they were unfit, unsafe, and dangerous as a roadbed and railway track upon which to operate engines and trains; (2) that at the time said locomotive engine became derailed the locomotive engineer in charge of said engine carelessly, negligently, wrongfully, and unlawfully caused said engine and train to be propelled at a very high, dangerous, excessive, and unsafe rate of speed, and at a rate of speed much in excess of the usual and ordinary rate of speed on said railway; (3) that at the time of said derailment said engine was being operated backward.

The law of Wisconsin bearing upon the liability of the railway company is as follows: "Liability for Injuries to Employees: Section 1816. Every railroad company operating any railroad which is in whole or in part within this state shall be liable for all damages sustained within the same by any of its employees without contributory negligence upon his part: (1) When such injury is caused by a defect in any locomotive, engine, car, rail, track, machinery or appliance required by said company to be used by its employees in and about the business of their employment, if such defect could have been discovered by such company by reasonable and proper care, tests or inspections; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company. (2) While any such employee is so engaged in operating, running, riding upon or switching passenger, freight or other trains, engines, or cars, and while engaged in the performance of his duty as such employee, and which such injury shall have been caused by the carelessness or negligence of any other employee, officer or agent of such company in the discharge of or for failure to discharge his duties as such." Rev. St. Wis. 1898.

At the trial of the case in the court below the plaintiff in error introduced evidence tending to show the following facts: Defendant in error owns and operates a line of railroad in the state of Wisconsin between the towns of Spring Valley and Woodville. On the 26th day of October, 1903, William B. Rickerd, while employed as fireman on a locomotive engine which was hauling one of defendant in error's trains on said road, was killed by the derailment of said engine and train. The train consisted of eight freight cars and one passenger coach. The railroad track at the place of the accident runs north and south. At a point north of the place of derailment 1100 feet the track is 17 feet higher than at the place of derailment, making a 1.8° grade. At a point 1500 feet south of the place of derailment the track is 30 feet higher than at the place of derailment, making a 2.5° grade. At the time of the derailment the train was going south, and the engine was being operated backward. The speed of the train was from 35 to 40 miles an hour. At the point of derailment there was a 3 per cent. curve in the track. Mr. Egan, a witness for plaintiff, testified that the roadbed at and near the point of derailment was rough and not well surfaced, the ties were old and light, the surface material between the ties was coarse, consisting of pieces of slag from two to three inches in diameter. There was no fine dirt on it, and water would run in every direction through the slag.

Harry Hall, a witness for plaintiff in error, was a passenger on the train in question, and testified that before the derailment the cars were swaying back

and forth and bobbing up and down. John Burns, a witness for the plaintiff, testified that the railroad track at the point of derailment was rough and uneven, with very little attempt to ballast it; that the condition of the ties was such that in various places you could kick them with your foot to pieces because of their being rotten. Mr. Burns, who is a locomotive engineer, also testified that it is not so safe to run an engine backward as forward, and that a maximum rate of speed of 15 to 16 miles an hour is a maximum safe rate of speed in running an engine backward, and gave it as his judgment that an engine could not be run over the track in question backward at a speed of forty miles an hour without being derailed. Mr. Gibson, another locomotive engineer, gave testimony to the same effect.

After the accident one of the wheels of the tender was found to be broken. The piece was broken out of the flange, and was about 14 inches long. The break was a fresh one. The testimony of plaintiff in error tended to show that the break occurred after the wheel left the rail. The testimony of defendant in error tended to show that the break occurred before the wheel left the rail.

Certain witnesses called by plaintiff in error testified as follows relative to the speed of the train at the time of derailment in comparison with the usual speed of the train: Katie Radbaugh: "Q. How did it run [the train] on this day in question as compared with the speed at which it ran on other occasions? A. It ran very fast, much faster than I have ever noticed it before." Marit Gronne testified: "Compared as to speed with other days when it [the train] went by, it was going faster the day it tipped over than at other times. I cannot remember that I ever saw any train go by before as fast as this." Elizabeth Gunderson testified that it seemed to her that the train ran faster at the time in question than usual. William Covell, the engineer on the train at the time in question, called by defendant in error, testified that the usual speed of the train with a heavy load as the train passed down by the charcoal kilns and over the bridge was between 30 and 35 miles an hour. The derailment occurred at the lowest point of the track between two hills, and at the middle point of the curve herein referred to. The engine was a 42-ton engine, with hauling capacity of 450 tons. The load on the cars at time of derailment was 160 tons.

The defendant introduced evidence which tended to contradict the evidence of plaintiff in error. The deceased, William B. Rickerd, had been fireman for defendant in error between four and five years on this same road, performing the same kind of service, including the manner of operating the engine, and during this time had made two trips a day over this same piece of road. At the close of all the evidence the defendant in error moved the court to direct a verdict in its favor, which motion was granted, and the case is now here on exception to such ruling.

Frank D. Larrabee (Mathias Baldwin, on the brief), for plaintiff in error.

Pierce Butler (Thomas Wilson, on the brief), for defendant in error.

Before HOOK, Circuit Judge, and CARLAND and POLLOCK, District Judges.

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

The question presented by the record is whether, under the law of Wisconsin and the general law of negligence, a case is presented for a jury where it is shown that a train consisting of eight freight cars, a passenger coach, locomotive engine, and tender was run on a down grade on a rough track, the engine operated backward, at the rate of from 35 to 40 miles an hour to a point where the track curves, and where it commences rapidly to ascend an up grade, with breakage of the wheel

of the tender, derailment of the engine and cars, and the killing of deceased as incidents of the trip. There can be but one answer to the question. It certainly presents a question for the jury, unless there is some rule of law which will prevent a recovery. It is urged in this case that there can be no recovery, because, as matter of law, the deceased must be held to have assumed the risks and hazards of his occupation on account of his service with the railway company as fireman on the same road, in the same kind of service, for four or five years prior to the accident. When Rickerd entered upon or continued in the employment of the company, he assumed all the risks and dangers of his occupation, which were known to him, and all which a reasonably prudent man in his situation would have known. In the case of Chicago G. W. Ry. Co. v. Price, 97 Fed. 431, 38 C. C. A. 247, this court declared the law as follows:

"The rule is that the danger from the defects of the railroad or machinery furnished the employé must have been so obvious and threatening that a reasonably prudent man in his situation would have avoided them, in order to charge the injured servant with contributory negligence because he continued in the discharge of his duty, and thereby assumed the risks. Railway Co. v. Jarvi, 10 U. S. App. 439, 450, 3 C. C. A. 433, 437, 53 Fed. 65, 69; Kane v. Railway Co., 128 U. S. 91, 94, 9 Sup. Ct. 16, 32 L. Ed. 339; Railroad Co. v. McDade, 135 U. S. 554, 570, 573, 10 Sup. Ct. 1044, 34 L. Ed. 235; Cook v. Railway Co., 34 Minn. 45, 24 N. W. 311; Myers v. Iron Co., 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176."

We must not lose sight of the fact, however, that the danger to which the deceased was subject under the circumstances detailed in the evidence resulted from a combination of alleged negligent acts on the part of defendant and its engineer. Neither one, perhaps, standing alone, would have caused the accident, but the rough and uneven track, the excessive speed, the running of the engine backward, the curved track at the bottom of a steep down grade where the track commenced a sharp up grade, all taken together, it is alleged, caused the derailment. Can it be said as a matter of law that by his service for four or five years as fireman deceased knew the danger to him of these combined acts of negligence, or that a reasonably prudent man in his situation would have known it? It is noticeable that both sides at the trial placed upon the stand expert witnesses as to the danger attendant upon operating an engine backward at the rate of speed and under the conditions shown by the testimony in this case. We think the question as to whether the deceased knew, or as a reasonably prudent man ought to have known, the danger of breaking the flange of the wheel and derailment by reason of the existence of the alleged acts of negligence, should have been submitted to the jury, especially in view of the testimony that the speed of the train at the time of the accident was greater than usual. This testimony cannot be brushed aside as of no weight, as its weight or the credibility of the witnesses is not for the court, but for the jury, to determine. The witnesses who testified that the speed of the train was from 35 to 40 miles an hour, and the witnesses who testified that the speed was faster than usual, corroborate each other, as the engineer called by the defendant testified that the usual speed was 30 to 35 miles an hour. We think that the evidence left the extent of the knowledge of deceased of the

danger to which he was exposed by the alleged acts of negligence of the railway company too indefinite and uncertain to warrant the trial court in withdrawing the question of his assumption of this danger from the jury.

The trial court assumed that there was no evidence as to the bad condition of the track, except the use of slag for ballasting, and, as slag was used by other railroad companies for ballasting, there was no want of ordinary care in the use of it in the present case. The assumption as to what the evidence showed, as well as the legal conclusion drawn therefrom, was erroneous. What a well-conducted railroad company may use for ballast may be evidence relevant to the issue of negligence, but the plaintiff had the right to have her case tried by a court of justice, and not by some other railroad company. The trial court, again, said that, notwithstanding the testimony of some of plaintiff's witnesses that in their opinion it was unsafe to run an engine backward faster than 15 or 18 miles an hour, it was customary among very many railroads to run engines with the tenders in front at much higher rates, and that whatever is customary on well-conducted roads is not negligence. This was an erroneous view of the case, as it took a disputed question of fact from the consideration of the jury, and announced a mistaken view of the law of negligence. The final arbiters of what shall constitute negligence under a particular state of facts are the courts of justice, and they cannot abdicate this function in favor of any one. In this class of cases the law fixes the standard; the question always being: "What would a reasonably careful and prudent man, in the exercise of ordinary care, have done under like circumstances?" Evidence of what other well-conducted railroads do in the operation of engines backward may, in a proper case, be relevant; but other railroads cannot, by their custom, deprive the plaintiff in error from having the question as to whether the operation of the engine backward under the conditions which she claims existed in this case, and in face of the fact that she introduced evidence that to so operate them faster than 15 to 18 miles an hour is dangerous, and that to so operate them is not as safe as to operate them in the regular way, submitted to a jury for determination. The trial court was also of the opinion that there was not sufficient evidence to warrant the jury in finding that the derailment was caused by any other cause than the breaking of the flange of the wheel on the tender, and, as there is no complaint made as to any negligence in regard to the wheel, there could be no recovery. The proximate cause of the derailment in this case was for the jury, and the testimony left that question in doubt, but the plaintiff in error had the right to claim, as a reasonable inference from the evidence, that the acts of alleged negligence on the part of defendant in error broke the flange of the wheel of the tender. It would not be an improbable thing, and certainly not impossible.

The judgment of the trial court must be reversed, and a new trial ordered.

TAGGART v. REPUBLIC IRON & STEEL CO.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1905.)

No. 1,415.

1. RAILROADS—OHIO STATUTE REQUIRING BLOCKING OF FROGS—PRIVATE SWITCHES.

A manufacturing company, maintaining in its yards a number of tracks and a switch engine for its use in shifting freight cars, is not a "railroad corporation operating a railroad or part of a railroad," within the meaning of 93 Ohio Laws, p. 342, requiring such railroad corporations to block their frogs.

[Ed. Note.—Duty to block switches, see note to Hauss v. Railroad Co., 46 C. C. A. 98.]

2. MASTER AND SERVANT—ACTION FOR INJURY TO SWITCHMAN—QUESTIONS FOR JURY.

Plaintiff was employed as a switchman in the yards of defendant, a manufacturing company, and in stepping between slowly moving cars to uncouple the same, after the automatic coupler failed to work, his foot caught in an unblocked frog, and he was injured. There was testimony that the couplers on a large number of cars switched in the yards would not work, and that it was customary in such case, and in fact often necessary, for the switchman to go between the cars; and there was no rule prohibiting it. Plaintiff had worked there but 12 days, and testified, without contradiction, that he did not know the frogs were unblocked, because they were covered with cinders. *Held*, that the question whether plaintiff was negligent in attempting to make the coupling as he did, and also the question whether, if so, his negligence was a proximate cause of his injury by reason of the unblocked frog, were questions for the jury.

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

King & Tracy and Marshall & Fraser, for plaintiff in error.

Richard Jones, Jr., and Holbrook & Monsarrat, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit to recover damages for personal injuries (the loss of a foot) suffered by the plaintiff while in the employ of the defendant as a yard switchman. The court directed a verdict against the plaintiff, on the ground that the testimony showed he was guilty of contributory negligence. The case is here upon the question whether it was one for the jury.

The accident took place on August 8, 1903. Taggart, the plaintiff, was then 35 years old, and had been employed by the steel company about 12 days. Before that time, he had been employed some 3 years as a brakeman in yard and road service. The company owns and operates a rolling mill near Toledo, Ohio, and in connection with it a number of tracks and switches in the yard which incloses its plant. On these tracks it operates a pony or switch engine for convenience in shifting freight cars. For this purpose it employs an engineer and a switchman. On the day of the accident, the plaintiff and the engineer were engaged in switching cars in the yard. Three box cars were attached to the engine. It was necessary for the plaintiff to cut off two of these cars by uncoupling them. The cars were moving at the rate of from two to

four miles an hour. The cars to be uncoupled were each provided with an automatic coupler. The plaintiff was on the west side of the train, the same side as the engineer. There was testimony tending to show it was necessary for him to be here, because only from this side could he signal the engineer, and because a sand bin and other obstructions came so close to the track on the other side as to prevent an approach to the cars there. Walking along as the train moved, the plaintiff two or three times attempted to uncouple the cars by the use of the lever of the automatic coupler, but it would not work. He says the chain was so long it would not lift the pin. At any rate, failing to uncouple the cars by the use of the automatic coupler, he stepped between them for the purpose of lifting the pin with his hand. As he stepped in, his foot was caught in an unblocked frog and crushed and mangled by the moving car before he could extricate it. The testimony was conflicting as to whether the cars could have been safely uncoupled while standing still. The engineer, who had had no experience as a switchman, thought they could. The plaintiff and other switchmen said they could not. The court took the view that, since the cars were equipped with automatic couplers, the switchman was bound to uncouple them without going between them, and, if there were obstructions on the other side, he should have signaled the engineer to move the cars further up, and then have gone around and tried the coupler on the other side. Since he did not do this, but took "the more dangerous way," he was guilty of contributory negligence. Respecting the testimony of the plaintiff that it was the custom in that yard to uncouple by hand while the cars were in motion when the automatic coupler would not work, the court said that no custom of that sort could change the inherent negligent character of the act of unnecessarily going between the cars when they were moving.

1. Counsel discussed the question whether the Ohio statute requiring railroad companies to block their frogs did, or did not, apply to the defendant. The act in terms applies to "every railroad corporation operating a railroad or part of a railroad in this state." 93 Ohio Laws, p. 342. Failure to comply with the act subjects the railroad corporation to a punishment by fine. Although, by the law of Ohio, a manufacturing company may construct a railroad, when such purpose is stated in its articles of incorporation (Rev. St. § 3866), and with respect to it is made subject to the general railroad laws of the state, we are not satisfied that the yard tracks and switches, operated by the defendant in the manner we have described, come within the intent and meaning of this statute. U. S. v. Harris, 177 U. S. 305, 20 Sup. Ct. 609, 44 L. Ed. 780. They do not seem to us to constitute a railroad or make this manufacturing company a railroad corporation under the law of Ohio. We might as well hold that every private switch constitutes a railroad and makes the person or company owning and operating it a railroad corporation. These yard tracks are nothing more than private switches and were only used as such. There were some 10 frogs in this yard, all unblocked, and covered with cinder, so their character was not open and obvious. The failure to block them, if not negligence as a matter of law under the Ohio statute, might have been held by the jury to be negligence in fact under all the circumstances.

2. The real question in the case, as submitted to us, is whether the court was correct in holding that the plaintiff had been guilty of contributory negligence in stepping between the cars. We think the court was not; that the rule laid down in the case of L. E. & W. R. R. Co. v. Craig, 73 Fed. 643, 19 C. C. A. 631, and Id., 80 Fed. 488, 25 C. C. A. 585, required the submission of the question to the jury. Taggart had been employed in the yard only 10 or 12 days. He was not informed that the frogs were unblocked. He says he did not know they were unblocked, that the cover of cinder concealed their character, and there was nothing to contradict him, except an inference—the inference that because he was working there he must have noticed their character. In answer to this, it might be said that, having worked where the frogs were required by law to be blocked, he would naturally presume, without examination, that these frogs were blocked. The company had no rules to regulate his work. In the Craig Case there was a rule forbidding employés to go between the cars when coupling or uncoupling, but the plaintiff was permitted to show that the company practically abrogated or abandoned the rule by acquiescing in its constant violation. In the present case there was no rule, and there was testimony tending to show that it was usual and customary for the switchman to step in and lift the pin when the automatic coupler would not work, although the cars were in motion. The yard boss testified to this. There was also testimony of a substantial kind, tending to show it was not only customary, but, as a practical thing, necessary and proper, for the plaintiff, under the peculiar circumstances presented to him, to step in for the purpose of lifting the pin; that he had to work on that side, both to signal the engineer and because there were obstructions on the other; and he had to uncouple the cars while moving because they could not be uncoupled when standing still without unreasonable difficulty and delay, if not danger. To the suggestion that the presence of the automatic couplers changed the situation, it may be said that such a coupler to be effective must work. The uncontradicted testimony was that this coupler would not work and there was testimony to the effect that 80 per cent. of the couplers tried in the yard would not work. It may have been that the cars used there did not come under the federal act. That act, as we have held, is limited to cars used in interstate commerce. U. S. v. Geddes, 131 Fed. 452, 65 C. C. A. 320. But, however that may be, a car with an automatic coupler that will not work is to all intents and purposes a car without an automatic coupler, and the switchman must handle it in the old way, dangerous though that may be.

This brings us to another consideration, whether, if Taggart was negligent in stepping in to lift the pin, such negligence contributed directly to his injury; in other words, whether he should have anticipated the accident which befell him. Ought he to have forseen the unblocked frog? The record does not show that the cars were moving at a speed dangerous in itself. If Taggart, in stepping in, had stumbled and had been run over, or in lifting the pin had caught his hand and had it crushed, it might well be said that these were contingencies he should have anticipated, and that his negligence in exposing himself to such dangers was the proximate cause of his injury; but there was testimony

tending to show that he had no reason whatever to apprehend the danger of the unblocked frog. That was a danger to which he would have equally exposed himself in walking ahead of a moving train or in going around it to get to the other side. Both these things switchmen frequently have to do. In the Craig Case it was held that this question of proximate cause was one for the jury. 73 Fed. 642, 646, 19 C. C. A. 631.

Being of the opinion that the case was one for the jury, the judgment is reversed, and the case remanded for a new trial.

CHICAGO GREAT WESTERN RY. CO. v. CROTTY.

(Circuit Court of Appeals, Eighth Circuit. October 6, 1905.)

No. 2,003.

1. NEGLIGENCE—PERSONAL INJURY—ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE MAY ARISE OUT OF SAME FACTS.

   While assumption of risk and contributory negligence rest upon different grounds and are distinct and independent defenses, they are not necessarily incompatible, but may and sometimes do arise out of the same facts, as where the danger is not only known or obvious, but injury therefrom is so imminent that no person of ordinary prudence would assume the risk.

2. MASTER AND SERVANT—SERVANT ACTING UNDER DIRECTION OF SUPERIOR.

   Where a servant knows and appreciates the danger of the act which he undertakes, he does not any the less assume the risk of injury or become chargeable with contributory negligence, as the case may be, because he undertakes it under the direction of his superior.

   [Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 649, 781.]

3. SAME—STAKING OF CAR.

   A brakeman, who, in the absence of an emergency justifying his action, participated in staking a car with full knowledge and appreciation of the danger, assumed the risk of injury, although the conductor may have been negligent in directing that the car be staked when there was another and safe method of accomplishing the same result, and in directing the use of an engine and train in the process of staking when the use of the engine alone was reasonably possible and less dangerous; and, where the danger was so imminent that no person of ordinary prudence would have assumed the risk, the brakeman was also guilty of contributory negligence.

4. SAME—IOWA STATUTE—NEGLIGENCE OF CO-EMPLOYÉ ON RAILROAD—ASSUMPTION OF RISK.

   The statute of Iowa (Code 1897, § 2071) abrogates in respect of the "use and operation of any railway" the common-law rule that an employé by his contract of employment assumes the risk of injury from the future negligence of a fellow servant; but it does not affect the rule that, where an employé undertakes an act the danger of which is obvious or actually known to him, and is inherent in the act itself or in the particular manner in which it is to be performed, he assumes the risk of injury, and this, although the danger may have arisen from the prior negligence of a coemployé.

(Syllabus by the Court.)

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

Thomas D. Healy (M. F. Healy, D. M. Kelleher, A. G. Briggs, and John L. Erdall, on the brief), for plaintiff in error.

H. C. Kenline and J. J. McCarthy (R. P. Roedell, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge. This was an action to recover damages for the death of James J. Crotty, a brakeman, which occurred while he was engaged, with others, in moving a car from one of two parallel side tracks to the other over a connecting switch by the process of staking, a term which indicates that the car was being pushed toward and over the switch by means of a pole placed between the car and a moving engine or train on the other track. The only negligence charged against the defendant which the evidence tended to sustain was that staking, although known to be dangerous, was resorted to when another and entirely safe method of moving the car was reasonably open, and that an engine and train were used in the staking when the use of the engine alone was reasonably possible and was known to be attended with less danger. That this constituted actionable negligence is not questioned. The defenses were assumption of risk and contributory negligence. The defendant, conceiving that both were conclusively established by the evidence, requested that the jury be instructed to return a verdict in its favor. The request was denied, and that ruling is assigned as error.

Without conflict, the evidence, and more especially that for the plaintiff, established these facts: A train crew, in which the deceased was a brakeman, had just brought a freight train, consisting of an engine and about seven cars, from Clarion, Iowa, to one of two side tracks in the defendant's switching yards at Coulter, in that state, when the station agent requested the crew to move a loaded coal car to that side track from the other one over a connecting switch. The crew, with the aid of a section gang, pushed the car by hand until it became stalled in a frog, or by ice which had formed in places along the rails. Under the conductor's direction the process of staking was then undertaken. The deceased procured an ordinary fence post from near by, placed one end of it against the caboose, which was the rear car in the freight train, and held the post so that the other end would come in contact with the coal car as the train moved backward toward the switch. The conductor signaled the engineer to back up, and when the post came in contact with the coal car the latter ran ahead a few feet more rapidly than the train was moving, the post slipped and fell, and the train was stopped at a signal from the conductor. In this first effort the post was applied to the corners of the cars in such manner that the deceased was not upon either track, but that was changed at the conductor's direction. One end was placed in the hollow of the coupler of the caboose, where it would not slip so easily, and the deceased took a position on the track in the rear of the caboose, or rather in front of it, considering the direction in which it was to move. The train was again put in motion, but the resistance offered by the coal car, by reason of the ice which had formed in places along the rails, was so variable that the car ran ahead a few feet every now and then, making it impossible to maintain the contact. The staking proceeded and the

deceased walked along in front of the moving caboose, holding the post in position to keep it from falling as the coal car jumped from one icy place to another. By reason of the convergence of the tracks the coal car was gradually moved over in front of the caboose and the deceased came to occupy a position between the ends of these moving cars, the distance between which was seven feet, the length of the post. He remained in this exposed position, and the staking was continued, until the post slipped and fell. The cars then came together and he was crushed to death. The train was being moved backward as slowly as it well could be, and when the post slipped the engine was promptly stopped at an emergency signal from the conductor, but by reason of the slack in the train, which was not unusual, the caboose did not stop until it came in contact with the coal car. The deceased made no objection to the staking of the car or to the part in it which was assigned to him. He was 28 years of age, was intelligent and well educated, and had had seven or eight years of experience as a switchman and brakeman. The accident occurred in the daytime.

There can be no difference of opinion among candid, reasonable and impartial men upon these facts. The dangers which inhered in the process of staking were obvious and easily capable of full appreciation; more than that, they were vividly illustrated to the deceased as the staking progressed and before he paid the awful penalty for disregarding them. He knew the particular conditions under which the staking was undertaken and continued. He saw and understood how many cars were in the train, how much slack there was in it, and how it was controlled, because he was one of the crew which brought it from the station where it was made up. He saw and understood the condition of the track which contributed to the irregular and jerky movement of the coal car. He saw and understood what character of post he was using. He saw and understood that the contact with the coal car could not be maintained, that the post was all that kept the cars from coming together and that it was inclined to slip and fall. In short, he knew whatever of defect there was in the method adopted, or in the appliances used, to transfer the car from one track to the other, and whatever of enhancement of the risk there was in the particular conditions under which the transfer was undertaken. It is idle to say that he may not have fully appreciated the dangers of the undertaking, or of his part in it. They were so obvious that their full appreciation was unavoidable to one of his years, intelligence, and experience. Thoughtful consideration of the undisputed facts irresistibly leads to the conclusion that he participated in the staking of the car with full knowledge and appreciation of its dangers and without objection, and that thereby he voluntarily assumed the risk of injury. Worden v. Humeston & Shenandoah Ry. Co., 72 Iowa, 201, 207, 33 N. W. 629; Cudahy Packing Co. v. Marcan, 106 Fed. 645, 45 C. C. A. 515, 54 L. R. A. 258; King v. Morgan, 48 C. C. A. 507, 109 Fed. 446; Musser-Sauntry Land, etc., Co. v. Brown, 61 C. C. A. 207, 126 Fed. 141; St. Louis Cordage Co. v. Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551; Glenmont Lumber Co. v. Roy, 61 C. C. A. 506, 126 Fed. 524.

While assumption of risk and contributory negligence rest upon dif-

ferent grounds and are distinct and independent defenses, they are not necessarily incompatible, but may and sometimes do arise out of the same facts, as where the danger is not only known or obvious, but injury therefrom is so imminent that no person of ordinary prudence would assume the risk. Musser-Sauntry Land, etc., Co. v. Brown, 61 C. C. A. 207, 126 Fed. 141; St. Louis Cordage Co. v. Miller, 126 Fed. 495, 502, 505, 61 C. C. A. 477, 484, 487, 63 L. R. A. 551. This case is of that character. Walking between moving cars separated by only a short distance is always attended with much and obvious danger. The deceased was walking between moving cars; more than that, he was attempting to hold in place between them an unwieldy fence post which required such use of his arms and of the strength of his body as to impair his capacity to use them quickly and freely for his protection. The irregular and jerky movement of one of the cars made his task altogether uncertain of accomplishment. If the post slipped, as it was likely to do at any moment, it would be most difficult for him to extricate himself from his position before the gap between the cars was closed, and, failing in this, he would almost certainly receive serious injury if he did not lose his life. The danger was therefore imminent as well as obvious; so much so that no person of ordinary prudence would have assumed the risk. By its assumption the deceased manifested a reckless disregard of his own safety, and was guilty of contributory negligence.

But it is said that his participation in the staking of the car was not voluntary because it was at the direction of his superior officer, the conductor. The premise is correct, but the conclusion does not follow. The deceased knew and appreciated the danger, and in that respect stood upon an equal footing with the conductor. Yet he complied with the latter's direction without objection when he could have complied or not as he chose. The law adjudges such action to be voluntary. It is well settled that where a servant knows and appreciates the danger of the act which he undertakes he does not any the less assume the risk of injury, or become chargeable with contributory negligence, as the case may be, because he undertakes it under the direction of the master's representative. Gorman v. Des Moines Brick Mfg. Co., 99 Iowa, 257, 264, 68 N. W. 674; Kean v. Detroit Copper & Brass Rolling Mills (Mich.) 33 N. W. 395, 400; Toomey v. Eureka Iron & Steel Works (Mich.) 50 N. W. 850; Showalter v. Fairbanks (Wis.) 60 N. W. 257; Writt v. Girard Lumber Co. (Wis.) 65 N. W. 173; Bradshaw v. Louisville & N. R. Co. (Ky.) 21 S. W. 346; Linch v. Sagamore Mfg. Co., 143 Mass. 206, 9 N. E. 728; Wescott v. N. Y. & N. E. R. R. Co., 153 Mass. 460, 27 N. E. 10; Reed v. Stockmeyer, 20 C. C. A. 381, 384, 388, 74 Fed. 186; Railroad Co. v. Jones, 95 U. S. 439, 443, 24 L. Ed. 506. The last case was one in which the plaintiff was injured in a collision while riding on the pilot of a locomotive. He sought to excuse his act in occupying such an exposed position by evidence tending to show that he and other employés of the defendant were about to be conveyed from their place of work by a train consisting of a locomotive and box car, when the defendant's representative told them to jump on anywhere as they were behind and must hurry, and that in response to this direction

the plaintiff and others took a position on the pilot of the locomotive. Of this it was said by the court:

"The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant nor non compos. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter the former could not arise."

Gorman v. Des Moines Brick Mfg. Co., supra, was a case where the plaintiff was injured while attempting to loosen, with a wrench, a greasy burr on vibrating machinery. The wrench slipped and his hand was caught in revolving cogwheels. He sought to excuse his act in attempting to remove the burr without stopping the machinery by testimony to the effect that the defendant's representative directed him to keep the machinery running and not to stop it. The trial court held that the plaintiff was guilty of contributory negligence and directed a verdict for the defendant. In disposing of the claim that the plaintiff acted in obedience to the direction of his superior, it was said by the Supreme Court of Iowa:

"But if it be conceded that the plaintiff was given specific directions to do the act in the manner he did, or that he was justified in believing that such were given him, yet we are not prepared to say that the court was in error in sustaining the defendant's motion. Plaintiff testified that when he attempted to loosen the nut, the machine was vibrating, so that the wrench he was using was likely to slip off, and that he knew that if it did slip off, his hand would go into the revolving cogwheels, which were not more than five inches from his hand. Now, it seems to us that the danger was so manifest as to prevent a reasonable, prudent, and cautious man from risking it, even upon an order from his superiors in authority. It is well settled that while obedience to an order from a superior authority will, as a rule, relieve one from the charge of contributory negligence, yet, when the act to be done is so reckless or obviously dangerous as that no reasonably prudent man would have undertaken it, the order from the superior will be no excuse. Plaintiff was familiar with the dangers attendant upon the use of the wrench so close to the moving cogwheels, as was the defendant's superintendent, and in obeying the orders given him, if it be conceded any were given, he assumed the risks incident to the performing of his task."

The contention is also made that the deceased's participation in the staking of the car was not voluntary or negligent because he was acting in an emergency or under circumstances when he was not free to refuse obedience to the conductor's direction, and in support of this contention reference is made to Kane v. Northern Central Ry. Co., 128 U. S. 91, 94, 9 Sup. Ct. 16, 17, 32 L. Ed. 339, where it was said:

"An employé upon a railroad train, likely to meet other trains, owes it to the public, as well as to his employer, not to abandon his post unnecessarily."

But as it was an essential part of the plaintiff's case that the staking of the car was itself unnecessary, or that the use therein of more of the freight train than the engine was unnecessary, and as both of these matters are shown to have been apparent, it is not open to the plaintiff to say that compliance with the conductor's direction was a duty owing to

the public or to the defendant. Moreover, the coal car was not part of the freight train, or intended to be made so, and it is a necessary conclusion from the evidence that noncompliance with the conductor's direction would not have been an abandonment of the deceased's post as a brakeman of the freight train, would not have interfered with the progress of that train toward its destination, and would not have subjected either life or property to danger, but at most would have led to the adoption of a safer method of transferring the coal car from one point in the defendant's yards to another.

The claim is also made that under the statute of Iowa (Code 1897, § 2071), as interpreted by the Supreme Court of that state in Phinney v. Illinois Central Ry. Co., 122 Iowa, 488, 98 N. W. 358, the deceased did not assume the risk of injury from obedience to a negligent direction of the conductor because the latter was a fellow servant. Careful examination of the statute, the case cited and other decisions of the same court, discloses that, so far as the statute is applicable to the present case, its only effect is that of attributing the negligence of the conductor to the defendant. It abrogates, in respect of the "use and operation of any railway," the common-law rule that an employé, by his contract of employment, assumes the risk of injury from the future negligence of a fellow servant; but it does not affect the rule that where an employé voluntarily undertakes an act, the danger of which is at the time obvious or actually known to him, and is inherent in the act itself or in the particular manner in which it is to be performed, he assumes the risk of injury therefrom. In the case cited a railroad employé was injured in a collision caused by the negligence of a train dispatcher of which he neither had nor could have had any knowledge prior to the injury, while in the present case the negligence of the conductor was an existing fact or condition with knowledge and appreciation of which the deceased elected to participate in the staking of the car and to chance the danger from which the injury ensued. This distinction is clearly recognized in the decisions of the Supreme Court of the state. Thus, in Pearl v. Omaha & St. Louis Railroad Co., 115 Iowa, 535, 88 N. W. 1078, where the death of a brakeman was caused by the negligence of the conductor in failing to set the brakes upon a detached portion of his train, of which the brakeman could have had no knowledge at the time, it was held that there was no assumption of the risk because, as was said, a railroad employé "never, under our statute, assumes the risk of the future, unanticipated negligence of his co-employé." And in Cowles v. Chicago, Rock Island & Pacific Ry. Co., 102 Iowa, 507, 71 N. W. 580, where a railroad employé was injured by going in front of a moving engine to adjust a turntable, when the engine had almost reached the turntable and was moving with substantially unchecked speed, it was held that he assumed the risk of injury, although it arose primarily from the negligence of a co-employé whose duty it was to stop the engine and wait for a signal indicating that the turntable was adjusted. It was said in that case:

"Under the repeated adjudications of this court, recovery cannot be had when one voluntarily exposes himself to danger of which he knows, or might have known by the exercise of ordinary care."

That the statute relied upon does not prevent an assumption of the risk in instances like the present, where the danger, though arising from negligence, is known and appreciated, is also shown in the case of Martin v. Chicago, Rock Island & Pacific Ry. Co., 118 Iowa, 148, 153, 158, 91 N. W. 1034, 59 L. R. A. 698, 96 Am. St. Rep. 371.

Another Iowa statute requires that in every railroad train there shall be "a sufficient number of cars with some kind of efficient automatic or power brake to enable the engineer to control the train without requiring brakemen to go between the ends or on the top of the cars to use the hand brake," and in respect of violations of the duty so imposed abolishes the defense of assumption of risk. Code 1897, §§ 2082, 2083. It is now said that this statute was violated in making up the freight train, and that this contributed to or caused the injury. But no such contention appears to have been insisted upon in the Circuit Court, and of course it cannot be made in this court in the first instance. The petition contains no reference to the statute, to the absence of automatic or power brakes from any of the cars, or to any inability of the engineer to properly control the train. Some evidence was introduced respecting the number of cars equipped with such brakes, the manifest purpose of which was to show the amount of slack in the train, and nothing more; but there was no evidence as to what proportion or number of the cars should have been so equipped to enable the engineer to exercise the prescribed measure of control over the train. Whether, therefore, the statute is applicable to a case in which the injury for which recovery is sought did not result from going between or on top of the cars to use hand brakes need not be considered at this time.

As it follows from what has been said that the court erred in refusing to direct a verdict for the defendant, the judgment is reversed, with a direction to grant a new trial.

TOWER LUMBER CO. v. BRANDVOLD.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1905.)

No. 2,079.

MASTER AND SERVANT—INJURY OF SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff was in the employ of defendant lumber company, and was sent out as one of a crew over a private logging railroad owned by defendant. The train was run backward, pushing in front some logging cars, back of which, next to the tender, was a flat car provided for the men and tools. The road was rough and likely to be obstructed by fallen trees and stones. Plaintiff, with some others, was sent forward at one point to remove an obstruction from the track, and in returning, instead of going upon the flat car with the other men, took a position on the front logging car, sitting on the end of a cross timber projecting beyond the side of the car, which was merely a skeleton car for carrying logs. In going down a grade the car was derailed and plaintiff was injured; none of those on the flat car receiving injury. *Held*, that the injury was due to plaintiff's own negligence and recklessness in unnecessarily taking a position of obvious danger, which was not justified or excused by the fact that it was acquiesced in by the foreman, and for which defendant was not liable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 703, 754.]

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

H. H. Grace, for plaintiff in error.

John Jenswold, Jr., for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This action was instituted by John Brandvold, defendant in error, hereafter called plaintiff, against the Tower Lumber Company, defendant, to recover damages sustained by him by reason of the negligence of defendant in carelessly operating a logging train and maintaining an unsafe track over which the train was operated. The answer consists of a general denial and plea of contributory negligence.

The facts as disclosed by the record are these: The defendant, owning large tracts of timber land near Bear Head Lake, in Minnesota, constructed a sawmill and built a logging railroad connecting the Duluth & Iron Range Railroad with its mill and thence, by tracks and spurs, through the timber as occasion required. This road was not for public use in the carrying of freight or passengers. It was exclusively a private concern used for the purpose of milling and marketing timber. A short distance from the mill was a railroad camp or headquarters for the men, known as "Camp 2." From this camp, on the morning of April 14, 1902, the defendant started out a logging train consisting of locomotive, tender, flat car, and three logging cars, going in the reverse order, the locomotive backing the train into the timber. Plaintiff and 22 other men, all of whom were in the employ of defendant, boarded the train, taking their place on the flat car, which was specially provided to carry them and their working tools. The logging cars were about 24 feet long, composed of two longitudinal sills, and two cross-pieces, called "bunkers," one near each end of the car. These bunkers consisted of a piece of timber 9 or 10 feet long, extending well over the sides of the track from the longitudinal sills, with an upper surface of 11 inches. The train went on its way about a mile, when, observing some stones on the track, Foreman Pierson, who was riding on the tender, caused the train to be stopped, and the stones to be removed. The train had proceeded about a half a mile further when a fallen tree was observed across the track and it was again stopped. The foreman ordered some of the men riding on the flat car to go forward and remove the tree, and among them he wanted one, at least, who had an ax. Plaintiff, having an ax as required, went forward with two or three other men to remove the tree. The tree was lifted off the track and all the men except plaintiff returned to the flat car. Plaintiff, instead of returning to it, jumped upon the third logging car, which was in advance of all others as the train was being backed into the timber, and took his seat on the end of the bunker near the front and on the left side of the car as it was moving. Some diversity of views are expressed by the witnesses as to the exact place on the logging car where plaintiff sat, but the plaintiff testified as a witness in his own behalf and cleared up the matter. He testified substantially

to the effect that he sat on the end of the bunker, with his feet hanging down over the end, with nothing to steady or support him except his bare hands pressed against the side or edge of the bunker on which he sat. The uncontradicted evidence is that the road was crudely constructed as a logging road only, with many curves and heavy grades, and liable to obstruction by falling trees and stones. Plaintiff had ridden on this road before, and was familiar with the general condition of the cars and track. After removing the tree from the track the train progressed about one-half a mile when it stopped, and plaintiff was called upon by the foreman to turn a switch located there. This he did, and afterwards returned to the logging car and again took his seat, the same as already described. The train again started, and soon took a steep downward grade. At or near the foot of this grade it had reached a speed, according to plaintiff's witnesses, of from 12 to 14 miles an hour. Plaintiff kept his seat on the end of the bunker with his face towards the side of the track, trying to steady himself by clutching the edge of the bunker with his hands, until the car reached the foot of the grade, where it was derailed and plaintiff thrown off and injured. There is strong evidence that plaintiff was repeatedly warned of the danger of riding on the bunker and ordered back to the flat car where all the other workmen rode; but this evidence is contradicted by plaintiff, and accordingly cannot be considered for the present purposes. None of the other workmen, who rode on the flat car, were injured by the accident.

In the light of the foregoing testimony the defendant, at the end of the case, requested the trial court to instruct the jury that plaintiff was not entitled to recover, which the court refused to do. The controlling assignment of error is predicated on this refusal. In the view we take of the plea of contributory negligence, it is not necessary to consider the issue relating to defendant's negligence. In fact, for the purpose of this opinion, it may be assumed that there was substantial evidence of actionable negligence on the part of the defendant; but if the plaintiff, for want of ordinary care on his part, directly contributed to his injury, he cannot, on familiar principles of law, recover.

We cannot read the evidence, consisting largely of plaintiff's own statements, without being irresistibly led to the conclusion that he not only failed to observe ordinary care, but that he displayed a recklessness and disregard for his own safety of the grossest sort. A place of safety was provided for him and other workmen. He knew it, and at first occupied it. Afterwards, when he and other men were called to the front of the advancing train to remove obstacles from the track and the work was done and his co-employés returned to the flat car where they belonged, he mounted the skeleton car, and seated himself as already seen. There is no evidence that he was ordered or requested to go there for the discharge of any duty in behalf of the master. The evidence in our opinion conclusively shows that he voluntarily and needlessly exposed himself to danger; that he took a position upon the logging car full of obvious peril. Any unusual jolt or mishap, in the nature of things and according to common experience of mankind, would have dislodged him from his perilous position and subjected him to in-

jury. He was a full-grown man, and presumably possessed of common intelligence. By the use of his own senses, even the instinct which prompts men of ordinary prudence to self-protection, he should have realized his danger and abandoned his rash and foolhardy action. In these circumstances he cannot excuse his carelessness, as he attempts to do in his evidence, by saying he did not know or appreciate the danger of the situation. Tuttle v. Milwaukee Railway, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; King v. Morgan, 109 Fed. 446, 448, 48 C. C. A. 507, 509; St. Louis Cordage Co. v. Miller, 126 Fed. 495, 513, 61 C. C. A. 477, 63 L. R. A. 551, and cases cited.

We think this case falls fairly within the principles laid down by this court in Gilbert v. Burlington Railway Co., 128 Fed. 529, 63 C. C. A. 27, and is fully covered and controlled by the following cases: Railroad Company v. Houston, 95 U. S. 697, 24 L. Ed. 542; St. Louis, etc., Railway v. Schumacher, 152 U. S. 77, 14 Sup. Ct. 479, 38 L. Ed. 361, and Railroad Company v. Jones, 95 U. S. 439, 24 L. Ed. 506. The Jones Case is very similar in its facts to the one now before us. Jones was in the employ of the railroad company, engaged in constructing and repairing the roadway. The crew with which he was engaged was out with a train consisting of an engine, tender, and box car. When about to return to camp one evening, the conductor of the train told the men to jump on anywhere; that they were behind time, and must hurry. Jones jumped on the pilot of the locomotive, and was injured while on the way to camp. The box car was open, and contained plenty of room for plaintiff and the other workmen. The court, in its opinion, uses the following language:

"He [Jones] and another who rode beside him were the only persons hurt upon the train. All those in the box car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune."

In that case the Supreme Court holds that the knowledge, assent or direction of the company's agents as to what Jones did is immaterial. The court says:

"If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive."

This last observation affords a complete answer to the contention of plaintiff's counsel, that the request of Foreman Pierson that plaintiff in this case should go forward and open a switch, was the equivalent of recognizing his right to be upon the logging car. If the company's agents could not, by their direct assent, justify the plaintiff's riding upon the logging car when no business of the company dictated or required such exposure, certainly the request that plaintiff should get off the car and open the switch would afford no justification by implication. See Chicago Great Western Ry. Co. v. Crotty (decided at this term) 141 Fed. 913.

After attentive consideration of all the evidence we are of opinion that plaintiff was guilty of negligence which directly contributed to his

injury, and that his conduct was such that all reasonable men, in the exercise of unbiased and impartial judgment would so say. Such being the case, the trial court should have directed a verdict for the defendant. Gilbert v. Burlington Ry. Co., supra. For failure to do so the judgment must be reversed and a new trial granted. It is so ordered.

AMERICAN BRAKE BEAM CO. v. PUNGS.

(Circuit Court of Appeals, Seventh Circuit. January 20, 1905.)

No. 1,092.

CONTRACTS—LEGALITY—RESTRAINT OF TRADE.

A contract recited that plaintiff, who was the patentee of an invention relating to brake beams, for the consideration of $10,000 to be paid him, had assigned to defendant, which was a corporation engaged in the manufacture of brake-beams, a certain patent and a pending application for a second and provided that plaintiff during the life of the patent should not become connected with any company manufacturing or selling brake-beams in the United States either as officer, employé or shareholder but reserved to him the right to terminate such part of the contract at any time by refunding the consideration paid him by defendant. *Held*, that such agreement to remain out of the brake-beam business did not render the contract unlawful as one in restraint of trade and competition or creating a monopoly and that plaintiff could maintain an action thereon to recover the stipulated consideration.

[Ed. Note.—For cases in point see vol. 11, Cent. Dig. Contracts, §§ 550–553.]

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

The action in the Circuit Court was on a written agreement between Pungs and the Brake Beam Company, wherein the Brake Beam Company, for certain considerations therein named, agreed to pay Pungs the sum of ten thousand dollars, credit being given for two thousand, five hundred dollars already paid.

The defense was the general issue, with notice of special defenses.

At the trial, on motion of the plaintiff, a verdict for the plaintiff for the sum of nine thousand, one hundred and thirty-five dollars, and forty-one cents was returned; and on this verdict, after motion for new trial was overruled, judgment was entered. Upon the refusal of the court to grant a new trial; upon the court's direction to the jury to return a verdict for the plaintiff; and upon the exclusion of certain evidence offered on the trial by defendant, the principal errors complained of are assigned.

The evidence showed, that beginning in 1886 as an inventor, and 1887 as a manufacturer, Pungs was in the metallic brake-beam business until 1892, when with others, he organized the American Brake Beam Company, which took over, along with other companies, his previous company. Of the American Brake Beam Company, Pungs was a stockholder and the manager until 1894, when selling his stock to Henry D. Laughlin, the latter became general manager of the company. Until 1897, however, Pungs remained in the employ of the company, superintending its business at Detroit, Michigan. On this latter date he was discharged.

January 19th, 1899, one of the contracts sued upon was executed in writing as follows:

An agreement between Wm. A. Pungs of the city of Detroit, in the state of Michigan, and the American Brake Beam Co., a corporation under the laws of the state of Illinois, whose chief or home office is in the city of Waukegan, in said state.

Witnesseth: In consideration of the mutual agreements of the parties, as herein expressed, they agree as follows:

1st: Under the date of June 28th, 1898, letters patent No. 606,298 were issued from the patent office of the United States to said Pungs, covering the brake beam therein described. His application for a patent on another brake beam has been allowed by the patent office, as per notice to him from Thomas S. Sprague & Son, dated Nov. 12th, 1898, and hereto attached. This latter patent, Pungs will cause to be issued to himself or the Brake Beam Co., as his assignee, as may be agreed.

2nd: Both these patents said Pungs sells to said Company, and he will assign them in due form, and also will assign to the Company all such letters patent as may be hereafter granted to him on any metallic brake beam or any part relating to a brake beam, and will enter into a written contract with the Company not to engage in a brake beam business in any way, shape or form, and not to be connected with any company manufacturing or selling brake beams, either as officer, employé or shareholder (the Chicago Railway Equipment Company alone excepted), all for the price and sum of Ten Thousand Dollars ($10,000.00) to be paid to him by said Brake Beam Company in four equal installments of $2,500.00 each, the first payable three months after the date hereof, the second in six months, the third in nine months, and the fourth in twelve months after said date; such stay-out contract to cover the period covered by said letters patent No. 606,298, and to be coextensive with the country. But he shall be given the right in said contract to at any time terminate it by refunding to said Brake Beam Company, its successors or assigns, said sum of Ten Thousand Dollars ($10,000.00).

3rd: In the event said Pungs at any time prior to the expiration of the term covered by said letters patent, that is to say, at any time prior to June 28th, 1915, becomes an officer, agent or shareholder in any company or corporation manufacturing or selling metallic brake beams of any type whatever, or engages in the business himself, that in that case his so doing shall be construed as an election on his part to refund to said Brake Beam Company the said sum of Ten Thousand Dollars ($10,000.00), forthwith, and he covenants and agrees so to do.

4th: This contract is in no way to affect the representative claims of the parties against each other and shall not be so treated, the deal covered by it being independent and alone.

March 22nd, 1899, a supplemental contract in writing was executed as follows:

An agreement between William A. Pungs of the city of Detroit, the state of Michigan, and the American Brake Beam Company, a corporation under the laws of the state of Illinois, whose chief office is in the city of Waukegan in said state.

Witnesseth:

In consideration of the mutual agreements of the parties as herein expressed, they agree as follows:

1st: Since the execution of the contract between the parties, dated January 19th, 1899, said Pungs has transferred to said Brake Beam Company letters patent of the United States No. 606,298 referred to in the 1st paragraph of said contract, and has also executed an assignment to said Brake Beam Company of his pending application for another patent on brake beams, which is also referred to in said 1st paragraph, and will without delay, cause the letters patent covering his said application to be forthwith issued to said Brake Beam Company, as assignee of himself, and to be duly delivered to the Company.

2nd: As contemplated in the said second paragraph of said contract of January 19, said Pungs now enters into this written contract with said Company, and by it covenants and agrees that he will not engage in the brake beam business in any way, shape or form at any place within the United States of America, its territories, or the District of Columbia and that he will not be connected with any company manufacturing or selling brake beams in the United States, either as officer, employé, or shareholder (the Chicago Railway Equipment Company alone excepted), at any time during the period covered by said letters patent No. 606,298. Said Pungs reserves the right, however, to at any time terminate this contract, and thus to relieve himself of his stay-out

obligation, by refunding to said Brake Beam Company, its successors or assigns, the sum of Ten Thousand Dollars ($10,000.00), which is the price to be paid him by said company for said letters patent, and his stay-out obligations, as hereinafter more clearly expressed.

3rd: For the letters patent as aforesaid and the stay-out obligation aforesaid, said Brake Beam Company covenants and agrees to pay to said Pungs the sum of Ten Thousand Dollars ($10,000.00) in four equal installments of twenty-five hundred dollars ($2,500.00) each, the first installment to be payable on the 19th day of April A. D. 1899; the second on the 19th day of July, the third on the 19th day of October, 1899, and the fourth and last on the 19th day of January, 1900.

4th: In the event said Pungs at any time prior to the expiration of the term covered by said letters patent, that is to say, at any time prior to June 28, 1915, becomes an officer, agent or shareholder in any company or corporation manufacturing or selling metallic brake beams of any type whatever, or engages in the business himself, then and in that case his so doing shall be construed as an election on his part to refund to said Brake Beam Company said sum of Ten Thousand Dollars ($10,000.00) forthwith, and he covenants and agrees so to do.

On these contracts, twenty-five hundred dollars, and no more, have been paid. The suit was for the balance. Further facts are stated in the opinion.

Harry P. Webber, for plaintiff in error.

Dwight C. Rexford, for defendant in error.

GROSSCUP, Circuit Judge, after stating the facts, delivered the opinion of the court. The contract, upon which suit was brought, obligated the Brake Beam Company to pay an indivisible sum, ten thousand dollars. The consideration was the conveyance to the Brake Beam Company of certain inventions patented and to be patented; as also an agreement, that during the period to be covered by certain of the letters patent, Pungs would not engage in the brake beam business in any place within the United States, or be connected with any company engaged in such business. The contract does not disclose how much of the consideration was for the patents, or how much for the agreement to remain out of business. On the face of the contract, either consideration, assuming that they were both lawful, would sustain the contract, and entitle Pungs to a recovery.

It is not argued that the consideration, so far as it is embodied in the inventions transferred, is not lawful. Parties may lawfully assign inventions not yet patented, and even future inventions, so far as such future inventions are tributary to the inventions assigned.

But is was insisted that the agreement embodied in the contract to remain out of the brake beam business within the United States for the time named, was an attempt to illegally restrain trade, to illegally restrict competition, and to create a monopoly; and was, therefore, an unlawful consideration; and evidence was offered tending to show that though the assignment of the inventions was stated to be a part of the consideration, the sole real consideration, as understood between the parties at the time, was this agreement to remain out of the brake beam business. This evidence was excluded. Evidence, also, was offered tending to show that the inventions were without commercial or practical value. But independently of its probative weight on the issue whether the agreement to remain out of business was, or was not, the sole real consideration, such evidence clearly would have been immaterial.

The first question thus presented, is this: Is the agreement to remain out a consideration that invalidates the contract? If the contract is not thus invalidated, the entire case made by plaintiff in error fails.

It will be noted that Pungs actually transferred the patents, so that the contract in this respect was already executed; also, that the period he was to remain out of the brake beam business was just the period the transferee was to have the benefit of the patent transferred; and, further, that Pungs was at liberty, at any time during the period named, to return to the brake beam business upon refunding the ten thousand dollars paid him.

We do not look on this as a contract in restraint of trade. It binds no one to stay out of the trade. At most, it is an agreement, merely, that if Pungs renews his connection with the trade, he shall return the consideration received by him for the patents transferred. Pungs, personally, was not a manufacturer of brake beams. He was in no true sense a dealer or competitor, commercially, in that business. His connection with the business was that of inventor chiefly; and the agreement under consideration may be considered as an incident, only, to the commercialization of his invention. Even in this he has put no mortgage on his inventive faculties. He has merely put himself where, without putting any binding restraint on his inventive faculties, or for that matter, upon his liberty as a manufacturer, he will realize, for the time being, on what he has already invented, the largest commercial return.

This is not, in our judgment, restraint of trade. The question whether a given contract is restraint of trade depends as much upon the nature of the business said to be restrained, as upon the more commonly mentioned elements of time and place. Harrison v. Glucose Refining Company, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915. The nature of the contract under consideration comes plainly within the principles of that case, and of Morse, etc., Company v. Morse, 103 Mass. 73, 4 Am. Rep. 513, and other cases.

In the view thus taken of this question, the other questions raised and discussed become immaterial. The judgment of the Circuit Court is affirmed.

FIRST NAT. BANK OF DUNCAN v. ANDERSON.

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

No. 2,152.

1. BILLS AND NOTES—INDORSEMENT FOR PURPOSE OF TRANSFER—LIABILITY OF INDORSER.

Where the cashier of a national bank, acting as plaintiff's agent, with full power to invest her money, made a loan thereof to a third person, taking his note therefor payable to the bank, which on the same day transferred it to plaintiff by indorsement, without receiving any consideration therefor, such indorsement was merely for plaintiff's accommodation, and gave her no right of action to recover the amount of the note from the bank.

2. SAME—CONSIDERATION OF INDORSEMENT.

The mere fact that the borrower deposited the money borrowed in his account in the bank, and thereafter paid from it certain notes he owed to the bank when they matured, did not constitute a consideration for the indorsement of the note.

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

For opinion below, see 82 S. W. 693.

Potter, Bowman & Potter, for plaintiff in error.

William I. Gilbert and Edward H. Bond, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. Lou Anderson, plaintiff below and defendant in error here, instituted this suit in the United States Court in the Indian Territory, Southern District, against the First National Bank of Duncan, plaintiff in error, to recover $1,666.10, balance alleged to be due her on a certain promissory note made by one J. A. Thomas on July 11, 1900, payable to the order of the bank and by it on the same day indorsed and delivered to her. The answer tendered the issue that the bank's indorsement was solely for the accommodation of the plaintiff and without any consideration moving it thereto. On the issues so tendered the defendant, admitting plaintiff's prima facie right of recovery, assumed the burden of proving the affirmative defense set up in the answer. The case was tried to a jury, and resulted in a verdict and judgment for plaintiff for the amount sued for with interest. The United States Court of Appeals in the Indian Territory, after a consideration of the case, affirmed the judgment, and it is now before us on writ of error to secure a reversal of the case.

The main and important assignment of error is that the trial court erred in not directing a verdict at the close of the evidence in favor of the defendant, and that the United States Court of Appeals in the Indian Territory erred in not so ruling. The facts are simple: J. T. Jeans, the cashier of defendant bank, is practically the only witness as to the material facts determinative of the right of recovery. He testifies, in substance, that the plaintiff, a relative of his wife, who either had money on deposit in his bank or was about to collect some, requested him to invest it for her so that she could get "something out of it." He represented to her that J. A. Thomas, a farmer and cattle dealer, would like to borrow it, and testifies that he went over the matter with Thomas; took a list of his collateral and submitted the whole matter to the plaintiff and asked her what she wanted him to do about it; she said she would leave it all to him; that whatever he thought best, to go ahead and do it.

The foregoing evidence is without any contradiction and establishes beyond question that the plaintiff constituted Jeans, the cashier of the bank, her agent, with unlimited discretion to invest her money for her. Pursuant to this authority Jeans made the loan of $2,000 to Thomas for one year, taking his note for the principal, with interest at the rate of 2 per cent. per month added, making the face of the note $2,480. This note was made payable to the order of the bank and

forthwith indorsed and delivered to plaintiff. Jeans explains that the reason for making the note payable to the bank, instead of to the plaintiff directly, was that in case the maker, Thomas, should be disposed to plead usury, owing to the unwarranted interest contracted for, a suit in the name of the bank would, in some manner imperceptible to us, afford immunity against such a plea. However that may be, the note was in fact made payable to the order of the bank, and according to the allegations of the complaint and in harmony with the proof the bank on the day of its date, "transferred and indorsed it to the plaintiff." On the same day, July 11, 1900, the maker, Thomas, made and executed a chattel mortgage conveying a large number of cattle, hogs, mules, and horses to plaintiff directly, as collateral security for the payment of the note in question. The evidence permits of no doubt that the money which formed the consideration for the note belonged to plaintiff; that she authorized Jeans, the defendant's cashier, to make the loan in question to Thomas; and that he acted as her agent with plenary powers in the transaction. The indorsement in question was only a means, inspired by questionable motives, doubtless, of transferring the legal title to the note to plaintiff in whom the equitable right belonged. The indorsement, therefore, was only for the accommodation of the plaintiff, and can, in and of itself, afford no right of recovery in this case. West St. Louis Savings Bank v. Shawnee County Bank, 95 U. S. 557, 24 L. Ed. 490; Western National Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470; United States National Bank of New York v. First National Bank of Little Rock, 13 C. C. A. 472, 64 Fed. 985; State National Bank v. Newton National Bank, 14 C. C. A. 61, 66 Fed. 691.

The other question requiring attention is whether the bank received a consideration for its indorsement. There is no claim that it did so directly; that plaintiff either paid anything to the bank or understood that the bank was getting anything for its indorsement. The proof shows that at the time Thomas borrowed the money from the plaintiff he was a depositor in the defendant's bank and was indebted to the defendant on some notes; that on borrowing this money from the plaintiff he deposited it to his individual credit with the bank, and subsequently paid off his indebtedness to the bank represented by notes in the amount of $700 to $1,400. The exact sum does not appear. From these and other facts to which attention will be called, it is sought to justify the verdict on the ground that this payment by Thomas of his indebtedness to the bank in some manner operated as a consideration for defendant's indorsement of Thomas' note. There is nothing in the bare fact that the bank required Thomas to pay his matured obligations. Such is a necessary and daily occurrence in all well managed banks. The bank got nothing by the transaction except the payment of a loan, and after its payment the loan was no longer an asset. The result left the bank in the same condition as to assets and liabilities as it was before. But the theory suggested or insinuated in the cross-examination of witness Jeans is that because Thomas paid his loans to the bank soon after receiving plaintiff's money, and because some eight or ten months thereafter he (Thomas) failed in business, as is shown

by the evidence, therefore it must have been a part of the purpose of the cashier of the bank in negotiating the loan to Thomas to put him in funds with which to pay a doubtful debt owing by him to the bank. This theory, in our opinion, is not warranted by any substantial evidence.

It is true there is some evidence tending to show that Thomas was, and had been for a long time, addicted to drinking and gambling, and was in these respects regarded as reckless; but according to the undisputed evidence he enjoyed good financial credit at the time his note was taken. Eight months afterward, in March, 1901, he became financially involved, had to borrow more money, and later became a fugitive from justice. But these facts have no legitimate bearing upon the issue whether the defendant, at the time of indorsing the note in question, received a valuable consideration therefor. All this evidence and other like evidence could only have afforded a basis for unwarrantable speculation and conjecture, and is not sufficient upon which to base an intelligible finding or to warrant a recovery in an action at law. Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 49 C. C. A. 244. Moreover, the evidence shows that soon after the bank received payment of its notes from Thomas it allowed him the privilege of overdrawing, and that he exercised it to such an extent that by March, 1901, he was indebted to the bank on overdrafts in the sum of $600 to $800. This fact is inconsistent with the theory of plaintiff's counsel that the bank induced the plaintiff to loan her money to Thomas for the real purpose of enabling it to secure payment of an imperiled loan theretofore made to Thomas. If the bank was, in July, 1900, distressed over the fact of Thomas' indebtedness to it, we can conceive of no reasonable likelihood of its soon afterwards voluntarily permitting him to become a creditor in practically an equal amount as before.

The testimony of witness Jeans presents a consistent and reasonable theory of the case; one in full accord with human experience. The plaintiff, Mrs. Anderson, was not called upon to contradict it in any way. By fair inference, therefore, she should be held to admit its substantial truth. The defense is not only supported by substantial evidence, but it is in harmony with the law governing national banks. As already observed, the law prohibits them from indorsing any paper merely for the accommodation of another; and common honesty, which should, in the absence of substantial proof to the contrary, be imputed to them, rather than the dishonest and unworthy purpose charged by the plaintiff, renders the other phase of the plaintiff's contention improbable.

We do not deem it necessary to further discuss the testimony. It is sufficient to say we have given it a careful perusal and consideration, and taking it all together we fail to find any substantial evidence contradicting the testimony of Jeans to the effect that he acted solely as the agent of the plaintiff in negotiating the loan to Thomas, and that the bank received no consideration whatever for its indorsement of the note in question.

The trial court, therefore, should have directed a verdict in favor of the defendant, as requested at the close of the evidence, and the United

States Court of Appeals in the Indian Territory should have reversed the judgment of the lower court because of its failure to give that instruction. The judgment will therefore be reversed, and the cause remanded to the United States Court in the Indian Territory, Southern District, with instructions to grant a new trial. It is so ordered.

CHICAGO GREAT WESTERN RY. CO. v. SMITH.

(Circuit Court of Appeals, Eighth Circuit. October 13, 1905.)

No. 2,159.

RAILROADS—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.

The law requires of one about to cross railroad tracks the vigilant exercise of his faculties of sight and hearing at such short distance therefrom as will be effectual for his protection, and if this duty is neglected, and injury results, there can be no recovery, although the injury would not have occurred but for the negligence of the railroad company.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1043-1052.]

(Syllabus by the Court.)

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

John L. Erdall (A. G. Briggs, on the brief), for plaintiff in error.

P. W. Tourtellot and E. H. Crocker (Henry Rickel, on the brief), for defendant in error.

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

VAN DEVANTER, Circuit Judge. This was an action under the state statute to recover damages for the death of R. H. Armstrong, who was struck by a locomotive and instantly killed while walking across the tracks of the railway company in its yards at Oelwein, Iowa. The negligence charged against the company was that the locomotive was being driven at a rate of speed prohibited by an ordinance of the town, and that the bell was not rung nor the whistle blown, as required by the ordinance. There may be some question whether the ordinance was applicable to the place of the injury; but it will be assumed that it was, and also that there was sufficient evidence of the right of the deceased to cross the defendant's yards at that place and of the negligence of the company to make the case in these respects one for the jury. One of the defenses set up in the answer was contributory negligence, and the only question necessary to be considered is whether or not this defense was so conclusively proven that the court should have granted the defendant's prayer for a directed verdict in its favor. The evidence, if viewed in the light most favorable to the plaintiff, established these facts:

The company's yards contained several parallel tracks used for various railroad purposes, including the making up and movement of trains and the switching and storage of engines and cars. On one of these

tracks was stored an engine not then in use, spoken of as a "dead engine." Next to it was a track, spoken of as the "coal track," because it led to the place where engines were supplied with coal. The distance between the overhang of the dead engine and the nearest rail of the coal track was about 7 feet. The deceased approached these tracks on a line substantially at right angles to them, passed close by one end of the dead engine, which was on his left, and then over the intervening 7 feet onto the coal track, when he was struck by a locomotive coming from the left which was being driven backward at a rate of possibly 15 or 20 miles an hour. The injury occurred in the daytime. Before reaching the dead engine the deceased looked to the left, but by reason of intervening obstructions he could not have seen the moving locomotive from that point. When he passed the line of the dead engine the other locomotive was in such plain view that its approach would have been disclosed by a mere glance along the track in that direction. There was nothing in the surrounding conditions to distract his attention or to prevent him from taking appropriate observations for his protection. He was not seen by those in charge of the locomotive until after the injury.

These facts permit of no other conclusion than that the deceased went upon the coal track without taking the precautions necessary to determine whether he could do so in safety. This was negligence. The place was one of great danger, and the track was itself a warning. As was said in Elliott v. Chicago, etc., Ry. Co., 150 U. S. 245, 248, 14 Sup. Ct. 85, 86, 37 L. Ed. 1068:

"It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom."

The law requires of one going into so dangerous a place the vigilant exercise of his faculties of sight and hearing at such short distance therefrom as will be effectual for his protection, and if this duty is neglected, and injury results, there can be no recovery, although the injury would not have occurred but for the negligence of others. Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403; Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542; Schofield v. Chicago, etc., Ry. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Northern Pacific R. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; Chicago, etc., Ry. Co. v. Andrews, 64 C. C. A. 399, 130 Fed. 65; Shatto v. Erie R. R. Co., 59 C. C. A. 1, 121 Fed. 678; Ames v. Waterloo, etc., Co., 120 Iowa, 640, 95 N. W. 161.

But it is urged that the deceased had a right to expect that the company, in propelling a locomotive or train along any of its tracks, would conform to the requirements of the town ordinance, and that he was justified in conducting himself accordingly. The case of Texas Pacific Ry. Co. v. Cody, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132, is relied upon as sustaining this contention, but it does not go so far. On the contrary, it is in entire accord with the prior and subsequent decisions before cited, which hold that the duties of railroads and travelers at intersecting highways are mutual and reciprocal, and no higher degree of care is required of the one than of the other; that one cannot

too exclusively impose upon the other the duty of avoiding a collision; that negligence on the part of one is no excuse for negligence on the part of the other; and that if both are negligent, and injury results, there can be no recovery. The case relied upon was this: The plaintiff was injured by a train which was being backed over a street crossing in the nighttime. There was evidence tending to show that the night was very dark and misty; that the crossing was not lighted; that no bell was rung, no whistle was blown, and no light was displayed on the train; and that the plaintiff as he went upon the crossing slackened his pace, walked slowly, listened, and looked, but neither saw nor heard the train. In the presence of this evidence tending to show that the plaintiff had taken due precautions for his protection, approval was given to an instruction to the effect that a person attempting to cross a railroad track has the right to expect that the railroad company will give the signals required by law, and, "if he is without fault" and the company fails to give such signals, and its neglect results in his injury, he can recover. The present case is quite different. In no view of its facts can the deceased be said to have been without fault. The injury occurred in broad daylight. He stepped immediately in front of a rapidly moving engine which was in plain view when he was yet in a place of security, and when there was nothing in the situation to distract his attention or to prevent him from exercising due regard for his safety. He was conclusively shown to have been guilty of negligence contributing to his injury, and a verdict for the defendant should have been directed.

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

WABASH R. CO. v. DE TAR.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1905.)

No. 2,018.

1. RAILROADS—INJURY AT CROSSING—PRESUMPTION AS TO DUE CARE BY TRAVELER.

Because the natural instinct of self-preservation generally prompts men to acts of care and caution when approaching or in the presence of danger, there is, in the absence of credible evidence of the actual fact in any instance, a presumption of the exercise of due care and caution; but, like other presumptions of fact arising from the ordinary or usual conduct of men, rather than from what is invariable or universal, this presumption is disputable, and cannot exist where it is incompatible with the conduct of the person to whom it is sought to apply it, which may be shown by the testimony of eyewitnesses to his movements, or by evidence of the physical surroundings and other conditions at the time.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1121.]

2. SAME—WEIGHT AND APPLICATION OF PRESUMPTION.

The presumption of the exercise of due care and caution on the part of one approaching a place of danger is essentially inferior in probative force and weight to credible evidence, either direct or circumstantial, explanatory of the actual occurrence, and, in those courts where the presumption underlies the rule that the burden of proving contributory negligence rests upon the defendant and must be maintained by a fair preponderance of

the evidence, its force and influence are so largely embodied in the enforcement of that rule that it has little independent application, save as it rests upon a general, but not invariable, rule of human experience which may and should be considered in determining the credibility of evidence and the weight to be given to it when these matters are not otherwise entirely clear.

(Syllabus by the Court.)

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

James P. Hewitt (George H. Carr, A. C. Parker, and Craig T. Wright, on the brief), for plaintiff in error.

J. C. Mabry (Byron C. Ward and J. Edward Mershon, on the brief), for defendant in error.

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

VAN DEVANTER, Circuit Judge. This was an action to recover damages for the death of William De Tar, who was instantly killed by a train which came in collision with his wagon as he was driving over the crossing of the Wabash Railroad and Chestnut street in the outer part of Albia, Iowa. The petition charged the railroad company with negligence in that the speed of the train was excessive, no signal of its approach was given, and no precaution to discover the presence of travelers at the crossing was taken by the enginemen. The answer traversed this charge, and also alleged that the deceased was guilty of negligence contributing to the injury in that he drove upon the crossing without exercising reasonable care for his own safety. The trial in the Circuit Court resulted in a verdict and judgment for the plaintiff. It appeared from the evidence that the collision occurred about nine o'clock in the morning of a day in January; that the deceased was a mail carrier in the rural delivery service, was quite familiar with the crossing, having passed over it with his wagon and team almost daily for many months; and that the wagon was partially inclosed, and the team was gentle. In respect of the charge that no signals of the approach of the train were given, the evidence was conflicting. There was no direct evidence, in the sense of testimony from eyewitnesses, as to what, if any, precautions for his own safety were taken by the deceased as he approached the crossing; but there was at least substantial evidence tending to show that the physical surroundings and other conditions at the time were such that, had he made reasonable use of his senses of sight and hearing, he would have discovered the approaching train before he drove upon the crossing and in ample time to have avoided the collision. In its charge to the jury, the court, after stating that on the issue of contributory negligence the railroad company had the burden of proof and must maintain it by a fair preponderance of the evidence, gave the following instruction:

"It is a law of nature that you and I recognize that every man wants to live. It is so with men, unless their minds are disordered in some way or other. That is a natural instinct implanted within us, the desire to live. That is entitled to weight as evidence, as an affirmative fact, and can only be offset by

affirmative evidence on the other side. How much evidence does it take to ride down the presumption that every man is presumed not to do a negligent act? That is to say, whether one witness or several, or whether it may be ridden down by circumstances and situation and attendant facts, but this presumption that every man has a desire to live is entitled to weight as evidence. It is as though Mr. De Tar could in some way speak to us."

And in that connection the following requests to charge, tendered by the defendant, were refused:

"If you find from the evidence introduced that said Wm. De Tar did see or hear the train, or by exercising reasonable care he could have seen it, in time to avoid the accident, then the presumption that he exercised care in order to preserve his life is overcome by the evidence, and plaintiff cannot recover.

"If you first find that defendant was negligent, then the presumption that said Wm. De Tar exercised reasonable care in order to preserve his life would be sufficient to warrant a recovery, if there was no opposing evidence upon that question; but in this case affirmative evidence has been introduced tending to show negligence upon the part of said De Tar, and, if you find there is sufficient evidence to establish his negligence by a fair preponderance of the evidence, there can be no recovery by the plaintiff in this case."

Complaint is made of these rulings, and we think it is well grounded. Because the natural instinct of self-preservation generally prompts men to acts of care and caution when approaching or in the presence of danger, there is, in the absence of credible evidence of the actual fact in any instance, a presumption of the exercise of due care and caution. Railroad Company v. Gladmon, 15 Wall. 401, 407, 21 L. Ed. 114; Continental Improvement Co. v. Stead, 95 U. S. 161, 165, 24 L. Ed. 403; Baltimore & Ohio R. R. Co. v. Griffith, 159 U. S. 603, 610, 16 Sup. Ct. 105, 40 L. Ed. 274; Texas & Pacific Ry. Co. v. Gentry, 163 U. S. 353, 366, 16 Sup. Ct. 1104, 41 L. Ed. 186; Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461, 474, 24 Sup. Ct. 137, 48 L. Ed. 262; City of Naples, 16 C. C. A. 421, 424, 69 Fed. 794; Northern Pacific Ry. Co. v. Spike, 57 C. C. A. 384, 121 Fed. 44. But it is a presumption of fact, not of law, and, like other presumptions arising from the ordinary or usual conduct of men, rather than from what is invariable or universal, it is disputable, and cannot exist where it is incompatible with the conduct of the person to whom it is sought to apply it. Fresh v. Gilson, 16 Pet. 327, 331, 10 L. Ed. 982; Insurance Co. v. Weide, 11 Wall. 438, 441, 20 L. Ed. 197; French v. Edwards, 13 Wall. 506, 514, 20 L. Ed. 702; Lincoln v. French, 105 U. S. 614, 617, 26 L. Ed. 1189; Schutz v. Jordan, 141 U. S. 213, 220, 11 Sup. Ct. 906, 35 L. Ed. 705.

Thus, in Continental Improvement Co. v. Stead, supra, it was said of persons approaching and passing over railroad crossings:

"They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case. But notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them, such, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault."

And in Baltimore & Potomac R. R. Co. v. Landrigan, supra, where approval was given to an instruction to the effect that, in the absence

of evidence on the subject, there would be a presumption of the exercise of due care by one attempting to pass over a railroad crossing, but that the presumption might be rebutted by evidence of the surrounding circumstances, it was said:

"There are few presumptions, based on human feelings or experience, that have surer foundation than that expressed in the instruction objected to. But, notwithstanding the incentive to the contrary, men are sometimes inattentive, careless, or reckless of danger. These the law does not excuse nor does it distinguish between the degrees of negligence."

So, also, in the cases City of Naples and Northern Pacific Ry. Co. v. Spike, supra, it was held by this court that the presumption arising from the natural instinct of self-preservation stands in the place of positive proof "in the absence of countervailing evidence." As the presumption reflects only the ordinary or usual conduct of men, and is at utter variance with what they sometimes do, it is not entitled to probative force or weight as affirmative or positive evidence, but only to the force or effect of a rebuttable inference of fact which must necessarily yield to credible evidence of the actual occurrence. Nor is it essential that such evidence shall come from eyewitnesses to the movements of the person injured, because the presumption must equally yield to evidence which shows that the physical surroundings were such that the injury would not have occurred had he been in the exercise of reasonable care. Tomlinson v. Chicago, etc., Ry. Co., 67 C. C. A. 218, 134 Fed. 233; St. Louis & San Francisco R. R. Co. v. Chapman (C. C. A.) 140 Fed. 129; Rollins v. Railway Co. (C. C. A.) 139 Fed. 639; Northern Pacific R. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014. The last case was a railroad crossing case, the facts of which were these: The highway approached the crossing by a gradual decline, the length of which was 130 to 150 feet. Along the greater portion of this distance the view of an approaching train was cut off by the banks of the excavation on either side of the highway; but at a distance of about 40 feet before reaching the track the road emerged from the cut, and the view of the track for about 300 feet was unobstructed. The deceased was familiar with the crossing, and was driving a gentle team. The train which collided with his wagon was going at a speed of about 20 miles an hour. Three witnesses who at the time occupied positions ranging from 130 to 250 feet from the crossing, gave testimony tending to show that the deceased made no effort to discover whether or not a train was approaching. The court said:

"When it appears that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in face of all the oral testimony, that such precautions were taken."

And also:

"If, in this case, we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look, or, if he looked, he did not heed the warning, and took

the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence. * * * Upon the whole, we are of opinion that the testimony tending to show contributory negligence on the part of the deceased was so conclusive that nothing remained for the jury, and that the defendant was entitled to an instruction to return a verdict in its favor."

It is thus plainly and authoritatively settled not only that the presumption of the exercise of reasonable care is a rebuttable inference of fact, but also that it does not have any probative force or weight in a case where the surrounding circumstances are shown to have been such that, had the injured person taken reasonable precautions for his safety, the injury would not have occurred.

What is here said of this presumption is also sustained by many decisions in the state courts. Thus, in Crawford v. Chicago, etc., Ry. Co., 109 Iowa, 433, 435, 80 N. W. 519, it was said by the Supreme Court of Iowa:

"The plaintiff also contends that, as Claflin lost his life in the collision, the presumption that he exercised due care must prevail. That such a presumption is proper, and must be given weight, may be conceded, but it cannot prevail against evidence which shows that he could not have exercised due care. * * * A person possessing the ordinary powers of seeing and hearing cannot, without negligence on his part, knowingly approach a railway crossing, and fail to discover an approaching train, which he can readily see or hear a sufficient length of time to enable him, with reasonable effort, to avoid danger."

And it was said by that court in Ames v. Waterloo, etc., Co., 120 Iowa, 642, 646, 95 N. W. 161, 162:

"Had there been no evidence whatever as to the circumstances surrounding the deceased at the time his injury was received, or as to how the accident occurred, the presumption would be entertained that, prompted by the instinct of self-preservation, the deceased was taking reasonable precautions for his own safety. But several witnesses saw deceased just as he stepped forward from behind the moving wagon and was struck by the car, and the fact that there was such evidence as to what occurred prevents the presumption which would otherwise be drawn from the instinct of self-preservation from being entertained."

And again:

"It has never been held that the presumption from the instinct of self-preservation constitutes affirmative proof of any specific act, or the exercise of any specific care."

In Sullivan v. New York, etc., R. R. Co., 34 Atl. 798, it was said of this presumption by the Supreme Court of Pennsylvania:

"The plaintiff's case rested upon the bare presumption that her husband had stopped, looked, and listened before attempting to cross the tracks. His duty in this regard was fixed by an unbending rule of law. The presumption that he did it is based upon the fact that the natural instincts of men lead them to avoid injury. It prevails in the absence of direct testimony upon the subject, but it may be rebutted by the proof of facts and circumstances as well as by direct evidence. It is demonstrated by the testimony that if he obeyed the legal injunction he saw and heard the approaching train; and the only deduction possible is that he did not look and listen, or that, seeing and hearing, he went on, regardless of the danger. The case comes directly within the rule stated in Myers v. Railroad Co., 150 Pa. 386, 24 Atl. 747: 'That one who is struck by a moving train, which was plainly visible from the point he occupied when it became his duty to stop, look, and listen, must be conclusively

presumed to have disregarded that rule of law and common prudence, and to have gone negligently into an obvious danger.'"

Philadelphia, etc., R. R. Co. v. Stebbing, 62 Md. 504, 518, was an action somewhat like the present, in which the issues related to the care exercised by the defendant's enginemen and to that exercised by the plaintiff. In the course of the opinion, which was delivered by Chief Justice Alvey, a jurist of very high repute, it was observed:

"It is certainly true, the motive to self-preservation is a principle of our common nature, and it is but rational to presume, in the absence of evidence to the contrary, that parties act under its promptings in view of impending danger. But, in such cases as the present, there is a counter presumption, when the proof does not show to the contrary, and that is, that every person charged with a duty involving the safety of himself or others will perform that duty; so that in fact it is not often the case that these mere presumptions afford much assistance in arriving at correct or just conclusions. They ought not to be indulged to the exclusion of direct evidence to the contrary; and it is only where there is no reliable proof to the contrary, or there is rational doubt upon the evidence as to the acts or conduct of the parties, that such presumptions can properly be invoked. The jury ought not to be instructed in such terms as would justify them in acting upon the mere presumption of the absence of fault in either party, in disregard of the proof in the case, where there are facts and circumstances to be considered by them."

Chase v. Maine Central R. R. Co., 77 Me. 62, 66, 52 Am. Rep. 744 is also an instructive case, in which the question is discussed as follows:

"Exception is taken to the judge charging the jury to take into consideration, upon the question of the intestate's care upon the occasion of the injury, the knowledge of the jury 'of the habits of thought and mind, and the natural instincts of men,' to preserve themselves from injury. Following, as no doubt it did, an impressive argument of counsel that a man would not be so unwise as to rush into danger when it was avoidable, we are inclined to think the idea intended was presented to the jury too prominently. Such a consideration is by no means evidence; for, if it were so, a jury might accept it as conclusive evidence. It is no more than an accompaniment or an appurtenance of evidence. It may have some influence upon the interpretation of facts affirmatively presented. It pertains, as said by defendant's counsel, to those natural laws in connection with which all evidence may be weighed. It belongs to the class of slight presumptions, described by Mr. Best, which, 'taken singly, do not either constitute proof or shift the burden of proof.' 1 Best, Ev. par. 319. It may give character or force to facts already proved. But it does not of itself add or create proof. It is rather an argument or mode of reasoning upon evidence. Practically speaking, it is no more than that a person's motive may be taken into consideration in relation to any act done by such person. It would be reasonable to say that a man would be naturally stimulated to avoid rather than to rush into dangerous situations. He would be impelled by strong motives to do so. But this would apply to the engineer or fireman or brakeman on a train as well as to the traveler, although perhaps not generally in the same degree. But the weakness of the plaintiff's position lies in the fact that this motive for personal safety does not operate upon the minds of men until they can clearly see that they are endangered by their carelessness. It does not keep them from careless acts. The danger is often not seen until too late to be extricated from it. The careless act usually precedes the moment when the natural instincts of self-preservation are aroused. And a man is quite prone to take risks. And a man is careless to take a risk in crossing a railroad in advance of a coming train. We all know that he often does it."

The decision of this court in Chicago, etc., Ry. Co. v. Bryant, 13 C. C. A. 249, 256, 65 Fed. 969, although not relating to this particular

presumption, is in principle applicable to the present discussion. There the plaintiff's intestate was killed in a collision while being transported from one point to another over the defendant's road in a train, consisting of an engine and passenger coach, which was in charge of the defendant's yardmaster. When the case was first before this court it was held that, in the absence of evidence explanatory of the occurrence, the presumption was that one riding in a coach of a common carrier palpably designed for the transportation of passengers was lawfully there by the invitation or permission of the employés in charge of the vehicle, and that they had authority to bind the carrier by such invitation or permission. Bryant v. Chicago, etc., Ry. Co., 4 C. C. A. 146, 53 Fed. 997. But when the case came before the court again, it appeared, from the evidence produced at a second trial, that the yardmaster and some of his co-employés were operating the train solely for purposes of their own, without the knowledge of the defendant, and without color of authority from it, and it was then said:

"Finally, it is said that, inasmuch as the presumption that the deceased was a passenger of the company arose from the facts that the yardmaster was in possession of the train, operating it on the track of the company, and the deceased was riding therein, there was some evidence for the jury in support of the claim of the defendant in error, and the case was properly submitted to them by the court. * * * A presumption of fact, like that which the counsel for the defendant in error here invokes, is a mere inference from certain evidence, and as the evidence changes, the presumption necessarily varies. A trial court is not bound to disregard a conclusive presumption which arises from all the evidence at the close of a case because at some time in the course of a trial counter presumptions arose. Possession of real estate raises a presumption of title; but, when a legal title is proved in another, a conclusive presumption arises from all the evidence that the latter is the owner, and the court must so direct. Possession of a horse raises the presumption of ownership, but the uncontradicted evidence of competent witnesses that the horse is the property of another and that the possessor secretly took him from his owner without right raises so conclusive a presumption of ownership in the latter that the court might be bound to disregard the first presumption from possession, and the possession itself might raise a presumption of larceny."

The force and application of other presumptions are illustrated in Lisbon v. Lyman, 49 N. H. 553, 562; Agnew v. United States, 165 U. S. 36, 51, 17 Sup. Ct. 235, 41 L. Ed. 624; Dunlop v. United States, 165 U. S. 486, 502, 17 Sup. Ct. 375, 41 L. Ed. 799.

It is true that in the opinion of this court in Northern Pacific Ry. Co. v. Spike, supra, there are expressions indicating that the presumption of the exercise of due care and caution "has its application in all cases" and is entitled to weight as affirmative evidence, but as these expressions appear to have gone beyond what was necessary to a decision of that case and to ascribe to the presumption greater force and influence than in principle should be accorded to it, they cannot be permitted to control the decision of other cases. As was said by Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 398, 5 L. Ed. 257:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before

the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Without further reference to judicial decisions, it may be safely said: Both reason and authority enforce and sustain the conclusion that the presumption of the exercise of due care is essentially inferior in probative force and weight to credible evidence, either direct or circumstantial, explanatory of the actual occurrence; that it arises and has application in the absence of such evidence, but not in opposition to it; and that, in those courts where it underlies the rule that the burden of proving contributory negligence rests upon the defendant, and must be maintained by a fair preponderance of the evidence, its force and influence are so largely embodied in the enforcement of that rule that it has little independent application, save as it rests upon a general, but not invariable, rule of human experience which may and should be considered in determining the credibility of evidence and the weight to be given to it when these matters are not otherwise entirely clear.

In its charge to the jury, as before shown, the court, in addition to telling them that the burden of establishing contributory negligence on the part of the deceased was on the defendant and must be maintained by a fair preponderance of the evidence, attributed to the presumption of the exercise of due care the probative force and weight of affirmative evidence, notwithstanding there was substantial evidence tending to explain the actual occurrence, and also went to the extreme of indicating that the presumption was to be regarded as if it were testimony coming from the deceased. This was error, and plainly tended to mislead the jury. Los Angeles Traction Co. v. Conneally (C. C. A.) 136 Fed. 104, 108; Thayer's Preliminary Treatise on Evidence, 337–339. There was also error in the general terms in which it was left to the jury to say whether the presumption could be overcome by evidence of the physical surroundings and other conditions at the time. That it could be so overcome was matter of law to be stated by the court, and not matter of fact to be determined by the jury.

The law requires that one about to go over so dangerous a place as a railroad crossing shall make vigilant use of his faculties of sight and hearing to discover whether or not a train is approaching, and that he shall do this at such short distance from the crossing as will be effectual for his protection. Chicago Great Western Ry. v. Smith (C. C. A.) 141 Fed. 930. It was therefore the duty of the court, when so requested, to have plainly instructed the jury that if the evidence showed that the deceased, by the exercise of reasonable care, would have seen or heard the train in time to have avoided the collision, the presumption was overcome, and the plaintiff could not recover.

While it was urged in argument that the evidence so conclusively established the defense of contributory negligence that the court should have directed the jury to return a verdict for the defendant, the present state of the record is such that that question has not been considered.

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

INCORPORATED TOWN OF GILMAN v. FERNALD.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1905.)

No. 2,148.

COURTS—UNITED STATES CIRCUIT COURT OF APPEALS—APPEAL AND ERROR—MOTION TO DISMISS—DELAY IN FILING TRANSCRIPT.

Where a transcript of the record is filed in the Circuit Court of Appeals within 60 days from the signing of the citation and within the time specified therein, but after the return day of the writ of error, and the failure to file it before that return day has not continued the hearing of the case over any term of court, and no motion to dismiss the writ is made until the expense of printing the transcript has been incurred, the writ will not be dismissed.

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

See 123 Fed. 797.

J. P. Lyman and Thomas A. Cheshire, for plaintiff in error.

Joe R. Lane and C. M. Waterman, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

PER CURIAM. A motion has been made to dismiss the writ of error in this action because, although the writ was returnable on or before the 12th day of November, 1904, the transcript of the record was not filed until November 28, 1904. Rule 16 of this court requires the filing of the record with the clerk by or before the return day. Subdivision 5 of rule 14 provides that all appeals, writs of error, and citations must be made returnable not exceeding 60 days from the date of signing the citation. The citation in this case was signed on October 26, 1904, and was returnable on or before December 25, 1904. The writ of error and the citation should have been made returnable at the same time, but through some oversight they were made returnable at different times. The transcript was filed within the time fixed for appearance in the citation. The expense of printing the record, which amounted to at least $100, was paid in January, 1905, and the motion to dismiss the writ was not filed until February 17, 1905. The writ of error appears to have been prosecuted in good faith, and the delay in filing the transcript did not continue the case over any term of this court. Where a transcript of the record is filed within 60 days from the signing of the citation and within the time specified therein, but after the return day of the writ of error, and the failure to file it before that return day has not continued the hearing of the case over any term of this court, and no motion to dismiss the writ is made until the expense of printing the transcript has been incurred, the writ will not be dismissed. McClellan v. Pyeatt, 49 Fed. 259, 1 C. C. A. 241; Bingham v. Morris, 7 Cranch, 99, 3 L. Ed. 281; Altenberg v. Grant, 83 Fed. 980, 28 C. C. A. 244.

The motion to dismiss this writ is accordingly denied.

INCORPORATED TOWN OF GILMAN v. FERNALD.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1905.)

No. 2,148.

1. MUNICIPAL CORPORATIONS—LIABILITY FOR BORROWED MONEY—INVALIDITY OF BONDS.

Where a municipal corporation in Iowa, having power to borrow money, but not to issue negotiable bonds, borrowed a sum which it used for an authorized purpose, the fact that it issued to the lender its negotiable bonds, which were ultra vires and void, will not preclude him from recovering the sum lent in an action for money had and received.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1992.]

2. SAME—LIMITATION OF ACTION FOR MONEY HAD AND RECEIVED.

Where a municipality issued void bonds as evidence of an indebtedness which it had the power to incur for money of which it received the benefit, and subsequently paid the holder interest on the bonds as it matured, the statute of limitations did not begin to run against an action to recover the money so long as the municipality recognized its express obligation to pay the bonds by paying the interest thereon.

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

See 123 Fed. 797.

J. P. Lyman and Thomas A. Cheshire, for plaintiff in error.

Joe R. Lane and C. M. Waterman, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. On May 10, 1888, the incorporated town of Gilman, in the state of Iowa, plaintiff in error, by due action of the town council adopted an ordinance entitled:

"An ordinance authorizing a loan of $2,500.00, to be raised by issuing bonds to provide for the establishment of waterworks, with necessary tank, windmill, pump, pipes, hydrants, and other necessary appurtenances for the same, and for the purchase of a fire engine and its apparatus for the town of Gilman, Iowa."

The ordinance provides that no more of the bonds should be signed, issued, or negotiated than were necessary for the purpose of constructing the contemplated waterworks, and that the money arising from the sale of the bonds should be used for no other purpose. Section 3 of the ordinance provides as follows:

"The faith of the town of Gilman is hereby pledged for the payment of said principal sum of $2,500.00 and the interest thereon."

On the same day the town council passed another ordinance providing for the assessment and collection of an annual special tax of two mills on the dollar to create a sinking fund for the gradual extinguishment of the bonds, to be issued under the authority of the first mentioned ordinance. Pursuant to the authority of these ordinances, the town on July 1, 1888, executed and delivered to one William H. Fernald its five certain negotiable bonds, each for the sum of $500, maturing July 1, 1898, with 20 coupons attached, each representing interest ac-

cruing during the preceding six months, at the rate of 7 per cent. per annum. These bonds soon after their execution were delivered to William H. Fernald, named therein as payee, who then paid the city the full face value therefor. The semiannual interest coupons were paid regularly by the town to William H. Fernald, the holder of the bonds, for nine and one-half years, until July 1, 1898, when the last one matured. Then, for the first time, the town refused to pay the interest maturing on the bonds, refused to pay the principal which matured on that day, and first gave Fernald to understand that it intended to repudiate its apparent express obligation as evidenced by the bonds. The ground assigned for such refusal was that the bonds were void, because, among other reasons, they were made negotiable in form and without any statutory authority for that purpose, express or implied. During the 10 years from the date of the issue of the bonds until the date of the maturity of the same, the town had made use of all the money received from Fernald for the bonds in strict compliance with the provisions of the ordinance, in constructing a system of waterworks, and during all this time had enjoyed the benefit of the waterworks, and was, at the maturity of the bonds, and now is in possession and enjoyment of the same. After the refusal to pay the interest or principal on July 1, 1898, William H. Fernald, the payee named in the bonds, assigned them to Louis P. Fernald, the defendant in error, plaintiff below, and with them, also, all claims against the town of Gilman which he might have. Afterwards, on January 10, 1903, the defendant in error, hereafter called plaintiff, instituted this suit in the Circuit Court for the Southern District of Iowa against the defendant, counting upon the bonds themselves and also, in one count, for money had and received by the town under an implied agreement to repay the same. A judgment was recovered on the last-mentioned count, and defendant brings this case here by writ of error for reversal of the same. The question decisive of the case, duly presented by the assignment of errors, will appear later.

The bonds were payable to William H. Fernald, or order, for a definite sum of money, at a time fixed, and were payable absolutely and without condition. They were therefore negotiable instruments within the law merchant. At the time in question the only statutory provision authorizing the town of Gilman to borrow money was contained in section 500 of the Iowa Code of 1873, which was as follows:

"Loans may be negotiated by any municipal corporation in anticipation of the revenues thereof, but the aggregate amounts of such loans shall not exceed the sum of 3 per cent. upon the taxable property of any city or town."

This statute, it is observed, authorized the borrowing of money by any municipal corporation, but it did not authorize the issuance or delivery of negotiable bonds as evidence of the loans. The Supreme Courts of the United States and of the state of Iowa have held, and such is now the controlling law, that negotiable bonds issued by municipalities under such statutes as that just quoted are ultra vires and void, and that, in order to issue bonds or obligations for money borrowed which will circulate in the market as negotiable securities, there must be express statutory authority. Merrill v. Monticello, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. Ed. 1069; Brenham v. German American Bank, 144 U. S.

173, 12 Sup. Ct. 559, 36 L. Ed. 390; Barnum v. Okolona, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495; Heins v. Lincoln, 102 Iowa, 69, 71 N. W. 189. See, also, German Insurance Co. v. City of Manning, Iowa (C. C.) 95 Fed. 597.

Learned counsel for plaintiff do not in argument or brief question the application of this rule of law to the present case. For the purposes of this case, they concede that the bonds in question were issued without statutory authority, and for that reason were void as evidence of plaintiff's right of recovery. They therefore plant their right of recovery upon the seventh count of the petition, which is for money had and received. This count, after stating the facts connected with the issue and delivery of the bonds to William H. Fernald, the payment by him to the town of $2,500, the use of this money by the town for the purpose of building its waterworks, the retention of the advantage secured by the town by the use of his money, alleges, further, that the defendant recognized—

"And treated them as valid municipal obligations, and regularly paid the interest thereon as therein provided, up to the 1st day of July, 1898, when each of said bonds and the last interest coupons matured, that up to said last-mentioned date, by no act or expression of said municipality or its officers, representatives, or inhabitants, had plaintiff or his assignor, William H. Fernald, been given any reason to believe, nor did they or either of them believe, that the obligation purporting to be incurred by said municipality, by the terms of said bonds and each of them, would not be kept and performed fully to the letter by said town."

The defendant in its answer to the seventh count admits the purchase by William H. Fernald of the bonds in question, the payment by him of $2,500 therefor, the receipt of money by the mayor of the defendant town, and the payment by him of the same for the construction of the system of waterworks; admits that the defendant regularly paid the interest thereon up to the 1st day of January, 1898; admits that it did not pay the last interest coupon or the principal of the bonds, and that it refused to pay the same. The defendant sets up the fact that the bonds were negotiable, and for that reason ultra vires and void, and further pleads the statute of limitations to the effect that the money paid by Fernald for the void bonds on July 1, 1888, conferred upon him a present and immediate right to institute a suit for its recovery, and that the statute of limitations of the state of Iowa applicable to an action to recover such money barred the right of action in five years thereafter.

Learned counsel for defendant, with the same candor which prompted counsel for plaintiff to make concessions, concede in argument and brief, as we understand them, that the weight of authority authorizes the recovery of money paid in circumstances such as those disclosed by this record, notwithstanding the fact that the bonds evidencing the loan were ultra vires and void; and state that the real question for consideration is whether the right to recover the amount of the loan at the time the seventh count in the petition was filed was barred by the statute of limitations. We might, therefore, properly assume that the only question requiring consideration at our hands is that relating to the statute of limitations; but, lest we misunderstand the meaning of counsel, we

briefly state our views concerning the right of plaintiff to maintain this action on the common count for money had and received.

By the provisions of section 471 of the Code of Iowa (1873) power in the abstract is conferred upon cities and incorporated towns of that state to erect or to authorize the erection of waterworks. By the provisions of section 500 of the same Code, power was conferred upon the municipal corporations of the state to negotiate loans for municipal purposes in anticipation of the revenue. No power was at the time in question conferred upon the municipalities of the state to issue bonds or negotiable securities to evidence such loans. Notwithstanding this want of power to issue negotiable securities, the town, having borrowed of William H. Fernald, pursuant to the power conferred by section 500 of the Iowa Code, the sum of $2,500, gave to him as evidence of his claim the five certain negotiable bonds in question. These bonds, as already seen, were void for want of power to issue them, but the obligation to pay the loan made pursuant to the power conferred by law was not avoided by the fact that an unwarranted evidence of the loan was executed. Notwithstanding such fact, the money loaned, if used by the municipality for its own benefit, may be recovered. Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659; Chapman v. County of Douglas, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; Read v. Plattsmouth, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414; Hedges v. Dixon County, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. Ed. 1044; Geer v. School District No. 11, 49 C. C. A. 539, 111 Fed. 682, and cases cited.

We are, therefore, not only by the concession of counsel, but by controlling authority, brought to the conclusion that plaintiff has a right to recover in this action on the seventh count of his petition, unless such right is barred by the statute of limitations. Section 3447 of the Code of Iowa, supra, which controls this question, is as follows:

"Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared: * * * (6) Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years."

The claim of the town is that the cause of action accrued to plaintiff's assignor on July 1, 1888, immediately upon the payment by him of the $2,500 to the town; therefore that his right of action was barred in five years thereafter, namely, on June 30, 1893, notwithstanding the fact that during all this time the town continued to pay the interest as expressed in its written contract. Such interest was paid without objection or intimation of any infirmity in the written contract until July 1, 1898, when, for the first time, the town repudiated the written contract and declined to pay either the interest or principal called for by it. This suit was instituted January 10, 1903, counting only on the bonds, and by leave of court on June 12, 1903, an amendment was filed counting on the implied obligation to pay the debt notwithstanding the invalidity of the bonds as such. The filing of this amendment, if indeed it shall be regarded as the institution of the present suit (which we do not assert),

was clearly within five years from the date of defendant's repudiation of the void bonds.

On the question when the statute begins to run in cases of this kind we need say but little. This court in two opinions has passed upon what we conceive to be the very question now involved, and has held in substance that when a municipality issues void bonds as evidence of an indebtedness which it had power to incur, for work or property of which it received the benefit and subsequently paid the holder of the bonds interest as it matured according to the tenor of the bonds, the statute of limitations does not begin to run against an action brought to recover the money as long as the municipality recognizes its express obligation to pay the bonds and pays the holder interest thereon according to the requirement of the bonds themselves. We have re-examined the question in the light of the exhaustive and able briefs of the counsel for the defendant town, and fail to discover any reason for receding from the views expressed and adopted by this court in the two cases of Geer v. School District No. 11, supra, and Board of Commissioners v. Irvine, 126 Fed. 689, 61 C. C. A. 607. We also fail to discover any substantial difference in the facts of the case now before us and those involved in the Geer Case, except that the case now under consideration presents a stronger showing of no purpose to repudiate the express contract, but rather a determined and settled purpose to observe its requirements up to the time of the maturity of the bonds. In this case there was not only a continuous recognition of the written obligation, by the payment of interest called for by the bonds, until their full maturity, but a provision made by ordinance for the creation of a sinking fund to meet the principal when it should fall due. Not only so, but the evidence discloses that $850 has actually been collected from the taxpayers for the purpose of this sinking fund.

This court should be slow to overrule its twice-expressed opinion in aid of a highly technical defense to what must be conceded to be a most meritorious cause of action—a cause of action based on a claim against a town for money actually used in constructing one of its most salutary and necessary public utilities. We therefore decline to do so, and, on the authority of the two cases last cited, affirm the judgment rendered below.

THE WINNEBAGO.

IROQUOIS TRANSP. CO. et al. v. A. HARVEY'S SONS MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. November 18, 1905.)

No. 1,417.

1. MARITIME LIENS—STATE STATUTE—CONTRACTS FOR CONSTRUCTION OF VESSELS.

Contracts for building vessels or for work done or materials furnished in their construction are not maritime, and hence a state statute relating to such contracts, giving liens to the contractors and providing for their enforcement in the state courts, is not invalid, as in derogation of the ad-

miralty jurisdiction conferred on the District Courts of the United States by the Constitution and the judiciary act of 1789.

[Ed. Note.—Maritime liens created by state laws, see note to The Electron, 21 C. C. A. 21.]

2. COURTS—FEDERAL COURTS—FOLLOWING DECISION OF STATE COURT.

The Michigan water craft act (Comp. Laws, c. 298), which gives a lien to contractors and persons furnishing labor and materials in the construction of vessels, relates to contracts which are not maritime, and its construction by the Supreme Court of the state is binding on the federal courts.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

3. MARITIME LIENS—STATE STATUTES—JURISDICTION OF STATE COURTS.

The fact that a vessel subject to statutory liens for labor or materials under a state statute has been enrolled and engaged in interstate commerce, and may therefore become subject to superior maritime liens enforceable in a court of admiralty, does not affect the jurisdiction of a state court over a suit to enforce the statutory liens.

4. SAME—CONSTRUCTION OF MICHIGAN STATUTE.

Comp. Laws Mich. c. 298, gives a lien for labor or materials furnished for the building of a vessel, without reference to whether credit is given to the vessel or the owner personally, and the lien exists in either case, unless it is shown that it was waived.

5. SAME.

Under such statute, a lien is given for materials furnished for the purpose of being used in the construction of a particular vessel, and it is not necessary to its enforcement to prove that they were in fact so used.

6. SAME—PAYMENT—TAKING OF NOTES.

The giving of notes by the owner of a vessel under construction to one who was furnishing materials therefor for arbitrary amounts desired by him to be used in raising funds, which notes were not paid and were afterwards returned, did not constitute a payment which deprived the materialman of his right to a lien, where there was no agreement that they were taken as payment.

7. SAME—MATERIALS FURNISHED AFTER LAUNCHING.

A vessel launched, but still under construction, does not become subject to the maritime law because she rests in the water instead of on the land, so as to deprive one who after such launching furnishes materials for her construction of his right to enforce a statutory lien therefor in the state courts.

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

This is a cause which originated in a state court of Michigan, the circuit court for the county of Wayne, wherein the defendant in error sought to enforce against the steamer Winnebago a lien given by a statute of the state for materials furnished for her construction. The steamer was built at St. Clair, Mich., by the Columbia Ironworks, a Michigan corporation, under a contract with John J. Boland and Thomas J. Prindiville, who subsequently organized under the laws of Indiana the corporation, the Iroquois Transportation Company, plaintiff in error here, and assigned the contract to it. This contract required the Columbia Ironworks to construct for, and deliver to, the other party within a designated time a steel steamer of a described size and character for the sum of $95,000, payable by installments during the progress of construction, except the last installment, which was payable on the completion of the vessel; and it was stipulated that a penalty of $50 per diem, but not exceeding in all $3,500, should be paid by the Columbia Ironworks for any delay in completion, and a bonus of the same sum per diem for completion earlier than the stipulated date. While the vessel was in course of construction, the Columbia Iron-

works was also engaged in the building, at their yards, of another vessel of like character. The A. Harvey's Sons Manufacturing Company engaged at Detroit in the business of selling valves, piping, fittings, plumbing material, and the like, furnished the Columbia Ironworks with a quantity of these materials to go into the construction of the two vessels on orders which were for duplicates of the items required. In general these materials were respectively used in the construction of the vessels for which they were ordered, but a comparatively small portion of the duplicates intended for the vessel now called the Winnebago is not shown to have been actually employed for that purpose. One of the duplicate parts of the articles furnished was charged by the Columbia Ironworks to one of the vessels, and the other half to the other, except that a small amount, $52 worth, was charged to "Building and Equipment Account." But it was not known to defendant in error that any part of the duplicate of materials furnished for each vessel was appropriated to any other purpose. The last of the articles were furnished July 18, 1903, while the vessel was lying in the water at St. Clair. She was launched on March 21, 1903, but she was not completed until after all the articles had been furnished. On July 18, 1903, she was inspected and enrolled at Port Huron in the name of the Columbia Ironworks as owner, and thereupon the balance of the purchase price, less the forfeit for delay, was paid, and a bill of sale given by the Columbia Ironworks to the plaintiff in error. Five days afterwards a new enrollment was made of the vessel at Chicago, reciting a change of ownership and of districts. The defendant in error had no knowledge for whom the vessel was being built, nor did either of the parties know of the enrollment of the vessel by the Columbia Ironworks at the time when that was done. The vessel made several trips on the Lakes after her enrollment at Chicago. A part of the price of the materials furnished by defendant in error remaining unpaid, this proceeding was commenced under the Michigan water craft act (Comp. Laws, c. 298) beginning with section 10,788, by the filing of the complaint praying for a warrant of seizure and a summons to the owner or master. Upon the seizure of the vessel, a bond was given by the plaintiff in error as owner and the vessel released. The plaintiff in error thereupon, and before the time for its pleading had expired, filed its petition and bond for removal into the Circuit Court of the United States for the Eastern District of Michigan, and the cause was removed accordingly. The plaintiff in error in due time filed its answer, pleading to the merits and denying the validity of said chapter 298 of the statutes of Michigan, upon the ground that it was in violation of the second section of article 3 of the Constitution of the United States, conferring jurisdiction upon the courts of the United States in admiralty. A replication having been filed, the cause came on for trial before the court and a jury. A verdict was rendered for the defendant in error for the sum of $2,434.36. Upon judgment having been entered thereon, the cause was brought here on writ of error.

C. E. Kremer, for plaintiffs in error.

H. B. Graves, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, having stated the case as above, delivered the opinion of the court.

The questions discussed by counsel may be resolved into the following:

1. Whether the Michigan statute, in its application to such a case as this, is in derogation of the admiralty jurisdiction conferred upon the District Courts of the United States by the Constitution and the judiciary act of 1789. It would be superfluous for us to canvass anew the many decisions of the Supreme Court of the United States upon this general subject. This has been so often done by that court that

we may properly assume the leading principles affirmed in its more recent decisions as settled, and proceed to a discussion of the question before us by their light. Contrary to what was said by Mr. Justice Miller in The Hine v. Trevor, 4 Wall. 555, 18 L. Ed. 451, respecting the effect of the act of 1845 upon the admiralty jurisdiction of causes arising on the Great Lakes and connecting rivers, it is to be understood that no part of that act is now in force. The reason for that conclusion is stated in The Eagle, 8 Wall. 15, 19 L. Ed. 365, and the conclusion is confirmed in The Robert W. Parsons, 191 U. S. 17, 31, 24 Sup. Ct. 8, 48 L. Ed. 73. We are therefore to be remitted to the original investiture of the admiralty jurisdiction by the Constitution and the judiciary act of 1789 for the ascertainment of its scope and limits. In the definition of those ordinances by the decisions of the Supreme Court we take it to be settled that the jurisdiction extends to all cases of a maritime nature, whether the right in question is one accorded by the general rules of the admiralty law or is created by legislation; the doctrine being that newly created rights of this nature become parts of the jurisdictional dominion, as in the case of state legislation according a lien for supplies furnished in the home port. But the maritime nature of the subject is always the test of jurisdiction. And so, while state legislation may create rights which are of such a nature that they may properly be administered by the admiralty courts, such state legislation cannot enlarge the power of those courts by creating rights of which they cannot take cognizance consistently with their principles or with the objects of their institution. These rules are the obvious deductions from the authoritative decisions upon the subject. Passing from these predicates, we observe that it is also to be accepted as settled law that contracts, whether for the building of ships or for furnishing materials for their construction, are not maritime in their nature, nor are liens given upon ships while in course of construction maritime liens. This doctrine was affirmed by this court in The John B. Ketchem, 97 Fed. 872, 38 C. C. A. 518, and is supported by many decisions of the Supreme Court. Some of these are: Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487; Johnson v. Chicago, etc., Elevator Co., 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447; Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 643, 20 Sup. Ct. 824, 44 L. Ed. 921; The Robert W. Parsons, 191 U. S. 17, 25, 24 Sup. Ct. 8, 48 L. Ed. 73.

It seems to follow by obvious sequence that, in creating liens of this character and conferring upon their own courts the power to enforce them, state legislation does not derogate from the jurisdiction of the admiralty courts of the United States. It may be that in its application to ships already engaged in commerce there would be such derogation, and that to that extent its provisions would not be enforceable. But that is no valid reason why the statutes should not be given effect so far as they may. We have, therefore, no occasion to consider whether the remedy provided by the Michigan statute is to be regarded as one strictly in rem, or as one which, like a proceeding in foreign attachment, contemplates the recovery of a judgment against

the owner, and the enforcement of a lien upon his property for its satisfaction. If the contract is not of a maritime nature, it is of no concern to the federal jurisdiction what remedies the state may provide, whether in rem or otherwise. "If," said Mr. Justice Brown, in Knapp, Stout & Co. v. McCaffrey, supra, "a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the state. Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in its construction (The Jefferson [People's Ferry Co. v. Beers] 20 How. 393, 15 L. Ed. 961; The Capitol [Roach v. Chapman] 22 How. 129, 16 L. Ed. 291), we held, in Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487, that, in respect to such contracts, it was competent for the states to enact such laws as their Legislatures might deem just and expedient, and to provide for their enforcement in rem." The owner of a ship may make a nonmaritime contract and mortgage his ship to secure it, or it may be seized on mesne or final process; and in both cases the ship may be sold for the satisfaction of the debt on the order of a common-law court without recourse to the admiralty jurisdiction. We therefore think the proceeding was one maintainable in the state court.

2. One ground of defense made by counsel for the plaintiff in error is that the steamer Winnebago was, at the time of her construction and seizure, not intended to be used only in navigating the waters or canals of the state of Michigan; and the question presented and argued is whether the statute intends a vessel exclusively used in navigating the waters of the state, or one which is to be used in such waters, or there and elsewhere, as the business in which she is engaged may require. The construction of the provision of the statute in this regard was presented to the Supreme Court of the state in The City of Erie v. Canfield, 27 Mich. 479, and was decided adversely to the contention which counsel for plaintiff in error now makes; the court holding that the vessel need not be one intended to be exclusively used on the waters of that state. Apparently this settles the question for us, if, as we think, it could make no difference in determining the maritime nature of the transaction, whether the ship was intended to be used wholly in Michigan waters, or elsewhere as well.

3. Another question is presented by the point made that the plaintiff (below) could not recover because it was a subcontractor only, and could not recover, unless there was something due the contractor. But the premise is bad. It rests upon the predicate that the Columbia Ironworks was at work upon, and obtained these materials for, a vessel not its own, but one belonging to the Iroquois Transportation Company; whereas the contrary was the fact. The ownership was in the Columbia Ironworks until she was delivered. This was the ruling made by us in the case of The John B. Ketchum, supra, upon a contract like that upon which this vessel was built, and we see no reason for reconsidering the point.

4. Again, it is urged that, because the vessel was enrolled and licensed and was already engaged in interstate commerce, the seizure

was in violation of the Constitution and laws of the United States. It is said that she had become "a vessel subject to admiralty jurisdiction," which is quite true. And it is further suggested that she might become subject to maritime liens which could only be enforced in the admiralty, which may also be conceded. We are unable to perceive that any relevant consequence ensues upon the fact that the vessel had engaged in interstate commerce. And the fact that she might become subject to maritime liens would not destroy liens already lawfully acquired. It is true she might become subject to maritime liens which would be superior to the existing lien, and that such liens would have to be enforced in the admiralty. But that possibility does not defeat the enforcement by a state court of the nonmaritime lien to which she is subject. How else is the owner of the latter to obtain his remedy? It may be the vessel will never become subject to maritime liens at all; and, if so, the holder of the existing lien may never have even the privilege of proving his claim in some cause instituted for another purpose. But no such supposed embarrassment has yet occurred. And they are as yet imaginary. But suppose such other liens should attach. That should not prevent the enforcement of the earlier lien in the proper court. If the holder of the earlier lien delays his action, he subjects himself to the danger of superior liens becoming fastened, and the enforcement of his own lien in the state court must leave the vessel subject to the superior liens of which the state court cannot take cognizance. If occasion requires, and the admiralty court enforces the superior liens, it is in no wise obstructed by the action of the state court, and the title under a decree of the former court would defeat the title gained under the decree of the state court. The case of Moran v. Sturgis, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981, is a good illustration of this subject. There is no difficulty other than such as may happen in case one court should take and have possession of the vessel at a time when the other should require it; but that is an incident common along all the lines of concurrent proceedings in the state and federal courts, and gives no ground for the denial of jurisdiction to either.

5. Again, counsel for plaintiff in error contends that the supplies were not furnished on the credit of the vessel, but on the credit of the Columbia Ironworks. The statute declares a lien in favor of the party furnishing material for the building of the ship. But it does not contemplate that credit shall not be given to the owner, or that he shall not be liable personally for the debt. It is possible, no doubt, for the furnisher to waive the lien; but, unless he does so, the lien exists. The burden of showing the waiver rests upon the party who alleges it. There is nothing in the bill of exceptions which would justify a finding that the lien was waived.

6. It is contended also that the Michigan statute requires as a condition for a lien that the materials should have been in fact used in and about the construction of the vessel, and that the mere fact that materials were supplied for that purpose is not sufficient. This question was presented in the case of The James H. Prentice (D. C.) 36

Fed. 777, which was decided by Judge Brown, now one of the Justices of the Supreme Court. It was held by the learned judge, upon a full and very thorough consideration of the question, that the furnishing of the material for the purpose of being so used was the test supplied by the statute. We should feel strongly inclined to follow that decision, if the question stood in doubt. But the reasons stated in the opinion are convincing that the decision was correct. And it is supported by the preponderance of opinion in the state courts upon similar provisions in the local statutes.

7. It appears that, at one time during the course of the transactions, the Columbia Ironworks gave two notes for amounts desired by the defendant in error to use in raising funds. These notes were not for any payment particularly stipulated in the contract, but for arbitrary amounts. The notes were never paid, and were afterwards returned to the maker. There was no evidence which tended to show that these notes were received upon an express agreement that they should be taken as payment, and the presumption is to the contrary. See The Kimball, 3 Wall. 37, 18 L. Ed. 50; The Emily Souder, 17 Wall. 666, 21 L. Ed. 683; The Atlas S. S. Co. v. Columbia Land Co., 102 Fed. 358, 42 C. C. A. 398, and our own decision, Pflueger v. W. Lewis, etc., Co., 134 Fed. 28, 67 C. C. A. 102.

8. As has been stated, the vessel was launched on March 21, 1903. But she was not completed before July 19, 1903. Some of the materials for her construction were furnished in the interim; and it is contended that for these there could be no recovery. This distinction between materials furnished before and after the launching of the vessel was not taken in the court below, and seems to have been an afterthought. However, we are disposed to say that we do not think it sound. A ship launched, but still in the course of construction, does not become subject to the maritime law, because she rests in the water rather than on land, and does not become so until she is put into use as an agency of commerce, or, at least, until she is fitted for that purpose; and she ceases to possess a maritime character when she is permanently withdrawn from such service. City of Detroit v. Grummond, 121 Fed. 963, 971, 58 C. C. A. 301, and cases there cited.

Our conclusion is that there is no error, and that the judgment should therefore be affirmed, with costs.

HOLT v. NIXON.

(Circuit Court of Appeals, Seventh Circuit. October 24, 1905.)

No. 1,165.

1. LANDLORD AND TENANT—ACTION OF FORCIBLE DETENTION BY LANDLORD—DEFENSES.

Under the Illinois statute providing for the recovery of real estate by an action in forcible detainer from any lessee who holds possession "without right" after the determination of his lease, it is a good defense to such an action by a lessor, after the expiration of a lease, that such lease gave defendant the right to renew for another term, and that plaintiff refused to sign a renewal lease which was tendered to him by defendant for execution.

2. SAME—RIGHT OF TENANT TO RENEW LEASE—ELECTION.

A provision in a lease that the rent should be "paid quarterly in equal payments on the ———" in legal effect requires such payment to be made at the end of each quarter, and where the lease gave the lessee the right to renew on the same terms the tender to the lessor for his signature of a new lease providing that the rent should be paid on the last day of each quarter was a sufficient election to renew.

3. SAME—EVIDENCE.

The right of a tenant to renew a lease, given by its terms, where notice of an election to renew was given to the lessor and not withdrawn, cannot be affected by the fact that after the landlord refused to renew the tenant looked for other premises with a view to surrendering those occupied, if it should be thought advisable.

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

This action in forcible detainer was begun in February, 1904, by the plaintiff in error to obtain possession of certain premises in Chicago occupied by the United States custom house, and in charge of the defendant as collector of customs. The trial was had to the court without a jury, and resulted in a judgment for the defendant.

On April 19, 1898, a written lease was executed by Mr. Holt, owner of the premises, of the first part, and the United States, by Mr. Nixon, as collector, acting under the authority of the Secretary of the Treasury in behalf of the United States, of the second part, for one year from May 1, 1898, at a rental of $4,800 a year; "said rent to be paid quarterly in equal payments on the ———."

The lease contained the following provision:

"It is further understood that the party of the second part shall have the privilege of six annual renewals of this lease upon the same terms and conditions as are herein set forth."

New leases of the same form were executed each year until 1903.

On the trial Mr. Holt made his prima facie case by proving the defendant's possession, the lease that expired on May 1, 1903, the fact that no subsequent lease had been executed, the plaintiff's demand thereafter for possession, and the defendant's refusal. The defendant, over the plaintiff's objection, then proved these facts: On April 20, 1903, the United States, through Mr. Nixon, notified Mr. Holt of its election to take a new lease for the year beginning May 1, 1903, in pursuance of the option in the original lease, and tendered him for execution a form of lease identical with the original in all respects, except that the rent clause provided: "Said rent to be paid quarterly in equal payments on the last day of each quarter, first payment becoming due on July 31, 1903." Mr. Holt declined to execute this lease.

After the foregoing facts were in evidence Mr. Holt proved that the Treasury Department, from 1898 to April, 1903, had paid the rent substantially in

advance of the ends of the quarters. And he offered to prove that Mr. Nixon, though insisting that he had no authority to execute a lease calling for rent in advance of the end of the quarter, had stated that he was authorized to say to Mr. Holt, and would and did agree, that the rent should be paid quarterly in advance; that the same understanding was had between Mr. Holt and Mr. Nixon at each renewal down to 1903; and, further, that the Treasury Department, after Mr. Holt's refusal to execute the lease tendered to him on April 20, 1903, had written a letter instructing Mr. Nixon to look around for other premises. The court sustained the defendant's objections to these offers.

The part of the Illinois statute that applies to this action reads thus: "The person entitled to the possession of lands and tenements may be restored thereto in the manner hereafter provided: * * * Fourth: When any lessee of the lands or tenements, or any person holding under him, holds possession without right after the determination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit or otherwise."

Certain sections of the Revised Statutes of the United States are referred to in the opinion:

"Section 3648. No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any services or the delivery of articles of any description for the use of the United States, payment shall not exceed the value of the services rendered or of the articles delivered previous to such payment. * * *

"Section 2957. No collector or other officer of the customs shall enter into any contract or agreement for the use of any building to be thereafter erected as a public store or warehouse, and no lease of any building to be so used shall be taken for a longer period than three years, nor shall rent be paid, in whole or in part, in any case, in advance." [U. S. Comp. St. 1901, pp. 2425, 1944].

William P. Sidley, for plaintiff in error.

Francis G. Hanchett, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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

The action of forcible entry and detainer is statutory, and the plaintiff can succeed only on the terms prescribed in the statute. Under the section applicable here the plaintiff could not maintain his action, except by complying with the statutory condition, which required him to prove that the defendant was holding over "without right." This the plaintiff accomplished in his opening, wherein it was not disclosed that the United States had elected to renew. In meeting the prima facie case the defendant was entitled to bring out the fact of election to renew, not as an affirmative defense, legal or equitable, but as the denial of the existence of the condition without which the plaintiff could not bring himself within the statute on which he based his action. Facts that demonstrated that the plaintiff was withholding the lease without right would establish that the defendant was not holding over without right. Eichorn v. Peterson, 16 Ill. App. 601. The Supreme Court of Illinois, so far as we are advised, has not passed upon this question. Hunter v. Silvers, 15 Ill. 174, was based on a former statute that did not contain the words "without right." So the court below ruled correctly in admitting evidence of the election to renew.

The plaintiff claims that he was entitled to a directed verdict on account of the insufficiency of the facts brought out by the defense to constitute an election to renew. The point is made that the plaintiff's covenant did not require him to execute a lease which contained the words "payable on the last day of each quarter." But such was the legal effect of the words of the original lease. The terms and conditions respecting rent were therefore as distinctly expressed as if the legal effect of the words employed had also been written out in full. Consequently there was no variance between the lease tendered for execution and those which the plaintiff had been executing in renewal.

And since the rent conditions were fully expressed in the original lease, the foregoing conclusion also disposes of the assignments based on the court's refusal to permit the plaintiff to introduce parol evidence in contradiction of such conditions. Furthermore, the Treasury Department and the collector of customs derived their authority from the law; and the statutes quoted in the statement of the case, which were called to the plaintiff's attention before he signed the original lease, limited the authority of the governmental agents to bind the United States.

The letter from the Treasury Department to the collector was properly excluded. The rights of the United States became fixed by the notice to renew, which was never withdrawn. Those rights were not abandoned by looking for other premises with a view to surrendering, if the Treasury Department should thereafter think it desirable to do so, the premises in question to the plaintiff.

The judgment is affirmed.

ELLIS v. KRULEWITCH.

(Circuit Court of Appeals, Eighth Circuit. November 16, 1905.)

No. 54.

1. BANKRUPTCY—REVIEW OF REFEREE'S DECISION ON CERTIFICATE.

Where the only matter certified to the district court for review by a referee in bankruptcy was an order overruling a demurrer to and denying a motion to strike out portions of a motion filed by a trustee, a subsequent order made by the referee on said motion was not before the District Court for review.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. SAME—MODE OF REVIEW BY CIRCUIT COURT OF APPEALS.

An order made by a District Court in bankruptcy, confirming or setting aside an order by a referee requiring a bankrupt to turn over property is not reviewable by the Circuit Court of Appeals on a petition for revision in matter of law, where disputed questions of fact are involved.

In Bankruptcy. On petition for review.

W. S. Bicksler (Daniel B. Ellis, Edmon G. Bennett, and George L. Nye, on the brief), for petitioner.

H. H. Hindry (M. Summerfield and Alfred Muller, on the brief), for respondent.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

CARLAND, District Judge. From the petition of the trustee filed herein, it appears: That at the first meeting of creditors in the matter of the Western Hat & Cap Company, a bankrupt, Phillip Krulewitch, who was the trustee and manager of said company, was examined, and as a result of such examination, the referee, on motion made in behalf of the trustee, made the following order:

"It is hereby ordered that Phillip Krulewitch, as president and manager of the above named bankrupt, be and appear before the undersigned referee in bankruptcy, on Monday, the 21st day of November, 1904, at the hour of 10 o'clock a. m., and show cause why, if any he has, he should not deliver to Charles F. Ellis, Esq., the trustee of said bankrupt's estate, property of the bankrupt or the proceeds thereof in the value of $9,278.02, as prayed for by such trustee on the application filed November 15, A. D. 1904.

"David V. Burns, Referee in Bankruptcy."

That, at the time and place mentioned in said order, respondent appeared and filed a demurrer to the motion of the trustee and also a motion to strike out portions of said motion, which said demurrer was by the referee overruled, and the motion to strike out denied. Whereupon the respondent asked for time to file an answer to said order to show cause, which request was granted by the referee, and November 26th, at 10 o'clock, was fixed as a time for filing said answer. November 26th respondent filed an answer, but declined to offer any testimony. Thereupon the referee made an order that respondent turn over to the trustee property of the value of $6,000 or its equivalent in cash. That respondent then requested the referee to certify to the district judge the ruling and order which overruled the demurrer, and denied the motion to strike out, for review; and this matter was certified as requested. On February 21, 1905, the judge made the following order as the result of the hearing:

"It is ordered by the court that the order of the referee requiring Phillip Krulewitch, president and manager, to turn over and deliver property to the trustee herein, be, and the same is, hereby vacated, set aside, and for naught held. And the orders of the referee overruling the demurrer of the respondent to the application of the trustee for an order requiring said Krulewitch to turn over property and the order denying the motion of the respondent to strike out certain portions of said application be, and the same and each thereof be, and they are, hereby approved and confirmed. It is further ordered by the court that the referee assign a time and place for a hearing to determine whether or not Phillip Krulewitch, president and manager of the bankrupt, has property in his possession or under his control belonging to the estate of the bankrupt, and that said Krulewitch and the trustee be allowed to introduce testimony on such hearing as they shall be advised."

The answer of the respondent admits the facts stated herein. It is this last-mentioned order that is sought to be reviewed in this court. In this proceeding our jurisdiction is limited to matters of law. By section 38 of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435]), every act of a referee in bankruptcy is subject to review by the judge of the United States District Court. The only order of the referee which Krulewitch requested the District Court to review was the order which overruled his

demurrer to, and denied his motion to strike out, the trustee's motion for the order for the delivery of the property or money, which the trustee alleged he had in his possession, to the trustee. The proceedings of the referee subsequent to this order overruling the demurrer were not, therefore, properly before the District Court for consideration or review. That court sustained the order which overruled the demurrer and denied the motion to strike out, and directed that Krulewitch have leave to introduce evidence and try the merits of the issue tendered by the motion of the trustee, nevertheless. A proceeding in bankruptcy is a proceeding in equity. Rule 34 of the rules in equity requires the court to give to the defendant an opportunity to answer when his demurrer is overruled, and by analogy with this rule and the equity practice there was no error in the order of the court below to the effect that the parties should have an opportunity to present their evidence and to be heard upon the issue tendered by the motion of the trustee after the demurrer to it was sustained by the court.

Moreover, if the final order of the referee, made in the proceeding subsequent to the order overruling the demurrer, were here for review, it is difficult to perceive how error of law could be predicated of it, because it is made upon evidence from which men of different minds might draw different conclusions, and a question of this nature is a question of fact, reviewable by appeal and not by petition for review. Under section 2, subsec. 10, of the bankruptcy law (30 Stat. 546 [U. S. Comp. St. 1901, p. 3421]), the district judges have the power to "consider and confirm, modify or overrule, or return with instructions for further proceedings the records and findings certified to them by referees."

There was no error of law in the action of the district judge challenged by this petition, and the petition is accordingly dismissed.

GIUS et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 9, 1905.)

No. 964.

JURY—CONSTITUTIONAL NUMBER IN CRIMINAL CASES—ALASKA CODE.

Code. Civ. Proc. Alaska, § 171 (Carter's Ann. Alaska Codes, p. 179), in so far as it provides that in trials for misdemeanors six persons shall constitute a legal jury, is in violation of the rights secured to persons accused of crime by the fifth and sixth amendments to the Constitution of the United States, and void.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 221-225.]

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

John R. Winn and L. R. Gillette, for plaintiffs in error.

Robert E. Friederich and John J. Boyce, U. S. Attys., and Edward E. Cushman, Sp. Asst. Atty. Gen., for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The defendants in the court below (plaintiffs in error) were indicted under section 127 of the Penal Code of Alaska (Carter's Annotated Alaska Codes) for the crime of keeping a house of ill fame. A trial was had before a jury of 6 persons, resulting in a verdict against the defendants. Judgment was entered in accordance with this verdict, from which a writ of error was sued out to this court.

The principal error assigned is the action of the court in compelling the defendants to go to trial before a jury of 6 persons, refusing to allow the full panel of 12 jurors. Section 171, p. 179, Code Civ. Proc. (Carter's Ann. Alaska Codes), providing for the formation of juries, provides, among other things, as follows:

"The jury shall consist of twelve persons, unless the parties consent to a less number. Such consent shall be entered in the journal: Provided, that hereafter, in trials for misdemeanors, six persons shall constitute a legal jury."

The Supreme Court of the United States, in Rassmussen v. United States, 197 U. S. 516, 25 Sup. Ct. 514, 49 L. Ed. 862, considered the identical question presented here, and held that, under the treaty with Russia ceding Alaska and the subsequent legislation of Congress, Alaska has been incorporated into the United States, and the Constitution is now applicable to that territory; that under the fifth and sixth amendments to the Constitution Congress cannot deprive one there accused of a misdemeanor of a trial by a common-law jury, and therefore section 171 of the Alaska Code, in so far as it provides that in trials for misdemeanors six persons shall constitute a legal jury, is unconstitutional and void.

Upon the authority of this decision, the judgment of the District Court is reversed, and the cause remanded for a new trial.

BEERS v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. August 1, 1905.)

No. 1,143.

1. INJUNCTION—ALTERNATIVE RELIEF—LACHES.

To authorize a decree for damages as an alternative for an injunction, a case in equity must be made, and laches which would defeat the right to an injunction will also defeat the right to the alternative relief.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 816, 817; vol. 27, Cent. Dig. Injunction, §§ 414–416.]

2. EMINENT DOMAIN—REMEDIES OF PROPERTY OWNERS—INJUNCTION—DAMAGES—LACHES.

A property owner, who, with knowledge of a city ordinance requiring a railroad company to elevate its track on a street in front of his property, the necessary result of which would be to occupy the entire street, permits the work to be done and a large amount of money to be expended in the same by the company, is chargeable with laches which will defeat his right to an injunction or to an award of damages in equity as an alternative relief.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 783–786.]

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

The facts are stated in the opinion.

Frank Crozier, for appellant.

Chas. B. Keeler, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion.

The bill in the Circuit Court was to enjoin the maintenance by appellee of its elevated railway tracks in a street in front of the appellant's lots, and to compel the removal of the tracks thus elevated. The bill asks, in addition, that appellee may be decreed to pay to appellant the damages sustained by reason of the trespass on his lots, and render reasonable compensation for the use thereof, and for other relief. The bill is predicated upon the theory that the street, occupied by appellee's elevated tracks, is a public street, and that though the occupation was under an ordinance regularly passed by the Council of the City of Chicago, the City of Chicago was wholly without power to devote such street to the purposes of track elevation; wherefore, the appellant, an abutter on the street, dependent upon such street for ingress and egress, and cut off from the same by the elevation in question, is entitled to an order removing the embankment, or (as stated in oral argument at bar) to an ascertainment in equity of the damages sustained, and an order for their payment.

Among other defenses to the bill thus stated, the appellee asserts that appellant has been guilty of laches. The bill was dismissed for want of equity by the Circuit Court.

Appellant is the owner of lots fronting on Bloomingdale road, occupied since 1872 by the tracks of the appellee's railroad. Under an ordinance of the city, of February 21st, 1898, requiring an elevation of appellee's tracks, work was begun in March, 1898, and finished during that year. The work thus ordered, carried appellee's elevation in front of, and beyond appellant's lots; but in front of appellant's lots, the elevation was already descending to the surface, so that it constituted an embankment variously estimated as averaging from two and one-half feet, to eight feet in height, on either side of the base of which in the street was width sufficient to afford ingress to, and egress from, appellant's lots.

January 13th, 1902, the city passed another ordinance, ordering the extension of the elevation westward. The effect of this ordinance was to raise the earth embankment, opposite appellant's lots, to the standard height of twelve feet, and to extend the base of the embankment to the full width of the street. Both this ordinance, and the preceding one, provided that the side slopes and lateral dimensions of the embankment should be determined by the natural angle of repose of the material used; and there is no averment or evidence, that in extending the width of the base of the embankment, this natural angle was exceeded. Work under this later ordinance was commenced in April, 1902, and prosecuted continuously up to August 2nd, 1902, when the bill was filed. At

the time of filing the bill, the embankment was practically completed. In constructing the first elevation the railroad, approximately, expended seven hundred and fifty thousand dollars, and the second elevation cost upwards of two hundred thousand dollars, in addition to which a sum of over one hundred thousand was contracted, by appellee, for structural steel for subway viaducts on the line of the road covered by the new embankment.

The appellant resides at Geneva, Illinois, distant from Chicago less than one hundred miles. He became the owner of these lots in 1893. He was called as a witness on his own behalf in the Circuit Court, but did not testify respecting either his knowledge or his ignorance of these ordinances; or his knowledge or his ignorance of the elevation work done under them. And the sole averment in the bill, relating to knowledge or ignorance, is that on or about the 6th of July, 1902, appellant's attention was first called to the fact that appellee was erecting the second embankment. Even this was not under oath, for the bill does not seem to have been verified.

That laches is shown on the face of this record seems to us to be without doubt. The ordinance of 1898, four years before the bill was filed, established the policy of the city in the way of requiring appellee, within the city limits, to elevate its tracks. No one knowing this fact could have doubted that that ordinance, though not extending at that time the embankment in full dimensions in front of appellant's lots, would be followed, in time, by an embankment that would be of full dimensions. The ordinance showed what the character of that embankment would be—its standard height of twelve feet, and the angle of repose—and that this would result in occupying the whole of the street in front of the lots as a base for the embankment.

Under these circumstances, the ordinance of January, 1902, could have been no surprise to the owners of abutting lots. And in the absence of distinct evidence, from the appellant himself, that he was ignorant, either of the passage of the ordinance in January, or the commencement of the work in April, we are not justified in believing otherwise than that he had knowledge; and though the burden of showing laches may have been on the appellee, in the first instance, that burden is fully met, when the facts disclosed create the probability that the complaining party has had such knowledge as, under the circumstances named, would constitute laches.

But it is urged in argument, that though laches appear, whereby a right to an affirmative injunction no longer exists, the alternative right of determining, in equity, appellant's damages, and ordering its payment, is not thereby lost. The proposition is not sound. The ascertainment in equity, as an alternative for an injunction, of the damages suffered, is only the form that a decree may take, when, within the discretion of the court an affirmative injunction ought not to be issued. But for a decree of this form, as well as for a decree for an injunction, there must first be established a case in equity. Until that time the party obtains no foothold in equity. Laches prevents such foothold. Laches being disclosed, no cause in equity exists—the party being already remitted, at the time of the filing of the bill, to his remedies at law.

The decree appealed from is affirmed.

POWELL v. CITY OF LOUISVILLE et al.

(Circuit Court of Appeals, Seventh Circuit. August 1, 1905.)

No. 1,162.

CANCELLATION OF INSTRUMENTS—EQUITY—JURISDICTION—SUIT FOR LEGAL RELIEF.

A suit by the sole owner of water fund certificates, issued by a village under statutory authority and secured by a trust deed on a waterworks plant, for the cancellation of such deed and the recovery of the amount of the certificates from the village on the ground of fraudulent misrepresentations as to the value of the security, is not within the jurisdiction of equity, being essentially an action to recover for false representations or for money had and received, and cognizable at law.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, §§ 11, 12, 16.]

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

The facts are stated in the opinion.

R. H. McAnulty, for appellant.

Logan Hay and B. D. Monroe, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion:

The suit, in the Circuit Court, was a bill in equity by appellant, a citizen of Vermont, against the village of Louisville, in the State of Illinois, and the American Trust & Savings Bank, a corporation of Illinois; and the decree appealed from dismissed the bill for want of equitable jurisdiction.

The bill, in substance, avers that the village of Louisville, acting under and by virtue of a statute of Illinois, authorizing cities, towns and villages in Illinois, to build, purchase, and extend water works systems, issued thirty water fund certificates, aggregating ten thousand dollars, bearing interest at the rate of six per cent.; that in accordance with authority to secure the payment of these certificates, the village executed a trust deed upon the water works system thus created, and the lot upon which the water station was built, together with all incomes and profits thereof—the American Trust & Savings Bank being the trustee therein; that the appellant, relying upon the representations and recitals of such certificates, purchased them for value, and is now the holder and owner thereof; that the certificates, on their face, recite that they were issued to defray the cost of constructing a water works system; that in truth and fact the water works plant cost only fifty-five hundred dollars, the balance of the avails of the certificates being used in the construction, in connection with the water works plant, of an electric light plant at a cost of about sixty-five hundred dollars; that the electric light and water plant have been operated together, no separate fund having been kept of the profits of either; that the water works plant practically was without value, the revenue therefrom being insufficient to pay its operating expenses; but that the electric lighting sold to the citizens pays, almost, if not entirely, the cost of operating both plants—the village get-

ting the benefit of the lighting of twenty-five to thirty arc lights in its public streets, without paying anything therefor.

The bill avers, further, that "through its said water fund certificates and said trust deed," the village of Louisville fraudulently misrepresented the cost price of the water works plant—ten thousand dollars, instead of the fifty-five hundred dollars actually expended—and that in disregard of the statute, giving authority to create municipal water works, the village has failed to keep a separate fund of the profits arising from the operation of the water works. The bill prays that the American Trust & Savings Bank be ordered to deliver up, for cancellation, the trust deed; that the trust deed be declared null and void; and that it be ordered and declared that the village, "by reason of the fraudulent representations aforesaid," pay over to appellant the sum of ten thousand dollars, together with interest; and for other relief.

The village of Louisville answered, admitting the execution of the certificates, the purpose of their execution, the use made of the money obtained thereon, and the securing of the certificates by mortgage as alleged in the bill. The answer averred, further, that the certificates were delivered to the contractors in full payment for the water works and electric light plants; and, after denying that the cost of the water works system was fraudulently misrepresented to appellant, sets forth that the taxable property of the village, at the time the certificates were issued, did not exceed forty thousand, six hundred and seventy-seven dollars—the village being then indebted in a large amount in excess of the constitutional five per cent. on this taxable property.

There was considerable discussion at bar, and in the briefs, of whether the issuance of the certificates, considering the constitutional limitation of indebtedness being limited to five per cent. was null and void; of whether the village was estopped, by the recitals of the certificate, from setting up want of authority for this issuance; of whether the certificates were negotiable instruments within the doctrine that their recitals constituted an estoppel; of whether, considering the alleged fraudulent misrepresentation as a tort by its officers, the village was liable therefor; and other questions going to the merits. But in the conclusion to which we have come, none of these questions need to be decided.

As a general rule, courts of equity have concurrent jurisdiction with courts of law, to grant relief in cases of fraud, where the remedy at law would not be adequate. Were the purpose of this bill to give the appellant recourse upon the property into which his money has gone, and for that purpose bring in the American Trust & Savings Bank, as a necessary party to the decree, the suit might lie in equity. But such is not the purpose of the suit, or the effect of the suit growing out of the averments of the bill. The suit is not an effort equitably to sequester the property created by appellant's money, devoting it to the repayment of appellant's outlay. The suit in effect is a bill in chancery to recover damages for false representation; or perhaps more exactly fitting the purpose of the suit, to recover as in an action at law, moneys had and received.

We do not see how, on the facts stated, appellant is entitled to recover of the village, in any kind of action, a gross money sum equaling the

amount of his advances independently of the property into which the advances went. But assuming arguendo that such an action would lie, it does not appear to us that his remedy is by a bill in equity. No ground for equitable intervention is shown. The presence of the American Trust & Savings Bank, and its interest as trustee in the trust deed, might furnish equitable ground, were some of the certificates constituting the matter of the trust, held by persons other than the appellant. But the bill shows that appellant is the sole holder of these certificates, and therefore the sole cestui que trust. A tender by him of the certificate would be a tender of the sole outstanding interest under the trust deed; and we see no reason, under circumstances such as this, why the appellant might not, in an action at law, offer a cancellation of the trust deed and certificates—with perhaps whatever compensation might be due to the trustee, for acting as such trustee—as a condition to an action at law for whatever remedy, in the way of a money judgment, he may show himself to be entitled to. Thus there is no need to go in equity, to remove the interests growing out of the trust deed, as a preliminary step to an action at law.

The decree of the Circuit Court dismissing the bill for want of equitable jurisdiction, is not erroneous, and is affirmed.

EMPLOYERS' LIABILITY ASSUR. CORP., OF LONDON, ENGLAND, v. CHICAGO & BIG MUDDY COAL & COKE CO.

(Circuit Court of Appeals, Seventh Circuit. August 1, 1905.)

No. 1,155.

INSURANCE—EMPLOYERS' LIABILITY INSURANCE—ESTOPPEL TO DENY LIABILITY. Under a policy insuring an employer against loss from liability for damages on account of personal injuries to employés, which required the assured to give the insurance company immediate notice of any accident, with full particulars, prohibited any settlement therefor without the company's consent, and in case of suit required the company to defend, giving it exclusive control of the defense and power of settlement, unless it elected to pay the policy, where the company took such control of a suit with full knowledge of the ground of action, and conducted the defense in the name of the assured to judgment, such action constituted a contemporaneous construction of the policy, which estopped the company from thereafter denying its liability on the ground that the case was not with in the terms of the policy.

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

The action in the Circuit Court was to recover on a policy of insurance, indemnifying the defendant in error against loss, for common law or statutory liability, for damages on account of bodily injuries, fatal or non-fatal, suffered within the period of such policy, by any employé of the defendant in error. The occasion of the suit was that one Charles Coats, an employé of defendant in error, while on duty as such employé, in its coal mine, was struck by a large piece of slate falling from the roof of the mine, receiving injuries resulting in death.

After the death of Coats, an action was commenced by Nancy C. Coats, widow, to recover damages for the loss of her husband's life. In the suit of

Nancy C. Coats, the declaration in its first count, averred that contrary to the statute of Illinois relating to coal mines, the defendant in error had willfully and negligently failed and neglected to have its mine examined, and its working places marked, by a duly authorized examiner, on the day when the accident occurred; and in its second count, that the defendant in error willfully failed and neglected to furnish, though demanded by Coats, props, caps and timbers of suitable length and dimensions, for securing the roof of the working place in the mine in which he worked, though the lengths and dimensions of such props, caps and timbers had been specified theretofore by Coats. In addition to the two counts, the declaration as originally filed, contained a further count—the common law count—that it was the duty of the defendant in error to furnish Coats a reasonably safe place in, and safe appliances with, which to work. But this count was dropped by amendment before the Coats case came to trial.

Upon the commencement of the action by Nancy C. Coats, the plaintiff in error retained attorneys to defend it; a copy of the declaration was furnished to the plaintiff in error; all the facts on which the action was based, and all the pleadings were furnished plaintiff in error; in short, full dominion of the action was given to it. Whereupon, as averred in the declaration, the plaintiff in error, wthout any disclaimer of liability on its part, and without notifying the defendant in error in any way, that it would in any event consider itself absolved or discharged from liability to pay any judgment, which might be recovered in said action against the defendant in error, represented to and assured the defendant in error that it would take full charge of the action, and assume all responsibility for the same, and protect and save harmless defendant in error from the same, and from any judgment which might be recovered therein. Under the dominion thus acquired by plaintiff in error, the action went to trial, resulting in a judgment for three thousand dollars and costs; which judgment the defendant in error has since satisfied.

Upon this state of facts a jury having been waived, the court below, in the action now under review, found that all the allegations of the defendant in error's declaration were true, save one relating to expenses for settlement; and gave judgment for defendant in error, for the sum of three thousand, one hundred seventy-nine dollars, and sixty cents. There was no motion, in the court below, for judgment for plaintiff in error; no motion for a new trial; and no motion in arrest of judgment.

The first four assignments of error simply challenge the court's findings on account of specific facts, and solely because the given fact involved was found, or not found. The fifth and sixth challenge the court's conclusions of law.

Further facts are stated in the opinion.

Wm. C. Quarles, for plaintiff in error.

Frank M. Hoyt, for defendant in error.

Before GROSSCUP and BAKER, Circuit Judges, and ANDERSON, District Judge.

GROSSCUP, Circuit Judge, after stating the facts, delivered the opinion.

We see no way of reviewing the first four assignments of error. The specific facts, to which they relate, were merged in, and are determined by, the general finding of the court. It is difficult, too, to see how, under the fifth and sixth assignments of error, there being no motion for a new trial or in arrest of judgment, there can be any case made here. But objection on that score being waived, we are willing, without approving the correctness of the practice involved, to pass upon the point of merit raised.

The point made is this: The policy of assurance indemnifies against loss from common law or statutory liability for damages on account of

bodily injuries fatal or non-fatal; but exempts therefrom injuries occasioned by reason of the failure of the assured to observe any statute affecting the safety of persons, or any local ordinance, of which it has knowledge.

But the policy provides, also, that upon the occurrence of an accident, immediate written notice, with the fullest information obtainable, shall be given to the assurer; and that upon any such suit being brought for damages on account of the accident, the assured shall not settle any claim except at his own costs; nor incur any expense; nor interfere in any negotiation for settlement, or in any legal proceeding, without the consent of the assured previously given in writing—the assurer undertaking, at its own cost, to defend or settle actions in the name of the assured, unless the assurer shall elect to pay the assured the indemnity.

What construction would be put upon the general contract of assurance, as modified by the exemption indicated, and how that might affect defendant in error's right to indemnity on the facts stated, had plaintiff in error elected not to take the Coats case out of defendant in error's control, we need not here determine; for the act of the plaintiff in error, in taking control and dominion of the action for damages, and keeping such control and dominion until judgment was entered, without notice to the defendant in error that it did not consider itself liable under the policy—thereby taking from the defendant in error the control and dominion of the action—is such a construction of the policy, by contemporaneous acts, as estops plaintiff in error from denying liability, now that that action is at an end. To take any other view of this case, would be to hold that the assurer could effectually tie the hands of the assured, in an action that might, or might not, on a close construction of the policy, be covered by the terms of the policy, and then, the cause being determined against it, insist that upon a closer reading of the policy, the assured ought to have been left to make its own defense, and at its own risk. This cannot be the law. The judgment below will be affirmed.

MACKENZIE v. BARRETT, Sheriff.

(Circuit Court of Appeals, Seventh Circuit. August 1, 1905.)

No. 1,173.

HABEAS CORPUS—NATURE OF RESTRAINT—PERSON AT LARGE ON BAIL.

One under arrest, but at large on bail, is entitled to a writ of habeas corpus, the same as if the arrest was accompanied by actual imprisonment; the purpose of the writ being to test the right of the court or other body issuing the process to detain the person for any purpose by restraining him of his right to go without question.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 11.]

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

On motion to dismiss appeal.

The petition in the Circuit Court showed that Mackenzie, a resident of the State of Idaho, defendant to a suit by his wife in the Circuit Court of

Cook County, Illinois, for separate maintenance, was arrested on a certain writ of Ne Exeat issued out of said court in said suit, commanding that if the said Mackenzie should fail to give bail according to the provisions of the statute of Illinois, in the sum of ten thousand dollars, to appear before the said Circuit Court at a day therein named, and abide the orders of the court, he should be committed to the jail of Cook County; that at the time the petition was filed, Mackenzie was detained and imprisoned in said jail; and that the writ of Ne Exeat was unlawful in that Mackenzie was within Cook County at that time for the sole purpose of answering and defending against certain indictments for alleged abandonment of his said wife secured by her testimony; wherefore a writ of habeas corpus was prayed.

The defendant's return to this writ was, that the cause of the detention was under and by virtue of a surrender on the Ne Exeat bond.

In the Circuit Court the petition was dismissed, and the petitioner remanded; whereupon the appeal was prosecuted.

The particular matter before the court is the motion of respondent to dismiss the appeal, on the ground that on the 14th of January, 1905, the date on which the petition in the court below was dismissed, Mackenzie filed with the respondent his bond, conditioned for his appearance as required by the Ne Exeat writ, which bond was approved and accepted.

Harris F. Williams, for appellant.

John M. Duffy, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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

Whether appellant, on the record made, is entitled to the writ of habeas corpus prayed for, is not a question now before the court. The question presented and argued at this time is: Whatever may have been appellant's right to the writ, has his suit therefor abated by the fact of his giving bond, thereby being released from actual custody pending the appeal.

The cause of action embodied in a habeas corpus proceeding can only be said to have abated, by the giving of bail pending the appeal, in case a writ in the first instance would lie for actual detention only, and would not lie for what may be called constructive detention. But the Supreme Court has held, Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287, that when bail is given, the principal is not regarded as discharged, but only as delivered over to the custody of his sureties. The dominion of the sureties is a continuance only of the original imprisonment. When seized at the instance of the sureties, the seizure is not made by virtue of a new process. It is likened, rather, to the rearrest by the sheriff of an escaping prisoner. And this principle was applied in Cosgrove v. Winney, 174 U. S. 67, 19 Sup. Ct. 598, 43 L. Ed. 897; though in that case the petitioner was in actual custody at the time the petition was filed.

The cases brought to our attention in support of the motion, are not in point. In Ex parte Baez, 177 U. S. 389, 20 Sup. Ct. 673, 44 L. Ed. 813, the Supreme Court, on original application to it, refused the writ, because on the face of the record it was seen that before the return could be made and the case heard, the time of restraint would have expired.

Cheong Ah Moy v. United States, 113 U. S. 216, 5 Sup. Ct. 431, 28 L. Ed. 983, was a case under the Chinese deportation act, in which the

petitioner had gone beyond the jurisdiction of the United States before the writ was applied for.

Wales v. Whitney, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277, was a case where, under the order of the Secretary of the Navy, an officer in the navy was ordered not to leave the District of Columbia. The court held, that except as a matter of naval discipline, the order exercised a moral restraint only, and not a legal restraint. None of these cases, or the other cases cited, detract from the proposition, that under the rulings of the Supreme Court, one under arrest, but at large on bail, is entitled to a writ the same as if the arrest was accompanied by actual imprisonment. The purpose of the writ of habeas corpus is to test the right of the court, or other body issuing the writ of arrest, to detain the person for any purpose; and the detention it seems, is sufficient, if it restrain the party of his right to go without question, or, as stated in the English case, cited in Taylor v. Taintor, without a string upon his liberty. The exact point was decided in Re Grice (C. C.) 79 Fed. 627, by District Judge Swayne.

The motion is overruled.

HAGGERTY v. CHICAGO, M. & ST. P. R. CO.

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

No. 2,231.

MASTER AND SERVANT—INJURY OF SWITCH TENDER—ASSUMED RISK.

Switchyards of a railroad company were on a general level with the top surface of the ties, and in order to drain off the water which would otherwise accumulate thereon a number of small ditches or drains were made, crossing under the tracks between the ties. In the spring it was necessary to clean out such ditches, in order that they might carry off the water from the melting ice and snow. Plaintiff was a night switch tender, who had been employed by defendant in such yards for four or five years, during which time such system of drainage had been in use. While in the performance of his duties one night in the spring, he stepped into one of such ditches, which had been cleaned out the day previous to a depth of from three to six inches, and fell, and was injured by striking the rail. *Held*, that defendant was not negligent in failing to provide him with a reasonably safe place to work, but that the injury resulted from one of the ordinary risks of his employment, which plaintiff assumed.

[Ed. Note.—Assumption of risk 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 Minnesota.

Frank D. Larrabee (Mathias Baldwin, on the brief), for plaintiff in error.

H. H. Field (F. W. Root, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and CARLAND, District Judges.

CARLAND, District Judge. Haggerty sued the railway company to recover damages for a personal injury received by him while in the

employ of the company. At the close of all the testimony the trial court, on motion of counsel for the company, directed a verdict in its favor, to which ruling counsel for Haggerty excepted, and the case is here on writ of error to review such ruling.

The facts in the case, as they appear from the record, are substantially as follows: The yards of the railway company, at Minneapolis, Minn., are on a general level with the top surface of the ties upon which the railway rails are laid. In order to carry off surface water which may accumulate upon the yards either from the fall of rain or the melting of ice and snow, the section men of the company had for four or five years prior to the date when Haggerty received his injury, excavated from 20 to 25 ditches or drains underneath the several tracks lying upon said yards and between the ties upon which the rails of the track are laid. These drains or ditches underneath the tracks occupy generally the space between the ties as to width and the thickness of the ties as to depth. The drains are necessary to carry off water from the yards of the company so that said yards may not become muddy and slippery in mild weather, and that the standing water may not freeze and prevent the operation of the switches in cold weather. The drains during the summer fill up to some extent, and in the winter are filled up with ice and snow to such an extent that in the springtime, when the snow and ice upon the yards begin to melt, these drains have to be cleaned, so as to let the water escape into larger ditches or culverts, which are covered. The drains in question have never been covered; it being shown by the evidence that to cover them is impracticable, for the reason that, if they were covered, then the water flowing through them from thawing snow and ice would freeze and fill the drains, rendering it necessary to clean them out daily.

On the 6th day of March, 1904, Haggerty was a night switch tender in the employ of the company and performing his duties as such switch tender at the yards in question. He had worked for the company as switch tender at Minneapolis for 15 years prior to the date of this injury, and had worked for 4 or 5 years upon these yards since this system of drainage had been in operation. About half past 2 on the morning of the date aforesaid Haggerty, in performance of his duty as switch tender, was engaged in the act of signaling a Soo passenger train which was entering said yards. He had a lantern, and while signaling said train with the lantern was looking, as he claims, toward the Soo train. While so engaged he stepped into one of these drains before described, which on the day previous had had the snow and ice removed therefrom by the section men. By reason of stepping into this drain, which the proof shows was about 6 inches wide at one end and 11 inches at the other and of a depth of from 3 to 6 inches, Haggerty fell and struck his knee upon the rail of the track and fractured his knee pan or cap. The only testimony which in any way would change the case as thus stated is the testimony of Haggerty, wherein he states that the drain was about 14 inches deep. We are of the same opinion as the trial court in respect to this testimony. Haggerty testified that he did not know that the drain had been cleaned out, and his only opportunity

of ascertaining the depth of the drain was on the night in question, when he stepped into the same, and, as he was immediately taken away in an ambulance, his opportunity of observing the depth of the drain was slight. He saw the drain some weeks after the accident, and testified that it was about the same as at the time of the accident, only not quite so deep. Considering the fact that a drain as deep as Haggerty claims this drain was when he stepped into it would have been useless for the purpose of carrying off the surface water, we think his unsupported statement is rendered incredible by all the other evidence in the case, and that a verdict resting upon his evidence alone as to this point could not stand. The evidence of the other witnesses who have worked for the company upon these yards shows that these drains had existed for 4 or 5 years prior to the date of the accident, and that they were always cleaned out in the spring. It was the duty of the railway company to use ordinary care to furnish Haggerty with a reasonably safe place in which to perform his duties, and it was also the duty of Haggerty to use ordinary care to not unnecessarily expose himself to dangers which he knew, or in the exercise of ordinary care might have known. He assumed, when he entered the employ of the company as switch tender upon the yards in question, the ordinary risks and hazards of the service in which he was engaged, which he knew or which a reasonably prudent and careful man might have known. This case is clearly distinguishable from those cases where a master has allowed holes or culverts to remain uncovered at and about the place where the servant is obliged to perform his duties. The small ditch or drain in question was not what is known as a culvert, but a part of a system found necessary for the carrying off of surface water from the yards into larger drains or culverts, which were covered.

We do not think that under the evidence in the record, the company was negligent in failing to cover this ditch or to place a danger signal there when it was cleaned out. We are of the opinion that the injury which Haggerty received resulted from one of the ordinary risks and hazards which he assumed when he entered the service of the company as switch tender and remained in such service upon the yards in question for the time stated in the evidence.

The judgment of the trial court is affirmed.

INTERNATIONAL POSTAL SUPPLY CO. OF NEW YORK v. AMERICAN POSTAL MACHINES CO.

(Circuit Court, D. Massachusetts. December 21, 1905.)

No. 1. 597.

PATENTS—INFRINGEMENT—STAMP-CANCELING MACHINE.

The Hey & Laass patent, No. 341,380, the Laass & Hey patent, No. 388,366, and the Hey patent, No. 632,527, all for stamp-canceling machines of the type in which the letter actuates the printing mechanism, construed, and *held* not infringed.

In Equity. On final hearing.

Hey & Parsons, for complainant.

Richardson, Herrick & Neave, for defendant.

COLT, Circuit Judge. This suit is brought for the infringement of three patents for improvements in stamp-canceling machines, which are used in the post offices of the United States. The parties to the suit are rival manufacturers of these machines.

The patents in controversy and the claims alleged to be infringed are as follows:

Hey & Laass, No. 341,380, applied for February 26, 1884, issued May 4, 1886; claim 4 in issue.

Laass & Hey, No. 388,366, applied for June 2, 1884, issued August 21, 1888; claims 1 and 2 in issue.

Hey, No. 632,527, applied for September 17, 1884, issued September 5, 1899; claims 1, 4, 27, and 44 in issue.

A stamp-canceling machine may be described in general terms as comprising a marking roller carrying the type, an impression roller which supports the letter during the printing, and feed mechanism which carries forward the letter to the printing point.

For the purpose of a clearer understanding of this case, these machines may be conveniently divided into two classes, those in which the letter does not control the printing, and those in which the letter does control the printing.

As an illustration of the first class of machine we may take an organization in which the two opposing printing rollers are continuously revolved in fixed bearings, with the result that, when the machine is in its normal condition, the printing mechanism is necessarily always in operation; in other words, the operation of the printing mechanism is unaffected by the presence or absence of a letter in the machine. There are two defects in this type of machine: First, the impression roller becomes smeared with ink from the marking roller, and consequently the backs of the letters are defaced; and, second, there is an imperfect registration of the printing die upon the mail matter.

In the second class of machines, in place of two printing rollers revolving in stationary bearings, we have an organization in which one of the rollers has a reciprocating movement. In these machines the rollers are held apart when the machine is in its normal condition, and they are brought together, or into the position for printing, only

when a letter is presented to them to be marked. After the printing, the rollers are again separated until the next letter is presented. This organization prevents the inking of the impression roller, and secures the proper registration of the printing die upon the mail matter. The present suit relates to this type of machine.

The three patents in suit describe a stamp-canceling machine in which the letter controls the marking member. The first patent, Hey & Laass, No. 341,380, discloses one form of this machine, and the two remaining patents, Laass & Hey, No. 388,366, and Hey, No. 632,527, disclose another form of this machine. In both of these machines the marking member is practically separated from the rest of the machine, and it is moved into the position for printing by the movement of the letter as it is carried forward by the feed mechanism. In other words, we find in these patents the conception of a stamp-canceling machine in which the two printing members (the reciprocating marking member and the impression member) are fundamentally distinct organizations, employing in their operation two independent sources of power. In this dual organization, when the primary source of power is applied to the machine, or the machine is in its normal condition, the whole marking mechanism is at rest, and it is only when a letter moves along the bed of the machine that this mechanism is actuated. It is apparent that this conception throws upon the moving letter the work of setting in operation an independent marking organization.

Patent No. 341,380 shows the first form in which this conception is embodied. In this machine the movement of the marking member towards the impression member is effected by means of an electromagnet and connecting mechanism. The end of the moving letter comes in contact with and moves forward a finger, whose movement operates to close the circuit, thereby bringing together the two printing members. The marker in this machine is a flat stamp, and the printing is done by forcing the stamp down upon the moving letter. Whatever the degree of inventiveness shown in this machine, it proved a practical failure. No machine like this patent has ever been constructed except one model. With respect to the defects in this machine, it is only necessary to point out that the printing die in the operation of canceling the stamp descends at a right angle to the moving letter. Although this patent is the first in the art to describe a machine of this type, it did not solve the problem of a stamp-canceling machine in which the letter controls the printing.

The two remaining patents in suit, No. 388,366 and No. 632,527, disclose the other form in which the patentees embodied their conception of this type of machine. In this machine the movement of the marking member towards the impression member is effected by the action of a spring and connecting mechanism. When the machine is in its normal condition, the marking member is held away from the impression member against the pressure of this spring by means of a lever and catch. When, however, the end or forward part of the moving letter comes in contact with one end of this lever, the catch is released, thereby causing the action of the spring to bring together

the two printing members. Here the marker is a roller, and the printing takes place as the roller is revolved by the friction of the moving letter upon its surface.

This machine has not proved a commercial success. It is open to the objection of forcing upon the end of the moving letter the duty of releasing the marking roller against the spring pressure which moves the roller into the position for printing.

The principle of construction in both these machines is defective. No successful stamp-canceling machine, in which the letter controls the printing, ever has been constructed in which the end, or forward part, of the moving letter was called upon to set in operation a substantially independent marking mechanism actuated by an independent source of power, such as an electro-magnet or a spring.

The machines of these patents show ingenuity and afford valuable suggestions. They proved, however, impractical for commercial purposes; and they cannot therefore be said to have solved the problem of an efficient letter-actuated machine. The defects in these machines are not confined to details. They lie deeper in the very principle of their construction and mode of operation.

In the complainant's commercial machine the idea of a practically independent marking mechanism has been abandoned. The marking member is no longer mounted in an oscillating frame, and the complicated mechanism of the patents in suit has been simplified. The whole machine in fact is substantially a single organization actuated by one source of power. In this essential particular it is more like the old type of machine and the defendant's machine, than it is like the machines described in the patents in suit.

The defendants manufacture what is known as the Ethridge machine, since it closely resembles in construction the machine shown in the Ethridge patent No. 323,799, dated August 4, 1885. The Ethridge machine is founded upon the modification of the old type of machine by incorporating into it the reciprocating and letter-actuating features. In this machine the marking roller and the impression roller always revolve, and these rollers with their connecting mechanism are fundamentally and at all times a single co-acting organization operated from one source of power. The reciprocation of one of these rollers is provided for by suitable means. The rollers are also held apart until a letter is presented to them, when one of them moves towards the other into an operative position for printing. There is also provided a stop mechanism, which arrests and holds the moving letter until it can be properly presented to the die of the marking roller. Such stop mechanism is necessary, because the marking roller carrying the die is constantly rotated.

In the alleged infringing machine embodying this conception, the reciprocation of the impression roller is effected by means of a cam and connecting mechanism, and the printing rollers are held apart during the normal condition of the machine by means of a pivoted lever and a projection on the supporting yoke of the impression roller. The marking roller in this machine is provided with clamping feet, and there is a timing lever in the path of the moving letter. As the

letter is carried forward to the printing rollers by the feed mechanism, it is stopped and held by the timing lever until the clamping feet upon the revolving marking roller push it sidewise against the pivoted lever, thereby moving the end of the pivoted lever to one side of the projection on the yoke of the impression roller, when the two rollers are brought together by the action of the cam and connecting mechanism. The action of the cam is such that, at the time the end of the pivoted lever is moved to one side, there is no pressure of the projection on the impression roller yoke against the end of the lever. The lever, so to speak, is merely withdrawn from the path of the projection. This machine, as distinguished from those described in the patents in suit, has proved a practical success; and machines constructed on this principle were the first commercial machines installed in the post offices of the United States.

We come now to the consideration of the claims of the patents in suit which the defendant's machine is alleged to infringe. Claim 4 of the first patent, No. 341,380, reads as follows:

"In combination with a letter-supporting bed, a carrier for moving the letter over the bed, a stamp or marker, and a mechanical engaging finger to engage the moving letter and transmit motion to the stamp or marker, substantially as described."

The important element in this claim is the "mechanical engaging finger to engage the moving letter and transmit motion to the stamp or marker." In defendant's machine the moving letter does not engage a finger and transmit motion in any sense within the meaning of this claim. As we have seen, the moving letter comes to a stop; it is then pushed sidewise by the clamping feet of the marking roller, and the pressure of the clamping feet against the sides of the letter moves a lever to one side of a projection on the impression roller yoke, which permits the impression roller to move towards the marking roller by the action of the cam and connecting devices. It is apparent from this organization that there is no transmission of motion whatsoever, and no finger engaging the moving letter in the sense of this patent. Owing to this radical difference in the construction of the two machines, the defendant's machine does not infringe this claim of the patent. The claim cannot be held to cover every machine in which the movement of the letter in any way may be the means by which the two printing members are brought into proper position for printing. In construing this claim in another case, the Circuit Court of Appeals for the Second Circuit said:

"While it is true that by the Groth device an equivalency of result is produced, the difficulty which the complainant encounters upon the question of infringement is that the patentees describe, in the second and fourth claims, the devices in the form and peculiarities in which they are described in the specification and pictured in the drawings, and limited themselves to a barrier or finger which intercepts a moving letter in its onward path, whereby the letter, through the medium of the finger, or the finger itself, transmits motion. By reason of these limitations the Groth device escapes the charge of infringement." Groth v. International Postal Supply Company, 61 Fed. 284, 287, 288, 9 C. C. A. 507.

Respecting the second patent, No. 388,366, it is only necessary to consider claim 1, since claim 2 is simply a more limited or restricted

statement in another form of the subject-matter of claim 1. This claim reads as follows:

"(1) In a machine for stamping or marking mail matter, the combination, with the supporting-feed bed, of a stamp normally out of the path of movement of the mail matter, and a stamp tripper or releaser normally in said path."

If this claim is to be construed as covering every organization in which the marker is normally out of the path of the movement of the mail matter, and a tripping finger normally in said path, it is clearly anticipated by the earlier patent in suit, which described a stamp out of the path of the letter and an engaging finger normally in the path. In order therefore to save this claim, it is plain that it must be limited to the machine of the patent, and that the phrase "stamp tripper or releaser" must be held to refer to the tripping and releasing mechanism shown in the patent. In the first patent the "engaging finger" actuates the marker by means of an electric circuit. In this patent the tripping finger supports and releases the marker.

In defendant's machine the finger, or lever, neither supports nor directly releases the marking member or, what is the same thing, the impression member. We have previously referred to the fact that in defendant's machine, when the clamping feet of the marking roller push the letter sidewise against the pivoted lever, the other arm of the lever is out of contact with the projection on the yoke of the impression roller, and therefore, at this time, the pivoted lever supports nothing. Nor does this lever directly release the impression roller, since it merely permits it to be moved forward by the action of the cam and connecting mechanism. This comparison of the defendant's machine with the subject-matter of claim 1 fails to show any infringement of this claim. Such a comparison only affords another illustration of the substantial difference in construction and mode of operation of the two machines.

In comparing this patent with the first patent in suit, in the Groth Case, the court said:

"The distinction is that the finger is not of itself a tripper in the earlier patent, and is in the later patent a tripper which supports and releases the stamp. The earlier patent is for a stamping device in which the moving letter meets and actuates a finger in its path, which transmits motion to a tripper out of the path of the letter, so that the stamp is released. The later patent is for a stamping device in which the moving letter meets in its path, and actuates, a tripper which supports and directly releases the stamp out of the path of the letter. Reading into the two claims the requirement which is necessary to their safety, that the stamp tripper itself supports the stamp, the question is in regard to infringement." Groth v. International Postal Supply Company, 61 Fed. 284, 288, 9 C. C. A. 507.

With respect to the third patent in suit, No. 632,527, the complainant relies upon claims 1, 4, 27, and 44. It is unnecessary, however, to consider claims 27 and 44, since the important element in those claims is found in claim 4.

Claims 1 and 4 read as follows:

"(1) In a mail-marking machine, the combination of a marker having a die, a feed mechanism, and mechanism for insuring the same speed for the marker as the mail matter being marked, independently of the speed of the feed mechanism."

"(4) In a mail-marking machine for automatically marking mail matter, the combination with a feed member and a marking member having a die; of means for controlling the registration of the die upon the mail matter."

The important part of claim 1 is "mechanism for insuring the same speed for the marker as the mail matter being marked, independently of the speed of the feed mechanism."

In the machine of complainant's patents, when the power is applied, or the machine is in its normal condition, the entire marking mechanism is at rest. When, however, by means of the letter, the printing members are brought together, it is the letter which rotates the marker. It follows that the speed of the marker during the printing operation will always be the same as the speed of the moving letter, independently of the speed of the endless belt of the feed mechanism. If, for any reason, the speed of the endless belt and the letter should differ, as might be caused by the letter slipping on the belt, still the speed of the letter and the marker will always be uniform during the printing.

The defendant's machine does not infringe this claim, because, at all times, the printing roller, the impression roller, and the feed belt are positively driven at the same speed. Since in defendant's machine there is only one uniform speed, and consequently no feed mechanism with an independent speed, this claim of the patent has no application to defendant's machine.

Claim 4, as well as claims 27 and 44 of this patent, relates primarily to the feature of registration, which signifies the placing of the mark on the forward part of the envelope as it is fed through the machine. In claim 4 this element is described as "means for controlling the registration of the die upon the mail matter." This claim cannot be held to cover every means whereby the postmark is printed on the proper part of the envelope; and the question of infringement, therefore, must turn on whether the defendant's machine employs substantially the same means to effect this result.

In the patent, we start with a printing roller carrying the die, which is normally at rest. In the defendant's machine, we start with a printing roller carrying the die, which is always rotated. In the patent, broadly speaking, the problem of registration is properly to present the moving letter to a stationary die; in the defendant's machine the problem of registration is properly to present the moving letter to a constantly rotated die. Looking at the machine of the patent, it is apparent that this problem must be solved by controlling the die; and looking at the defendant's machine it is apparent that this problem must be solved by controlling the feed.

In the patent, the means for insuring the proper registration of the die are the cam, the pin, and the spring, which are connected with the marking roller. Through these means the marking roller, after each marking operation, always comes to rest in exactly the same position with respect to its die; in other words, the die is in a certain relation to the lowest point of the roller, or in the proper position for printing. When the advancing end of the letter again trips the marking roller, it is brought down in the same position upon the letter, so

that when the rotation of the marking roller is started by the letter the die prints upon the forward part of the letter. In this organization the proper registration is secured by stopping the marking roller in a certain position, and retaining it in that position for the printing operation.

In defendant's machine the means for insuring the proper registration of the die are the timing lever, which stops the advancing letter, and the clamping feet on the marking roller, which press the letter away from the timing lever and against the feed belt. These devices control the feed, and are the means employed for presenting the forward part of the letter at the proper moment to the die upon the constantly revolving marking roller. In this organization, it is by controlling the feed mechanism, or by securing the proper accuracy of the feed, that proper registration of the die upon the letter is secured.

The machine of the patents in suit and the defendant's machine differ so radically in construction and mode of operation that I fail to find infringement of any of the claims in issue. In reaching this conclusion, I have given to the patents in suit the full breadth of construction which is warranted by the position which they occupy in the art.

Upon this ground, and without entering upon the other defenses raised by the pleadings and the evidence, a decree must be entered dismissing the bill.

Bill to be dismissed, with costs.

LOUDEN MACHINERY CO. v. JANESVILLE HAY TOOL CO. et al.

LOUDEN MACHINERY CO. et al. v. SAME.

(Circuit Court, W. D. Wisconsin. December 27, 1905.)

Nos. 72, 73.

1. PATENTS—INVENTION—NEW COMBINATION OF OLD ELEMENTS.
   Where a new organization of old elements produces a new mode of operation and a beneficial result, there may be patentable invention, whether that result be new or old.
   [Ed. Note.— For cases in point, see vol. 38, Cent. Dig. Patents, § 48.]

2. SAME—INFRINGEMENT—HAY-SLINGS.
   The Louden patent, No. 444,546, for a hay-sling, while for a combination of old elements and not entitled to a broad construction, produces by a new combination a new mode of operation and a better result, and discloses patentable invention; also *held* infringed.

3. SAME—INVENTION.
   The Louden patent, No. 539,524, for a hay-sling, is void for lack of patentable invention.

4. SAME—PULLEY.
   The Toney patent, No. 393,941, for a pulley having a detachable head so that different forms of heads can be used interchangeably to fit different hay carriers, is void for lack of invention, in view of the prior art which contained pulleys precisely the same in operation and effect and having the same elements except the removability of the head.

5. SAME.

The Louden patent, No. 434,544, for a hay-carrier elevating pulley, was not anticipated and discloses invention, being for a new combination of old elements co-acting to produce a new and useful result; also *held* infringed.

6. SAME—HAY-CARRIER APPARATUS.

The Louden patents, Nos. 493,216 and 526,839, both for track hangers for hay-carriers, show only combinations of old elements each of which performs its old functions, and are void for lack of invention.

7. SAME—STOP DEVICE FOR HAY-CARRIERS.

The Burkholder patent, No. 490,738, for an adjustable stop device for hay-carriers, is limited as to all of its claims to a device having extending wings as shown in the specification and drawings. As so construed, *held* not infringed.

In Equity. Suit for infringement of letters patent No. 434,544, granted August 19, 1890; No. 444,546, granted January 13, 1891; No. 493,216, granted March 7, 1893; No. 526,839, granted October 2, 1894; No. 539,524, granted May 21, 1895—all to William Louden, and relating to hay-carrier apparatus; No. 393,941, for a pulley, granted December 4, 1888, to J. Toney; and No. 490,738, for an adjustable stop device for hay-carriers, granted January 31, 1893, to John H. Burkholder. On final hearing.

Jones & Addington, for complainants.
Offield, Towle & Linthicum, for defendants.

SANBORN, District Judge. These two cases involve the validity of seven patents for storing hay, covering the operation of unloading, elevating, moving, and dropping the hay, by means of a hay-sling, compressing pulleys, registering head locking the elevating apparatus to the carrier, stopping the carrier at the proper place, and releasing the load; also for suspending the carrier track to the roof of the hay barn. Large numbers of the various devices covered by the patents, in forms somewhat modified from the patent designs, have been sold by complainant, and the apparatus has been commercially successful. Defendant dealt with complainant in the purchase of the apparatus for several years, without objection, and purchased large numbers of patent pulleys, fittings for hay-slings, etc. Afterwards defendant commenced to make, use, and sell all the devices covered by complainant's patents, in substantially the same shape as the commercial forms of the devices sold by complainant.

It is claimed by complainant, and the proof shows, that the devices have been commercially successful, and that the development of the hay-sling art by these patents was final, and was marked by useful results. It is in testimony as to some, possibly all, of the patent devices, that the patent marked the final step in the development of the art. These various fixtures, when used with a hay-carrier consisting of a four-wheeled truck, running on the horizontal flanges of an inverted T-rail, serve to raise the hay from the load, compressing it in the sling, locking the compressing pulleys, locking the latter to the carrier, moving the bundle along on the track, stopping and releasing it at the proper place by means of the mechanism

of the pulleys, registering head and stop block, and then, by means of the trip-coupling located at the center of the hay-sling, the bundle is released and the hay falls on the mow.

The Louden Adjustable Hay-Sling Patent, No. 444,546.

This is a patent for adding adjustability to a hay-sling. Mr. Louden makes no claim for inventing a hay-sling, but only for making it elastic, adjustable, and successful. He adds devices for easily making it long or short, puts old things into a new combination, thereby securing adjustability, and for this new element claims a patent. The hay-sling which he so improved may be described by imagining two diamond or cross-shaped kites laid together endwise, and tied to each other by a device known as a trip-coupling. When the hay is laid on the sling the extreme ends are brought together and fastened, and the hay thus bundled up and compressed, ready to be lifted, carried to its destination, and dropped by parting the sling in the center. This is done by opening up the trip-coupling by pulling the trip cord, when the coupling parts, the two sections of the sling separate and the bundle falls. The ropes surrounding the two kite-shaped parts of the sling are called the sling ropes. The cross-pieces are the spreaders. These are made of wood. The longitudinal pieces are omitted, thus leaving the sling composed only of the ropes, cross-pieces, and coupling. The trip-coupling is composed of two parts; each having castings with rope-holes for attaching the ends of the companion slings. One casting has a pin set at right angles, and the other a socket for the pin, and a movable trip-latch resting over the pin and keeping it in place. To this a tripping-rope is tied. When it is desired to uncouple the sling the latch is pulled from over the pin, the coupling opens, and the sling parts.

This was the sling to which the patentee, by the use of other old devices, added adjustability. The old sling could not be readily made longer or shorter. This defect had, however, been partially met in two ways. Originally the sling-ropes were immovably fastened to the ends of the spreaders. This had been improved by running them through the spreaders, and securing them by the use of wedges. Thus, by using two or three spreaders in each half of the sling, the latter could be lengthened by bringing the spreaders closer to each other, or shortened by placing them further apart; the ropes remaining of the same length. Another method of adjustment was to leave free the ends of the sling-ropes, at the extremities of the sling, tie knots in these rope-ends, at short intervals, and change the length of the sling by taking it up at one or another of the knotted places. By catching the knots over a slot in an elevating pulley hook the bundle, surrounded by the sling, could be held together while being raised to the hay-carrier, and until released by opening the trip-coupling. These means of adjusting the length of the sling were not convenient or practical. They were improved by the patentee by the addition of tent-rope clamps and end-rings, to replace the knotted end-ropes, and J-shaped hook-bolts for the wedges.

To make the sling adjustable the patentee first fastens the end-rope

in one of the eyes of the tent-clamp casting. He then carries it loosely through one of the eyes in the end-ring, much as it would run through a pulley-sheave, then back through the two remaining eyes of the tent-clamp ring, and from there to the spreader-ends. To change the length of the sling he loosens the rope and moves the adjustable tent-clamp ring back and forth on the spreader-ropes, at the same time adjusting the hook-bolts on the ends of the spreaders, allowing the distance between the spreaders to be changed, and thus shortens or lengthens the total length of the sling. The tent-clamp device was old. It is found in the Clark patent, 109,176, for a ring clamp to shorten hay-sling ropes; in the Louden patent, 328,896, for a hay-carrier including a casting with eyes, whereby the rope could be readily lengthened or shortened; in the Chambord patent, 377,063, showing a casting with four eyes for adjusting rope lengths; and in the Kuntz patent, 71,393. The spreader clamp is simply a hook-bolt or bolt with one end bent to a half-circle to hold the rope, and the other threaded for a nut by which the rope may be clutched and securely held to the spreader. It is only as a combination, therefore, that the patent can be sustained.

The only claim in question is No. 4, for "A hay-sling composed of the ropes, A and A^1, trip-coupling, C, spreaders, B, adjustable clamps, C^1 and B^1, and attaching rings, D, substantially as shown." Complainant's position as to this claim is that it was the first in the art to produce a hay-sling with means for adjusting the length of the sling between the attaching end-rings; that it secured a new function and a new result, and was a distinct advance step in the art. It is evident that the claim is specific and not broad, and that the patent can be sustained, if at all, on narrow grounds. "A new combination, with a new mode of operation, may be inventive, even if all the parts thereof are old, and even if the functions of the combination be also old." Walker on Patents, § 37. Where a new organization of old elements produces a new mode of operation, and a beneficial result, there may be a patentable invention, whether that result be new or old. Id. § 26; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 118 Fed. 139, 55 C. C. A. 86. "The combination of old devices in a new article, without producing any new mode of operation, is not invention." Burt v. Evory, 133 U. S. 349, 358, 10 Sup. Ct. 394, 397, 33 L. Ed. 647; Florsheim v. Schilling, 137 U. S. 64, 78, 11 Sup. Ct. 20, 34 L. Ed. 574. Novelty is not negatived by antiquity of parts. Walker, § 66. "In case of a claim for a combination, where all the elements are old, and where the invention consists entirely in the new combination of old elements or devices, whereby a new and useful result is obtained, such combination is sufficiently described if all the elements or devices of which it is composed are all named, and their mode of operation given, and the new and useful result to be obtained pointed out, so that those skilled in the art and the public may know the extent and nature of the claims, and what the parts are which co-operate to produce the described new and useful result." Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68.

Now these three devices, the end-rings, rope-clamps, and hook-

bolt (all very simple in themselves), have a joint operation. The sling may be lengthened by taking up the rope through these rings, and further lengthened by loosening the hook-bolts at the ends of the spreaders and bringing the latter nearer together; and may be shortened by reversing the operation. It is plain that the function of these rings and the hook-bolts is to make the whole sling longer or shorter, as may be desired. The sling, as a whole, is adjusted, and its operation modified, by the use of the rings, and also the hook-bolts. To apply the language of Justice Matthews, in Pickering v. McCullough, 104 U. S. 318, 26 L. Ed. 749:

"All the constituents enter into it, so that each qualifies every other. * * * It produces a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions."

There is also a new mode of operation, and a more beneficial result, though perhaps not a new or different one. Formerly the length of the sling was changed by knotting the ropes at different places near their ends, and catching the knots over a claw-shaped hook at the proper length; also by knocking out the wedges at the ends of the spreaders and thus adjusting the length of the sling. But under the patent the mode of operation is quite different, and an improved result, if not a new one, is accomplished. It is also in testimony that these improvements made this type of hay-sling a commercial success; and this, in a doubtful case, is entitled to weight. It is said that this claim 4 is not for a combination, but simply for the specific things mentioned in it. But I think it comes within the definition of Justice Clifford, in Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68, above quoted as a claim for a combination, since the operation and result of the various devices are fully explained in the specifications and drawings. See 2 Complt.'s Rec., 70, 71. Counsel for defendant are in error in saying that the hook-bolt is not shown or described in the patent. Deft.'s Brief, p. 34. It is shown in figure 7, and its operation clearly described on page 70. On the whole I think the hay-sling patent, 444,546, is valid, and should be sustained.

But it is insisted that defendant's sling is different, and does not infringe. Defendant uses a hook-bolt at the ends of the spreaders, slightly different in detail from that of the patent, but having exactly the same operation. It also uses a different clamp or casting for shortening the rope at B^1. Instead of a casting or rope-clamp with three eyes for the rope to pass through, it uses a clamp with two eyes, one elongated and divided in the middle by an arm loose at one end, which can be raised when it is desired to loosen the rope, and then laid upon the clamp when the rope is in place. Two of the three holes of the patent clamp are made by means of such movable arm, and making a different mode of operation, as well as an improved one. Although the patent is subject to a strict construction, in view of the want of novelty of the different elements, and simply the final step in a series of improvements, yet I think that defendant's sling is its equivalent, and that infringement exists.

The Louden Trip-Coupling Patent, No. 539,524.

Claim 4, of the hay-sling patent just considered, calls for any trip-coupling device, but the drawings show the Smith patent, 116,231. This was a pin dropped between two jaws. When these were opened by pulling the trip-cord, the pin was released and the sling parted. The same pin and socket construction was improved by the Ricker patent, 392,690, in which a spring-actuated trip-plate or bolt was arranged over the pin to hold it in the socket, and a guide provided for the trip-cord. The cord was fastened to a lever, and when pulled the trip-bolt was drawn back and the pin released. The Ricker device was loose-jointed. It was movable in all directions. Hence it readily adjusted itself to the circular shape of the sling. It appears from complainant's expert testimony that this movable feature was a defect, because the eyes of the coupling which carried the sling-ropes were so placed that the pull on the ropes tended to twist the two coupling sections, making it more or less difficult to disengage the coupling mechanism. It also appears from such testimony that the earlier couplings did not effectually guide and dispose of the sling-ropes in connection with the trip-rope.

The patentee added three improvements. These were rigidity, arc-form, and improved rope-disposal. For the pin he substituted a lip or hook, a coupling-loop to catch over the hook, a trip-plate to project over the loop, and a keeper to hold the plate in position.. Thus he imparted rigidity to the loose mechanism of the earlier devices. Having done away with the loose construction, which adapted itself to the circular form of the sling, he restored this feature by carrying obliquely into the coupling the eyes made to attach the sling-ropes, so as to give an arched form to the coupling and dispose of the sling-ropes in the plane of the mechanism. He further provided an improved disposition of the ropes by carrying the trip-ropes into the coupling longitudinally, and the sling-ropes transversely, separating the two by grooved partitions. Looking at the prior art, we find the element of rigidity supplied by the Brown patent, No. 375,865, and the central draft of the trip-rope by the Church hay-sling patent, No. 384,960. Giving the arched form to the device is like bending a hoop to fit a barrel. Keeping the ropes from interfering with each other is a most simple and usual expedient. Avoiding strain on the mechanism by accommodating its shape to the form of the sling shows improvement, but not invention. The whole device is modified pin and socket construction, with more rigidity, less friction, improved disposal of ropes, and better form; but all these features are secured by the use of old elements, acting in the old way. Nor is there a new mode of operation, as the Ricker device operates in the same way. It is true there is a new or different result, by relieving strain, secured by first imparting rigidity and then relieving it by simple, well-known mechanical expedients, all operating in their accustomed way. I think the device, although ingenious and practical, lacks invention, and must be held not patentable.

The Toney Patent, No. 393,941.

This is for a pulley combined with an adjustable or removable registering head having a knob at its upper end adapted to lock immovably into a hay-carrier. The head being detachable, any one of 20 different ones may be used, so formed as to fit all carriers in use. The device consists of a pulley, having its side or cheek pieces extended to grasp the head, which is pinned or bolted to them, and easily detached. The one claim of this patent is "The main frame made in one casting with the cheek-pieces, a, a, and bridge, b, in combination with the pulley wheel, B, and removable block, D, formed with a knob, g, substantially as described." "The pin, d," says the inventor, "may be driven out with a punch and reinserted to hold any of the interchangeable blocks." The knob on the head is designed to lock into the hay-carrier until released by the action of the carrier and stop-block. He asked for a claim for a "combination with the pulley frame of the removable block, D, formed with a knob, G," but this was rejected on the prior art. In the Bower patent, No. 330,290, the same pulley is shown, with the same head and knob, but the head, although provided with a screw thread, so that its position in the pulley might be changed, was not intended to be detachable, or designed to be taken out for the insertion of other heads. The inventor says he attaches importance to the adjustability of the head for the reason that the wear upon it may be readily compensated for, and the relation of the pulley block may be readily adjusted to suit a tripping lever also shown. Here is the idea of a movable head, which readily suggested a detachable one. In the patent office the examiner objected to the broad claim, on the ground that the adjustability of the shank did not lend patentable novelty, since it did not add to or modify the action of the device; and he rejected the claim and allowed the specific claim for the separate elements in combination, above quoted. The notion of having a number of pulley heads to fit different carriers is also contained in the patent to J. Farrell, No. 307,932, where six different forms of heads are shown. But neither Bower nor Farrell grasped the idea of Toney to make the head detachable, although it was but one step from their conceptions to his.

The question, then, is whether the Toney device is a patentable novelty. Its result and mode of operation are identical with the devices of Bower and Farrell. When in actual use the operation of all three is the same; the only difference being that of movability and substitution. There is a combination of two old elements, the pulley and the head, attempted to be combined with a third, that of interchangeability; but the operation and effect of the combined devices is precisely the same whether such third element be present or absent. In the jail lock cases (Fond du Lac County v. May, 137 U. S. 395, 11 Sup. Ct. 98, 34 L. Ed. 714; May v. Juneau County [C. C.] 30 Fed. 241; Id., 137 U. S. 408, 11 Sup. Ct. 102, 34 L. Ed. 729) the patentee combined old devices consisting of a bar moved by a lever to simultaneously lock several prison-cell doors. This had been previously done; but his improvement consisted in lengthening the bar by carrying it across and outside of a corridor at the side of the row of cells, so that

the jailer could operate it in safety, and without the danger of attack by the prisoners. This idea was new, and had a beneficial effect. The patented device was marketed for many years, and uniformly sustained by the Circuit Courts. In the Fond du Lac County Case the Supreme Court said:

"As the mechanical operation and effect of the patented devices are the same whether there be a grating or other barrier or not, there is no patentable combination between the devices and the grating."

And in the cigar-bunching machine case (National Progress Bunching Machine Co. v. Williams Co. [C. C.] 44 Fed. 190, 12 L. R. A. 109) the court say:

"Where the mechanical operation and effect of the patented devices are the same whether one of the elements of the claim is present or absent, there can be no patentable combination between these devices and that element."

That is the case here; the operation and effect of the pulley and head are precisely the same whether the head be immovably fastened to the pulley, as in the Farrell device, or attached with a movable bolt, allowing the use of any kind of a head, as in the Toney pulley. If the device had a different operation when used with the different kinds of heads, there might be a valid combination; but, in the absence of this, the combination seems to lack patentability. The combination is ingenious and useful, and seems to be without the range of mere mechanical skill; but under the authorities cited it cannot be sustained as a valid, patentable combination.

The Louden Self-Locking Compressing Pulleys Patent, No. 434,544.

This patent covers two elevating pulleys with hooks at their lower ends, adapted to receive the attaching end-rings of a hay-sling. One of the elevating pulleys, called the receiving pulley, is made double, with two sheaves placed far enough apart to admit the entrance of a catch or head on the other, or engaging pulley. This receiving pulley has a registering head adapted to be locked into the over-hanging carrier, and is simply a developed and improved Toney pulley. The engaging pulley has a single sheave, and its upper portion is provided with a head or hook adapted to engage a pivoted catch or latch in the receiving pulley, having a stop arresting its downward movement.

The operation of the device is as follows: The rope by which these compressing pulleys are locked together and then raised so as to enable the registering head to lock into the overhead carrier, runs from the draft horse or other source of power to a pulley on one side of the carrier. It is then carried down through one of the sheaves or pulley wheels of the receiving pulley, thence around the sheave of the engaging pulley, then back through the other sheave of the receiving pulley, and upward to the opposite side of the carrier, where it is fastened. The end-rings of the hay-sling being attached to the pulley hooks, power is applied, the ends of the sling approach each other, compressing the hay into a bundle. As the pulleys come together by the tightening of the rope the hooked-head of the engaging pulley is guided into and between the sheaves of the receiving pulley

by means of a plate or guide attached to the latter, and as the hooked-head goes in it catches over a latch and locks, where it remains until the load is released by operation of the trip-coupling of the hay-sling. The latch is then lifted by hand, the hook released from the catch, and the pulleys separated for another operation.

The hooks on the lower ends of the pulleys are provided with movable quadrant-shaped safety-stops, so that, when the end-rings of the hay-sling are attached to the hooks, the stops fall over them, thus holding them in place. These stops are set in recesses in the shanks of the pulley frames, so as to automatically close the hooks, and are provided with pins or keys with which to regulate their movements.

Ten claims of this patent are involved in suit. The elements of the alleged patentable combination are: The elevating pulleys; the pulley wheels so arranged as to operate the pulleys at right angles to each other, thus adjusting the bundle of hay so that it will fall at right angles to the carrier-track; the hook on the frame of the engaging pulley; a pivoted catch in the receiving pulley to engage the hook; a stop under the pivoted catch to limit its downward movement; a detachable registering head on the top of the frame of the receiving pulley, adapted to lock into the carrier, as shown in the Toney patent; a recess or opening under the registering head to allow the hook to enter and engage the pivoted catch; a guide on the frame of the receiving pulley (which may be set at various angles), to steer the hook into the recess; flanges on the upper part of the receiving pulley frame, to allow the ready removal of the registering head; pins or points on the registering head to engage with such flanges, in order to keep the head securely in place; the quadrant-shaped stops already described, in combination with the pulley frames; a stop on the frame of the engaging pulley, to limit its movement into the receiving pulley; guards over the sheaves of the receiving pulley, to protect and support them, extending from the pulley frame to the pulley bearings.

The Prior Art.

All of those devices are in themselves old. The use of the two pulleys is shown in the Van Sickle patent, No. 82,570, the Smith patent, 96,161, the Patrick patent, 226,457, the Chambord patents, 254,921 and 314,998; and particularly in the Foote patent, 317,109. The right-angle adjustment of the pulleys was shown by Vandorwalker, in his patent No. 311,545, and by Boyer, in patent No. 377,012. The locking operation of the hook, pivoted catch, and stop were suggested by the locking mechanism of the registering head in the carrier, and also by the Foote device already mentioned, and referred to below. The Boyd patent, No. 300,687, also shows a pivoted catch. The registering head was taken from the Toney patent, already held not to be a patentable combination. The recess, guide, flanges, points, stop, and guards are merely details in the construction of the pulleys, which would readily suggest themselves to any skilled workman. And the quadrant-shaped stops are suggested by

the ordinary snap hook, by the Hayes patent, No. 79,347, showing a clasp-hook attached to an ordinary iron hook, and by the Foote patent, No. 317,109, showing a stop designated to discharge the ring of the sling-rope from the hook. Does the combination of any or all these elements in the compressing pulleys covered by this patent show a patentable novelty? Do these good old things have a new mode of operation, or simply perform their accustomed functions? And do they co-act with each other; each taking part in a new and beneficial result?

It is evident that the registering head, the hook on the engaging pulley, the pivoted catch, and stop in the receiving pulley, the quadrant-shaped stops on both pulleys, and the stop on the frame of the engaging pulley (to adjust its entrance) all co-act in a new mode of operation to produce a new and useful result. In connection with the hay-sling they tie up the bundle of hay, securely compress it, and lock it to the carrier. The registering head (detachable or otherwise) is not in itself patentable, as already shown; but it holds the locked pulleys up to the carrier so that the slackening of the draft-rope will not lower the load. As admitted by Mr. Pond, the defendant's expert (Deft.'s Ev. 355), the registering head on one pulley and the interlocking mechanism between the two pulleys co-act in producing a structure wherein the hay is compressed and supported by the carrier. The devices which secure this result are old, but in a new mode of operation they produce utility. The pulleys have made a commercial success, some 25,000 sets of them having been sold.

The Foote device, No. 317,109, is claimed as an anticipation. It shows compressing pulleys in which a hook on one locks over a cross-bar in the other, but the pulleys are held up to the carrier by a grip on the draft rope. This feature renders the locking mechanism unimportant, because the grip will hold the pulleys together without locking. Mr. Pond so testified, as well as Mr. Louden. Deft.'s Ev. 355. C. R. 329. But defendant insists that the Emerson patent of June 18, 1889, No. 405,541, completely anticipated the Louden pulley patent, and I have carefully considered the evidence relating to that device. It contains the important features of the Louden patent, being the registering head and mechanism adapted to securely lock together the two pulleys. In detail the two patents are quite different, but both secure the same result. If the Emerson device is part of the prior art, that of Mr. Louden could only be sustained in its specific form, when defendant's pulleys would not infringe, as they differ in many specific details. A thorough reading of the evidence, however, has convinced me that the Louden pulleys were invented, disclosed to others, and embodied in a working structure, prior to January 26, 1899, when application for the Emerson patent was filed. Without referring to the evidence in detail, it is enough to say that on August 23, 1888, Mr. Louden wrote a letter to Cochrane Bros., at St. Thomas, Ontario, describing his pulleys, and containing a rough sketch. His description includes the hook, recess, catch, and registering head. He also wrote to defendant about the pulleys August 23, 1888. A practical and successful test of their operation

was made in December, 1888. This evidence is corroborated by a number of witnesses.

On the whole, I am satisfied, notwithstanding some evasion in Mr. Louden's cross-examination, that the evidence carries his invention back of the date of Emerson's application. I also think that defendant's compressing pulleys infringe the patent in suit. They are made under the Strickler patent of August 2, 1901, No. 671,245. The differences between the two sets of pulleys are only in details. The engaging pulleys of each set will lock into the receiving pulleys of the other set. The registering head, pivoted catch, stops of all kinds, recess, right angle operation, etc., are all present. There is some improvement. For one pivoted catch defendant used two, held in place by spiral springs. The hook of the Louden engaging pulley is a round head in the Janesville pulley, and there are other differences. The Strickler device is a good example of a patent showing highly specialized claims, in which the old elements have, in the main, their accustomed modes of operation. I think, therefore, that this patent is valid, and infringed.

The Patents in Case No. 73.

The Two Louden Patents for Track-Hangers, Nos. 493,216 and 526,839.

These are two-part devices for a hay-carrier track, centrally located above the track, and adapted to grip the head or bead of the track-rail, and carrying suspending loops at their upper ends to engage an extraneous suspending device. Counsel for defendant call the first one the "sister-hook" device, and say it is nothing more nor less than an ordinary pair of sister-hooks such as have been used for generations, adapted, as would naturally be the case for such use, so as to rigidly grasp the upper edge of the ordinary T-rail. Sister-hook is defined in the Standard Dictionary as:

"A pair of hooks so mounted that they face and overlap each other; match hooks."

The patent adds to this definition by describing flanges at their lower ends adapted to fit under the flanges of the rail, and by providing for securely fastening the hooks together by means of a threaded bolt.

One purpose of this invention is to have the hooks adjustable to the track, so that they can be readily attached at any desired place. Another is to make the hooks so light and thin that they will not interfere with the passing of the carrier along the wide horizontal flanges of the rail.

The earlier patent of Myers, No. 440,602, covers:

"A track-suspending device consisting of two (partially) severable parts, having means at its lower end to embrace the edge of a track-rail, and at its other end means to catch over an extraneous supporting device, its said parts arranged side by side; and means for holding the two parts together."

The only substantial difference between this and the Louden device is that the two parts of the latter are entirely separable, and the

means for holding the two parts together is changed from a ring or collar to a bolt; and the Forshey patent, No. 308,483, is for a hanger showing entire separation.

The alleged patentable novelty of this device consists in making an adjustable hanger, attached to the bead of a T-rail, so formed as to readily admit the passage of the carrier-wheels. All these elements appear in the prior art, and in the patent each performs its old function. There is improvement, but the result is the same. This patent is without novelty or invention, and should be held void.

The Second Track-Hanger Patent.

This is called the dished-suspension or side set-over device. It consists in setting to one side the head of the bolt in the earlier track-hanger, by dishing the sister-hooks, so as to make the hanger thinner, thereby enabling the wheels of the carrier to be set closer to each other. Mr. Louden, in his testimony, admits that the earlier patent shows all the features of the later one except the dished or set-over feature. As defendant's counsel say, the nut is countersunk into the track-hanger so to equi-space the bolt. Like the shears in ordinary use, this device is a purely mechanical and noninventive structure. The elements of this device, its results, and the mode of operation, are all old. It operates precisely like the first hanger, but the form is improved by equi-spacing the bolt. This device also, like the other, lacks patentable novelty.

The Burkholder Stop-Block Patent, No. 490,738.

This covers a flattened A-shaped device fastened to the top of the carrier rail in the same manner as the track-hanger devices. It co-operates with a carrier having a rising and falling latch, which engages and locks upon the stop-block. The A-shaped device is otherwise described as a double inclined lug, operating with the rising and falling latch of the carrier. The object of the invention was to provide a stop, which, like the track-hanger, could be attached to the track at any point, without drilling holes in it, and which would not interfere with the passage of the carrier-wheels thereon. These results were secured by this patent. But the commercial device of complainant, and also that made and sold by defendant, are in form entirely different from the Burkholder device. In the latter the double inclined lugs are under the track, but in the two former they are centrally located over the track. The Burkholder device is secured to the top or bead of the track, and has wings extending outside of the carrier-wheels and downward to a point below the track; the lugs being attached to the lower part of each one of the wings. At this point, below the track, the rising and falling latch of the carrier engages the lugs, locking and unlocking as desired. These wings or arms are entirely lacking in the devices of complainant and defendant, which, as already said, operate above the track. The inventor says that the wings constitute one of the most important parts of his invention. The mechanism was designed to operate with a particular form of carrier described by the patentee, so constructed as to

require the stop-block to be located under the track. The claim alleged to be infringed is:

"The combination with an inverted T-shaped track and a hay-carrier stopping-device, secured to and over the vertical portion of said track, and carrying on both sides the double inclined lug, g, of a hay-carrier having a vertically movable catch-block, F, the upper ends of which extend above the sides of said carrier and have lateral projections which engage with said inclines, as set forth."

It will be noticed that this claim does not mention the wings; but they are referred to in the other claims, are shown in all the drawings, and alleged by the patentee to be one of the most important parts of his invention. The question is whether the Louden and Janesville devices, not having the extending wings, are made in substantial accordance with this claim, in view of the construction to be placed upon it supplied by the history of the patent. Can this broad claim be fairly applied solely to structures having wings, in view of the inventor's statement as to the importance of the wings, and the fact that the drawings all show them; and thus read into the claim, in connection with the other evidence, just as if it had claimed also the wings?

The express terms of the claim do not limit the patent to any particular device, but it is insisted it was so intended; that the patent is a contract between the government and the patentee, governed in its construction by the general rules for the interpretation of grants and contracts; and that the court should put itself in the place of the parties at the time the contract was made and read its terms in the light of the facts and circumstances which then surrounded them. National Hollow Brake Beam Co. v. Brake Beam Co., 106 Fed. 693, 45 C. C. A. 544.

In support of this argument it is said that Burkholder did not contemplate or claim a stop-block devoid of wings, and the patent office so understood his position, and that such a claim entirely ignores the state of the art. It is further made to appear that, after the filing of the Burkholder application, P. A. Myers applied for a similar improvement, for use with a carrier having its lock mechanism above the track, and so he made his stopping device to operate above the track. In other respects his invention was the same as that of Burkholder. Myers was granted a patent. He having filed subsequent to Burkholder, this could not have been done had the patent officers suspected interference, under the rule in Ex parte Upon, 27 O. G. p. 99. If the Burkholder claim reads on defendant's device, it equally reads on the Myers device.

The essential feature of the Burkholder invention is the adjustably securing of the stop-block on the central web of the inverted T-rail, without mutilation of the rail. This is shown by Mr. Louden's testimony. But the prior art shows other devices adjustably attached to the central web of a rail. This is true of the Myers patent, No. 307,725, which shows a stop-block above the rail, and adjustably attached to its central web, without mutilation of the rail. It is true, as stated in complainant's brief, that the stop-block of the Myers patent

is attached to the track-hanger and not to the rail; but this seems to be a distinction without a difference. The same objection may be made to the Burkholder patent, since his stop-block is attached to the wings or arms of the device, and not directly to the track itself. Both devices involve the same idea, which is the adjustable attachment of a stop-block to a rail, by means of a hanger in one and an arm in the other; neither touching the track itself. It is also true that the Burkholder device is more adjustable than that of Myers; his being necessarily attached to the track-hangers, making its position over the track depend on the immovable position of the hangers. But the same conception is at the foundation of both devices.

There are also a number of other prior patents showing a track-hanger device adjustably attached to the central web of a T-rail, as stated in the discussion of the track-hanger patents. It further appears that the double inclined lugs of the Burkholder device were contained in the carrier described by the patentee, as adapted to operate with his invention.

We have, then, in the prior art the notion of a stop centrally placed above a track rail; of a block with double inclined lugs; and of adjusting the device by means of a hanger or arm to the central web of the rail. This would seem to show no invention in the first claim of Burkholder, under the construction given it by complainant, as a broad claim covering any stop adjustably secured to the central web of the track. For these reasons it seems that the claim was not intended to be given this broad construction, and in view of the fact that the ideas so embodied are old. Thus limited the claim is not infringed by defendant, whose device, like that of Mr. Louden, constructed ostensibly under the Burkholder patent, is attached upon the track itself, without the use of wings or arms. The hay-sling and self-locking pulley patents are sustained, and held infringed. All the others are held to lack invention, except the Burkholder patent, which is not infringed.

The Question of Multifariousness.

In view of the result in suit No. 73 it is not necessary to consider this question in that suit. In suit No. 72, involving the hay-sling, trip-coupling, registering-pulley head and compressing pulleys, I think those devices capable of joint operation, and that they actually do so operate. The hay is held by the sling, compressed by the locking pulleys, raised by the ropes passing through the carrier and pulleys, sustained by the registering head locked to the carrier, by the lock mechanism of the pulleys, the sling and the locked trip-coupling, and finally released by the tripping device of the last—all to the end that the hay may be stored. All the parts mentioned work together, at the same time, as portions of one machine, to sustain, carry, and deposit the load. The apparatus would be impaired if any one of the patented devices were lacking.

Let the usual decree be entered dismissing the bill in No. 72, as to the trip-coupling and registering-pulley patents, sustaining the bill as to the hay-sling and compressing-pulley patents, and securing the relief

prayed as to them. In case No. 73, let the bill be dismissed, with costs. As to costs in case No. 72, inasmuch as the two patents sustained include both of the devices held not patentable, I think the decree should include costs, and that defendant is also entitled to costs as to the Toney patent and the Louden trip-coupling patent. An equitable division of the costs should be made when the decree is settled.

BENJAMIN ELECTRIC MFG. CO. v. DALE CO. et al.

(Circuit Court, S. D. New York. October 31, 1905.)

No. 8,742.

PATENTS—INFRINGEMENT—CLUSTER LIGHTS.

The Benjamin patents, Nos. 721,774 and 721,777, granted on a divisional application and both relating to a cluster of electric lights, in which the electricity is conveyed to the lamps through plates, instead of by a separate wire to each, disclose sufficient mechanical improvement over prior structures to constitute patentable invention, although not novel in their electrical features. As so construed, *held* not infringed by a structure mechanically, but not electrically, different from those of the patents.

In Equity. On final hearing.

Seward Davis and Jones & Addington (W. Clyde Jones, Keene H. Addington, and Robert Lewis Ames, of counsel), for complainant.

William M. Stockbridge, for defendants.

HOLT, District Judge. This suit is brought to restrain the alleged infringement of two patents, Nos. 721,774 and 721,777, issued to Reuben B. Benjamin, and by him assigned to the complainant. The invention relates to an improvement in the arrangement of a cluster of electric lights. It provides, in substance, for a cluster of electric lights so arranged that, instead of separate wires connecting each lamp in the cluster, there are two leading-in wires, each connecting with two metallic plates insulated from each other, and so arranged that the electricity is conveyed to and from each of the lamps through the plates. An interference was declared between Benjamin's original application and an application for a patent for a similar invention by Nelson Weeks, and decided in favor of Benjamin. Benjamin thereupon added new claims to his application. A second interference with Weeks was declared, which again resulted in favor of Benjamin. Thereupon he added still further claims to his application, and a third interference was declared, which was again decided in favor of Benjamin. Benjamin's original application, in the course of these proceedings, had been divided and made into four applications, and after the decision on the third interference four patents were issued to Benjamin. The result of this repeated addition of claims to the pending applications is that the patent No. 721,774 now contains 46 claims, and the patent No. 721,777 contains 17 claims, making 63 in all. Many of these claims are substantially identical, and the excessive number of distinct claims inserted in the patent, most of which are expressed in substantially indistinguishable terms, serves no useful purpose, and simply makes burdensome the in-

vestigation of the claims. The complainant's counsel has stipulated to rely on only 17 claims of the first patent, and 9 claims of the second patent, making 26 claims in all relied upon. This number might have been further restricted without sacrificing any real rights of the complainant.

The complainant's claim is that the two patents relied on are capable of conjoint use, and that the defendant's structure infringes features of both patents. But it seems to me, in the first place, that it is very doubtful whether the second patent is not to be regarded as invalid because anticipated by the first patent. I can see no essential distinction between it and the first patent. Benjamin's original application included both forms of construction, and it is said that the Patent Office required that the application be divided. It was divided, into distinct applications, and both patents were issued at the same time. As I understand the rule, the patent numbered first takes precedence of the other. I cannot see anything in the claims of the second patent which is not substantially anticipated by the claims of the first patent, except the claim for a simple bushing in which the lamp is screwed. There was certainly nothing novel about that.

Assuming, however, that both patents can be regarded as of equal validity, the first question which arises is whether they show patentable invention, in view of the prior state of the art. Upon a careful consideration of the evidence, I am not able to see that they involve any electrical invention. The electrical arrangement for a wireless cluster of electric lamps shown in the Benjamin patents seems to me to have been substantially shown in the prior English patent to Brougham and in the Weeks patent, No. 601,106. Both these patents, however, were not well adapted to actual commercial use. The two Benjamin patents in suit, while using substantially the same electrical arrangement, had mechanical improvements which at once made a cluster light constructed in accordance with those patents commercially successful. The arrangement of the contact plate with oblique side walls provided a strong and secure mechanical support for the lamps, and the most effective arrangement of the lamps in a cluster. The substitution of a metallic hemispherical casing having an opening opposite each lamp receiver, and the introduction of the necessary insulating material in bushings passing through the openings, upon which the threaded shells were screwed, permitted the external structure to be made of metal, instead of porcelain as in the Weeks patent. It was commercially essential, to prevent the danger of fire and injury or annoyance to persons, to have the exterior part of the structure insulated. This was accomplished in the Weeks patent by making the exterior of porcelain, an insulating material. But porcelain is a substance so brittle and easily broken, and so difficult to easily mold into different forms, that it is obvious that an external metallic casing, if it could be safely insulated, would be far superior commercially. It can be made much cheaper; it is less liable to break or become disarranged; it is capable of great variety of form and ornamentation and in the kind of metal employed. The clusters manufactured under the Benjamin patent immediately entered into extensive

commercial use. I think that there is sufficient mechanical invention shown in the Benjamin patents to make the patents valid.

Upon the question whether the clusters manufactured by the defendants under the patent issued to Dale infringed the complainant's patents, I have felt much doubt. The Dale patent certainly does not differ greatly from the Benjamin patents, and particularly patent No. 721,777, commonly spoken of as the second patent in suit. The essential distinction between them is that in the Dale patent the two contact plates and the insulating base between them, instead of being fastened to the upper part of the lamp, and being a support for the lower hemispherical casing, is placed within the lower hemispherical casing, and is supported by it. In the Dale patent the lower hemispherical casing is also made easily detachable by a bayonet joint, instead of being permanently secured to the upper part of the lamp, and the insulating ring, a, in the second patent in suit is dispensed with. In the Benjamin patents, there is a provision for a removable cap at the bottom of the hemispherical casing, through which to obtain access to the interior for the purpose of connecting the wires to the binding posts. The defendants' structure by which the entire hemispherical covering is removed, and the essential electrical device in the structure is removed with it, is much more easily put in position, and the wires properly connected; and, in case any repairs are necessary, is more easily taken down and put in order than the Benjamin structure, which has to be placed in position, and then the wires attached through the small opening in the bottom by workmen standing under it. The Benjamin patent contains several claims for a removable cover; but I think that the term "a removable cover," in the Benjamin patent, refers to a cap additional to the external casing, as illustrated in the drawings and specifications. If the only change made in the Dale patent had been to make the hemispherical casing in the Benjamin patents easily removable, I hardly think that would involve invention. But I think the arrangement in the Dale patent, by which the contact plates and the insulating base are placed in and supported by the hemispherical casing, and the insulating ring, a, shown in the second Benjamin patent, is omitted, shows a structure resulting in sufficient mechanical superiority to or difference from the Benjamin patents to show independent invention over the prior art open to the use of each. This was the view of the Patent Office. The original claims in the Dale patent were 12 in number. All of them were rejected, 11 on the ground that the Benjamin patents anticipated them. The application was then amended by striking out the claims as originally drawn, and substituting others which based the invention substantially on the combination of a removable cap and a block of insulating material between two contact plates, the block and contact plates being supported wholly by the cap.

Quite elaborate arguments were made by the respective counsel upon the question as to what is the insulating base of the second Benjamin patent; the defendants claiming that the ring, a, is the insulating base, within the meaning of that term as used in the Benjamin patent, and that, as the defendants' structure contains no such ring, it did not infringe. The ring, a, in the Benjamin second patent is, in a certain

sense, an insulating base. In Benjamin's first patent, the block of insulating material extending across the entire top of the cluster is obviously the insulating base, and in his second patent, he has practically taken out the center of this block, leaving the exterior ring in its original situation, and placed the center of the block lower down. But the true and essential insulating basis of the electrical structure in the second Benjamin patent, as in all the wireless clusters, is not the ring, a, but is the body of insulating material between the two contact plates; and, in that sense, in my opinion, the insulating base of the defendants' patent is substantially the same as the insulating base of both the Benjamin patents. In short, I cannot see any substantial and essential electrical distinction between the Dale patent and the two Benjamin patents; but, as I have already stated, I can see no substantial electrical distinction between these patents and the prior English patent to Brougham and the Weeks patent. Dale, when he applied for his patent, had the same right as Benjamin had to use the electrical devices shown in the Brougham patent and the Weeks patent. The fact that the complainant has since purchased the Weeks patent does not affect the question. The bill contains no allegation of a right to recover on the Weeks patent. Benjamin produced by mechanical invention a wireless cluster of electric lights commercially superior to anything which had preceded it. Dale had the right to do the same thing, provided he did not infringe the Benjamin patents. While I think it a close question, my conclusion is that Dale's patent involved sufficient mechanical invention distinct from the Benjamin patents to make it valid. Upon the whole, I think that the defense of the invalidity of the complainant's patent is not sustained, but that the defense of noninfringement is sustained.

My conclusion is that the bill should be dismissed, with costs.

MELLOR v. CARROLL et al.

(Circuit Court, D. Massachusetts. December 22, 1905.)

No. 2,159.

1. PATENTS—SUIT FOR INFRINGEMENT—PRIVITY OF ESTOPPEL WITH ASSIGNOR.
   If the assignor of a patent, who is estopped to deny its validity, enters into business with others, and all, availing themselves of his knowledge of the patented process or machine, enter upon a manufacture infringing the patent, all are bound by his estoppel when sued for infringement; and, when individuals so estopped form a corporation to carry on the infringing manufacture, the corporation is also deemed in privity of estoppel with them, even though it has some stockholder who is more or less ignorant of the history of the patent and of the transactions which led to the incorporation.

   [Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 184.]

2. SAME—INFRINGEMENT.
   The Carroll patent, No. 475,929, for a nonmetallic bearing, *held* infringed on motion for a preliminary injunction in a suit by the assignee against the patentee and others.

In Equity. Suit for infringement of letters patent No. 475,929, for a nonmetallic bearing, granted to William T. Carroll May 31, 1892. On motion for preliminary injunction.

Howson & Howson and Roberts & Mitchell, for complainant.
George N. Goddard, for defendants.

LOWELL, Circuit Judge. This is a bill in equity to restrain the infringement of letters patent No. 475,929, issued to Carroll, one of the defendants. The case is before the court on motion for a preliminary injunction.

The complainant is the assignee of Carroll, and Carroll is therefore estopped to deny the validity of the patent. The complainant alleges that the other defendants are so engaged with Carroll in the infringing manufacture that they are included in his estoppel. The defendants Pharaoh and C. E. Forbes "were associated" with Carroll. As the result of this association, Carroll and Pharaoh, with I. B. Forbes, organized the defendant corporation, of which they were sole stockholders and sole directors; Carroll being president. The defendant Charles E. Forbes succeeded I. B. Forbes as stockholder and director. The directors voted that the corporation buy of Carroll, Pharaoh, and C. E. Forbes (i. e., of themselves) the inventions and appliances, goodwill and trade-marks, secret process and recipe, correspondence, merchandise, machinery, tools, working process, etc., which were concerned and concerned only with the alleged infringing manufacture. For this conveyance the three directors were paid by the issue of stock, and by an additional payment to Carroll in cash. Of this corporation Carroll has been president, and is now director.

It is not easy to state precisely the rule by which is tested the estoppel of those, not themselves assignors, who are associated with the assignor of a patent in a manufacture alleged to infringe. The assignor is estopped to deny the validity of the patent by reason of his grant, but this reason does not apply to those who have become associated with him in business since the grant. If they had no connection with him, they could not be prevented from showing that the patent is invalid, in a suit for their alleged infringement of it, and this would be equally true, whether they knew of the assignment or were ignorant of it. Upon what principle can A. be restrained from making an article because B. has estopped himself to contest that it is patented? If A. is merely an employé of B., he may be restrained as such employé. But the cases extend the privity of estoppel beyond the case of an employé. Continental Wire Fence Co. v. Pendergast (C. C.) 126 Fed. 381; Daniel v. Miller (C. C.) 81 Fed. 1000; Time Telegraph Co. v. Himmer (C. C.) 19 Fed. 322; Woodward v. Boston Lasting Machine Co., 60 Fed. 283, 8 C. C. A. 622; Marvel Co. v. Pearl (C. C.) 114 Fed. 946; National Conduit Co. v. Connecticut Pipe Co. (C. C.) 73 Fed. 491.

Mere co-operation in the alleged infringement with the estopped assignor may not, as suggested in Continental Co. v. Pendergast (C. C.) 126 Fed. 381, 384, be enough to create the estoppel. If the estopped assignor enters into business with others, who derive from

him their knowledge of the patented process or machine, and, availing themselves of his knowledge and assistance, enter with him upon a manufacture infringing the patent which he has assigned, they are bound by his estoppel. By the application of this test the defendants Pharaoh and Forbes are here bound by the estoppel of Carroll. When individuals thus estopped establish a corporation to carry on a business which they would be restrained from carrying on as individuals, then the corporation, also, is deemed in privity of estoppel with them, even though it contain some stockholder more or less ignorant of the history of the patent and of the transactions leading up to the incorporation. From these considerations it follows that all the defendants are here estopped to deny the validity of the patent here in suit. Were this not true, then any estopped assignor could escape the effect of his estoppel by incorporating himself, and securing for his corporation a single bona fide stockholder for value.

That the defendants infringed the patent, if it is valid, is plain. Their advertisements practically admit this, and the analyses of the complainant's experts establish it. Under the circumstances the defense of laches is not applicable. Interlocutory injunction to issue.

GENERAL ELECTRIC CO. v. GARRETT COAL CO.

(Circuit Court, W. D. Pennsylvania. November 6, 1905.)

No. 35.

PATENTS—INFRINGEMENT—REGULATOR FOR ELECTRICAL DRIVEN MACHINERY.

The Knight and Potter patents, Nos. 587,441 and 587,442, one for a method of regulating electrically driven machinery, and the other for an apparatus for applying such method, are not infringed by an apparatus in which a dead resistance is continuously used in changing the connection between the two motors used from series to multiple, whereas in the method and apparatus of the patents it is entirely cut out at one stage of the transition.

In Equity. On final hearing.

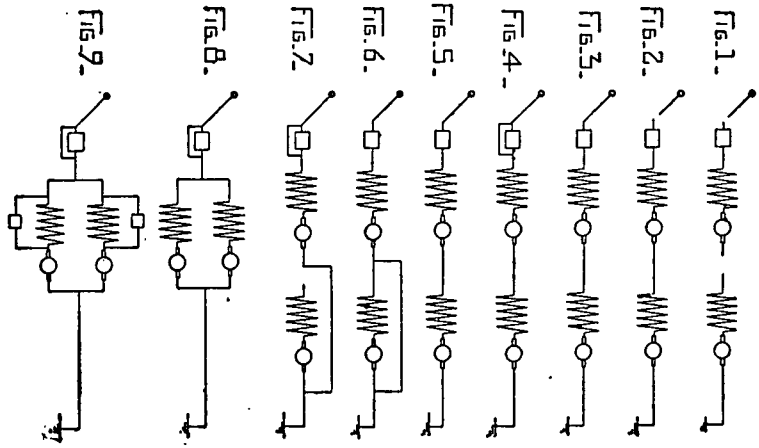
Betts, Betts, Sheffield & Betts, for complainant.
Glenn S. Noble, for respondent.

BUFFINGTON, District Judge. This is a bill in equity brought by the General Electric Company against the Garrett Coal Company, charging infringement of claims 1 and 2 of patent No. 587,441, granted to its assignors, Walter H. Knight and William B. Potter, on August 3, 1897, for a regulating apparatus for electrically driven mechanism, and of claims 3, 4 and 9 of patent No. 587,442, granted to its said assignors the same day, for a method of regulating electrically driven machinery. Without entering into a statement of the art and the technical terms herein employed, we content ourselves with noting the conclusions we draw from a study of the case. In traction practice, wherein infringement is here alleged, it was fully recognized prior to these patents that a trolley car could best be operated by the use of two motors con-

nected in series for slow, and in multiple for high, speeds. If a single motor was used, there was no way to control its power and speed except by putting more or less dead resistance in series with it to regulate the current to which it was subjected. But the use of such resistance is highly objectionable, for, as stated by complainant's expert:

"Under such circumstances the counter electro-motor force of the motor at slow speeds would be small, while the dead resistance would be large, and the impressed electro-motive force of the trolley wire would be wastefully consumed in bearing the dead resistance, and only to a small degree consumed usefully in overcoming the counter electro-motive force."

The practice, therefore, is to use two motors and supplement them by a minimum of dead resistance, and, by series or multiple connections, secure two extremes of speed under economic conditions. But the difficulty of changing from series to multiple relation with a second motor, or vice versa, lies in the electric arc produced by breaking the circuit, or in the sudden rush of heavy current incident to the connecting of a slow moving motor, with its slight counter electro-motive force, to a trolley wire with its great impressed electro-motive force. To meet these difficulties the patents in suit—one a method, the other an apparatus for applying such method—were addressed. Their manner of doing so is shown in the figures and specifications of the patents:



"Referring to the drawings which accompany this specification, figures 1 to 9 show in diagram the several combinations of circuits which are produced in succession in the practice of our method according to the manner we have found best suited for use in connection with the service for which it is particularly adapted, to wit, the control of railway cars operated by two electric motors. * * * Referring to the diagrams in figures 1 to 9, it will be observed that in figure 1, which represents the first condition of motor circuits established by the switch, the two motors are out of action, and there are two breaks in the circuit—one between the trolley, T, and resistance, R; and the other between the armature, Aa, of the motor, A, and the field magnet, Bf, of the motor, B. The first step in the series is to close the latter of these two breaks, when the two motors will be in series, as shown in figure 2, but still disconnected from the trolley. The second step is to close the remaining break, when the

condition will be as shown in figure 3. This condition is the first one in which a complete circuit is made, and it gives the lowest rate of speed; the two motors being in series with each other and with a resistance. The third step is to short circuit the resistance, when the condition shown in figure 4 is produced, giving a higher rate of speed, although it is to be understood it is also of importance that the resistance be adapted to prevent the sudden influx of an undue volume of current at the moment the circuit is completed. The fourth step introduces the resistance once more, as shown in figure 5, and the fifth completes a shunt-circuit around one of the motors, to wit, motor, D, as appears in figure 6. With these two steps the process of gradually changing the motors from series to multiple begins. The shunting of one motor is a preparation for its entire removal from the series connection, and it acts at the same time to connect the unshunted motor directly to the main line circuit, which is the connection it has when in multiple; but the effect of this change is modified by the reintroduction of the resistance, which prevents an undue degree of acceleration in speed, and protects the unshunted motor from injury by an undue volume of current. The sixth step, continuing the series multiple change, produces the condition indicated in figure 7, in which the circuit of the shunted motor is severed, so that no current passes therein, while at the seventh step this motor is connected in multiple with its mate, which, it will be observed, has continued its active operation; the resistance at the same time being short-circuited. This completes the change of motor connections, and the two motors which were formerly in series without resistance are now in multiple without resistance, as the resistance has performed its designed function of assisting in the changing-over process, which by its aid has been accomplished gradually and safely. The eighth and last step is one which we have provided for giving an extra rate of speed to the motors in multiple, and this is accomplished by shunting the field magnets of the two motors through a suitable resistance, as is indicated in figure 9. The above-described series of circuit combinations provides for several and distinct rates of speed, between which the conditions may be regarded as more or less temporary and transitional. Thus the first rate of speed will be given by the condition in figure 3, the second by the condition in figure 4, the third by the condition in figure 6, the fourth by the condition in figure 8, and the fifth by the condition in figure 9."

Now, the use of dead resistance as a motor protection was not first disclosed by this patent. What was disclosed was its use at the particular times or stages therein pointed out in order to effect motor change from series to multiple. This will be seen from the patentees' statements in the specifications. Thus in the apparatus patent it is said:

"The result of this organization is to establish connection between the successive pairs of contact-plates 1 and 2, 3 and 4, etc.; in any predetermined sequence the connection being maintained for a predetermined length of time between the plates of each pair, and finally interrupted at a predetermined period."

And the method patent, after describing the several steps says:

"This completes the change of motor connections, and the two motors which were formerly in series without resistance are now in multiple without resistance, as the resistance has performed its designed function of assisting in the changing-over process, which by its aid has been accomplished gradually and safely."

The patentees, then, having disclosed no new elements in their apparatus, the novelty of their disclosure is to be looked for in a new use of known agents. This we assume they did, and we next ascertain just what that use was. Passing down to figure 4, we start with the two motors in series and with the resistance cut out. In stages 5

and 6 it is cut in the transition from stage 6 to stage 8; the resistance is cut out entirely in stage 7. This intermittent use and disuse of this important factor of dead resistance is clearly pointed out in the specification, and is carried into the claims quoted below, which describes the entire process step by step. Thus the specification says:

"In Figs. 5 and 6 the resistance is first cut in, and then one motor is shunted; the other motor being left in series with the resistance only. In Figs. 7 and 8 one terminal of the motor, B, is disconnected from the circuit and reconnected to the corresponding terminal of the other motor, so that the two are in multiple while the resistance is cut out."

And the claim is:

"(2) In an apparatus for regulating the power and speed of mechanism driven by two electric motors, the combination of two motors, and a switch for placing them in series with each other and with a resistance, the switch provided with contacts and connections adapted to cut out the resistance, for one rate of speed, to again cut in the resistance, to shunt one motor, to disconnect one motor and cut out the resistance, and to connect the two motors in multiple."

It will thus be seen that in the transition stage, 7, there is no dead resistance to counteract the current. In the reverse transition the break of the current would, owing to the absence of resistance, cause sparking, which is alleged to be disastrous and is conceded to be objectionable, and the testimony would indicate the complainant later adopted a construction in type K, which obviated this sparking in type J which embodied the apparatus of the patent. In that regard complainant's expert says:

"The K controller reduced somewhat such sparking as tended to occur in controller J in passing back from position 8 to position 5, through the intermediate positions 6 and 7. * * * It is probable that the reduction of the sparking was one of the objects in producing the new controller."

We have noted these things, not with a view to minimize the patent, but simply to emphasize the fact that the patentees during one stage of the only method they pointed out wholly eliminated the factor of dead resistance, and that this omission was not a mere minor, unimportant detail, but was a substantial, functional feature in the apparatus and the method they disclosed. Now, in the respondent's apparatus and method the dead resistance is used in every stage of the change of the motors from series to multiple and vice versa. It is true their method accomplishes the same object as does complainant's, viz., a change from series to multiple, but it is accomplished in a different way, to wit, by a continuous instead of a noncontinuous use of dead resistance. Complainant's expert, with commendable frankness, recognizes the difference between the two methods. When asked if he found in respondent's apparatus "a condition to that shown in figure 7 of the patent drawings—that is, with one motor cut out and the other motor in circuit without resistances"—he says:

"No; the defendant keeps the protecting resistance in circuit during the entire change from series to multiple and from multiple to series."

And when asked:

"Do you consider there is any advantage derived from keeping this resistance in the circuit while making these changes?"

He replied:

"Yes; I think it is better to keep it in during the entire change."

While this difference is thus shown to exist, it is sought to minimize its significance by the fact that stage 7 is not a working condition, but a rapid, instantaneous transition. But we must remember we are dealing with an apparatus whose purpose is rapid change; that is, not only to accomplish change in conditions, viz., from series to multiple and vice versa, but in doing so it must provide for an instantaneous adjustment, if a powerful current, to changing conditions in load, grade, or other factors. Dealing, as the apparatus does, with such a powerful agent as an electric current of great volume, and one whose good or ill effects are effective even in the transitory instant of the swiftest mechanical change of a controller, it will be seen that it is in the fact and nature of change, and not in the time employed in making it, that the real significance of such change lies. In view, then, of the fact that respondent has found another way of accomplishing the change from series to multiple connection from that disclosed by complainant's patent, that in its method it employs the constant, uninterrupted use of dead resistance, it would seem that this difference is one of substance, and we are of opinion the patent should not be so construed as to cover a method which is not only not disclosed in the patent, but in the point where it does differ from the patent, viz., in the constant use of dead resistance, it may be said in that regard to be a departure from the teaching and spirit of Knight and Potter's method. To hold otherwise would be to make the patent laws a means to discourage and not "to promote the progress of science and useful arts."

Finding, therefore, as we do, that respondent's device neither employs the method or uses the apparatus disclosed by Knight and Potter in their patent, we are of opinion that the charge of infringement cannot be sustained, and a decree may be drawn dismissing the bill.

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

(Circuit Court, N. D. Illinois. December 18, 1905.)

No. 24,516.

PATENTS—SUPPLEMENTAL BILL FOR INFRINGEMENT—SUCCESSOR OF DEFENDANT.

Pending a suit for infringement of a patent by an article made under a later patent, the defendant sold its business, property, and good will to another corporation, which took an assignment of the license under which the alleged infringing article was made, and continued its manufacture and sale, afterwards obtaining a new license by which it contracted to make and sell the article during the life of such license. *Held*, that the purchaser assumed such relation to the subject-matter in suit that, after decree finding infringement, it might be brought in by supplemental bill and subjected to the injunction granted thereby, and to liability for damages under such decree as to acts of infringement committed by it subsequent to its purchase.

In Equity. On demurrer to amended supplemental bill.

For former opinion, see 137 Fed. 603.

Coburn & McRoberts, for complainant.
Chas. C. Bulkley and W. Bancroft Jarvis, for defendant.

KOHLSAAT, Circuit Judge. This cause is now presented to the court on demurrer to complainant's amended supplemental bill. The cause was heretofore before the court on demurrer to complainant's original supplemental bill, wherein it was sought to subject the defendants herein to the terms of the decree for an accounting entered against the defendants in the original bill, at which hearing the demurrer was sustained. 137 Fed. 603. It is now sought by the amended supplemental bill to subject this defendant to the injunctional order entered in the original cause, and to require an accounting as to acts of infringement committed by this defendant subsequent to those committed by the original defendant. The demurrer sets up certain technical objections to the petition which are not material and need not be considered, and alleges, further, that the alleged acts of infringement of defendant herein are distinct and independent causes of action, arising, if at all, after the commencement of the original suit and entirely independent of the acts of the original defendant; that the doctrine of a pendente lite transfer does not apply; and that the original decree is not res adjudicata as to the New Jersey corporation. The allegations of the supplemental bill fail to establish such a case as would justify the court in finding that the transfer by the original defendant to the defendant herein was made for the purpose of avoiding the effect of the decree in the original suit. While there is some ground for the claim that this defendant conducted the defense in the original suit, there is lacking proper allegations as to the mutuality of the matters claimed to operate as an estoppel. It is too well settled to require citation of authorities that one taking the res, pendente lite, by assignment or transfer, is bound by the judgment of the court as to that res. It seems clear on authority that in a case like the one now presented, the court has the power to subject the assignee or transferee to the terms of the original decree so far as it affects the res.

Demurrant insists that in the present case there is no res, and that the supplemental bill seeks to subject the defendant to a mere money liability for new torts. Of course, this cannot be done in a supplemental proceeding. But is there no res? The opinion of the Court of Appeals in the original cause (131 Fed. 75, 65 C. C. A. 313) finds that "appellee's device is manufactured according to letters patent Nos. 617,691 and 617,692, January 10, 1893, to Overshiner," and holds that "the fact that Overshiner improved upon Fisk * * * is no warrant for using appellant's property without leave." One of the admitted allegations of the amended supplemental bill herein is that this defendant "did on or about said 19th day of May, 1900, take possession and control, and did assume the ownership, of all the property, * * * franchises, * * * business, and good will" of the original defendant, including its plant and stock of material and merchandise, and continued at the same place the manufacture and sale of annunciators and spring jacks identical in construction and operation with complainant's Exhibit Defendant's Device, found to be an

infringement by this court, and that the Overshiner license granted to the original defendant was assigned and transferred to this defendant by said original defendant, pendente lite. It also appears from Exhibit H to this amended supplemental bill that defendant herein entered into a new agreement with Overshiner, dated July 2, 1900, and pending said original suit, whereby, in consideration of a new license to manufacture under the Overshiner patents aforesaid, thereby granted, and for other privileges therein given, defendants agreed to make and sell said inventions in switchboards to the exclusion of all others during the life of the license. It thus satisfactorily appears that defendant herein is continuing to operate under the Overshiner patents, which the court has held to be infringements of complainant's device, and that defendant was and is well advised of the decree in the original case.

It seems clear to me that these facts, in view of the necessity for the avoidance of unnecessary litigation, warrant the court in overruling the demurrer; and it is so ordered.

LANE BROS. CO. v. WILCOX MFG. CO. et al.

(Circuit Court, S. D. New York. November 1, 1905.)

No. 8,665.

PATENTS—INVENTION—DOOR HANGERS.

The Lane patents, No. 422,305, for a wheel for door hangers, and No. 426,390, for a door hanger, are void for lack of patentable invention, and the latter also for anticipation.

In Equity. Suit for infringement of letters patent No. 422,305, for a wheel for door hangers, granted to William J. Lane February 25, 1890, and No. 426,390 for a door hanger, granted to the same patentee April 22, 1890. On final hearing.

A. Parker Smith, for complainant.

Herbert A. Heyn and Bond, Adams, Pickard & Jackson, for defendants.

HOLT, District Judge. I think that the complainant's patents for door hangers, No. 426,390, and for a wheel for door hangers, No. 422,305, are invalid for lack of patentable invention. The patent for door hangers was, in my opinion, anticipated by the patents to Doan, Prindle, Stevens, and Richards, and the patent for a wheel by the patents to Ewing, Ward, Martindale, McAleenan, and Righter. The design patent, in my opinion, is invalid, because the design attempted to be patented has no peculiar configuration or ornamentation which enhances its saleable value. It is nothing but an attempt to obtain a design patent for the shape of a mechanical structure.

My conclusion is that the bill should be dismissed, with costs.

THE ROSEDALE.

THE CYGNUS.

(District Court, S. D. New York. October 25, 1905.)

COLLISION—VESSEL AT END OF PIER—VIOLATION OF STATUTE.

A steamer using the end of a pier as a landing place in the North river, in violation of Laws N. Y. 1897, p. 314, c. 378, § 879, which provides that such use shall be unlawful, *held* liable thereunder for an injury by collision to another vessel entering an adjacent slip, and also in fault for the collision in backing against the other vessel as she was passing at a safe distance.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 102.]

In Admiralty. Suit and cross-libel for collision.

Butler, Notman & Mynderse, for the Iron Steamboat Company and the Cygnus.

James J. Macklin, for Anning J. Smith and the Rosedale.

ADAMS, District Judge. The first of these actions, that of The Iron Steamboat Company against the steamer Rosedale, was brought to recover the damages sustained by the steamer Cygnus, owned by the libelant, in a collision with the steamer Rosedale at the foot of 22d Street, North River, on the 29th day of August, 1904. The second action, that of Anning J. Smith against the steamer Cygnus, was brought by the cross libelant to recover the damages he sustained by reason of injuries to his steamer, the Rosedale, in the same collision.

Both vessels were side wheel steamers about 220 feet long and 64 feet beam. They were making regular trips between New York and Coney Island. On the afternoon of the day in question, they came to New York at about the same hour, first stopping in the vicinity of the Battery and then proceeding up the river to 22d Street, where the Rosedale had a regular landing place at the pier at the end of the street and the Cygnus on the southerly side thereof. After leaving the Battery, they went up the river in company, the Cygnus about 200 feet further out in the river. They kept almost together, the Rosedale slightly ahead, until off 15th Street, where the Cygnus slowed down and she was stopped off 18th or 20th Street, and the Rosedale went on to her pier and made fast there, extending about 150 feet below the southerly side. The tide was ebb, running about 3 miles. The Cygnus turned into her destination off about 20th Street, expecting to clear the stern of the Rosedale about 15 feet, but as she was passing the latter, a collision occurred between the stern of the Rosedale and the port side of the Cygnus, about 70 feet from the bow, which caused damage to both vessels. This was between 5 and 6 o'clock.

The Cygnus alleges that as she was carefully proceeding to her destination and was passing the Rosedale at a safe distance the latter backed, without any warning, although it could easily have been seen that the Cygnus was entering her slip; that the Rosedale did not maintain a lookout astern; was in fault in impeding the entrance of the Cygnus to her

slip, and in mooring at the end of the pier in violation of the statute of New York.

The Rosedale alleges that as she was making her landing at the end of the pier, the Cygnus attempted to enter on the side and brought about the collision by not keeping a proper lookout, in proceeding at a too rapid rate of speed, in not giving any signal of her intention to enter, and in not waiting until the Rosedale had left her berth.

The question of whether or not the Rosedale backed has been strenuously contested, those on her testifying that she had made fast to the wharf and still remained so when the contact took place, while those on the Cygnus say that she backed 10 or 15 feet, and an otherwise safe passage on the part of the Cygnus was prevented by such movement. The preponderance of proof seems to be decidedly with the Cygnus. A number of witnesses on her say explicitly that they saw the Rosedale's walking beam going, her paddle wheels reversing and that she actually backed for a short distance before the vessels came together. This is confirmed by two disinterested witnesses who were standing on the pier and there can be no reasonable doubt that the contention of the Cygnus in this respect should be sustained. I do not think any fault can be found with the Cygnus in her manner of approach. She provided for an ample margin of safety if the Rosedale had remained at her landing place until the Cygnus had reached hers and there evidently would have been no collision if the Rosedale had remained quietly at the pier. The absence of a signal on her part seems to be of no importance.

The Rosedale was also in fault for using the end of the pier as a landing place, even though she only expected to remain there a few minutes.

The New York statute provides (chapter 378, p. 314, Laws 1897, § 879) as follows:

"It shall not be lawful for any vessel, canal boat, barge, lighter or tug to obstruct the waters of the harbor by lying at the exterior end of the wharves in the waters of the North and East river except at their own risk of injury from vessels entering or leaving any adjacent dock or pier; and any vessel, canal boat, barge, lighter or tug so lying shall not be entitled to claim or demand damages for any injury caused by any vessel entering or leaving any adjacent pier."

This case seems to fall directly within the terms of the statute. As in The Chauncey M. Depew (C. C. A.) 139 Fed. 236, the Rosedale occupied water which was required for the use of a vessel properly bound to a berth on the side of the same pier and I see no escape for the Rosedale from liability under the express provisions of the statute.

There will be a decree for The Iron Steamboat Company, with an order of reference, and the libel against the Cygnus will be dismissed.

INTERSTATE COMMERCE COMMISSION v. CHICAGO GREAT WESTERN RY. CO. et al. (two cases).

(Circuit Court, N. D. Illinois, E. D. November 20, 1905.)

Nos. 27,723, 27,829.

1. CARRIERS—ACT TO REGULATE COMMERCE—ITS OBJECTS.
The principal objects of the interstate commerce act were to secure just and reasonable rates; to prohibit unjust discriminations in the rendition of like service under substantially similar circumstances and conditions; to prevent undue or unreasonable preference to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freight.

2. SAME—COMPETITION.
The act to regulate commerce was not designed to prevent competition between different roads, but rather to encourage it.

3. SAME—SECTION 1 OF ACT TO REGULATE COMMERCE.
Section 1 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) requires that all charges made for the transportation of property shall be reasonable; and the evidence shows that the rates in controversy in these cases are reasonable.

4. SAME—FACTORS TO BE CONSIDERED IN FIXING REASONABLE RATES—VALUE OF SERVICE TO THE SHIPPER.
There are a great many factors and circumstances to be considered in fixing rates, and among other things is the value of the service to the shipper, which includes the value of the goods and the profits which the shipper can make by having them transported from one point to another. The evidence and authorities in the cases show that this method of rate making is not only ideal, but practical, when not interfered with by competition; and it is based on an idea similar to taxation. Case cited: I. C. C. v. B. & O. R. Co. (C. C.) 43 Fed. 37, 53.

5. SAME—COST OF SERVICE TO THE CARRIER.
The evidence shows that the cost of service to the carrier would be an ideal theory for rate making; but it is not practical. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is, however, worthy of consideration and is a very important factor. Cases cited: I. C. C. v. B. & O. R. Co. (C. C.) 43 Fed. 37, 53; Ransome v. E. C. Ry. Co. (1857) 1 C. B. 437, 26 L. J. C. P. 91; Judson on Interstate Commerce, §§ 148, 149; W. U. Tel. Co. v. Call Pub. Co., 21 Sup. Ct. 561, 181 U. S. 92, 45 L. Ed. 765; I. C. C. v. D. G. H. & M. R. Co., 17 Sup. Ct. 986, 167 U. S. 633, 42 L. Ed. 306.

6. SAME—WEIGHT, BULK, AND CONVENIENCE OF TRANSPORTATION.
The weight and bulk of the article to be transported, and the convenience or inconvenience to the carrier in transporting it, may be considered in rate making.

7. SAME—AMOUNT OF THE PRODUCT OR COMMODITY OFFERED FOR TRANSPORTATION.
The fact that there is a large amount of a product or commodity in the hands of a few persons under almost one control, which is offered for shipment at stated intervals, in fixed and continuous quantities, may be considered in rate making, thus recognizing the principle of selling cheaper at wholesale than at retail. Case cited: I. C. C. v. B. & O. R. Co., 12 Sup. Ct. 844, 145 U. S. 263–272, 36 L. Ed. 699.

8. SAME—GENERAL PUBLIC GOOD.
The general public good may be considered in rate making. This includes the welfare and advantage of the great body of the citizens of the United States, who constitute the producers, shippers, and consumers; and it also includes the welfare and advantage of the various localities and of

the common carriers. Case cited: I. C. C. v. B. & O. R. Co., 12 Sup. Ct. 844, 145 U. S. 263, 36 L. Ed. 699. See, also, T. & P. Ry. v. I. C. C., 16 Sup. Ct. 666, 162 U. S. 218, 219, 40 L. Ed. 940.

9. SAME—COMPETITION.

Competition may be considered in rate making. The authorities, as well as the experts in these cases, recognize that competition may be a controlling factor. Cases cited: Pickering, Phipps & Co. v. L. & N. W. Ry. Co., 2 Q. B. D. (1892) 229; I. C. C. v. B. & O. R. Co., 12 Sup. Ct. 844, 145 U. S. 263, 36 L. Ed. 699; C., N. O. & T. P. Ry. v. I. C. C., 16 Sup. Ct. 700, 162 U. S. 184, 40 L. Ed. 935; I. C. C. v. Ala. Midland Ry. Co., 18 Sup. Ct. 45, 168 U. S. 164, 42 L. Ed. 414; L. & N. R. Co. v. Behlmer, 20 Sup. Ct. 209, 175 U.S. 648, 44 L. Ed. 309; E. T., V. & G. Ry. v. I. C. C., 21 Sup. Ct. 516, 181 U. S. 1, 45 L. Ed. 719; T. & P. Ry. Co. v. I. C. C., 16 Sup. Ct. 666, 162 U. S. 197, 40 L. Ed. 940; I. C. C. v. L. & N. R. Co., 23 Sup. Ct. 687, 190 U. S. 273, 47 L. Ed. 1047.

10. SAME—NO ONE OF THE ABOVE FACTORS IS ALONE CONTROLLING.

None of the above factors alone are considered as necessarily controlling. Neither are all of them controlling as a matter of law. It is a question of fact, to be decided by the proper tribunal in each case, as to what is controlling. In every case the Supreme Court has held that competition may be controlling. In only one case has it, as a matter of fact, been held not to be a defense.

11. SAME—SECTION 3 OF ACT TO REGULATE COMMERCE—ITS OBJECT.

The object of section 3 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]) was to prevent undue preference or advantage to any person, company, firm, corporation, or locality, or any particular description of traffic.

12. SAME—UNDUE OR UNREASONABLE PREFERENCE OR ADVANTAGE.

The statute does not define the phrase "undue or unreasonable preference or advantage." Whether a preference or advantage is "undue" or "unreasonable" must be determined by the circumstances of each case.

13. SAME—INEQUALITY OF CHARGE.

Mere inequality of charge does not constitute undue or unreasonable preference or advantage. Railroads are only bound to give the same terms to all persons alike, under the same conditions and circumstances; and any fact which produces an inequality of conditions and a change of circumstances justifies an inequality of charge. Case cited: I. C. C. v. B. & O. R. Co., 12 Sup. Ct. 844, 145 U. S. 272, 36 L. Ed. 699.

14. SAME.

It is proper under the third section to give a preference or advantage or to discriminate between persons, localities, or traffics, provided such preference, advantage, or discrimination be not undue or unreasonable. Cases cited: I. C. C. v. Ala. Midland Ry., 18 Sup. Ct. 45, 168 U. S. 144, 42 L. Ed. 414; C., N. O. & T. P. Ry. v. I. C. C., 16 Sup. Ct. 700, 162 U. S. 184, 40 L. Ed. 935.

15. SAME.

In passing upon the question of undue or unreasonable preference or advantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise. Case cited: I. C. C. v. B. & O. R. Co. (C. C.) 43 Fed. 37, affirmed 12 Sup. Ct. 844, 145 U. S. 263, 36 L. Ed. 699.

16. SAME—COMPETITION.

In considering the question of undue or unreasonable preference or advantage prohibited by the third section, competition may be considered. Cases cited: E. T., V. & G. Ry. Co. v. I. C. C., 21 Sup. Ct. 516, 181 U. S. 1, 45 L. Ed. 719; I. C. C. v. Ala. Midland Ry. Co., 18 Sup. Ct. 45, 168 U. S. 144, 42 L. Ed. 414; Judson on Interstate Commerce Law, §§ 175–183; I. C. C. v. Clyde S. S. Co., et al., 93 Fed. 83, 35 C. C. A. 217.

17. SAME—ORIGINATING COMPETITION.

Even if one of the defendants (the C. G. W. Ry. Co.) had originated the competition in these cases it would be immaterial. Why a defendant cannot begin the competition is not apparent. Some one must begin, and why not a defendant, if it is losing the business. A contrary construction would discourage competition which the act to regulate commerce, as well as the anti-trust act, was intended to encourage. Cases cited: E. T., V. & G. Ry. Co. v. I. C. C., 21 Sup. Ct. 516, 181 U. S. 1, 45 L. Ed. 719; I. C. C. v. Southern Ry. Co. (C. C.) 105 Fed. 703.

18. SAME—DISTINCTION BETWEEN ORIGINATING COMPETITION AND REDUCING RATES.

The C. G. W. Ry. Co., by its contract of August 8, 1902, reduced the rates on live stock products; but it did not originate the competition in those products. That competition was going on beween these different defendants and other railroad companies, with which said contract was made. Each company was striving to get what business it could; and the C. G. W. Ry. Co. reduced the rates in order to get its share of the traffic for which all of defendants had been and were then actively competing.

19. SAME—REDUCTION OF RATES—WHEN NOT VOLUNTARY.

The reduction of rates made by the C. G. W. Ry. was forced upon it, as it could not otherwise have continued to successfully compete for the business. Said reduction therefore was not "voluntary" on its part, within the meaning of the law. Case cited: E. T., V. & G. Ry. Co. v. I. C. C., 21 Sup. Ct. 516, 181 U. S. 1, 45 L. Ed. 719.

20. SAME—DISTINCTION BETWEEN "REAL" AND "POSSIBLE" COMPETITION.

The fact that defendants might, if they choose to do so, bring about a severe competition in live stock, as in its products, is immaterial. It is sufficient that real and substantial competition is not as severe in live stock, as in its products; and it is useless to inquire whether it might be possible to make competition as severe in the one case, as in the other. Case cited: I. C. C. v. L. & N. R. Co., 23 Sup. Ct. 687, 190 U. S. 273, 47 L. Ed. 1047.

21. SAME—PARTICULAR DESCRIPTION OF TRAFFIC.

The construction of the phrase "undue or unreasonable preference or advantage," when applied to "any particular description of traffic," must be the same as when applied to "any particular person, company, firm, corporation, or locality." All of said terms are contained in a single sentence of the third section, and the same construction must be given to all of the sentence that is given to a part of it.

22. SAME—SECTION 3 OF "ELKINS ACT," APPROVED FEB. 19, 1903.

Section 3 of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 848 [U. S. Comp. St. Supp. 1905, p. 600]) provides a remedy in court, without going before the Interstate Commerce Commission, for any discriminations forbidden by law, including the discriminations or preferences prohibited by sections 1 and 3 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379, 380 [U. S. Comp. St. 1901, pp. 3154, 3155]).

(Syllabus by the Court.)

In Equity.

Case No. 27,723 was brought by the Interstate Commerce Commission against certain named defendants under sections 1 and 3 of the interstate commerce act of 1887, on the 29th day of April, 1905. In that case a petition was filed before the commission on March 31, 1902, and a hearing was commenced on January 22, 1903, wherein the testimony of about 20 witnesses was taken. As the result of that hearing, an order was entered by the commission on the 7th day of January, 1905, that, in accordance with a report and opinion of the commission in said matter, the relation of rates then maintained and enforced by said defendants in that certain territory described in the petition, whereby their rates for transportation were higher on live cattle and live hogs than upon dressed meats or prepared products of cattle and hogs, on the shipments thereof to Chicago, in the state of Illinois, from points on the

Missouri river, Sioux City, in the state of Iowa, to Kansas City, in the state of Missouri, inclusive, and from South St Paul, in the state of Minnesota, or from points in the territory between the Missouri river or South St. Paul and Chicago, constituted a wrongful prejudice and discrimination in violation of the provisions of the act to regulate commerce; and that said defendants, and each of them, were notified and required to cease and desist on or before the 15th day of February, 1905, from maintaining or enforcing the said unlawful relation of rates, and from further continuing said unlawful prejudice and discrimination. Proper notice was served upon the defendants, and they refused to obey said order. Thereafter this proceeding was begun in this court.

On the 17th day of July, 1905, the Interstate Commerce Commission began suit No. 27,829, against said defendants, under section 3 of an act to further regulate commerce with foreign nations and among the states, which took effect February 19, 1903, and known as the "Elkins Act." Act Feb. 19, 1903, c. 708, 32 Stat. 848 [U. S. Comp. St. Supp. 1905, p. 600]. Answers were filed by the defendants therein, in each case, and issue joined on or before the 15th day of September, 1905, at which time the above named interveners filed their petitions for intervention, and issue was joined upon them. Pleas of former suit pending were filed and overruled. An order was then entered in this court combining the two causes.

The prayer of the petitions in these suits is substantially the same; the object in the first suit being to enforce the order of the commission, and in the second suit to require a discontinuance of the discrimination alleged in said petition. The substance of the allegations of the two petitions is: That the defendants were common carriers from the Missouri river and St. Paul to Chicago; that before August 8, 1902, the published rates of the defendants as to fresh meats and packing-house products from the Missouri river and St. Paul to Chicago were the same as were the rates on live cattle and hogs from the same points to Chicago. That upon the mentioned date, the defendant the Chicago Great Western Railway Company made a contract with certain owners of packing houses in Kansas City, St. Joe, and other Missouri river points, in consideration of receiving a certain percentage of their business for seven years. That for that period the said railway company would transport from the Missouri river points and St. Paul to Chicago fresh meats and packing-house products at the following rates:

Statement showing rates on cattle, hogs, packing-house products and fresh meats, car loads, from Missouri river and other points to Chicago, Ill. (Rates in cents per hundred pounds.

To Chicago, Ill., From	Cattle.	Hogs.	Packing-House Products.	Fresh Meats.
Kansas City, Mo.				
St. Joseph, Mo.	23.5	23.5	20	20
Atchison, Kan.	b 20	b 20		
Leavenworth, Kan.	c 18.5	c 18.5	a 18.5	a 18.5
Council Bluffs, Iowa.	23.5	23.5	20	20
Omaha, Neb.			a 18.5	a 18.5
South Omaha, Neb.				
Nebraska City, Neb.				
Sioux City, Iowa.	25	23.5	20	20
			a 18.5	a 18.5
St. Paul, Minn., or	25	27	15.7	17
South St. Paul, Minn.	—	b 17.5	a 14.6	a 15.7
Ottumwa, Iowa.	22	21	16	
Des Moines, Iowa.	22	23.5	18.5	
Marshalltown, Iowa.	22	21	16	
Cedar Rapids, Iowa.	21	18.5	13.5	

a Destined to points east of Illinois-Indiana state line.
b Applies on shipments originating beyond.
c When originating beyond and destined beyond the Illinois-Indiana state line.

And that at that time, and since, the local rates on live cattle and hogs from said points to Chicago were as above set forth. And they further charge that such condition of rates had existed from that time until the filing of these pe-

titions; that said rates were unreasonable under section 1 of the interstate commerce act; and the result of such condition of rates was that under section 3 of the interstate commerce act and of the Elkins act the defendants were committing an unlawful discrimination against said live cattle and live hogs, the shippers thereof, and the locality of Chicago, and thereby giving an undue and unreasonable preference or advantage to the traffic of fresh meats and packing-house products over said live cattle and hogs.

The Chicago Great Western Railway Company generally denied the violations of the law, and set up that the rates were reasonable and gave no undue advantage; that they were caused by competition and justified by the cost of service; and that the order of the commission was illegal. The other defendants denied said charges in their answers and claimed, among other things, (1) that the said rates for live cattle and hogs were unreasonably low; (2) that there was not undue or unjust prejudice or advantage under section 3, because there was no relation or similarity between the traffic in fresh meats and packing-house products on the one hand and live cattle and hogs on the other, nor was there undue preference of any kind; (3) that when the cost of service was considered it was reasonable to carry the dressed meats and packing-house products cheaper than the live stock; (4) that packing-house products and fresh meats did not compete in any market with the live stock; (5) that when the commercial necessity of the situation was considered there was no undue prejudice against live stock in the rates; (6) that while the value of the service to the producer of the fresh meats and packing-house products was greater than that to the shipper of live stock, yet the risk of its carriage was very much less; (7) that the rate given to the producer of the packing-house products and fresh meats was caused by necessary competition; (8) that the complainant before the commission had no interest in the business and no right to complain; (9) that the contract made by the Chicago Great Western Railway Company with the packers prevents the raising of the price of the products of the packers, and that the railroads could not be forced to lower live stock rates. The interveners filed their petitions objecting to the prayer of the original petitions, and setting out facts tending to show injury to them.

Upon these issues testimony was taken in open court on most of the days from September 15, 1905, to October 14, 1905, and over 40 witnesses were examined, and all but 4 were witnesses who had not been before the commission. The testimony taken before the commission was admitted in evidence, and portions of it read to the court, and all of it considered by the court. The commission came to certain conclusions as to the facts that are fully set forth in their opinion in the case found in 10 Interst. Com. Com'n R. 428, which findings of fact the court assumed in the beginning of this hearing and in his consideration of the case to be the real facts in the case, as required by the statute. The court also considers the conclusions of the commission to be the proper conclusions unless overcome by other testimony produced upon the hearing, although perhaps not required to do so.

The testimony taken before the court was in part to the following effect:

(1) Upon the question as to whether the rates upon live cattle and hogs from Missouri river points and St. Paul to Chicago were reasonable or unreasonable, witnesses for the defendants, George H. Crosby, freight traffic manager of the Chicago, Burlington & Quincy Railroad Company, William A. Gardner, general manager of the Chicago & Northwestern Railway Company, William E. Keepers, general freight agent of the Northern and Western Lines of Illinois Central Railroad, Fletcher C. Rice, general inspector of transportation for the Chicago, Burlington & Quincy Railroad, J. H. Hiland, third vice president of the Chicago, Milwaukee & St. Paul Railway Company, R. M. Calkins, assistant general freight agent of the Chicago, Milwaukee & St. Paul Railway Company, J. N. Tittemore, freight traffic manager of the Minneapolis & St. Louis Railroad and the Iowa Central Railroad, A. B. Stickney, president of the Chicago Great Western Railway Company, George E. Simpson, superintendent of transportation of the Chicago, Milwaukee & St. Paul Railway, Harry Gower, assistant freight traffic manager of the Chicago, Rock Island

& Pacific Railway Company, John M. Daley, Illinois Central Railroad car accountant, and H. R. McCullough, third vice president of the Chicago & Northwestern Railway Company, testified that such rates were not only reasonable, but were too low. Edward P. Ripley, president of the Atchison, Topeka & Santa Fé Railway Company, and James Peabody, statistician for said company, also testified that such rates were too low; and T. W. Tomlinson and five or six shippers testified, on the part of the commission, that such rates were unreasonably high.

(2) Upon the question of the comparative cost of the service to the carriers in carrying dressed meat and packing-house products and live cattle and hogs, a great deal of testimony was taken on both sides. This subject was gone into by experts far more fully than had ever been done before. Many of the above witnesses on the part of the defendants, made complete and accurate statements of the different items that they thought ought to be considered in determining the cost of service of carriage. The result of all those statements is that it cost far more to carry live stock than it cost to carry fresh meat and packing-house products. They considered, upon the part of fresh meat and packing-house products, the expense of the cost of the refrigerating car, figured at one cent a mile, the terminal charge, in some cases two or three dollars a car, and the extra expense in hauling a heavier load, etc., and, upon the part of the live stock, the extra cost of service incurred by carrying men to take care of the cattle on the way to the market, and return transportation for said men, the extra expense of providing stock yards at every shipping place, costing from $800 to $1,200 and $1,400, amount of damages paid by the railroad companies because of delays in reaching the market and because of the destruction of the property in case of wrecks, etc. All the above-named witnesses for railroads substantially agreed upon these different items. On the part of the commission, Edward P. Ripley and his statistician, James Peabody, made comparative statements of the net results from the carriage of these different commodities, upon basis of average cost of all business, per gross ton mile, which is concurred in by the witness Tomlinson, who made further statements, which figures show that it is more expensive to the company to carry fresh meats and packing-house products than live stock; but they did not consider all the burdens peculiar to live stock. All the witnesses agreed in the showing that the cost of service in proportion to the value of both kinds of commodities was greater in carrying live stock.

(3) Upon the value of the service to the shipper the testimony of all the witnesses substantially agreed that the value of fresh meats was nearly twice as much as that of live stock, and that of packing-house products a large percentage more than that of live stock. It was also substantially agreed by the witnesses that the risk of carriage, notwithstanding the double value of fresh meats, was not as great in carrying fresh meats and packing-house products as in carrying live stock. This is true on account of the damages for delay to live stock, and additional damages in cases of wrecks. There is not much danger of wrecks in either class of business on account of the good condition of the roadbed and equipment of the railroads.

(4) Upon the subject of a proper basis for making rates it was substantially agreed by the witnesses that the following factors were to be considered in fixing a rate: (a) That it had been the practice for years, and was proper, for railroads to exact all the traffic would bear. By this, meaning not to arbitrarily demand certain rates, but what in the wisdom of the railroad officials they thought they could get from the traffic, taking into consideration the future business of the railway, the prosperity of its patrons, the length of the haul, the cheapness and kind of commodity, the profit the shipper could make out of the shipment, and other matters of that kind. This is the "value of service" theory. Experts and the interstate commerce commissioners have agreed that this is a very important factor, and ought to be the most important, unless interfered with by competition or some other factors. It is like the theory of taxation. This includes the consideration of the value of the goods shipped and the profit shippers can make by the carriage. (b) The cost of service of the carriage. This has not been an important factor

in the opinion of the railroad companies in the past, nor their practice; but in this case all seemed to agree that the cost of service ought to be an important factor in determining the rate. Mr. Stickney was of the opinion that the cost of service arrived at intelligently by a body of experts, would be the proper basis upon which to determine fairly to everybody the rate to be adopted, and this could be mathematically figured out all over the country. The other witnesses stated that this cost could not be obtained at all accurately, only approximately. (c) The weight, bulk and convenience in handling commodities. (d) Commercial necessity. It was agreed by all that rates must often be made lower than they would mathematically figure out from cost of service or value to the shipper, because the shipper could not move the commodity unless he got a lower rate than the railroads ought to give him when considering the cost of service. (e) They all agreed that competition was the greatest factor in determining a rate. (f) The testimony was all to the effect that, as to commodity traffic and large shipments subject to competition, no skill or science was required in making rates; that rates were forced on carriers by their competitors, regardless of what the rates ought to be.

(5) The testimony showed that the Atchison, Topeka & Santa Fé Railway Company, the Chicago & Northwestern Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Burlington & Quincy Railroad Company, of the defendants, extend west from the Missouri river; that the other railroad companies extend to the Missouri river points; that cattle and hogs originating west of the Missouri river, and carried to said river by the first named railroads, come to Chicago and Eastern points either upon the balance of the through rates or upon what is called a "proportional rate," and that such proportional rate from Missouri river points and St. Paul to Chicago was equal to or less than the rate upon fresh meat and packing-house products; that the local rate from Missouri river points on live stock to Chicago was according to above schedule; that the rate extended for 100 to 150 miles this side of the Missouri river and St. Paul to all points in that zone; that such rates reduced on going to the east until they got to the Mississippi river; and that the average Iowa rate to Chicago was 21 cents. The evidence also tended to show that quite a large number of cattle were driven in from points east of the Missouri river and east of St. Paul, to the Missouri river and St. Paul.

(6) The undisputed evidence showed that the published rate on fresh meat and packing-house products and live stock from Missouri river points and St. Paul to Chicago were the same up to August, 1902, and that before the railroad injunction referred to in the evidence of March, 1902, the actual rate on live stock was 23½ cents from Missouri river points, and on fresh meat and packing-house products rebates were given, making such rates below 18 cents; that when the said injunction was issued the railroad companies for a time followed the published rate on cattle of 23½ cents from Missouri river points and 25 cents from St. Paul; that the packing houses at Missouri river points and St. Paul are few in number; that they shipped large quantities of their products at regular intervals; that on account of such large quantities owned by a few shippers, they demanded lower rates than the published rate and negotiated with the defendant railroads. The result of the negotiations was that Mr. Stickney, president of the Chicago Great Western Railway Company, in August, 1902, entered into a contract with them for 7 years, providing that said railway for that period have a certain proportion of all said packers' business monthly, and it should carry the same for 20 cents per hundred pounds from the Missouri river points, Kansas City and St. Joseph to Chicago, and 18½ cents from such points to the Indiana and Illinois line, on freight going east of Chicago; that, as stated by Mr. Stickney, the object of his making said contract was to get more of the business, to get what he called his proportion of the business. It appeared that Mr. Stickney's road was the longest route from Missouri river points to Chicago, and that in order to obtain the traffic, or any substantial portion of it, it was necessary for him to make some special arrangement with the packers. Then it became neces-

sary for the other defendant railroads to ship at the same rate in order to get business. It appears from the testimony of all the railroad witnesses on both sides that these rates, according to their judgment, were caused by competition in rates.

(7) The effect of the present rates upon the shippers of live stock from intermediate points in Minnesota, Iowa, and Missouri, to Chicago, and to the Missouri river points and St. Paul was considered. Evidence was taken upon this subject. Schedules and tables were put in evidence upon this as well as almost every other rate subject. The substance of that evidence tends to show that a majority of the cattle within 150 miles east from the Missouri river and St. Paul went to Chicago rather than to the Missouri river and southeast from St. Paul upon the present rates; in other words, that the Chicago market is not injured by the present rates.

(8) The testimony showed that the Chicago market was the best market, that it controlled the price of all other markets between the Missouri river points and St. Paul, and that the Chicago market fluctuated from 5 cents to 50 or 75 cents in a day.

(9) The testimony showed that the Santa Fé Railroad Company had cut its live stock rate to 12 cents for a short period after August, 1902, when the above rates in question went into effect, and that such lowering of the rates of that company did not increase its business to Chicago.

The above is comparatively a very brief statement of the pleadings, the issues arising thereon, and of over 1,000 pages of testimony taken before the commission, and about 3,000 pages of testimony taken before the court in addition thereto, together with a great many tables, statements, and reports prepared by experts.

L. A. Shaver, C. B. Morrison, U. S. Dist. Atty., and S. H. Cowan, for complainant.

Ed. Baxter, for defendants B., C. R. & N. Ry. Co., C., St. P., M. & O. Ry. Co., Chicago & Alton Ry. Co., C. & N. W. Ry. Co., C., B. & Q. Ry. Co., C., M. & St. P. Ry. Co., C., R. I. & P. Ry. Co., Hannibal & St. J. Ry. Co., Illinois Cent. R. R. Co., Iowa Central Ry. Co., K. C., St. J. & C. B. Ry. Co., M. & St. L. Ry. Co., and Omaha, K. C. & E. Ry. Co.

C. A. Severance, for defendant Chicago Great Western Ry. Co., and intervener St. Paul Union Stock Yards Co.

S. A. Lynde, for defendant C. & N. W. Ry. Co.

Chester M. Dawes, for defendant C., B. & Q. Ry. Co.

James C. Jeffery, for defendant Missouri Pac. Ry. Co.

Charles A. Clark, for intervener T. M. Sinclair & Co., Limited.

Milchrist & Scott, for intervener Sioux City Stock Yards Co.

Ira B. Mills, for intervener Minnesota Railroad and Warehouse Commissioners.

F. T. Ransom, for intervener Omaha Packing Co.

BETHEA, District Judge, after making the above statement, announced the following opinion:

The court has considered all of the evidence in the case, and finds the following facts:

First. That the live stock rates are reasonable in themselves. All live stock from points west, southwest, and northwest of the Missouri river and St. Paul are shipped on a proportional rate from the Missouri river or St. Paul to Chicago. These rates are equal to or less than the rates on dressed meats and packing-house products between

the same points. There can be, and is, no complaint as to such traffic. The local rates from the Missouri river and St. Paul, and from 150 miles east, to Chicago, are as shown in above schedule. These rates gradually decrease until the Mississippi river is reached, and the average Iowa rate is 21 cents. The great weight of evidence indicates that these rates are at least reasonably low.

Second. That the cost of carrying live stock is greater than that of carrying dressed meats and packing-house products.

Third. That the value of the service of carriage is greater to the packers, because of the higher price of a car of dressed meats or packing-house products. Dressed meats and packing-house products are in value worth nearly twice as much as live stock. This factor is important, in ordinary cases, however, in part, because of the greater risk of carriage of high-priced commodities. In these cases as to the particular commodities in question, the evidence shows that the defendant railroad companies pay out a much larger amount in damages for losses arising from the carriage of live stock than they do for losses arising from the carriage of dressed meats and packing-house products, in proportion to the value of the products carried, and more in damages per car regardless of the value. This makes the risk of carriage greater for live stock. The result is that the value of the service is not such an important factor in this kind of a case as it is considered to be in ordinary cases.

Fourth. That the rates in question given to the packers at Missouri river and St. Paul were the result of competition. The product of the packers at these points was large in quantity, was certain and continuous in amount, was in the hands of a few people, and for years before the federal injunction of March, 1902, had been competed for so strenuously by the railroads reaching and passing through these points, as to cause the cutting of rates and the giving of secret rebates in large amounts. Four of the defendant companies, the Chicago, Milwaukee & St. Paul Railroad Company, the Chicago & Northwestern Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Burlington & Quincy Railroad Company, passed through these points into the territory west of the Missouri river and St. Paul. Four other of the defendant companies, the Chicago Great Western Railway Company, the Chicago & Alton Railway Company, the Illinois Central Railroad Company, and the Wabash Railroad Company reached the Missouri river points and St. Paul, competing for this business. Other railroads, running south to the Gulf of Mexico, also competed more or less for said business, including the Atchison, Topeka & Santa Fé Railway. After said injunction was granted the defendant railroads (according to evidence herein) obeyed it, and until August of that year the said traffic was carried under competition between the defendants at the rate of 23½ cents from Missouri river points to Chicago, and 25 cents from St.Paul to Chicago, etc., as set out above. As a result of such competition, the Chicago Great Western Railway Company became dissatisfied with the proportion of the business it received, and in order to get what it claimed as its share cut the rate to 20 cents to Chicago and 18½ cents to the Indiana line for Eastern business, and published

the same. This it did under a contract with the packers running for 7 years. The Chicago Great Western Railway Company was the longest route from Chicago to the Missouri river points. The other railroad defendants, to meet the rate made by the Chicago Great Western Railway Company, as a result of competition, met and published the same rate. These rates were not made voluntarily, but from necessity, same rate. These rates were not made voluntary, but from necessity, arising from competition; the necessity being that of carrying the goods at the lower rate, or losing the business to which the officers of said companies thought they were entitled. This cutting of the rate by the Chicago Great Western Railway Company was not the origin of competition. That had existed legally since March, 1902, between defendant railroads, and also between them and the Atchison, Topeka & Santa Fé Railway Company. There was not competition enough at said points to lower the rate as to live stock. There was little and different competition on rates as to live stock at points between the Missouri river and St. Paul and Chicago. The only places where the opportunities for competition existed as to live stock the same as to packing-house products were immediately at Missouri river points and St. Paul, and there only as to live stock driven in on foot from the surrounding country. There is comparatively a small amount of this stock. If it was exactly the same kind of a commodity as that furnished by the packers there would be an opportunity for competition in this at these points alone.

Fifth. That the competition in question did not result from agreement of the defendants, but was actual, genuine competition.

Sixth. That the present rates on live stock have not materially affected any of the markets, prices, or shipments; that they are reasonably fair to Chicago and to the shippers; that the shipments of live stock from points between Chicago and the Missouri river and St. Paul are as great in proportion to the volume of business as before the present rates were made; that the majority of the live stock comes to Chicago from points as near as 150 miles this side of the Missouri river and St. Paul, and that the lower rate given to the packers does not seem to directly influence or injure the shippers of live stock.

Seventh. That the rates for carrying packers' products and dressed meats were remunerative. They did not pay any portion of the fixed charges and interest of the railroad companies, nor its full share of the operating expenses, but they did pay more than its cost of movement and leave something to apply upon operating expenses.

Eight. That the welfare of the public, including the shippers, consumers, and all localities and markets, does not seem to be materially affected by the present rates.

Ninth. That the usual custom is for railroads to charge a higher rate for the finished product than for the raw material, and this, as a rule, has been applied to live stock and its finished products. This is not universal, however. There are many commodities where the raw material is charged more for carriage than its finished product, as in the case of the raw material of cotton and the compressed cotton, straw, unbaled and baled, pig iron and its products, and many other

commodities. It also appears that for 16 years out of 23, between Missouri river points and St. Paul and Chicago, the published rates on live stock were higher than on dressed meats and packing-house products. Many witnesses testified that the ideal rate for the finished product would be higher than the raw material. This, however, was based on the presumption that competition or commercial necessity did not interfere, and that the cost of service and value of the products would be greater in case of the finished products than in that of the raw material.

What is the law applicable to the above facts? These petitions were filed to enforce sections 1 and 3 of the interstate commerce act (Act Feb. 4, 1887, c. 104, §§ 1, 3, 24 Stat. 379, 380 [U. S. Comp. St. 1901, pp. 3154, 3155]) and section 3 of the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 848 [U. S. Comp. St. Supp. 1905, p. 600]). They are as follows:

"Section 1. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Elkins act:

"Sec. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction." etc.

The questions are: Do the facts in these cases show that the defendants have, under section 1 of the interstate commerce act, furnished reasonable rates? Have they, under section 3 thereof, given any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatever? Have they, under section 3 of the Elkins act, committed any discriminations forbidden by law? Or, in other words, did it make an undue preference in favor of the packers, or their products, at the Missouri river points and St. Paul, or unjustly discriminate against live stock, the shippers thereof, or against Chicago, for the defendants to lower the rates for the packers without making the same or a greater reduction for the shippers of live stock?

1. The evidence above shows that section 1 has not been violated. The rates were not unreasonable.

2. Section 3 of the Elkins act covers the same questions as do sections 1 and 3 of the original interstate commerce act. That section provides a remedy without going before the Interstate Commerce Com-

mission for the allowing of any discriminations forbidden by law. Those forbidden by law, so far as the questions involved in these cases are concerned, are the prohibitions in sections 1 and 3 of the interstate commerce act. Section 1 is disposed of. Section 3 will hereafter be discussed.

3. Does the evidence show a violation of section 3 of the interstate commerce act?

(A) The principal objects of the interstate commerce act, as shown by the many cases in the Supreme Court of the United States, were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like service under similar circumstances and conditions; to prevent undue or unreasonable preference to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freight. It was not designed to prevent competition between different roads, but rather to encourage competition. The railroad companies, under the decisions of the courts in England and the United States, are only bound under this act to give the same terms to all persons alike under the same conditions and circumstances, and any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. Interstate Commerce Commission v. Baltimore & Ohio Railroad Company, 145 U. S. 272, 12 Sup. Ct. 844, 36 L. Ed. 699. The object of section 3 was to prevent undue or unreasonable preference or advantage to any person, company, firm, corporation or locality, or any particular description of traffic. The statute does not define undue or unreasonable preference or advantage. That must be left to the circumstances of each case. It is proper, under this section, to give a preference or an advantage, or to discriminate between persons, localities or traffic; but not make them undue or unreasonable. Interstate Commerce Commission v. Alabama Midland Railway Company, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414; Cincinnati, New Orleans & Texas Pacific Railway Company v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935.

(B) What is meant, then, by "undue" or "unreasonable" preference or advantage? Judge Jackson in the case of Interstate Commerce Commission v. Baltimore & Ohio Railroad Company (C. C.) 43 Fed. 37, stated that:

"These words necessarily involve the idea or element of comparison of one service or traffic with another similarly situated and circumstanced, and require that, to be undue and unreasonable, the preference or prejudice must relate and have reference to competing parties, producing between them unfairness and an unjust inequality in the rates charged them, respectively, for contemporaneous service under substantially the same circumstances and conditions. In determining the question whether rates give an undue preference or impose an undue prejudice or disadvantage, consideration must be had to the relation which the persons or traffic affected bear to each other and to the carrier. When and so long as their relations are similar or 'substantially' so, the carrier is prohibited from dealing differently with them in the matter of charges for a like and contemporaneous service. * * * The English cases referred to above, and others that might be cited, establish the rule that, in passing upon the question of undue or unreasonable prefer-

ence or advantage, it is not only legitimate, but proper, to take into consideration besides the mere differences in charges, various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise."

This opinion was affirmed in 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699, and followed in other opinions of the Supreme Court.

(a) A careful examination of the opinions of that court (as well as the evidence taken in these cases) shows that there are a great many factors and circumstances to be considered in fixing a rate. Noyes, Am. R. R. Rates, pp. 61 et seq., 85-109. Among other things: (1) The value of the service to the shipper, including the value of the goods and the profit he could make out of them by shipment. This is considered an ideal method, when not interfered with by competition or other factors. It includes the theory so strenuously contended for by petitioners, the commission, and its attorneys, of making the finished product carry a higher rate than the raw material. This method is considered practical, and is based on an idea similar to taxation. Interstate Commerce Commission v. B. & O. Ry. Co. (C. C.) 43 Fed. 37, 53; Noyes, Am. R. R. Rates, 53. (2) The cost of service to the carrier would be an ideal theory, but is not practical. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is worthy of consideration, however. Interstate Commerce Commission v. B. & O. Ry. Co., supra; Ransome v. Eastern Railway Company (1857) 1 C. B. 437, 26 L. J. C. P. 91; Judson on Interstate Commerce, §§ 148, 149; Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765; Interstate Commerce Commission v. Detroit, Grand Haven & Milwaukee Railroad Co., 167 U. S. 633, 17 Sup. Ct. 986, 42 L. Ed. 306. (3) Weight, bulk, and convenience of transportation. (4) The amount of the product or the commodity in the hands of a few persons to ship or compete for, recognizing the principle of selling cheaper at wholesale than at retail. Interstate Commerce Commission v. B. &. O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. (5) General public good, including good to the shipper, the railroad company and the different localities. Interstate Commerce Commission v. B. & O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. (6) Competition, which the authorities, as well as the experts, in their testimony in these cases, recognize as a very important factor. Pickering Phipps v. London & Northwestern Railway Company, 2 Q. B. D. (1892) 229 (this case construes section 2 of the English act of 1854, which is almost like section 3 of our interstate commerce act); Interstate Commerce Commission v. B. & O. Ry Co., supra; Cincinnati, New Orleans & Texas Pacific Railway Company v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; Interstate Commerce Commission v. Alabama Midland Railway Company, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414; Louisville & Nashville Railroad Co. v. Behlmer, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. Ed. 309; East Tennessee, Virginia & Georgia Railway Co. v. Interstate Commerce Commission, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719;

Texas & Pacific Railway Co. v. Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940; Interstate Commerce Commission v. Louisville & Nashville Railroad Co., 190 U. S. 273, 23 Sup. Ct. 687, 47 L. Ed. 1047. The Supreme Court has also held that it may be presumed that Congress, in adopting the language of the English act, had in mind the constructions given to the words "undue preference" by the courts of England. Interstate Commerce Commission v. B. & O. Ry. Co., 145 U. S. 284, 12 Sup. Ct. 844, 36 L. Ed. 699.

None of the above factors alone are considered necessarily controlling by the authorities. Neither are they all controlling as a matter of law. It is a question of fact to be decided by the proper tribunal in each case as to what is controlling. In every case the Supreme Court has held that competition may be controlling. In only one case has it, as a matter of fact, been held not to be a defense.

(C) Counsel for the commission strenuously contend in able arguments that competition does not apply to section 3 of the interstate commerce act. The authorities, however, are to the contrary. The question was raised in substantially all of the above and others of the Supreme Court cases wherever section 4 was considered. In the following cases the Supreme Court has held that this principle of competition applies to section 3. East Tennessee, Virginia & Georgia Ry. Co. v. Interstate Commerce Commission, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719, and cases cited; Interstate Commerce Commission v. Alabama Midland Railway Company, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414, and cases cited from English court; Judson on Interstate Commerce, §§ 175 to 183; Interstate Commerce Commission v. Clyde S. S. Co., 93 Fed. R. 83, 35 C. C. A. 217.

(D) But it is further claimed by petitioners' counsel that competition should not have any effect in settling the questions involved in these cases, because one of the defendants originated the competition. The Interstate Commerce Commission in its opinion considered the facts as to competition and found they did not control the fixing of rates. Its opinion, and the concurring opinion of Commissioner Knapp, show, however, that the majority of the commission acting in this case (Fifer and Prouty) thought that it was not a case to which competition applied. Their position is that competition cannot apply to this case because one of the defendants (the Chicago Great Western Railway Company) originated the competition in rates. They argue that in all of the other cases decided by the Supreme Court the competition resulting in the cutting of rates was begun by some transportation company not a defendant in the hearing before the commission and the court, and that the identical question involved in this case has not been passed upon by the Supreme Court. They further argue that in those cases the question as to the construction of the words "particular description of traffic" was not raised or disposed of. In reply it may be said that the questions of undue preference against persons or localities were in the decided cases, and those questions are in these. Besides an undue preference cannot be given to a "particular description of traffic" without giving it to a "person" also.

The same principle must apply to the traffic. The same construction must be given to all of the sentence that is given to a part of it. One sentence in section 3 applies to persons, localities, and particular descriptions of traffic. The same words "undue preference" apply to all those conditions, and the words "undue preference" must mean the same when applied to one condition as to another. It may be that the cases passed upon by the Supreme Court were cases where the railroad company starting the lowering of the rate was not a defendant. But the courts have held that where the rate is first lowered by competitors subject to the interstate commerce law, the competition must be considered. East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719; Interstate Commerce Commission v. Southern Railway Company, (C. C.) 105 Fed. 703. If counsel's contention was correct, the right of the railroad companies to set up competition as a defense could be removed by making the company starting the reduction of rates a party defendant. This construction would also discourage competition which the act, as well as the anti-trust act, was intended to encourage. East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719; Interstate Commerce Commission v. Southern Railway Company (C. C.) 105 Fed. 703. Why a defendant cannot begin the competition is not apparent. Some one must begin. Why not a defendant, if he is losing the business?

The facts in these cases, however, show that competition was going on between these different defendants and other railroad companies that were not defendants (particularly the Atchison, Topeka & Santa Fé Railway Company) before the granting of the injunction in March, 1902, and that such competition was going on under the law after March, 1902, down to August 8, 1902, when the Chicago Great Western Railway Company's contract was made and the above rates fixed. Each company was striving to get what business it could. The Atchison, Topeka & Santa Fé Railway Company, which is not a defendant here, was a very formidable competitor and had perhaps the shortest route between the points in question. The other railroad companies, who had longer routes, as did the Chicago Great Western Railway Company, in order to get business, were forced to do something to accommodate and please their patrons. That was going on during all the time mentioned, and was competition. So it cannot be said that competition was originated by the Chicago Great Western Railway Company. That company first lowered the rates, and competition forced the other defendants, including the Atchison, Topeka & Santa Fé Railway Company, to lower their rates. It is the duty of the officers of a railroad company to get business in the interest of its stockholders. It appears, then, under the facts, that the reduction of rates was not voluntary, according to the definition and description thereof in the case of East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission, supra, and other cases, but was caused on the part of the Chicago Great Western Railway Company by the necessity

of competing for business which under the law they were required to do.

(E) The evidence shows that the rates were (1) remunerative, (2) reasonable, (3) that competition was not the result of agreement, and (4) that the carrier must reduce the rate or lose the business. There was, then, a meeting here of all the four conditions required by the law to make competition a factor in the fixing of these rates. This is set out by Mr. Judson in his work on Interstate Commerce (section 183) in a discussion of section 3 and effect of competition on it, in the following language:

"But under the decisions of the Supreme Court, the application of the competitive rule is subject to the following qualifications: First. The competition must compel the lower rate; that is, the competition must be controlling. The carrier must either reduce its rates or lose the business. Second. The competition must not be created by the carrier; that is, the preference must not be affected through an agreement or combination of the carrier with other carriers stifling competition. Third. The competitive rate must be at the preferred point remunerative to the carrier. Fourth. The rates must be reasonable in themselves."

That author shows in section 183 how materially competition has affected the enforcement of section 3 of the interstate commerce act. It must be remembered in reference to this question of competition that there are more railroads competing for the packers' products than for the live stock, as shown in the findings of fact, supra. There are four railroads west of the Missouri river carrying live stock east to Chicago, besides the Atchison, Topeka & Santa Fé Railway Company. There are eight of the defendant railroads competing for the packers' products at the Missouri river to carry it east to Chicago. There are other railroads running south from the Missouri river that may make more or less competition. As to the live stock originating east of the river, there is much less and an entirely different kind of competition from that arising at the Missouri river points and St. Paul for the packers' business. Upon the principles announced in the above authorities, if the different commodities were exactly the same, as if it were all live stock or all packers' product, the railroads would have a right to consider, east of the Missouri river and St. Paul, the stronger competition at Missouri river points and St. Paul in fixing their rate the same as they do under section 4, or the long and short haul clause. So we are limited to the live stock driven into the Missouri river points and St. Paul, in determining whether that commodity is there entitled to the same rate as packers' products shipped from those same points.

(F) The contention is that because the defendant companies have reduced the rate there as to packers' commodities they must reduce it at the same identical points as to live stock. But there is strong competition at all those points as to packers' products—competition in rates—and there is no such competition at the same points as to live stock. It is argued that because they compete as to one kind of a commodity they must compete as to other kinds of commodities at the same points. This is substantially the same question that was raised in the case of Interstate Commerce Commission v. Louisville

& Nashville Railroad Company (La Grange) 190 U. S. 273, 23 Sup. Ct. 687, 47 L. Ed. 1047. In that case the Interstate Commerce Commission held that because the defendant companies competed at one point they must compete at another; but the Supreme Court, speaking through Mr. Justice White, said:

"In the report of the commission a suggestion is found that La Grange should be entitled to the same rate as Atlanta, because, if the carriers concerned in this case in connection with other carriers reaching La Grange choose to do so, they might bring about competition by the way of a line between Macon and La Grange, which would be equivalent to the competitive conditions existing at Atlanta. We are unable, however, to follow the suggestion. To adopt it would amount to this: That the substantial dissimilarity of circumstances and conditions provided by the act to regulate commerce would depend, not as has been repeatedly held, upon a real and substantial competition at a particular point affecting rates, but upon the mere possibility of the arising of such competition. This would destroy the whole effect of the act and cause every case where competition was involved to depend, not upon the fact of its existence as affecting rates, but upon the possibility of its arising."

The same principle must apply here. The construction is of the same sentence. In that case it was a portion of the sentence that referred to localities or certain shippers, or a certain kind of a particular description of traffic, if you please. In these cases it refers to a "description of traffic" and "to shippers."

(G) In passing upon this question of competition it is the duty of the commissioners and the court to take into consideration, in determining whether the circumstances and conditions are the same, and whether prejudice is undue or not, the quantity of the traffic in each case. While this may not be controlling, still it ought to be considered. In the Party Rate Case, supra (145 U. S. 272, 12 Sup. Ct. 844, 36 L. Ed. 699), it was held controlling as to passengers. In the English cases above cited it has been held a very important factor as to freight. The facts show that there is a large amount of packers' product to be shipped at stated intervals, fixed and continuous quantities, in the hands of a few people, under almost one control. The live stock is not in such hands, and cannot and does not create such competition. Noyes, Am. R. R. Rates, 102. After considering as far as possible all the surrounding circumstances and conditions, and considering the rates between the two classes of products involved in these suits, and the law as announced by the Supreme Court, this court holds that lawful competition must be considered as a factor in determining the questions of fact as to undue preference and unjust discrimination.

The court is bound to consider all of the above facts and factors with others, in determining whether the preference and advantage in question is "undue" or "unjust." In such consideration there appears in favor of the preference and advantage given to the packing-house products—the cost of service, the damage to the commodities, the quantity of the commodity in the hands of a few persons, the less bulk, the interest of the railroad companies, the interest of a majority of the localities and consumers, the general dissimilarity of conditions, and competition. While there is, in favor of the live stock, the less value of the product and of the service in the carriage, the interests of

Chicago and its markets, the stockyards, and dealers in live stock there. The evidence shows that in substantially all cases the factor of competition alone controls the rate. The Supreme Court in all cases has held that competition may be controlling. In only one case (Social Circle) has competition as a matter of fact been held not to make a defense to the charge of discrimination or undue preference. When all the factors are considered together, the conclusion must be reached that the preference and advantage in question is not "undue" or "unjust," and section 3 of the interstate commerce act has not been violated; nor has section 1 of that act, nor section 3 of the Elkins act. Upon a consideration of all the evidence the court holds that the prima facie case made by the findings of the commission has been overcome by the evidence offered before the court. The order of the commission in the first case is not lawful and should not be enforced, and the prayer of the petition in the second case should be denied.

The petitions of the Interstate Commerce Commission are dismissed, with costs.

BERGER v. PHILADELPHIA RAPID TRANSIT CO.

(Circuit Court, E. D. Pennsylvania. December 28, 1905.)

No. 33.

STREET RAILROADS—INJURY TO PERSON CROSSING TRACK WITH WAGON—CONTRIBUTORY NEGLIGENCE.

Under the law of Pennsylvania, as settled by decision, it is the duty of the driver of a wagon to look and listen immediately before attempting to cross the tracks of an electric street railroad, and a plaintiff driving a wagon having a hood, which prevented him from seeing on either side, who looked on first entering the street, and then, although he saw a car approaching, drove upon the track without again looking, is guilty of negligence per se, which precludes his recovery for an injury resulting from a collision with such car.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 215.]

William T. Boyle and Henry S. Scovèl, for plaintiff.
Stevens Heckscher and Thomas Leaming, for defendant.

J. B. McPHERSON, District Judge. The excellent brief of the defendant's counsel demonstrates, as it seems to me, that the plaintiff's own testimony convicts him of contributory negligence. He was driving a heavy wagon east on Summer street in the city of Philadelphia, intending to turn north on Eighth street. There was a front hood on the wagon, which prevented him from seeing anything on either side, unless he leaned forward and looked around the hood. As soon as he could see down Eighth street, he looked south toward Vine, saw a north-bound car a half square away that was either stopping or had just started, decided that it was far enough distant to permit him to cross in safety, leaned back behind the curtain, and drove on without looking again. The horses succeeded in clearing the track, but the wagon was struck, and the plaintiff was thrown out

and injured. Under the Pennsylvania cases this, I think, was undoubtedly contributory negligence. The rule announced by the Supreme Court of this state requires a man who is about to cross a street railway, on which cars propelled by electricity are running, to look for danger immediately before he crosses, and charges him with neglect of duty if he fails to do so, although he may have looked at some other point. The first case upon this subject was Ehrisman v. Harrisburg Railway Co., 150 Pa. 180, 24 Atl. 596, 17 L. R. A. 448, in which the court said:

"The rule to stop, look, and listen is applicable, in part at least, to crossing street railways. A person driving a vehicle has but to use his eyes to avoid such accidents. There is no danger, as in the case of steam roads, of stopping a horse at the very edge of the track. When, therefore, a citizen attempts to cross such track, it is his duty when he reaches it to look in both directions for an approaching car. It very rarely, if it ever, happens that the street is so obstructed that the car may not be seen as the citizen approaches the track. It is his duty to look at that point, and, if there is any obstruction, to listen, and his neglect to do so is negligence per se. This is an unbending rule, to be observed at all times, and under all circumstances. In the case of steam roads, a question sometimes arises as to the proper place to stop, look, and listen. Where there is a fair doubt upon this question, we have held that it must be submitted to a jury. But no such case arises in the case of city railways. If the citizen looks just before he crosses, he avoids all danger of accident."

Burke v. Union Traction Co., 198 Pa. 497, 48 Atl. 470, is equally explicit:

"Electric street railway companies have not the exclusive use of their tracks, but in their use their rights are superior to those of the traveling public, and their cars have the right of way. No one is warranted in assuming that if he first reaches the crossing he may go on, and that the whole duty of care and vigilance is then cast on the motorman. The duty to look for an approaching car is an absolute duty, and failure to do so is negligence per se. This duty is not performed by looking when first entering the street, but continues until the track is reached. Ehrisman v. East Harrisburg City Pass. Ry. Co., 150 Pa. 186, 24 Atl. 596, 17 L. R. A. 448; Omslaer v. Pittsburg, etc., Traction Co., 168 Pa. 519, 32 Atl. 50, 47 Am. St. Rep. 901; Smith v. Electric Traction Co., 187 Pa. 110, 40 Atl. 966. When a person about to cross the track of a steam railroad has stopped, looked, and listened, at an apparently proper place to see and hear, the question as to whether there was a second place where he should have stopped, if at all in doubt, is for the jury; but this question cannot arise in the crossing of the tracks of electric roads in cities, where the duty is to look just before crossing. Ehrisman v. Harrisburg Ry. Co., supra."

To the same effect are Pieper v. Union Traction Co., 202 Pa. 100, 51 Atl. 739; Keenan v. Union Traction Co., 202 Pa. 107, 51 Atl. 742, 58 L. R. A. 217; Moser v. Union Traction Co., 205 Pa. 481, 55 Atl. 15. The Superior Court in McPhillips v. Traction Co., 19 Pa. Super. Ct. 223, follows the same rule. In that case the court said:

"It was the plaintiff's duty to look just before he got upon the track. Had he done so, and been guided in his conduct by what he could clearly have seen, the collision would not have occurred."

See, also, Bornscheuer v. Consolidated Traction Co., 198 Pa. 332, 47 Atl. 872; Tyson v. Traction Co., 199 Pa. 264, 48 Atl. 1078, and

Mease v. United Traction Co., 208 Pa. 434, 57 Atl. 820, which, while not precisely in point, are not irrelevant to the question under consideration.

Being of opinion, therefore, that the plaintiff's own testimony shows that he was guilty of contributory negligence under the rule laid down by the Supreme Court of Pennsylvania, and finding no federal decisions in conflict therewith, it is directed that judgment be entered in favor of the defendant notwithstanding the verdict.

BLAZOSSECK v. REMINGTON & SHERMAN CO.

(Circuit Court, E. D. Pennsylvania. December 23, 1905.)

No. 29.

1. JUDGMENT—NOTWITHSTANDING VERDICT.
   Where the evidence on material issues of fact was conflicting to such extent as to require the submission of such issues to the jury, the court will not grant a motion for judgment notwithstanding the verdict.
   [Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 367.]

2. NEW TRIAL—GROUNDS—INADEQUACY OF VERDICT.
   The court will not grant a new trial on motion of plaintiff on the ground that the amount of the verdict was inadequate, where in its opinion the verdict should have been for the defendant.
   [Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 151, 152.]

At Law. On motion by plaintiff for new trial, and motion by defendant for judgment notwithstanding the verdict.

George Demming, for plaintiff.
Frank P. Prichard, for defendant.

J. B. McPHERSON, District Judge. That the plaintiff was himself guilty of negligence, whereby his present unfortunate condition was produced, I have personally little doubt, but the jury was of a different opinion, and I cannot say that the facts were so clear and undisputed that the question should have been decided by the court as a matter of law. Upon both questions—the defendant's negligence being the other—it seemed to me that the testimony would have amply justified a verdict for the defendant, but I have no disposition to interfere with the jury's right to take a different view, since the evidence was certainly conflicting, and the settlement of the dispute belonged properly to that tribunal.

Entertaining this opinion, I do not see my way to grant a new trial on the ground that the amount of the verdict is inadequate.

The motions for new trial, and for judgment notwithstanding the verdict, are refused.

LEERBURGER BROS. v. UNITED STATES.

(Circuit Court, S. D. New York. December 13, 1904.)

No. 3,434.

CUSTOMS DUTIES—CLASSIFICATION—MARASQUE WATER—DILUTED CHERRY JUICE.

The article known as "marasque water" or "eau de marasque," which is produced by distilling the juice of crushed cherries, diluted somewhat with water used in the distilling process, is not dutiable as cherry juice, under Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 299, 30 Stat. 174 [U. S. Comp. St. 1901, p. 1,655], but as an unenumerated manufactured article under section 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

On Application for Review of a Decision of the Board of United States General Appraisers.

This case relates to a decision of the Board of General Appraisers, G. A. 5,437 (T. D. 24,715), which overruled the protest of Leerburger Bros. against the assessment of duty by the collector of customs at the port of New York.

This merchandise consisted of an article known as "marasque water" or "eau de marasque," which is produced by distilling the juice of crushed cherries, some water being added in the process, and which is used exclusively as a flavoring for confections, candies, marshmallows, etc. It was invoiced at about 80 cents per gallon and contained 10.45 per cent. of absolute alcohol by volume, which was produced by fermentation; none being added extrinsically. The importers contended that the commodity was dutiable as an unenumerated manufactured article under Tariff Act July 24, 1897, c. 11, § 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]; but the board held it to be subject to the provision for cherry juice in paragraph 299, Schedule H, § 1, 30 Stat. 174 [U. S. Comp. St. 1901, p. 1655], or, if not to be considered cherry juice in fact, to be at least dutiable as such by similitude, under section 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

It was observed in the opinion of the board:

"SOMERVILLE, General Appraiser. The juice of the cherry, as observed in Smith v. Rheinstrom, 65 Fed. 984, 13 C. C. A. 261, is nothing but the sap obtained by expression. In re Curtice, G. A. 5,205 (T. D. 23,987). The addition of water to it would seem to work no change in the article, except to make it diluted cherry juice. In any event, if this addition of water has produced such a change in the article as to take it out of the description of any of the terms used in the tariff act, it would still, in our judgment, more nearly resemble cherry juice, as described in said paragraph 299, than any other article enumerated in the act. The material is almost identical; the only difference being that it has been weakened by water."

William B. Coughtry, for importers.

D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The decision of the Board of General Appraisers is reversed.

END OF CASES IN VOL. 141.